REAPING THE TOBACCO SETTLEMENT WINDFALL: THE VIABILITY OF FUTURE SETTLEMENT PAYMENT SECURITIZATION AS AN OPTION FOR STATE LEGISLATURES

I. INTRODUCTION

From the perspective of the casual observer, the recent settlement agreements[1] between the tobacco industry and the states' attorneys general represent an unprecedented opportunity for state governments[2] to advance the interests of their respective citizenry. In historical terms, the tobacco settlement itself stands in a category of its own and represents a unique situation in which an incredibly large sum of money is expected to flow into the coffers of state governments. Upon close examination of both the agreement terms and the future of the tobacco industry as a whole, however, it is evident that reaping the windfall of the settlement may be more difficult than previously imagined. This Comment seeks to uncover the problems with payment under the agreement and evaluate the validity of securitization of settlement income as an innovative solution to be considered by state lawmakers in crafting plans for future use of their settlement proceeds.

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1. The term "settlement agreements" refers to the various agreements which eventually led every state to release the tobacco industry from its liability for each state's past and future costs of treating tobacco related illnesses. Within this series of settlements, the Master Settlement Agreement ("MSA") reached between the tobacco companies and the state attorneys general of forty-six states, five commonwealths and territories, and the District of Columbia on November 28, 1998, for $206 billion stands out as the most publicized. However, four states—Florida, Texas, Mississippi, and Minnesota—chose not to participate in the MSA but reached individual settlements of their own totaling $40 billion. The combined $246 billion in the overall settlement package represents the tobacco companies collectively responsible for virtually the entire 97.5% of the tobacco market and is scheduled for disbursement to the states in perpetuity, with the bulk of payments being made over a twenty-five year time frame beginning in 2000. Unless otherwise noted, assume that any discussion of the terms of the MSA also applies equally to the separate settlement agreements reached by Florida, Texas, Mississippi, and Minnesota.

2. Though I refer to the states as the recipients of compensation under the MSA in this Comment, various metropolitan entities, including New York, Chicago, San Francisco, and Los Angeles, have successfully sued the tobacco industry for a proportionate share of the settlement proceeds. The effect of such suits is that these governmental entities have now locked in a proportionate share of the settlement award. Various county governments have followed suit and have also succeeded in locking in a portion of their settlement share from that of their respective state's settlement proceeds. For purposes of this Comment, however, assume that the state entity is the entity being discussed, unless it is otherwise noted.

II. THE PROBLEMS WITH CONVENTIONAL RECOVERY UNDER THE SETTLEMENT AGREEMENTS

Though the settlement agreements were intended to appease the states by giving them an unprecedented sum of money as compensation for the costs associated with the past and future tobacco related health problems of their citizenry,[3] a world of difference exists between merely signing the agreement and actually receiving the proceeds from the agreement. Indeed, had the attorneys general merely walked into a bank vault and each filled a suitcase with their respective share of the settlement proceeds upon signing the agreement, there would likely be no controversy. If such were the case, the key question for state legislatures would concentrate on how best to spend the settlement proceeds rather than the more fundamental question of how best to secure the proceeds from the agreement.[4] However, from an examination both of the particular provisions in the Master Settlement Agreement ("MSA") itself and the weak financial condition of the tobacco industry as a whole, both as a result of declining sales and pending litigation, it is evident that an infinite number of contingencies arise to potentially prevent payment under the agreement.

A. *The MSA Terms*

The often used maxim "the devil is in the details" could not be more true for the terms of the MSA, which binds forty-six states to its massive framework. The most important aspect of the agreement concerns the volume adjustment to be made over the course of payment in relation to the amount of domestic tobacco shipped in the United States.[5] In its simplest form, this provision mandates an "upward or downward adjustment" of payment in accordance with its accompany-

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3. *See* Marc Galanter, *Big Tobacco: Winning by Losing*, AM. LAW., Jan.-Feb. 1999, at 55.

4. As would be expected, the lion's share of the settlement proceeds has been earmarked for health care related spending in most states. *See* Shailagh Murray, *Most States to Spend Tobacco Settlement On Improving Health Care, Survey Says*, WALL ST. J., Mar. 8, 2000, at B6. However, the author assumes that receipt of payment will not be problematic. This Comment argues that future payment is extremely problematic by conventional means and examines securitization of settlement proceeds as a possible solution to recovery of settlement proceeds.

5. *See* Master Settlement Agreement, ch. 2 ("Definitions"), subsection (aaa) ("Volume Adjustment") *available in* <http://www.naag.org/tobac/cigmsa.rtf> (hereinafter "MSA"). This subsection provides the basic framework for adjusting the amount of money to be received by the states over the coming years. Thus, it is evident that the original $206 billion settlement figure most likely represents a grossly disproportionate figure compared with the amount the states are in actuality likely to receive over the course of the payment schedule.

ing formula.[6] The effect of the provision, however, is likely to significantly decrease the amount paid under the agreement over the entirety of the scheduled payments.[7]

There are two main considerations that provide support for this conclusion. First, several factors serve to expose the likelihood of a decrease in domestic tobacco consumption in the United States in the coming years. The MSA itself not only limits the ability of the tobacco industry to advertise in certain areas and target the youth smoking market,[8] but it also requires that the industry itself spend a significant amount of its resources to establish a national foundation for smoking prevention.[9] Additionally, a recent economic study suggests that the volume of domestic tobacco consumption is likely to significantly decrease in the coming years.[10]

Another important consideration influencing the future of domestic tobacco sales is the fact that the tobacco companies themselves are merely subsidiaries of larger corporate entities, which have diverse corporate portfolios composed of a multitude of consumer products.[11] The agreement itself does not prevent these leviathan companies from changing their corporation's emphasis away from tobacco and into safer consumer products with substantially less potential for tort liability. Likewise, there is nothing to prohibit the industry itself from exploiting extremely lucrative foreign markets and abandoning the do-

6. *See id.*, exhibit E ("Formula for Calculating Volume Adjustments").

7. The supreme irony of the volume provision is that it forces the states to take a position directly contrary to their conceived motivation for suing the tobacco industry. The fundamental concept behind the states' law suits concerned the actions of the tobacco companies in producing a harmful and dangerous product which left the states to absorb the tremendous cost of treating smoking related medical problems. *See* Galanter, *supra* note 3. Though public policy demands that the states bargain for provisions in the MSA to curb tobacco consumption, the only effective way for the states to get full compensation under the agreement is for consumption to either remain at present levels or even increase in the coming years.

8. *See* MSA, *supra* note 5, ch. 3 ("Permanent Relief").

9. *See id.*, ch. 6 ("Establishment of a National Foundation").

10. *See A Forecast of U.S. Cigarette Consumption (1999-2042)*, WEFA (formerly "WHARTON ECON. FORECASTING ASSOCS."), October, 1999. This study predicts that over the next forty years, U.S. cigarette consumption will decline by 58% from 1998 levels. The study reveals that cigarette consumption has seen consistent decline since its peak of 640 billion cigarettes consumed in 1981. In 1998, for example, there were 470 billion cigarettes consumed. Thus, the study concludes that there is an ongoing, widespread decline in U.S. cigarette sales, which will continue into the future. In terms of the MSA, the study's results indicate that state governments will receive substantially less money from the settlement over time because the volume of U.S. cigarette sales is expected to significantly decline.

11. For example, Philip Morris, which dominates the cigarette market with 68% of total sales, in large part due to its best selling brand Marlboro, is a corporate conglomerate with subsidiaries producing a variety of consumer products. If Philip Morris concludes in the future that its tobacco subsidiary is not very profitable, it has the option of shifting emphasis to promote its other extremely lucrative consumer products divisions, including Kraft Foods and Miller Brewing Co.

mestic market altogether.[12]

The potential for federal regulation of the tobacco industry is also factored into the settlement terms. The MSA provides that any future federal regulation of the tobacco industry will offset the amount to be received by the participating states.[13] Thus, if the federal government decides to regulate tobacco products, the monetary amount of such regulation will proportionally decrease each state's share of the MSA "dollar for dollar."[14] When combined with the volume adjustments identified above, the effect of this provision is to provide yet another means through which the tobacco industry can potentially decrease future payment under the settlement agreement.

B. The Minefield of Pending Litigation Against the Tobacco Industry

In addition to the various provisions in the MSA itself which may allow the tobacco companies to decrease their future payments, the massive amount of pending litigation against the industry may also significantly affect the tobacco industry's ability to pay under the agreement. Indeed, the threat of liability under such suits has led to corporate restructuring among industry members[15] and the increasingly realistic possibility of the tobacco companies seeking bankruptcy protection.[16] To further complicate this picture of financial distress, there is

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12. Foreign tobacco markets are extremely lucrative and have not been fully exploited. *See* Robert Weissman, *Cancel the Marlboro Man's Passport: Tobacco Legislation Should Restrict the Overseas Marketing of Cigarettes*, LEGAL TIMES, May 18, 1998, at 27. For example, the cigarette export market has risen more than 250% over the last decade for Philip Morris and R.J. Reynolds, and the companies currently sell 66% of their cigarettes overseas, which accounts for 50% of their overall profits. *Id.* Under the MSA terms, the tobacco industry could dramatically increase its sales to foreign markets and receive billions of dollars that would not serve to increase payments under the MSA. Only an increase in domestic tobacco shipments would trigger an increase of MSA payments to the states, which is unlikely. *See* WEFA, *supra* note 10. However, if foreign governments are successful in their pending suits against the industry, *see* Voris, *infra* note 21, the tobacco companies may find foreign tobacco markets much less appealing.

13. *See* MSA, *supra* note 5, ch. 10 ("Effect of Federal Tobacco-Related Legislation"). Under the terms of the agreement, such legislation must be enacted before November 30, 2002, for the offset to come into effect. This leaves roughly a two-year time frame for congressional action on the matter. Regardless of whether potential legislation comes into effect by the specified date, however, the industry will be financially crippled by such legislation. If the legislation occurs after the specified date, the lack of an offset will further push the industry into financial demise.

14. *Id.*

15. *See* Martha Hamilton, *Union of RJR, Nabisco Dissolves; Tobacco's Troubles Had Hurt Stock of Camel, Oreo Maker*, WASH. POST, Mar. 10, 1999, at A01 (reporting decision by major cigarette maker to spin off domestic tobacco business and sell international tobacco holdings for $8 billion).

16. *See* Jonathan Lipson, *Corporate Brief-Bankruptcy-Tobacco Companies*, NAT'L L.J., Dec. 6, 1999, at B6 (advocating the use of Chapter 11 reorganization as a means for tobacco companies to handle pending litigation); Andrew Bary, *Strong Profit Reports Put Stocks Back on Track*, BARRON'S, Oct. 25, 1999, *available in* 1999 WL-BARRONS 29061603 (acknowledging

evidence to suggest that jury opinions have recently begun to shift against the tobacco industry,[17] which could potentially impact the outcome of myriad pending claims against the industry. For example, while the most successful tobacco industry defense in past tobacco lawsuits has focused on the smoker's assumption of risk, this strategy has been recently undermined with the discovery of internal industry documents revealing the tobacco companies' knowledge of both the ill effects of smoking and the addictive nature of nicotine.[18]

Though the terms of the MSA demand that the cigarette manufacturers will assume a proportional share of the liability of any fellow bankrupt tobacco company,[19] this provision may create more problems than it attempts to solve, because it puts even more pressure on an already financially strapped industry. The use of bankruptcy in past industry-wide, class action tort settings has led to significant delay in the receipt of payment to product liability victims.[20] Thus, despite the fact that suits against the tobacco industry remain a lucrative undertaking for members of the plaintiffs' bar, the use of such suits to drive the industry into the arms of bankruptcy protection would delay payment to all tort claimants, including the states under the settlement agreements.

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the possibility of Philip Morris bankruptcy from the litigation in *Engle v. R.J. Reynolds Tobacco Co.*, 672 So. 2d 39 (Fla. Dist. Ct. App. 1996) and comparing the circumstances surrounding the *Engle* suit to the 1987 Texaco bankruptcy, where Texaco sought bankruptcy protection upon being ordered to pay a multi-billion dollar award to Pennzoil). *But see* Ann Davis, *Is Chapter 11 Just an Idle Threat by Big Tobacco?*, WALL ST. J., Apr. 17, 1998, at B1 (commenting on the disadvantages involved with filing for Chapter 11 and distinguishing the present tobacco litigation from past class actions involving the now bankrupt manufacturers of asbestos, breast implants, and female contraceptive devices). The author argues that a manufacturer must take a tortious product off the market before bankruptcy protection can provide effective relief from product liability claims. *Id.* Unlike past industry-wide lawsuits, such as those involving asbestos, breast implants, and female contraceptive devices, however, the tobacco companies continue to market their product and have not shown any willingness to voluntarily cease cigarette production. Indeed, proceeds from the sale of cigarettes will presumably constitute the main source of payment to prospective tort claimants.

17. *See* Tucker Player, *After the Fall: The Cigarette Papers, The Global Settlement, and the Future of Tobacco Litigation*, 49 S.C. L. REV. 311, 338 (1998).

18. *Id.* The uncovering of these documents served as the catalyst which began the series of events that ultimately culminated in the tobacco industry's settlement with the states' attorneys general. These documents led the tobacco companies to abandon their historically successful trial strategy of taking each lawsuit to trial rather than settling claims. *Id.* at 312. The remarkable success of this strategy is evident in the fact that the industry had never lost a single case nor paid a penny in damages before the advent of these internal documents. *Id.*

19. *See* MSA, *supra* note 5, ch. 18 ("Miscellaneous"), subsection (h) ("Obligations Several, Not Joint").

20. David Segal, *Tobacco Payout Questions: To Whom and How Much? Huge Liability Settlement Would Tread New Ground, Raise Problems of Administration*, WASH. POST, Apr. 25, 1997, at A22 (comparing possible tobacco settlement with other past industry-wide tort claims, including asbestos and female contraceptive devices, and concluding that bankruptcy in those settlements led to lengthy disruption of payment to claimants).

1. *The Variety of Pending Litigation Against the Tobacco Industry*

The suits themselves can broadly be classified into four categories: foreign government suits seeking to recover for the cost of treatment of tobacco-related illnesses, suits by private individuals to recover for illnesses, suits by the federal government seeking both to regulate tobacco and recover for the expenses of treating smoking-related illnesses, and suits by union trust funds to recover for the smoking-related medical expenses of their members. In a broad sense, these suits are similar to those of the states' attorneys general in that a particular entity is attempting to recover funds spent in the treatment of tobacco-related medical problems.

a. *Individual Lawsuits*

The terms of the MSA itself do not preclude individuals from suing the tobacco companies under personal injury tort theories.[21] Probably the most publicized and potentially threatening class action suit to the industry is *Engle v. R.J. Reynolds*, in which a Florida plaintiff sued on behalf of herself and other similarly situated Florida smokers who have suffered ailments due to tobacco-related illnesses. The jury in the trial court found the tobacco companies liable,[22] and the Florida Civil Court of Appeals subsequently affirmed the class certification but limited the class to Florida rather than United States residents in order to maintain efficiency in the judicial process.[23] Furthermore, the trial court jury recently determined the amount of punitive damages to be $145 billion.[24] Other recent successful individual suits also illustrate the danger posed to the tobacco industry by individual suits brought to recover medical expenses.[25] Thus, the industry is threatened by the ability of

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21. *See* Bob Van Voris, *New Attack on Big Tobacco: Philip Morris Verdict May Be Small Compared with Union Fund Liability*, NAT'L L.J., Feb. 22, 1999, at A1. Interestingly, the article notes that while the MSA does not preclude such suits, an aborted $368.5 billion global settlement during 1997 would have effectively shut the door on such suits, both individual tort actions and union trust cases. *See also* Player, *supra* note 17. The 1997 settlement agreement, however, failed to win approval in the U.S. Congress. *See* Adam Levy, *Announced to Trounced: A Journalist's Comments on the Demise of the Tobacco Settlement*, 2 J. HEALTH CARE L. & POL'Y 1, *available in* 2 WL-JHTHCLP 1 (1998).

22. *See* Milo Geyelin, *Florida Court Lessens Punitive Impact Tobacco Companies Will Have to Face*, WALL ST. J., Sept. 7, 1999, at B8.

23. *See* Engle v. R.J. Reynolds Tobacco Co., 672 So. 2d 39, 42 (Fla. Dist. Ct. App. 1996).

24. *See* Milo Geyelin & Gordon Fairclough, *Taking a Hit: Yes, $145 Billion Deals Tobacco a Huge Blow, But Not Killing One*, WALL ST. J., July 17, 2000, at A1 (reporting record punitive damages verdict but arguing that tobacco industry will survive the aftermath of the *Engle* suit).

25. *See, e.g.*, Henley v. Philip Morris Inc., No. 995172, 1999 WL 221076 (Cal. Super. Apr. 6, 1999) (reducing trial court jury's punitive damages award to lung cancer victim from

individual plaintiffs to sue on behalf of themselves and others to recover for tobacco-related illnesses.

b. *Federal Government Lawsuits*

Though an agency of the federal government recently lost its widely publicized court battle to regulate tobacco as a drug,[26] the Department of Justice has also sued the tobacco industry in an attempt to recover the federal government's share of Medicaid and Medicare expenses resulting from treatment of tobacco-related illnesses.[27] While the basis of this suit in theory sounds similar to that of the states' attorneys general, which culminated in the MSA, the federal government is using a number of innovative and untried theories to support its claim to recovery,[28] some of which have been dismissed by the trial court.[29] If the federal government were to prevail in its action, the damages would most likely be extraordinary and the tobacco industry

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$50 million to $25 million but retaining $51.5 million in total damages and denying defendant's motion for new trial and for judgment notwithstanding the verdict). Another class action has been certified in Louisiana but has not gone to trial. *See* Scott v. American Tobacco Co., 725 So. 2d 10 (La. Ct. App. 1998). For an analysis of the current state of class action tobacco lawsuits, see Susan Kearns, *Decertification of Statewide Tobacco Class Actions*, 74 N.Y.U. L. REV. 1336 (1999) (concluding that most recent statewide tobacco class actions have had trouble obtaining class certification).

26. *See, e.g.*, Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000), *aff'g* Brown & Williamson Tobacco Corp. v. Food & Drug Admin., 153 F.3d 155 (4th Cir. 1998). The decision of the U.S. Supreme Court in this case is not entirely an outright victory for the tobacco industry, because the Court's decision merely denied the FDA the right to regulate tobacco under the Food & Cosmetics Act. The U.S. Congress could effectively override the Court's decision if it were to pass legislation explicitly giving the FDA such authority. The effect of such new federal legislation would inevitably lead to a decrease in payments under the MSA, because the agreement explicitly contains provisions to this effect. *See* MSA, *supra* note 5. In the wake of the Court's decision, however, some commentators expect the states to take the initiative in the regulation of tobacco. *See* Gordon Fairclough, *States May Regulate Tobacco in FDA's Absence*, WALL ST. J., Mar. 23, 2000, at B14. If state governments were to pass legislation in this area, there would be no effect on MSA settlement payments, and the lack of an offset would further cripple the tobacco industry. Thus, the tobacco industry would prefer that the federal government take the lead in the area of tobacco regulation.

27. United States v. Philip Morris, Inc., No. 1:99CV2496 (D.D.C. Oct. 14, 1999).

28. *See* Bob Van Voris, *DOJ Tobacco Suit a Long Shot: Government Using RICO and Other Laws in Untried Ways*, 22 NAT.'L L.J. 7, Oct. 11, 1999. The article depicts the federal lawsuit as a longshot because it employs parts of the Racketeer Influenced and Corrupt Organization Act (RICO), the Medical Care Recovery Act, and Medicare Secondary Payer Act, all of which were legislative acts originally created for purposes other than those that the government is using them for in this case. However, at one time, the suits which culminated in the MSA were considered longshots and the tobacco industry as a whole seemed invincible. For a general history of tobacco litigation in the United States, see, *e.g.*, Player, *supra* note 17.

29. *See* United States v. Philip Morris, Inc., No. Civ. A. 99-2496 GK, 2000 WL 1477152, at *2 (D.D.C. Sept. 28, 2000) (dismissing federal government claims against the tobacco industry under the Medical Care Recovery Act and Medicare Secondary Payer provisions but upholding validity of federal government claims under the Racketeer Influenced and Corrupt Organizations Act). *See also* Gary Fields & Gordon Fairclough, *U.S. to Pursue Tobacco Case under RICO*, WALL ST. J., Sept. 29, 2000, at A3.

would be significantly crippled in its ability to meet its pre-existing financial obligations, including those under the MSA.

c. *Foreign Government Lawsuits*

In similar fashion to the suits initiated by American governmental entities to recover health care costs due to tobacco-related illnesses, many foreign governments have initiated similar suits in various U.S. federal courts.[30] Such suits seemingly represent a far-fetched attempt to recover from the tobacco industry. However, these suits serve to illustrate the truly immense litigation burden currently facing the tobacco industry in the wake of the successful settlement agreements with the states. Despite a recent federal court decision casting doubt on the jurisdictional validity of such foreign government claims,[31] the success of other suits against the industry, including those culminating in the MSA, has effectively given foreign governments the green light to pursue their own lawsuits in an effort to recover the expenses associated with the immense cost of treating smokers' health problems.[32]

d. *Union-Sponsored Lawsuits*

Various union pension plans have also initiated litigation against the tobacco industry for recovery of the expenses associated with treating the tobacco-related illnesses of union members. Indeed, more than eighty suits have been filed by union funds to recover such expenses, which total in the tens of billions of dollars.[33] While these cases have had mixed results in the courts,[34] they nevertheless represent yet another cause of action in the arsenal of weapons currently being used by

30. *See* Voris, *supra* note 21. The article reports that the governments of Guatemala, Nicaragua, Panama, Bolivia, and Venezuela have initiated such suits, with several other countries considering the possibility of similar suits.

31. *See In re* Tobacco/Governmental Health Care Costs Litigation, 83 F. Supp. 2d 125 (D.D.C. 1999) (ruling that claims by Republic of Guatemala against tobacco industry were barred by doctrine of remoteness).

32. *See* Carrie Johnson, *Big Tobacco Still Has Litigation Woes Abroad: U.S. Settlement May Spur Foreign Boom in Suits Against American Tobacco Sellers*, TEXAS LAW., Dec. 7, 1998, *available in* WL 12/7/1998 TEXLAW 6.

33. *See* Voris, *supra* note 21.

34. *See MSA Does Not Bar Union Fund Claims, CA Judge Rules*, Andrews Breast Implant Litig. Rep. (Jan. 17, 2000), *available in* WL, 8 No. 21 ANBRIMLR 7. This article discusses *In re Tobacco Cases II*, No. JCCP 4042 (Cal. Super. Ct. San Diego Cty., Dec. 15, 1999), a recent state court action brought by a union health fund to recover for its members' medical expenses. *Id.* The court found that the MSA did not prohibit the suit. *Id. But see Statutory Interpretation–Second Circuit Holds that Health Care Funds Lack Standing to Sue Tobacco Companies Under RICO–Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 191 F.3d 229 (2d Cir. 1999)*, 113 HARV. L. REV. 1063 (2000) (reporting recent action by the Second Circuit Court of Appeals in denying RICO claims of union health fund in litigation against the tobacco industry).

the plaintiffs' bar to attack the tobacco industry.

2. *The Cumulative Effect of Present and Future Litigation*

From the variety of pending actions against the tobacco industry detailed above, it is evident that the settlement agreements reached between the tobacco industry and the states' attorneys general have by no means precluded further legal attacks against the industry. Furthermore, there is nothing to suggest that the continuing stream of litigation will cease at any point in the near future. With the widespread publication of damaging tobacco documents on the Internet,[35] the discovery process has been made much simpler and sensitive documents are now within the reach of virtually any attorney considering a lawsuit. Whether the tobacco industry wins or loses the hundreds of claims currently asserted against it, there will be significant attorneys' fees and administrative costs associated with the defense of the industry. These costs alone will further cripple the financial power of the industry. Thus, it is evident that the ability of the tobacco industry to successfully pay under the MSA has been irrevocably altered by the current state of pending litigation, in all its many forms.

III. SETTLEMENT SECURITIZATION AS A SOLUTION TO THE PROBLEMS ASSOCIATED WITH FUTURE PAYMENT STABILITY

From the problems associated with payment under the settlement agreements outlined in Part II above, it is evident that recovery of the well publicized $246 billion cumulative settlement amount may be elusive by conventional means.[36] Indeed, an ill-informed state or municipal government may find itself obtaining a fraction of its share of the settlement proceeds unless affirmative action is taken to ensure payment through means other than the agreements themselves. One of the most promising and innovative solutions to these problems concerns securitization of future settlement proceeds as a means to immediately receive a large chunk of the settlement. Indeed, several governmental entities have already securitized portions of their tobacco settlement proceeds in order to obtain an immediate portion of their settlement

35. *See* Mark Gottlieb, *Finding the Smoking Guns in Tobacco Litigation*, TRIAL, Nov. 1999, *available in* WL, 35-NOV Trial 22.

36. The term "conventional means" refers to an approach to the settlement agreements which emphasizes receipt of the settlement proceeds as mandated by the agreements themselves (i.e., payment of the $246 billion in annual allotments over an extended time period). Securitization is the opposite of such an approach because it emphasizes payment of the proceeds up front rather than over an extended time period. *See* Kelly Nicholson, *infra*, note 40.

share.[37] Several other state governments have proposed legislation to facilitate the issuance of tobacco bonds,[38] and commentators expect that as many as forty-three state legislatures will address the issue of securitization in the coming years.[39]

A. *What Is Securitization?*

Broadly speaking, securitization is the act of a governmental entity issuing bonds backed by future settlement proceeds in exchange for an

37. The governmental entities which have already securitized portions of their settlement proceeds include New York City, which secured $685 million for school renovation and expansion; Nassau County, which secured $323 million for general budgetary purposes; Westchester County, which secured $92 million for construction of a medical care facility; Monroe County, which secured $160 million for undisclosed purposes; and Erie County, which secured $200 million to establish a trust for payment of ongoing expenses, such as Medicaid costs. Each of these entities is a part of the State of New York and receives a certain portion of New York's MSA proceeds. However, other jurisdictions have recently closed tobacco bond deals of their own. *See* Michael Stanton, *Smoking Out Investors: Dealers Look to Broaden Appeal of Tobacco Debt*, BOND BUYER, July 25, 2000, at 1, *available in* 2000 WL 23696409 (reporting that the Alaska Housing Finance Corp. secured $93 million to raise funds for capital projects in its state educational institutions). *See also* Shelly Sigo, *Alabama Officials Stressing the Safety of Their Tobacco Deal*, BOND BUYER, Aug. 31, 2000, at 44, *available in* 2000 WL 23697662 (reporting that the State of Alabama expects shortly to secure $50 million as part of an economic incentive package to facilitate the construction of an automotive manufacturing plant for Honda Motor Corporation). The history of poor fiscal management within several of these entities may be the leading factor influencing their decisions to secure portions of their settlement proceeds. *See* Daniel Kruger, *Will Nassau Trump NYC?*, BOND BUYER, Oct. 4, 1999, at 1, *available in* 1999 WL 19926250. The $323 million securitized by Nassau County represents the entirety of its future settlement proceeds. *See id.* Though New York City is on better financial footing than Nassau County, its also has a history of poor fiscal management. *See, e.g.*, Donna E. Shalala & Carol Bellamy, *State Saves a City: The New York Case*, 1976 DUKE L.J. 1119 (1976). The fundamental point to be taken from these sales, however, is that they illustrate that a substantial market exists for these bonds and that investment banks are willing to take the inherent risks associated with marketing these bonds. Indeed, it is estimated that the municipal bond market can support up to $15 billion in tobacco bonds. *See* Daniel Kruger, *State Finance Officials Push Tobacco Debt*, BOND BUYER, Mar. 10, 2000, at 1, *available in* 2000 WL 5810184.

38. *See, e.g.*, Darrell Preston, *Colorado Advances Proposal to Securitize Tobacco Money*, BOND BUYER, Mar. 23, 2000, at 1, *available in* 2000 WL 5810532 (reporting that Colorado is considering securitizing the entirety of its $2.9 billion tobacco settlement package); Elizabeth Albanese, *Kansas May Back Children's Bonds With Tobacco Money*, BOND BUYER, Mar. 15, 2000, at 1, *available in* 2000 WL 5810302 (reporting that Kansas is considering securitizing a portion of its $1.8 billion settlement package); Robert Whalen, *Florida Mulls $3 Billion of Tobacco Debt*, BOND BUYER, Feb. 9, 2000, at 1, *available in* 2000 WL 5808870; Robert Whalen, *Southeast States Begin Making Plans for Tobacco Largesse*, BOND BUYER, Jan. 27, 2000, at 4, *available in* 2000 WL 5808508 (reporting that such states as Alabama, Louisiana, Virginia, South Carolina, and Florida are considering the securitization of settlement proceeds); Elizabeth Albanese & Christopher McEntee, *Southern Governors Flirt with Tobacco Securitization*, BOND BUYER, Dec. 30, 1999, at 44, *available in* 1999 WL 29982659 (reporting that Alabama is considering tobacco securitization to further its economic incentives packages in order to attract big business to the state).

39. *See* Matthew Vadum, *And the Party Goes On*, BOND BUYER, Dec. 23, 1999, at 1, *available in* 1999 WL 29982496. The article reports that approximately one-third of states have yet to determine the manner in which to spend their respective share of the tobacco windfall.

immediate portion of the settlement in a lump sum.[40] The option to securitize tobacco settlement proceeds is analogous to the decision faced by a lottery winner: take the winnings up front, albeit a smaller portion, or take a larger portion of the winnings over an extended time period.[41] While bonds issued by municipal and state governments have been a mainstay of public finance in the United States for centuries,[42] due recently in part to the availability of the interest on such bonds being exempt from federal taxation,[43] tobacco settlement securitization presents unique benefits and disadvantages distinct from a typical public finance bond issue.

1. The Benefits of Securitization

There are several important reasons for a state government to consider securitizing portions of their settlement proceeds. Arguably the most important justification for securitization is that it passes the risk associated with the present financial problems of the tobacco industry onto bondholders rather than leaving the states to absorb such risks.[44] From the fundamental problems associated with settlement recovery under the MSA outlined in Part II, it is evident that a myriad of contingencies exist to potentially prevent full recovery under the agreement terms. Furthermore, if even a handful of the many pending lawsuits against the tobacco industry succeed, the companies themselves could be forced into seeking bankruptcy protection, which would delay payment under the settlement for an indeterminable time period. Con-

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40. In one sense, there is nothing novel about the ability of state governments to obtain an immediate cash infusion through securitizing portions of expected income streams. For example, two recent federal legislative acts, the National Highway System Designation Act of 1995 and the Transportation Equity Act for the 21st Century, have authorized state governments to issue so called "GARVEE" bonds, which are backed by revenue from future federal appropriations of state transportation funds. *See* Kelly Nicholson, *Securitization: An Option for State Tobacco Settlement Funds* (last modified Sept. 8,1999) <http://www.nga.org/Health/Tobacco.htm>. Despite the allowance for such bonds, however, it is undeniable that tobacco bonds are far more risky than "GARVEE" bonds, because the tobacco income stream is subject to many contingencies, as examined *supra* in Part II.

41. *See* Joni James & David Milstead, *States Mull Whether to Sell Stream of Tobacco Dollars*, WALL ST. J., Aug. 2, 2000, at F1. *See also* Patricia Hill, *Bond Plan Speeds Tobacco Cash; Virginia Sees a Way to Get Money for Schools Right Away*, WASH. TIMES, Jan. 17, 2000, at A1.

42. *See, e.g.*, D. Roderick Kiewiet & Kristin Szakaly, *Constitutional Limitations on Borrowing: An Analysis of State Bonded Indebtedness*, 12 J.L. ECON. & ORG. 62 (1996).

43. *See* 26 U.S.C. § 103(a) (1994), which provides that: "gross income does not include interest on any State or local bond." This basic provision excludes tax-exempt treatment of certain non-qualified "private activity bonds," *see id.* §103(b)(1), but otherwise acts to facilitate governmental entities in debt issuance for financial undertakings which represent a "public purpose."

44. For more detailed analysis concerning the manner in which securitization transfers such risk, see Nicholson, *supra* note 40.

sidering the inherent risks associated with recovery through conventional means, securitization represents an important option to be considered by state legislatures.

Another important advantage to securitization is that it provides for an immediate infusion of cash that state governments may use for ambitious public projects. States considering securitization have expressed widely divergent ideas as to the manner in which their bond proceeds may be spent.[45] Without the option of securitization, however, these ambitious projects might never effectively come to fruition due to budgetary concerns.

2. *The Disadvantages of Securitization*

Despite the apparent benefits that securitization offers state governments in the use of their respective settlement proceeds, there are also several important potential disadvantages which must be taken into account before a fully informed decision can be made regarding securitization. The most important concern with securitization of tobacco proceeds is the risk to the state associated with default on interest payments due to disruptions in settlement income. While theoretically the state has isolated itself from liability by issuing revenue bonds through distinct entities which are entirely separate from the state,[46] past municipal bond defaults reveal that the issuing entity of defaulting bonds may be culpable in the event of default.[47] Furthermore, revenue bonds

45. For example, Virginia plans to use its tobacco securitization proceeds to repair its state highways, *see* Whalen, *supra* note 38, while Alabama plans to use its money to attract large corporations into the state with economic incentives packages. *See* Albanese & McEntee, *supra* note 38. Meanwhile, Colorado expects to use its securitization proceeds for the establishment of an investment trust fund, *see* Preston, *supra* note 38, and Kansas plans to use its tobacco bond proceeds for the creation of childrens programs. *See* Albanese, *supra* note 38.

46. The distinction between "general obligation" bonds and "revenue" bonds provides the background necessary to fully understand the underlying issues. Unlike revenue bonds, which are backed solely by the revenue obtained from the project through which the bonds were issued, general obligation bonds are backed by the "full faith and credit" of the governmental entity issuing such bonds and are analogous to commercial unsecured recourse debt. Robert S. Amdursky, *The 1988 Municipal Bankruptcy Amendments: History, Purposes, and Effects*, 22 URB. LAW. 1, 2 n.4 (1990). Thus, if an entity issues general obligation bonds and the underlying project fails, bondholders have the right to force the governmental entity to raise taxes in order to repay the debt issued to initiate the project. *Id.* The riskiness of tobacco bonds precludes the issuing entity from even considering general obligation bonds, since default would entail grave budgetary problems. The issuance of revenue bonds, however, only entitles bondholders to debt repayment from the project revenue stream, and default on such bonds leaves the bondholders at a loss, without recourse to the taxing power of the entity issuing such debt. *Id.* Such bonds are analogous to commercial secured non-recourse debt. *Id.* Due to the inability of bondholders to force the issuing governmental entity to raise taxes in order to pay for defaulting bonds, revenue bonds are deemed more risky than general obligation bonds and typically carry a proportionally higher interest rate than general obligation bonds.

47. The notion of culpability carries with it many different forms. For example, while the State of Washington was held not liable in the repayment of $2.2 billion of defaulted revenue

may carry with them the concept of a "moral obligation" placed upon the state to ensure that the debt is repaid.[48] The conclusion to be reached from this discussion is that the mere issuance of tobacco bonds does not completely absolve the state entity of the risk associated with tobacco industry bankruptcy and subsequent default on interest payments. Though theoretically the tobacco bondholders will lose their investment in the transaction, as affirmed by judicial examination of past revenue bond defaults,[49] the state issuer may face some negative effects from default, such as increased issuance costs in the form of higher interest rates in future bond issues.

Another important concern with securitization is the fact that the state issuing tobacco bonds will spend a large sum of money in order to complete the transaction. Commentators have recognized that the investment banking firms pushing for tobacco bond securitization will themselves reap a tremendous financial windfall in the transaction fees charged to complete each deal.[50] Furthermore, attorneys acting as bond counsel will also demand adequate compensation for their work in providing legal advice on behalf of the issuing governmental entity. Each state government considering securitization should carefully consider the transaction costs to determine whether issuance of such bonds is in the best interest of the state.

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bonds resulting from the issuance of debt to finance two nuclear reactors, as part of the grossly mismanaged Washington Public Power Supply System ("WPPSS"), *see, e.g.*, Chemical Bank v. WPPSS, 666 P.2d 329 (Wash. 1983), the state nevertheless incurred an increase in issuance costs in subsequent bond deals, including an increase in available interest rates from bond underwriters. Teresa Trissell, Note, *Derivative Use in Tax-Exempt Financing*, 48 TAX LAW. 1021, 1029 (1995). The key point to be taken from the example of the *WPPSS* case, which was undoubtedly one of the greatest debacles in the history of municipal bond finance, is that the distinction between revenue and general obligation bonds cannot be understood in a vacuum. Though state governments may use revenue bonds in the issuance of tobacco debt, it must be understood that default on such bonds will economically impact the state if the debt is not repaid. The short term effect of such a refusal to repay tobacco revenue bonds would be a deterioration in the state's relationship with underwriters, resulting in much higher costs in future issues.

48. *See* Trissell, *supra* note 47, at 1028 n.62. The author argues that even though there is no legally binding obligation placed upon the state government issuing revenue bonds to repay the debt, there is nevertheless a "moral obligation" to repay such bonds since the negative side effects of non-repayment will grossly outweigh the state's responsibility to keep bondholders' expectations fulfilled.

49. *See generally Chemical Bank*, 666 P.2d 329. The court held the public issuance of $2.2 billion of revenue bonds *ultra vires* and absolved the State of Washington of its responsibility to repay the debt and satisfy its bondholders. *Id.* Part III of Justice Dore's concurring opinion is particularly instructive as to the distinction between revenue and general obligation bonds. The justice concludes: "[b]ecause the bonds [were] labeled as revenue bonds . . . the risk of project failure should be on the investors who bought the bonds knowing the sole source of payment was to be the revenues from the sale of electricity which was expected to be generated." *Id.* at 346.

50. *See* Mary Ellen Klas, *Bush: Sell Tobacco Claim for Lump-Sum Payment Deal Would Provide Risk-Free 29¢ on Dollar*, PALM BEACH POST, Jan. 22, 2000, at 1A, *available in* 2000 WL 7594710.

The available discount rate on tobacco revenue bonds is another significant concern involved in the decision by state governments to securitize tobacco settlement proceeds. The risk characteristics of the underlying transaction are an intrinsic part of all bond issues, and investment banks underwriting bond transactions assign an interest rate to the bond according to its calculation of the likelihood that the debt will eventually be repaid.[51] In terms of tobacco bonds, analysts use the "weakest link" approach to allocate risk, which emphasizes the financial ratings given to the tobacco companies themselves when assigning a risk factor to the underlying bond offering.[52] The fact that the State of Florida was recently offered twenty-nine cents on the dollar in preliminary discussions with investment banks concerning the issuance of tobacco bonds illustrates the risk inherent in such bonds and the manner in which this risk affects issuance costs.[53] As the ebb and flow of tobacco related litigation progresses over time, issuance costs will either increase or decrease depending on how the tobacco industry weathers its litigation storm. However, it would be entirely irresponsible for any state considering securitization to avoid discussing issuance costs before committing to a plan to secure its settlement proceeds.

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51. *See generally* Nicholson, *supra* note 40.

52. Daniel Kruger, *Step One: Bankruptcy with Tobacco, Worst-Case Scenario Comes First*, BOND BUYER, June 11, 1999, at 1, *available in* 1999 WL 19922803. The "weakest link" approach examines the most troublesome link in the debt transaction and rates the bonds according to this participant. *See* Nicholson, *supra* note 40. In this case, the weakest link is the tobacco industry itself, which overall has a low credit rating due to the concerns relating to pending litigation. *See supra* Part II. Thus, analysts rate the likelihood of default on tobacco bonds according to the credit rating of the tobacco companies themselves, because the financial strength of the industry supplies the revenue necessary for the state to make interest payments on the bonds. Nicholson, *supra* note 40. For example, analysts in the previous tobacco bond deals rated the bonds in the single A category. *See* Daniel Kruger, *New York City's Tobacco Debt Ready to Price*, BOND BUYER, Nov. 4, 1999, at 1, *available in* 1999 WL 19927273. According to the S&P rating system for bonds, AAA is the most favorable rating possible and, thus, carries the lowest rate of interest. Only the most well managed corporations, such as Johnson & Johnson, Exxon, and G.E., receive AAA ratings. *S&P's Corporate Ratings, Global 'AAA' List* (visited Jan. 25, 2001) <http://www.standardandpoors.com/ratings/highyield/AAAlist.htm>. The continuum continues to AA, A, and BBB, with any rating below BBB considered non-investment grade debt (i.e. junk bonds). *See* R.J. SHOOK, WALL ST. DICTIONARY 430 (Career Press 1999). Tobacco companies are generally rated in the A to BBB range. *See, e.g.*, Kruger *supra*. In terms of the tobacco securitization phenomenon, the effect of the "weakest link" approach is that it makes the cost of issuance higher than that which most state issuers are usually accustomed, because state government credit ratings are generally extremely high at AA to AAA.

53. *See* Klas, *supra* note 50. This effectively illustrates the lottery analogy discussed earlier in the Comment, *see* text accompanying *supra* note 41. By securitizing its settlement proceeds, Florida would receive approximately one-third of the amount it would receive if it were to wait and receive the money piecemeal over the next twenty-five years. From this example, it is evident that any state considering securitization will lose a large chunk of its proceeds through exercising the option to receive money immediately.

B. The Alabama Model

When the Alabama 21st Century Authority[54] ("Authority") was signed into law by Governor Siegelman on June 9, 1999,[55] Alabama became one of the first states to enact legislation to facilitate the securitization of future tobacco settlement proceeds. While the legislation itself was propagated upon a legislative finding that "[t]he State of Alabama has a great need from time-to-time to have access to financing for economic development and industrial recruitment that does not involve improvement to revenue-producing facilities,"[56] there were distinctive constitutional issues which also necessitated the creation of a separate entity to issue such debt.[57] The effect of the legislation is that Alabama is now in a position to issue debt backed by future tobacco settlement proceeds upon future legislative action.[58]

Though future legislative action must be taken to issue tobacco settlement bonds, the act creating the Authority provides detail to elucidate the financial structure of potential bond offerings.[59] Under the

54. ALA. CODE § 41-10-621 (Supp. 1999) ("Alabama 21st Century Authority"). In terms of the act itself, there is nothing novel in the state's creation of an "authority" to handle the settlement proceeds. Indeed, an examination of section 41 of the Alabama Code reveals that the legislature has created numerous authorities to finance many diverse governmental interests, ranging from industrial development, to historical site preservation, to public entertainment. The rationale for the creation of such entities is discussed more fully below.

55. *Id.* § 41-10-620.

56. *Id.* § 41-10-621(a)(1). Though the act itself focuses on issuing bonds to promote economic development, it would be incorrect to assume that the state has not allocated settlement proceeds for other purposes. Indeed, the act also transfers a large portion of the settlement to the Children First Trust Fund. *See id.* § 41-10-621(b). Additionally, the remainder of annual settlement proceeds after disbursements into the Alabama 21st Century Fund will be paid to the Alabama Senior Services Trust Fund and the State General Fund. *See id.* § 41-10-621(c). Thus, the authority will disburse settlement proceeds to an array of projects.

57. ALA. CONST. art. XI, § 213, provides that: "no new debt shall be created against, or incurred by this state, or its authority." Thus, the State of Alabama itself is constitutionally prohibited from issuing debt. The act creating the authority expressly recognizes this constitutional limitation. *See* ALA. CODE § 41-10-621(a)(2) (Supp. 1999). For a general explanation of the origins of such prohibitions among state governments, see Kiewiet & Szakaly, *supra* note 42, at 64-66. Similar prohibitions are extremely common among state governments, and all but five states have enacted partial or total restraints upon state debt issuance. *Id.* at 65. In order to get around this constitutional restriction, however, Alabama courts have upheld the constitutionality of legislatively created entities, such as the Alabama 21st Century Authority, through which the state may issue debt. *See* Opinion of the Justices No. 359, 692 So. 2d 825 (Ala. 1997); Opinion of the Justices No. 346, 665 So. 2d 1357 (Ala. 1995); Opinion of the Justices No. 183, 178 So. 2d 76 (Ala. 1965).

58. The need for future legislative action is illustrative of the fact that the Authority itself is merely a special-purpose entity ("SPE"), meaning that its existence consists solely of receiving the tobacco settlement proceeds. For further explanation of SPEs, see Nicholson, *supra* note 40. The Authority itself does not have the authority to issue debt. The authority to do so is exclusively reserved by the Alabama legislature, and the legislation creating the Authority explicitly recognizes this inherent right. *See* ALA. CODE § 41-10-621(a)(4) (Supp. 1999). Thus, the actual issuance of tobacco settlement debt will be subject to further congressional scrutiny before it comes into existence.

59. *See* ALA. CODE § 41-10-626(b) (Supp. 1999).

act, the tobacco settlement bonds would be revenue bonds backed solely by the future tobacco settlement proceeds and "shall be solely and exclusively an obligation of the authority and shall not create an obligation or debt of the state."[60] This distinction is crucial because, given the intrinsic risk associated with issuance of tobacco settlement bonds, it is fundamentally important that the state remove itself from liability in the case of default.[61] Given the approximately $350 million allocated to the Alabama 21st Century Fund for purposes of bond issuance,[62] structuring the bond transactions as revenue backed rather than as a general obligation of the state will protect the state in the event of default, leaving the bondholders to absorb the potential loss.[63]

Another important aspect of the Alabama 21st Century Authority legislation is the fact that it does not allocate all of its resources to bond issuance. Indeed, the state has diversified its settlement portfolio to include approximately $1.735 billion for the Children First Trust Fund[64] and has also earmarked settlement proceeds for the Alabama Senior Services Trust Fund and the State General Funds.[65] Thus, the Alabama legislation attempts to minimize the risk associated with tobacco bond issuance by diversifying its settlement portfolio to accommodate various public interests.

C. *Alternatives to Securitization*

Various states have displayed contempt for the risk associated with tobacco bond securitization and are considering other available legislative options to minimize the risks associated therewith.[66] Indeed, the legislative approach taken by the State of Mississippi toward obtaining tobacco settlement proceeds exemplifies the cautious attitude advocated

60. *Id.*

61. In terms of Alabama's legislation, the issuance of revenue bonds by the Alabama 21st Century Authority separates the state itself from default liability in two distinct ways. The Authority, not the State of Alabama, is the issuer of such debt. Furthermore, the Authority is explicitly authorized to issue revenue bonds rather than general obligation bonds. If tobacco industry bankruptcy creates default on such bonds, the state has theoretically isolated itself from liability.

62. *See* ALA. CODE § 41-10-629 (Supp. 1999). The money allocated to the fund is to be given in annual allotments beginning at $7 million and gradually increasing to $16 million. Thus, the $350 million figure represents the maximum amount of principal, interest, and premium permitted for bond issuance.

63. *But see supra* note 47 and accompanying text. In an instance of default, the State of Alabama may find it more beneficial to satisfy the demands of bondholders rather than face the financial consequences of hanging them out to dry. The higher issuance costs of future bond offerings associated with leaving the bondholders to absorb the loss may force the state to cover the obligations of the Alabama 21st Century Authority.

64. ALA. CODE § 41-10-621(b) (Supp. 1999).

65. *See id.* § 41-10-621(c).

66. *See* Michael Marois, *Fearful of Getting Burned: Some States Oppose Securitizing Tobacco Cash*, BOND BUYER, Mar. 13, 2000, at 1, *available in* 2000 WL 5810224.

by several states toward securitization. Under its plan, the State of Mississippi established the Health Care Trust Fund[67] pursuant to the state's belief that "the funds received by the state of Mississippi from tobacco companies in [the tobacco settlement] should be applied toward improving the health and health care of the citizens and residents of the state."[68] Rather than securitize the proceeds allocated to its trust fund, the state plans to invest the proceeds as they become available, an approach similar to that taken by the state in the administration of its employee retirement trust fund.[69] The advantageous nature of Mississippi's settlement with the tobacco industry, however, elucidates the cautious tone taken by the state in the administration of its settlement proceeds.[70] Thus, the Mississippi plan may not necessarily be a model for other states to use in deciding how to secure their portions of the settlement agreements.

IV. CONCLUSION

The historic settlement agreements reached between the tobacco industry and the states' attorneys general have the potential to significantly enhance the ability of every state government to provide for its citizenry. The signing of the agreements themselves, however, merely represents the beginning of the multi-stage process associated with the ultimate goal of securing the entirety of the settlement proceeds. Furthermore, reliance on the lengthy time table established by the MSA for settlement allocation may not be the best choice for state governments given the fact that the days of considering the tobacco industry a cash cow with an iron-clad, steady future income stream have arguably ended. The tobacco industry faces myriad pending lawsuits from virtu-

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67. *See* MISS. CODE ANN. § 43-13-405(1) (Supp. 1999). For similar health care trust fund legislation, *see* COLO. REV. STAT. ANN. § 24-22-115 (West 1999) (establishing the Tobacco Litigation Settlement Trust Fund to administer tobacco proceeds as mandated by the state legislature).

68. MISS. CODE ANN. § 43-13-401 (Supp. 1999).

69. *See* Marios, *supra* note 66. The approach taken by Mississippi is often called a "pay as you go" approach because the tobacco proceeds are invested only after they have been received by the state. The key distinction between this approach and an approach utilizing securitization is that securitization issues bonds backed by expected future tobacco settlement income while Mississippi's more cautious approach invests its settlement income only after the state has received it. Mississippi's plan presents a very conservative approach to the tobacco settlement conundrum.

70. Unlike most states, Mississippi reached a separate settlement agreement with the tobacco industry, which preceded the widely-publicized $206 billion MSA. Rather than receive small annual allotments of its settlement proceeds, as the MSA mandates, Mississippi has already received more than $280 million of its expected $3.5 billion settlement proceeds. *See The Tobacco Settlement: Practical Implications and the Future of the Tort Law*, 67 MISS. L.J. 847, 852 (1998). Thus, the conservative tobacco settlement strategy advocated by the state is likely a direct result of the fact that it does not face the same problems with obtaining settlement proceeds over the long term, as do many other states.

ally every conceivable angle and will probably continue to face such suits in the near future. Ironically, the aggressiveness of the states' attorneys general in pursuing the suits culminating in the MSA may have created the present litigation which in turn threatens to preclude payment under the settlement agreements negotiated by the states.

Securitization is an innovative concept designed to more easily enable state governments to collect their share of the settlement proceeds given the extensive problems associated with the conventional means to achieve such a result. While the concept is not without important disadvantages which must be thoroughly examined by the finance officials of any state government considering the issuance of tobacco bonds, there are definite benefits to securing settlement proceeds which may outweigh such risks. As one of the first states to pass legislation in this area, Alabama has effectively developed a financial strategy to deal with the problems faced by virtually all states under the MSA. Any state considering securitization should carefully examine this legislation when crafting their own plans for securing tobacco settlement proceeds. As a counterweight to the risk associated with the Alabama model, the Mississippi legislation establishing that state's Health Care Trust Fund should also be examined by state governments in their quest to more effectively reap the windfall of the tobacco settlement agreements.

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