

Mr. Chairman, thank you for inviting me to testify today. The views I express here are mine; they are not necessarily endorsed by MIT, the Massachusetts General Hospital, or any other organization.

I take no formal position on Mr. McInnis' bill, HR 2740. Instead, my purpose is to help this Committee determine whether and how to intervene in setting attorneys' fees. I have five main points.

First, fees paid to private lawyers do not necessarily represent a cost to state governments. Tobacco manufacturers have the ability to pay attorneys' fees above and beyond the amounts to be paid to states under the June 20, 1997, proposed nation-wide settlement. In fact, the participating firms have already agreed to pay separately up to \$500 million annually for attorneys' fees.

In 1996, the parent companies of the participating tobacco manufacturers earned \$15.9 billion before taxes. Moreover, tobacco manufacturers can and will raise prices to finance settlement payments. By my calculation, cigarette prices could rise by more than \$2 per pack and continue to bring in substantial revenues – over

\$30 billion annually – that could be allocated to settlement payments, retained as profits, or paid out as attorneys' fees. [0:30]

Second, a \$150-per-hour ceiling on lawyers' fees, as contemplated in HR 2740, may not adequately compensate private attorneys for having taken significant financial risks.

To date, 40 states as well as Puerto Rico and the cities of Los Angeles and San Francisco have filed complaints against tobacco manufacturers. Among the filing states and Puerto Rico, my best information is that 33 have retained private counsel.

In contracts between states and private lawyers, outside counsel have assumed most if not all costs of litigation, but have agreed to be paid their costs and attorneys' fees only if the state recovers an award. These costs can be substantial. Responding to defendants' requests for production of documents, including the records of all transactions of all Medicaid recipients, by itself can cost hundreds of thousands, if not millions of dollars.

From a national sample of 98 large firms reported two days ago by the *National Law Journal*, I calculate that the median hourly

rate for non-contingency work for partners and associates combined was \$214.

Third, a sound compensation scheme needs to reflect the fact that attorneys undertaking law suits filed one to three years prior to the settlement announcement on June 20, 1997, took substantially more risks than those who were retained later.

This fact is clearly reflected in the prevailing contracts between states and private lawyers. While the contingency fee was 25 percent in contracts with states that filed early, the median contingency rate was 12 percent for those states filing within 6 months of the settlement announcement, and even lower for states filing after the announcement. Ten states' contracts, in fact, specify a sliding-scale percentage based upon the duration of the litigation. The rates of compensation written into these contracts are the closest available approximations to the actual market values of the attorneys' services. [0:35]

Fourth, I have computed each state's share of tobacco industry payments under a nation-wide settlement, based upon three different

criteria: state population; total state Medicaid expenditures; and state Medicaid expenditures due to illness caused by smoking. State shares vary substantially with the criterion used for apportioning payments. For example, the state of New York would receive approximately 7 percent under a population-based rule and 16 percent under a Medicaid spending-based rule.

Based on each state's share of a nation-wide settlement and the contingency fee rates in the individual contracts with each state, I estimate that total private attorneys' fees would represent approximately 8 percent of total state receipts and 4 percent of total tobacco industry payments to all parties. The present discounted value of aggregate private plaintiffs' attorneys' fees under the Proposed Resolution of June 20, 1997, I compute, would amount to \$8 billion over 25 years.

Fifth, I computed attorney compensation based upon a uniformly applicable, sliding-scale contingency fee system in which the compensation rate would fall from 25 percent for attorneys contracting at least two years before the settlement announcement,

down to 1 percent for those contracting in the six months after the settlement announcement. Such a scheme would uniformly compensate all counsel for risk-taking and more closely adhere to the contracts negotiated by states and private counsel. For each \$10 billion in industry payments to states, I estimate, private counsel would receive \$700 million in the aggregate.

I thank you again, Mr. Chairman, for allowing me this opportunity to speak before the House Judiciary Committee. I hope my comments have been constructive, and would be pleased to answer questions.