Written Testimony Before the
Subcommittee on Courts and Intellectual Property,
Committee of the Judiciary, U.S. House of Representatives

Oversight Hearing on "Attorneys Fees and the Proposed Global Tobacco Settlement"

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Mr. Chairman, I thank you for inviting me to testify today. I am a primary-care physician at the Massachusetts General Hospital in Boston and a tenured member of the economics faculty at the Massachusetts Institute of Technology. For your reference, I have attached a short biographical sketch to my testimony.

Although I comment here on Mr. McInnis' bill (HR 2740 IH),[2] I take no formal position on the method of payment of plaintiff attorneys in connection with pending tobacco litigation. Instead, my objective is to help Congress determine whether and how to intervene in the setting of attorneys' fees. My main conclusions are as follows.

- **Fees paid to private counsel do not necessarily represent a cost to state governments. Tobacco manufacturers have the ability to pay attorneys' fees in addition to the amounts paid to states under the June 20, 1997, proposed global settlement.**

- **A compensation system based solely on a uniform hourly rate, as contemplated in HR 2740, may not adequately compensate attorneys for having taken risks. Nor would such a system adequately address cases of joint effort, or instances in which law firms have incurred substantial set-up costs in order to acquire special expertise.**

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[1] I have been retained as a expert witness and consultant by plaintiffs' counsel and by some state attorneys general in connection with tobacco litigation. My compensation is not contingent on the outcome of any pending law suit. I gratefully acknowledge the assistance of the staff of the House Judiciary Committee, including Diana Schacht, Deputy Staff Director-Counsel, for providing me with copies of individual contracts between states and private counsel, and other documents. The opinions expressed in my testimony today do not necessarily represent those of any law firm, any government entity, the Massachusetts General Hospital, the Massachusetts Institute of Technology, or any other organization.

[2] HR 2740 IH. 105th Congress, 1st Session. *To limit attorneys' fees in the tobacco settlement.* In the House of Representatives, October 24, 1997. Introduced by Mr. McInnis (for himself, Mr. Cox of California, and Mr. McHale). Internet: ftp://ftp.loc.gov/pub/thomas/c105/h2740.in.txt.

- **If Congress chooses to intervene in the determination of attorneys fees, it needs to design a compensation scheme that reflects the wide differences in currently prevailing fee arrangements between states and private counsel.**

- **I have computed each state's share of tobacco industry payments under a nation-wide global 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.**

- **I have further computed attorney compensation based upon a sliding-scale contingency fee system, in which counsel would receive a percentage of each state's recovery that depended on the date that the state contracted with counsel. For each $10 billion in industry payments to states, I compute that, under such a system, private counsel would receive $665 to $714 million in the aggregate.**

- **If Congress favors a system of attorney compensation based upon arbitration or judicial determination, then it needs to specify the standards that the arbitrators or courts will use. Provisions for review of initial fee determinations need to be made explicit.**

Tobacco Manufacturers' Ability to Pay

To date, 40 states as well as Puerto Rico and the cities of Los Angeles and San Francisco have filed complaints against tobacco manufacturers.[3] Among the filing states and the territory of Puerto Rico, 33 have retained private counsel.[4] Under these currently prevailing contracts, the states are expected to pay private attorneys' fees in the event of a recovery. However, under the June 20, 1997, nation-wide

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[3] State Tobacco Information Center, *State Suit Summary*. Boston MA: Tobacco Control Resource Center, Northeastern University, 1997. (Internet) http://stic.neu.edu/summary.htm.

[4] Contrubis J. *Attorneys' Fees in the State Tobacco Litigation Cases*. Washington DC: Congressional Research Service, September 23, 1997. As part of my analysis, I reviewed the specific contracts between private counsel and all plaintiffs except the states of New Jersey and Oregon and the territory of Puerto Rico. The attorney compensation provisions for Oregon are outlined at (Internet) http://www.doj.state.or.us/Rel6T9.htm.

Proposed Resolution[5] and the recent settlements with Mississippi[6] and Florida,[7] settling defendants in the tobacco industry agreed to make annual payments of up to $500 million per year to pay attorneys' fees.[8]

In 1996, the total pre-tax domestic operating profits of the five major U.S. cigarette manufacturers and UST, Inc. (which sells primarily moist smokeless tobacco products) were $7.926 billion. The combined corporate-wide pre-tax profits of all major tobacco producers amounted to $15.781 billion.[9] It might appear that these profit margins constitute an effective ceiling on the tobacco industry's ability to pay. Such a conclusion would be unwarranted, however, because it incorrectly assumes that tobacco manufacturers will not or cannot raise prices in order to finance settlement payments.

In reality, the tobacco industry's ability to pay damages is bounded by the maximum amount of money it could extract from consumers if the price of tobacco products were set at its full, monopoly profit-maximizing level. In a recent article,[10] I calculated that the full monopoly, profit-maximizing price of cigarettes in the United States in 1995 was approximately $4.08 per pack. By contrast, the nation-wide average price of cigarettes in 1995 was about $1.88 per pack. Accordingly, any increase in price up to $2.20 per pack would generate additional profits for manufacturers or revenues for governments. A $2.20-per-pack increase, I calculated, would generate over 32 billion dollars annually, which could be divided between settlement payments and industry profits. That would mean, for example, that $27 billion could be allocated to a global industry-wide resolution, while the industry would retain $5 billion in pre-tax profits.

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[5] "Proposed Resolution: For Settlement Discussion Purposes Only. 6/20/97, 3:00 p.m. DRAFT." 68pp.

[6] Memorandum of Understanding. *In Re Mike Moore, Attorney General ex rel, State of Mississippi Tobacco Litigation. Cause No. 94-1429. In the Chancery Court of Jackson County, Mississippi.* Washington, D.C., July 2, 1997. See (Internet): http://www.ago.state.ms.us/mssetdoc.htm.

[7] Settlement Agreement. *The State of Florida, et al. v. The American Tobacco Company, et al. Civil Action No. 95-1466 AH. Circuit Court of the Fifteenth Judicial Circuit, In and For Palm Beach County, Florida*. August 25, 1997, 11:20. See (Internet): http://stic.neu.edu/Fl/flsettle.htm.

[8] Arthur F. Golden (Davis Polk & Wardwell) to Joseph F. Rice (Ness, Motley, Loadholt, Richardson & Poole), *Re: State of Florida v. The American Tobacco Company et al., Civ. Action No. 95-1466 AH.* Letter dated August 29, 1997. "In each year the annual payment would be used to pay, or be allocated proportionately among, all unpaid approved legal fees (and certain other similar fees)."

[9] Harris JE. *Written Testimony Before the Senate Committee on Agriculture, Nutrition, and Forestry Hearings on the Tobacco Settlement and the Future of the Tobacco Industry*, September 11, 1997.

[10] Harris JE. American cigarette manufacturers' ability to pay damages: overview and a rough calculation. *Tobacco Control*, Winter 1996, Vol. 5, pp. 292-294.

Even if total industry payments were significantly increased beyond the amounts specified in the June 20, 1997, Proposed Resolution, the tobacco industry would still be in a position to pay $500 million annually in private plaintiff attorneys' fees. Congress need not frame the issue of paying private counsel as trading dollars for plaintiffs' lawyers against dollars for public health.

HR 2740: Uniform Hourly Rates

Under HR 2740, "any attorneys' fees paid in connection with the settlement of an action maintained by a State against one or more tobacco companies to recover tobacco-related Medicaid expenditures or for other causes of action involved in the settlement agreement dated June 20, 1997, shall not exceed $150 per hour…" The imposition of a ceiling on payment based upon a uniform wage, however, may run contrary to certain economic principles of compensation.

The pricing of assets and the determination of compensation for services ordinarily entails a "risk premium." A company with a mediocre credit rating and a higher risk of default must offer bonds at higher interest rate in order to finance its debt. A failing business must offer large bonuses to entice new managers to attempt a turnaround. The concept of "risk premium" applies equally to the payment of counsel in the state cases against the tobacco industry.

Under prevailing contracts between states and private counsel, the outside lawyers 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. In the state cases against the tobacco industry, it is my understanding that defendants have requested the electronic and paper records of all transactions of Medicaid recipients. Responding to such requests has entailed the hiring of outside contractors and consultants, as well as the purchasing of a substantial amount of computer time. In the states for which I have direct knowledge, the total costs of responding to defendants' production requests have run in the hundreds of thousands, if not millions, of dollars.

A uniform hourly rate may not be appropriate in cases where many individuals work together. For a relatively small investment in time, a surgeon may enhance the productivity of the entire operating room team. It would thus be inappropriate to pay the surgeon the same hourly wage as those of the interns, residents, and nurses. My experience thus far in state tobacco cases suggests that private counsel can likewise enhance the effectiveness of local counsel and state-employed attorneys.

Economics textbooks routinely cite examples where individuals are compensated beyond the standard market wage rate because they possess special skills or assets that are not easily acquired by others. Well-remunerated professional athletes are but one example. In tobacco litigation, the acquisition, storage, and cataloguing of millions of internal corporate documents may represent a similar case where some firms have made substantial up-front investments to acquire a special asset.

In principle, an hourly compensation rate could be adjusted upward in order to accommodate the special cases of a risk premium, joint effort, and set-up costs. However, it is doubtful that the specific limit of $150 per hour, contained in HR 2740, accomplishes this objective. In a national sample of 98 large firms (median size, 166 attorneys) reported on December 8, 1997, by the *National Law Journal*, I calculate that the median hourly rates for partners and associates were, respectively, $275 and $161. The median hourly rate for partners and associates combined was $214.[11] For Covington & Burling, a Washington DC firm that has represented some parts of the tobacco industry, the hourly rate for partners ranged from $250 to $440, while that for associates ranged from $110 to $245.[12]

<u>Prevailing Contracts Between States and Private Counsel</u>

Most contracts between states and private counsel specify a contingent fee as a percentage of the state's recovery, but the percentage varies according to the date the case was filed and the degree to which the state intends to share in the costs of litigation. Some states (e.g., Idaho, Indiana, Iowa, Ohio, Nevada, New York, Pennsylvania, Vermont, Washington, Wisconsin) specify a sliding-scale percentage based on the duration of the litigation. Other states' contracts (e.g., Alaska, Idaho, Maine, Montana, Nevada, Vermont) make specific reference to a global nation-wide settlement. Still others (e.g., Louisiana, Michigan, New Mexico, Ohio, Oregon) contemplate a modified Lodestar procedure based upon multiple criteria, as is used to determine fees in securities litigation. Some states (e.g., California, Colorado, Georgia, Missouri, New Hampshire, Rhode Island) have thus far elected not to retain counsel.

Eight states (Connecticut, Florida, Massachusetts, Maryland, Minnesota, New Jersey, South Carolina, Utah) have engaged private counsel at a 25%

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[11] National Law Journal, *A Firm-by-Firm Sampling of Billing Rates Nationwide*, December 8, 1997, p. B08. See (Internet): http://www.ljextra.com/cgi-bin/f_cat?prod/ljextra/data/texts/1997_1201_101.html.

[12] Exhibit B of the 5/27/97 contract between the Attorney General of Vermont and private counsel shows the hourly rates of senior lawyers at Berman & Hagens and Scruggs, Millette, Lawson, Bozeman & Dent to be $350. Other partners' rates are shown as $250 per hour, while associates' rates vary from $140 to $175 per hour and paralegals' rates are quoted at $65 per hour. In a list of 16 attorneys assigned to tobacco cases (including lawyers from Ness, Motley, Loadholt, Richardson & Poole), the median hourly rate was $205.

compensation rate.[13] With the exception of South Carolina, which retained counsel on 5/12/97, these high-percentage contracts were signed at least 9 months before the announcement of the Proposed Resolution of June 20, 1997. In fact, five of the eight high-percentage contracts were signed more than one year before the announcement of the global settlement. By contrast, among state contracts signed within six months of the announcement, the median contingency rate was 12%. Among states contracting after the announcement, the applicable contingency rates were 4% (New York), 10% (Nevada) and 12% (Alaska).

Among the 33 state contracts that I have examined, the law firm of Ness, Motley, Loadholt, Richardson & Poole, P.A. (Charleston SC) was retained in 19; Scruggs, Millette, Lawson, Bozeman & Dent (Pascagoula MS) was retained in 12; while Hagens & Berman, P.S. (Seattle WA) was retained in 12. In some states (e.g., New York), all three firms were retained concurrently. Norton Frickey & Associates (Colorado Springs CO) was retained in 3 states; the Law Offices of Don Barrett (Lexington MS) in 3 states; Lieff, Cabraser, Heimann & Bernstein (San Francisco CA) in 2; and Steven C. Mitchell, either acting as an individual proprietor or on behalf of Van O'Steen and Partners (Phoenix AZ) in 4.[14] In nearly all state contracts, private counsel other than the above-mentioned firms were retained. Some state attorneys general (e.g., Connecticut, Maine, Maryland, Minnesota, New Mexico, Pennsylvania, Wisconsin) contracted exclusively with local firms rather than national counsel. These patterns suggest that no single law firm or group of firms had a monopoly over the market for plaintiff attorneys' services in tobacco litigation. Nor does the contractual record suggest that state attorneys general acted in concert to exercise monopsony buying power. Taken as a whole, the contracts appear to represent the outcome of a competitive market process. The rates of compensation written into such contracts are the closest available approximations to the actual market values of the attorneys' services.

State Shares Under a Nation-Wide Settlement

Table 1 shows my computations of each state's share of tobacco industry payments under a nation-wide global 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 6.8 percent under a population-based rule, 15.9 percent under a Medicaid spending-based rule, and 15.1 percent based on smoking-attributable Medicaid spending. By contrast, California's share would be higher under a

[13] Information on the percentage rate in New Jersey (complaint filed 9/10/96) is preliminary.

[14] Lieff, Cabraser, Heimann & Bernstein was also retained by the City Attorney of San Francisco.

population-based rule (11.9%), but lower under a Medicaid spending-based rule (11.7%) or an allocation scheme based upon smoking-attributable costs (7.0%).

These differences are not trivial; they could reflect billions of dollars in states' recoveries over a 25-year-period. Under the Proposed Resolution of June 20, 1997, I have estimated that the states will receive total payments whose face value equals $162.8 billion over 25 years.[15] For the state of Massachusetts, the population-based formula would yield payments with a face value of $3.7 billion, while the Medicaid spending-based formula would yield $5.1 billion and the smoking-attributable spending formula would yield $5.8 billion. For Texas, by contrast, the corresponding payments would be $11.6 billion, $9.6 billion, and $7.8 billion, respectively.

Having estimated each state's share of a nation-wide settlement, I then computed private attorneys' receipts under the Proposed Resolution based upon the terms of the individual contracts with each state. For the five states (Louisiana, Michigan, New Mexico, Ohio, Oregon) where a modified Lodestar procedure was contemplated, I could not estimate lawyers' fees directly from the available data. For those states with specified percentage compensation rates, however, I estimated that total private attorneys' fees would represent 7.6 to 7.9 percent of total state receipts and 4.1 to 4.2 percent of total tobacco industry payments to all parties. Among only those states that paid private counsel on a percentage basis, the average rate ranged from 12.9 percent (under a Medicaid spending-based rule) to 14.6 percent (under a population-based rule). At a 7% annual discount rate, the present discounted value of attorneys' fees under the Proposed Resolution of June 20, 1997, would amount to $7.9 to $8.2 billion over 25 years.

A Sliding-Scale System of Compensation

The evidence suggests that attorneys who contracted with states early during tobacco litigation incurred substantially more risks than those retained near the time of the Proposed Resolution. Accordingly, I devised a uniform compensation scheme that reflected this basic principle. Private counsel would be paid a percentage of the state's recovery based upon the date of contract as follows:

Date of Contract	Contingency Rate
On or before 6/20/95	25%
After 6/20/95 but before 12/20/95	20%

[15] My computation reflects the "volume adjustment" provision in the Proposed Resolution, in which industry payments decline in proportion to the drop in cigarette sales. See Harris JE. *Written Testimony Before the Senate Committee on Agriculture, Nutrition, and Forestry Hearings on the Tobacco Settlement and the Future of the Tobacco Industry*, September 11, 1997.

After 12/20/95 but before 6/20/96	15%
After 6/20/96 but before 12/20/96	10%
After 12/20/96 but before 6/20/97	5%
After 6/20/97 but before 12/20/97	1%

I applied this sliding-scale contingency fee schedule to the estimated state shares of tobacco industry payments. Table 2 provides the results of my calculations. The table shows private attorney fees by state, in millions of dollars, for each $10 billion paid to states.

For private attorneys contacting with the Attorney General of Minnesota, which filed suit on 8/17/94, the compensation rate ranges from $43.3 to $55.2 million for each $10 recovered by all states taken together. For New York, which filed suit on 1/27/97 and contracted with private counsel on 9/8/97, the corresponding compensation rate ranges from $6.8 to $15.9 million per $10 billion in aggregate state payments. Overall, total attorneys' fees would amount to $665-$714 million for each $10 billion in industry payments to the states.

The results in Table 2 might form the basis of an alternative scheme that would compensate counsel for risk-taking and more closely adhere to the contracts negotiated by states and private counsel. For example, if Congress determined that private attorneys be paid sliding-scale percentages based on the first $10 billion in state recovery, then the estimates in Table 2 show the attorneys fees to be paid. If fees were to be paid on the first $20 billion in state recovery, then attorneys' fees would be twice the values shown in the table. Such payments would fall well within the caps set by defendant tobacco manufacturers.[16]

[16] See Golden to Rice, August 29, 1997, footnote 8 *supra*.

Table 1. Estimates of States' Shares of Global Tobacco Industry Payments Based Upon Three Different Allocation Criteria

State[1]	State Payments Based on:		
	Resident Population[2]	Medicaid Expenditures[3]	Smoking-Attributable Medicaid Expenditures[4]
AK	0.23%	0.21%	0.21%
AL	1.59%	1.31%	1.32%
AR	0.93%	0.80%	0.77%
AZ	1.65%	1.07%	1.12%
CA	11.85%	10.65%	8.97%
CO	1.42%	0.95%	1.09%
CT	1.22%	1.68%	1.88%
DC	0.20%	0.55%	0.49%
DE	0.27%	0.24%	0.23%
FL	5.35%	3.90%	3.82%
GA	2.73%	2.31%	2.08%
HI	0.44%	0.44%	0.48%
IA	1.06%	0.77%	0.76%
ID	0.44%	0.23%	0.22%
IL	4.40%	3.94%	3.78%
IN	2.17%	1.51%	1.58%
KS	0.96%	0.62%	0.65%
KY	1.44%	1.38%	1.63%
LA	1.62%	2.36%	2.16%
MA	2.26%	3.13%	3.56%
MD	1.88%	1.59%	1.76%
ME	0.46%	0.62%	0.81%
MI	3.57%	3.39%	3.83%
MN	1.73%	1.82%	2.21%
MO	1.99%	1.86%	2.05%
MS	1.01%	1.03%	0.92%
MT	0.33%	0.24%	0.27%
NC	2.72%	2.61%	2.66%
ND	0.24%	0.20%	0.21%
NE	0.61%	0.44%	0.42%
NH	0.43%	0.50%	0.70%
NJ	2.97%	3.48%	3.40%
NM	0.64%	0.55%	0.48%
NV	0.60%	0.30%	0.33%
NY	6.76%	15.93%	15.11%
OH	4.15%	4.10%	4.22%
OK	1.23%	0.74%	0.77%
OR	1.19%	0.96%	1.10%
PA	4.48%	4.91%	5.29%

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Table 1 (cont'd). Estimates of States' Shares of Global Tobacco Industry Payments Based Upon Three Different Allocation Criteria

State[1]	State Payments Based on:		
	Resident Population[2]	Medicaid Expenditures[3]	Smoking-Attributable Medicaid Expenditures[4]
RI	0.37%	0.57%	0.73%
SC	1.37%	1.31%	1.23%
SD	0.27%	0.21%	0.22%
TN	1.98%	2.12%	2.24%
TX	7.11%	5.87%	4.81%
UT	0.74%	0.38%	0.29%
VA	2.48%	1.37%	1.39%
VT	0.22%	0.23%	0.30%
WA	2.06%	1.93%	2.35%
WI	1.92%	1.61%	1.97%
WV	0.68%	0.82%	0.89%
WY	0.18%	0.11%	0.12%
PR	1.41%	0.15%	0.16%
Total	100%	100%	100%

Notes to Table 1:

1. Includes the 50 states, Washington DC, and Puerto Rico (PR), but excludes the territories of the Virgin Islands, Guam, American Samoa, and N. Mariana Islands, which participate in the Medicaid program.

2. Based upon estimated resident population as of 7/1/96. See (Internet): ftp://ftp.census.gov/pub/population/estimates/state/ST9096T1.txt for the 50 states and Washington DC, and ftp://ftp.census.gov/pub/population/estimates/puerto-rico/prcom96.txt for Puerto Rico.

3. Based upon total computable medical expenditures (net) as reported on HCFA-64 forms for Federal fiscal years 1995 and 1996 combined. See (Internet): http://www.hcfa.gov/medicaid/ofs-64.htm. See also: FMR95TCM.XLS archived in http://www.hcfa.gov/medicaid/fmr95.exe; and FMR96TCM.XLS archived in http://www.hcfa.gov/medicaid/fmr96.exe.

4. Based on estimated smoking-attributable expenditures among adults (but not newborns or children) for Federal fiscal years 1995 and 1996 combined. Smoking-attributable expenditures were computed as the product of: total computable Medicaid expenditures; the proportion of Medicaid expenditures among persons aged 18 years or more; and the estimated smoking-attributable fraction among adults. Total computable Medicaid expenditures were derived from HCFA-64 forms for Federal fiscal years 1995 and 1996 combined, as described in note 3 above. The proportions of Medicaid expenditures among persons aged 18 years or more were computed from form HCFA-2082 data for the years 1991 through 1996 combined, reported at (Internet) http://www.hcfa.gov/medicaid/mstats.htm. (See, in particular, files MCD91T28.WK1

through MCD96T28.WK1 archived in MCD91INT.EXE through MCD96INT.EXE, respectively. The values for AZ and PR, missing from the source data, were assumed to be 80.16%, the US average.) The smoking-attributable fraction s was computed as $s = (r-1)p/(rp+1-p)$, where p is the proportion of the adult population who has ever smoked cigarettes and r is the ratio of smokers' to nonsmokers' medical expenditures. The respective values of p were estimated from survey data on low-income (less than $20,000 annually) adult respondents to the 1992-1993 Tobacco Use Supplements to the Current Population Survey. The value of r was set equal to 1.15. See Harris JE. *Written Testimony Before the Senate Judiciary Committee Hearings on the "Proposed Global Tobacco Settlement: Who Benefits?"* Washington DC, July 30, 1997. Harris JE. *Estimates of Smoking-Attributable Medicaid Expenditures in Florida. Expert report submitted in The State of Florida, et al. v. The American Tobacco Company, et al.*, April 15, 1997. Harris JE. *Health-Care Spending Attributable to Cigarette Smoking and to Cigarette Manufacturers' Anti-Competitive Conduct: State of Washington Medicaid Program, 1970-2001.* Damage Expert's Initial Disclosure in: *State of Washington v. American Tobacco, Inc. et al*., November 3, 1997.

Table 2. Estimates of Private Attorneys Fees, in $Millions, by State, For Each $10 Billion in Global Tobacco Industry Payments to States Based on a Sliding-Scale Contingency Fee System[1]

			State Payments Based on:		
State[2]	Filed Suit[3]	Private Counsel[4]	Resident Population[5]	Medicaid Expenditures[6]	Smoking-Attributable Medicaid Expenditures[7]
AK	Yes	Yes	0.2	0.2	0.2
AL	No	No			
AR	Yes	No	0.0	0.0	0.0
AZ	Yes	Yes	16.5	10.7	11.2
CA	Yes	No	0.0	0.0	0.0
CO	Yes	No	0.0	0.0	0.0
CT	Yes	Yes	12.2	16.8	18.8
DC	No	No			
DE	No	No			
FL	Yes	Yes	133.8	97.4	95.4
GA	Yes	No	0.0	0.0	0.0
HI	Yes	Yes	2.2	2.2	2.4
IA	Yes	Yes	10.6	7.7	7.6
ID	Yes	Yes	2.2	1.1	1.1
IL	Yes	Yes	44.0	39.4	37.8
IN	Yes	Yes	10.9	7.6	7.9
KS	Yes	Yes	9.6	6.2	6.5
KY	No	No			
LA	Yes	Yes	24.3	35.3	32.4
MA	Yes	Yes	45.3	62.6	71.1
MD	Yes	Yes	28.3	23.9	26.4
ME	Yes	Yes	2.3	3.1	4.1
MI	Yes	Yes	35.7	33.9	38.3
MN	Yes	Yes	43.3	45.5	55.2
MO	Yes	No	0.0	0.0	0.0
MS	Yes	Yes	25.2	25.8	22.9
MT	Yes	Yes	1.6	1.2	1.3
NC	No	No			
ND	No	No			
NE	No	No			
NH	Yes	No	0.0	0.0	0.0
NJ	Yes	Yes	29.7	34.8	34.0
NM	Yes	Yes	3.2	2.8	2.4
NV	Yes	Yes	0.6	0.3	0.3
NY	Yes	Yes	6.8	15.9	15.1
OH	Yes	Yes	20.8	20.5	21.1
OK	Yes	Yes	12.3	7.4	7.7
OR	Yes	Yes	1.2	1.0	1.1
PA	Yes	Yes	22.4	24.6	26.5

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Table 2 (cont'd). Estimates of Private Attorneys Fees, in $Millions, by State, For Each $10 Billion in Global Tobacco Industry Payments to States Based on a Sliding-Scale Contingency Fee System[1]

State[2]	Filed Suit[3]	Private Counsel[4]	State Payments Based on: Resident Population[5]	State Payments Based on: Medicaid Expenditures[6]	State Payments Based on: Smoking-Attributable Medicaid Expenditures[7]
RI	Yes	No	0.0	0.0	0.0
SC	Yes	Yes	6.9	6.5	6.1
SD	No	No			
TN	No	No			
TX	Yes	Yes	106.6	88.1	72.2
UT	Yes	Yes	7.4	3.8	2.9
VA	No	No			
VT	Yes	Yes	1.1	1.1	1.5
WA	Yes	Yes	30.8	29.0	35.2
WI	Yes	Yes	9.6	8.1	9.8
WV	Yes	No	0.0	0.0	0.0
WY	No	No			
PR	Yes	Yes	7.0	0.8	0.8
Total			714.4	665.3	677.3

Notes to Table 2:

1. The sliding-scale contingency rates were: 25% for attorneys retained on or before 6/20/95; 20% for those retained after 6/20/95 but before 12/20/95; 15% for those retained after 12/20/95 but before 6/20/96; 10% for those retained after 6/20/96 but before 12/20/96; 5% for those retained after 12/20/96 but before 6/20/97; and 1% for those retained after 6/20/97 but before 12/20/97.

2. Includes the 50 states, Washington DC, and Puerto Rico (PR), but excludes the territories of the Virgin Islands, Guam, American Samoa, and N. Mariana Islands, which participate in the Medicaid program.

3. State Tobacco Information Center, *State Suit Summary*. Boston MA: Tobacco Control Resource Center, Northeastern University, 1997. (Internet) http://stic.neu.edu/summary.htm. The table does not include separate law suits by San Francisco (filed June 1996) and Los Angeles (filed July 1996). The state of California, whose law suit was filed on 6/12/97, has not retained private counsel. San Francisco has retained private counsel, while Los Angeles has not.

4. See note 2 of Table 1.

5. See note 3 of Table 1.

6. See note 4 of Table 1.

JEFFREY E. HARRIS: Biographical Sketch

Jeffrey Harris MD PhD is a physician and an economist. He is a primary-care internist at Massachusetts General Hospital and a professor at M.I.T, where he teaches micro-economics, health economics and a freshman seminar entitled "AIDS in the 21st Century."

Dr. Harris has testified before the House Ways & Means Committee on financing health-care reform (1993); the Massachusetts legislature on public disclosure of cigarette ingredients (1995); and the Senate Judiciary Committee (1997), the Senate Agriculture Committee (1997), and the Democratic Task Force on Tobacco (1997) in connection with the proposed global tobacco settlement. He has advised the Department of Veterans Affairs, Consumer Product Safety Commission, Centers for Disease Control, National Cancer Institute, Congressional Budget Office, American Cancer Society, Federal Trade Commission, and the Massachusetts Department of Public Health. He has served on National Academy of Sciences committees on AIDS, low birthweight, diesel emissions, and risk characterization. He was on the National Advisory Research Resources Council at the National Institutes of Health.

Dr. Harris wrote a chapter in the 1989 *Surgeon General's Report*, in which he estimated that smoking caused nearly 400,000 deaths annually. In a 1990 article in the *Journal of the American Medical Association*, he was one of the first researchers to document that AIDS victims were surviving longer. He authored *Deadly Choices: Coping with Health Risks in Everyday Life* (1993). Last year, he published an evaluation of the impact of the Massachusetts anti-smoking campaign. He is now starting work on a new textbook on health economics and health policy.

Recent Presentations and Publications Concerning the Tobacco Industry

(Available via Internet at http://web.mit.edu/jeffrey/harris)

Prepared Statement Before the Senate Democratic Task Force on Tobacco, Sen. Kent Conrad (D-ND), Chairman, Washington DC, October 21, 1997.

Cigarette Smoking Practices, Smoking-Related Diseases, and the Costs of Tobacco-Related Disability Among Currently Living U.S. Veterans. Report Commissioned by the Department of Veterans Affairs Assistant Secretary for Policy and Planning, September 15, 1997

Written Testimony Before the Senate Committee on Agriculture, Nutrition, and Forestry Hearings on the Tobacco Settlement and the Future of the Tobacco Industry, September 11, 1997

Written Testimony Before the Senate Judiciary Committee Hearings on the "Proposed Global Tobacco Settlement: Who Benefits?" July 30, 1997

Prepared Remarks at the American Cancer Society's Press Conference on the Proposed Tobacco Industry-Wide Resolution, Washington DC, July 24, 1997

Comments on Proposed Tobacco Industry-Wide Resolution, Commissioned by the American Cancer Society, June 26, 1997

What Can the Cigarette Industry Afford? Structuring a Long-Term Settlement. Remarks at the 12th Annual Conference of the Tobacco Products Liability Project, Northeastern University School of Law, Boston, May 11, 1997

Estimates of Smoking-Attributable Medicaid Expenditures in Florida. Expert report submitted in The State of Florida, et al. v. The American Tobacco Company, et al., April 15, 1997

"American cigarette manufacturers' ability to pay damages: overview and a rough calculation," *Tobacco Control* Winter 1996; 5:292-294.

"Cigarette Smoking Before and After an Excise Tax Increase and Antismoking Campaign – Massachusetts, 1990-1996," *Morbidity and Mortality Weekly Report* November 8, 1996; 45(44):996-970.

Testimony Before the Mass. Dept. of Public Health Concerning Proposed Regulations to Implement Massachusetts General Laws chapt. 94, section 307A (Cigarette Ingredient Disclosure), Boston, January 30, 1997.

A Working Model for Predicting the Consumption and Revenue Impacts of Large Increases in the U.S. Federal Cigarette Excise Tax. National Bureau of Economic Research, Cambridge MA, July 1, 1994.

Testimony Before the Committee on Ways and Means, U.S. House of Representatives, In Public Hearings on the Financing Provisions Of the Administration's Health Security Act. Washington DC, November 18, 1993.

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.