

HOUSE OF REPRESENTATIVES  
COMMONWEALTH OF PENNSYLVANIA

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House Bill 445

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House Judiciary Committee  
Subcommittee on Courts

Hershey Public Library  
701 Cocoa Avenue  
Hershey, Pennsylvania

Thursday, September 30, 1999 - 10:06 a.m.

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BEFORE:

Honorable Daniel Clark, Majority Chairperson  
Honorable Thomas Armstrong  
Honorable Jerry Birmelin  
Honorable Al Masland  
Honorable Harold James  
Honorable Joseph Petrarca  
Honorable LeAnna M. Washington

**ALSO PRESENT:**

**James Mann**  
**Majority Research Analyst**

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1                   CHAIRPERSON CLARK: Good morning. I am  
2 Representative Dan Clark. I'm the Chairman of the  
3 Judiciary Committee's Subcommittee on Courts. And today is  
4 the place and time advertised to conduct a public hearing  
5 on House Bill 445, which is the model statute to accept the  
6 Master Settlement Agreement with the tobacco industry which  
7 was entered into -- which the tobacco industry entered into  
8 with the Commonwealth and other states.

9                   This legislation does not set up the  
10 disbursement of that money. And had it done that, we would  
11 have probably had a much larger crowd. With that, I  
12 believe I'll start with my far left and have the other  
13 members of the Subcommittee on Courts introduce themselves  
14 to you followed by Representative Thomas Armstrong's  
15 testimony as the prime sponsor of House Bill 445.  
16 Representative Birmelin.

17                   REPRESENTATIVE BIRMELIN: Representative  
18 Birmelin, Wayne and Pike Counties.

19                   MR. MANN: My name is Jim Mann. I'm the  
20 Research Analyst with the Judiciary Committee.

21                   REPRESENTATIVE PETRARCA: Representative Joe  
22 Petrarca, Westmoreland County.

23                   CHAIRPERSON CLARK: Representative Armstrong.

24                   REPRESENTATIVE ARMSTRONG: Thank you, Mr.  
25 Chairman. And I appreciate the opportunity of being able

1 to come before your Committee today and express the support  
2 for the needed legislation. I am Representative Tom  
3 Armstrong. And I'm here today to urge you to favorably  
4 consider House Bill 445, the Tobacco Settlement Agreement  
5 Act.

6           Passage of this legislation is a critical part  
7 of permanently securing Pennsylvania's share of the  
8 national tobacco settlement. Thirty-six states have  
9 already taken action. All have been signed into law except  
10 California's bill, which is on the Governor's desk and is  
11 expected to be signed within the next several days.

12           While we are not required to enact this  
13 legislation, Pennsylvania's share of the tobacco settlement  
14 could be significantly reduced if we fail to act. The  
15 model statute creates a reserve fund for nonparticipating  
16 manufacturers to pay future claims, establishing a level  
17 playing field between participating and nonparticipating  
18 manufacturers.

19           The model may be enacted as a stand-alone  
20 piece of legislation, exactly as it appears as Exhibit T in  
21 the Master Settlement Agreement. Or the state may  
22 alternatively enact a qualifying statute as determined by a  
23 firm jointly retained by the settling states and the  
24 original participating manufacturers.

25           The ruling of the firm is final. A qualifying

1 statute is a statute, regulation, law, and/or rule  
2 applicable everywhere the state has authority to legislate  
3 that effectively and fully neutralizes the cost advantages  
4 that nonparticipating manufactures experience over  
5 participating manufacturers as a result of the MSA.

6 Under the MSA, on or before February the 2nd  
7 of each year when the market share loss exceeds zero, a  
8 nationally recognized firm of economic consultants will  
9 determine whether the provisions of the MSA played a  
10 significant role in the market loss.

11 If in any year the total aggregate market  
12 share of the participating manufacturers decreases more  
13 than 2 percent and an economic consulting firm determines  
14 that the provisions of the MSA were a significant factor  
15 contributing to the market share loss, payments to the  
16 states may be reduced based on that loss.

17 This reduction in state payments is called the  
18 nonparticipating manufacturers adjustment or the NPM. If  
19 the aggregate market share of companies participating in  
20 the agreement declines by greater than 2 percent, their  
21 annual payment is reduced by 3 percent for each percent  
22 lost over the 2 percent threshold.

23 If the market share loss exceeds 16 and  
24 two-thirds percent, a more complicated formula established  
25 in the MSA is used to determine the NPM adjustment. A

1 state's enactment of the model statute is significant  
2 because if there is an NPM adjustment in any year, a  
3 state's payment will not be reduced if the state has  
4 enacted and has in force the model statute or qualifying  
5 statute.

6 Payments to states that do not have a model  
7 statute or qualifying statute in full force and effect will  
8 be reduced to cover the entire NPM adjustment. In other  
9 words, Pennsylvania and the other states and jurisdictions  
10 that have not enacted the model statute or a qualifying  
11 statute split the cost of any NPM adjustment imposed.

12 It is possible for a state to lose its entire  
13 payment for the year. This could result in a state losing  
14 its entire payment of that year. As the number of states  
15 enacting the model or its equivalent continues to grow, the  
16 financial exposure of the states without the model  
17 significantly increases.

18 It leaves fewer states to share any potential  
19 NPM adjustment. If a state enacted the model statute but  
20 the statute is overturned or invalidated by a court action,  
21 the state would pay no more than 65 percent of its payment  
22 towards the NPM adjustment in that year.

23 If a state has enacted a qualifying statute as  
24 opposed to the model act in MSA and the qualifying statute  
25 is struck down by a court, the state will not enjoy any of

1 the protections afforded the states that enact the model  
2 act. In other words, those states would be subject to the  
3 full NPM adjustment in that year and would not enjoy the  
4 benefits of the 65 percent cap.

5 We should all want to ensure that the tobacco  
6 settlement funds of the Commonwealth of Pennsylvania are  
7 subject to the maximum protection agreement available under  
8 the Master Settlement Agreement. I urge you to make  
9 passage of this legislation a high priority. And thank you  
10 for your prompt attention -- or consideration of this  
11 legislation.

12 I would be happy to answer any questions that  
13 you may have. I'd also like for the record to be stated  
14 that this model legislation was put together by the -- by  
15 the National Attorney Generals Association as well as in  
16 agreement with the NCSL and the tobacco companies.

17 There's been a lot of work from national  
18 organizations to ensure the most protection that we can for  
19 each state. And that's why this -- this piece of  
20 legislation -- it's very important that we do not see a  
21 decline of any of those funds that are agreed upon at this  
22 point.

23 So with that, I guess I'll just close and open  
24 up for any questions that you may have. I have also  
25 included -- excuse me. I've also included some questions



1 and answers about the tobacco settlement agreement as it  
2 relates to 445, House Bill 445, for your consideration and  
3 a model statute as it was drafted by the National Attorney  
4 Generals Offices.

5 CHAIRPERSON CLARK: Thank you very much,  
6 Representative Armstrong. I'd like to welcome  
7 Representative Masland to the desk. And if you'd like to  
8 introduce yourself.

9 REPRESENTATIVE MASLAND: I'm Al Masland. I'm  
10 a representative from Cumberland and Northern York  
11 Counties.

12 CHAIRPERSON CLARK: Thank you. Are there any  
13 questions of Representative Armstrong?

14 (No response.)

15 CHAIRPERSON CLARK: Okay. We thank you very  
16 much for your testimony. You're certainly welcome to join  
17 us up front here as we continue with other individuals  
18 scheduled to testify.

19 REPRESENTATIVE ARMSTRONG: One last thing I  
20 would like to say, that if it sounded complicated about all  
21 of those numbers I was throwing out, Joy Wilson from NCSL  
22 can be very helpful in explaining the details of what I  
23 shared with you today. Thank you.

24 CHAIRPERSON CLARK: Okay. Thank you. The  
25 next gentleman to testify before the Subcommittee is the

1 Honorable Michael Fisher. He is our -- the Attorney  
2 General of Pennsylvania and probably knows more about the  
3 settlement than any other individual in the Commonwealth.  
4 We certainly welcome you today at our hearing and your  
5 input into the model statute.

6 MR. FISHER: Thank you very much, Chairman  
7 Clark. I'd like to thank you and the members of the House  
8 Subcommittee on Courts for having me here this morning to  
9 discuss the model statute contained within the Master  
10 Settlement Agreement which I helped to negotiate between  
11 the states and the tobacco industry.

12 I commend Representative Armstrong for  
13 introducing the proposed Tobacco Settlement Agreement Act  
14 and the Committee for considering it promptly. As you will  
15 hear in my testimony today, while enactment of the model  
16 statute is very important, it is not necessary to enact  
17 this statute in order to begin to receive our share of the  
18 settlement.

19 But I do caution you that it's important to  
20 enact this statute as quickly as possible for reasons that  
21 I'll explain. Before I speak on the model statute, allow  
22 me to give the Committee a brief update on where we stand  
23 with regard to the first payment under the settlement.

24 As you know, Pennsylvania is slated to receive  
25 approximately \$11.3 billion over the next 25 years. Our

1 first installment is \$142 million. Under the terms of the  
2 settlement, the tobacco companies have already paid the  
3 first installment into a national escrow account.

4 Pennsylvania will receive its first  
5 installment once two things occur. First, Pennsylvania  
6 must gain state-specific finality. We have been held up in  
7 attaining this by a frivolous appeal filed by a person who  
8 I see is scheduled to testify before you later today.

9 Last Friday, this appeal was rejected for a  
10 second time by the Commonwealth Court, which agrees with my  
11 position that the individual involved does not have  
12 standing to block our settlement. This court's order  
13 affirms the January 1999 ruling of the Philadelphia Common  
14 Pleas Court denying this intervention and approving the  
15 Master Settlement Agreement.

16 The appellant now has 30 days to file a  
17 petition for allowance of appeal with the Pennsylvania  
18 Supreme Court. Secondly, 80 percent of the states,  
19 representing 80 percent of the total allocation, must  
20 achieve state-specific finality.

21 Our scoreboard to date is that we've  
22 accomplished this first goal in that 43 states and  
23 territories have officially reached state-specific  
24 finality. California is expected to reach finality this  
25 week, which puts the allocation formula for the states

1 reaching state-specific finality at 79.6 percent.

2           This means Pennsylvania is in a position to  
3 put the settling states beyond the 80 percent threshold,  
4 which will allow the states to begin actually receiving the  
5 money under the settlement and putting it to good use for  
6 the health of Pennsylvanians.

7           If Pennsylvania doesn't do it, we expect  
8 Virginia will, in which case 45 other states will get their  
9 money; and we will need to sit and wait. I'd like to turn  
10 now to why it is necessary for Pennsylvania to enact the  
11 model statute which is contained in the Master Settlement  
12 Agreement.

13           As you know, the agreement contains economic  
14 provisions that obligate participating manufacturers to pay  
15 Pennsylvania a portion of the state's cost associated with  
16 the tobacco companies' misrepresentations and distribution  
17 of cigarettes here in the Commonwealth.

18           In addition, the participating manufacturers  
19 have agreed to certain noneconomic terms that restrict  
20 their advertising and marketing practices and control their  
21 corporate behavior. Although the agreement makes great  
22 strides in assuring the accountability of tobacco  
23 manufacturers, if Pennsylvania is to ensure these long-term  
24 public health and financial benefits, it's critical that  
25 all manufacturers of cigarettes marketed in our state be

1 made accountable for the potential costs associated with  
2 their sales.

3           The model statute accomplishes this goal by  
4 ensuring that manufacturers that are not part of the  
5 agreement are held financially accountable for the  
6 potential health-related costs associated with smoking.  
7 This is accomplished by requiring nonparticipating  
8 manufacturers to either pay into a fund held in reserve for  
9 the state's cost in treating smoking-related illnesses or  
10 join the Master Settlement Agreement.

11           If a nonparticipating manufacturer should  
12 decide not to join the Master Settlement Agreement, the  
13 rates they pay into the reserve fund would be calculated to  
14 be approximately equivalent to the rates paid by the  
15 participating manufacturers. The model statute contains  
16 stiff penalties for noncompliance.

17           It's interesting to note that many of the  
18 smaller tobacco manufacturers originally not included in  
19 the settlement negotiations have already opted to join the  
20 agreement and abide by its marketing and advertising  
21 restrictions. To date, more than 99 percent of the tobacco  
22 market share is bound by these restrictions.

23           That's up from about 97 percent, which was the  
24 percentage that was represented by the original  
25 participating manufacturers who are part of the settlement

1 negotiations. The principal deposited in escrow can be  
2 released from escrow -- this is under the model  
3 statute -- only to pay a judgment or settlement on any  
4 claims brought against a manufacturer by the Commonwealth  
5 or a party residing in Pennsylvania.

6           It is important for the Committee to be aware  
7 that there are potentially dramatic financial consequences  
8 for Pennsylvania if we do not enact the model statute as it  
9 is contained within the agreement. The issues dealt with  
10 by the statute are complex and involve market shares,  
11 payment formulas, and potential adjustments to payments  
12 being made to the states under the Master Settlement  
13 Agreement.

14           I'll try to explain them as simply as I can.  
15 The payments that the participating manufacturers make to  
16 the states under the terms of the agreement are based on  
17 how many cigarettes they sell; in other words, their market  
18 share. Due to the fact that the nonparticipating  
19 manufacturers are not subject to the marketing and  
20 advertising restrictions in the agreement, it's possible  
21 that they will increase their cigarette market share.

22           This potential reduction in market share for  
23 the major tobacco companies could result in their annual  
24 payments to the states being reduced. To illustrate this  
25 potential, let's use a hypothetical situation. Let's

1 assume that in the year 2003, the market share of the major  
2 tobacco companies has fallen 4 percent, say from the base  
3 of 97.5 of where it was to 93.5 in 2003.

4           If it can be proven that this reduction was  
5 the result of the marketing and advertising restrictions in  
6 the agreement, then a correlative downward adjustment of  
7 the following year's payments to the states will be made.  
8 First, it's important to note that we negotiated a 2  
9 percent buffer into the agreement.

10           In other words, in order for the payments to  
11 decrease at all, the participating manufacturers must  
12 suffer a market loss greater than 2 percent. So our  
13 hypothetical 4 percent market loss will result in a figure  
14 of just 2 percent being used to adjust the payments.

15           In 2003, the tobacco industry is scheduled to  
16 pay approximately 8 billion to all of the states. The  
17 formula contained in the agreement will be applied to this  
18 2 percent market loss and result in a reduction in the  
19 following year's payments of \$480 million. This reduction  
20 will be allocated only among those states that have not  
21 enacted the model statute contained in the Master  
22 Settlement Agreement.

23           This is why it's crucial that we protect  
24 Pennsylvania's payments under the agreement by getting the  
25 statute on the books. Presently, there are 36 states, the

1 District of Columbia, and I believe a couple other  
2 territories that have enacted a model statute.

3           It's also important to realize that the  
4 statute which is eventually enacted here must closely  
5 resemble the model contained in the agreement. The  
6 consequences of not adopting language which is very similar  
7 to what is in the agreement could be dramatic.

8           If Pennsylvania enacts a statute which  
9 conforms to the agreement and that statute is subsequently  
10 struck down as unconstitutional by a state court, the  
11 maximum reduction in payments the Commonwealth would have  
12 to bear is 65 percent of what it could be in a particular  
13 year. Without passage of a conforming model statute, we  
14 could lose 100 percent of our share in any reduction.

15           My office, along with the Ridge Administration  
16 and lawyers with the General Assembly, are currently  
17 working with the tobacco industry to fine-tune the model  
18 statute which is before you to conform with Pennsylvania  
19 statutory construction.

20           My staff and I continue to stand ready to work  
21 with the Committee to ensure that the legislation  
22 ultimately considered meets the necessary requirements of  
23 the Master Settlement Agreement. Again, Mr. Chairman,  
24 members of the Committee, I thank you for having me here  
25 today. And I would be pleased to answer any questions that



1 you may have.

2 CHAIRPERSON CLARK: Thank you very much,  
3 Attorney General. Are there any questions? Representative  
4 Masland.

5 REPRESENTATIVE MASLAND: Yes. Good morning,  
6 General Fisher. My question deals with the hypothetical  
7 you were dealing with about the reduction of -- the  
8 potential 2 percent reduction if the 4 percent share goes  
9 down as far as the market share for the major companies.

10 Now, you say that would only be allocated  
11 among those participating states. If all the participating  
12 states have enacted the model statute, then who suffers  
13 that loss? The way I understood it, you're saying that the  
14 \$480 million reduction would only affect those states that  
15 don't have a model statute. So if everybody gets a model  
16 statute, how is that done?

17 MR. FISHER: There's no loss.

18 REPRESENTATIVE MASLAND: There's no loss.  
19 Okay. Because the model statute protects them from any  
20 loss?

21 MR. FISHER: Yes.

22 REPRESENTATIVE MASLAND: Just another question  
23 that I don't think really affects this, but I'm interested  
24 in your take on it. The Attorney General of the United  
25 States has recently filed suit. What, if any, impact is

1 that going to have on the agreements that the states have  
2 made?

3 MR. FISHER: I -- it's -- it's difficult to  
4 speculate fully as to what impact that could have.  
5 Obviously, the United States Department of Justice is a  
6 long way from getting any recovery. If in fact they got a  
7 recovery through litigation or through settlement similar  
8 to ours without congressional intervention, the impact on  
9 the actual agreement would be -- there would be no impact  
10 on the actual agreement.

11 I would be concerned, however, that if the  
12 Congress intervened and there is some language in the  
13 agreement for potential offset if the Congress enacted a  
14 national settlement similar to what we had initially  
15 proposed before this Master Settlement Agreement, there is  
16 an outside possibility that there could be some reduction.

17 It's unfortunate, in my opinion, that the  
18 federal government hadn't followed suit -- had not filed  
19 suit earlier. We had actually presented an agreement to  
20 them, the June 20, 1997 agreement, which would have  
21 provided them about \$180 billion that we think would have  
22 represented the amount -- most of the amount they would  
23 have been entitled to.

24 But, you know, we'll have to see where that  
25 suit goes. But if it's resolved by litigation other than

1 the economic impact, there's always a question of how much,  
2 you know, how much can the industry afford to pay? But  
3 we'll have to see.

4 REPRESENTATIVE MASLAND: Thank you. I would  
5 concur. I think that the federal government should have  
6 come in earlier; and now that the states have worked out an  
7 agreement, that it would be improper, in my opinion, for  
8 Congress to come in and somehow change that on their own.

9 I think the states have the authority and  
10 should be the ones to follow through. So thank you for all  
11 your efforts.

12 MR. FISHER: Thank you, Representative  
13 Masland.

14 CHAIRPERSON CLARK: Representative Armstrong.

15 REPRESENTATIVE ARMSTRONG: Just a short  
16 comment. And I'm sure you're diligent along these lines.  
17 But in changing anything with this statute as it is written  
18 now could push it into a qualifying statute, not the model.  
19 So I just raise that as a flag that, you know, we are very  
20 careful and diligent that we don't change it into a  
21 qualifying unintentionally.

22 MR. FISHER: Right. That's correct,  
23 Representative Armstrong. And, you know, you've done a lot  
24 of work on this issue I know. I commend you for that.  
25 There is a difference between when it would qualify and

1 when it would be a model.

2           So I would encourage -- and as I said, we are  
3 working with the Administration and would be available with  
4 your Committee and others to make sure that the language is  
5 acceptable to everybody who is -- will be reviewing this.  
6 The model is attached as, I think, Schedule T to the Master  
7 Settlement Agreement. And that's where we hope this bill  
8 will ultimately end up.

9           REPRESENTATIVE ARMSTRONG: Thank you.

10          CHAIRPERSON CLARK: Representative Petrarca.

11          REPRESENTATIVE PETRARCA: Thank you for being  
12 here, General. I guess I personally wish that your office  
13 would show the same amount of diligence in trying to clean  
14 up the admissions testing problem that we're experiencing  
15 in Pennsylvania as you are dealing with the tobacco  
16 settlement. But that may be a discussion for another day.

17                 But my question is, is this -- is what we're  
18 talking about today with the agreement, is this something  
19 that needs to be debated? Or are we just talking about  
20 trying to fine-tune a statute that fits into the  
21 Pennsylvania regulatory scheme or statutory scheme? Is  
22 that all we're talking about?

23          MR. FISHER: Now, this is -- I mean, the --

24          REPRESENTATIVE PETRARCA: Because who's going  
25 to oppose us? I mean, what -- it seems like it's just --

1 MR. FISHER: Yeah. It's a very good question.  
2 Who would oppose it? Today -- today, there are subsequent  
3 participating manufacturers who have signed onto the  
4 agreement. I am not aware -- although, I'm sure there's  
5 somebody selling a tobacco product that would be defined as  
6 a cigarette.

7 But I'm not aware who that is that's selling  
8 such a product in Pennsylvania today. All right. The  
9 issue really is, is what could happen down the line. And  
10 we used the example of 2003. It's hard to predict what  
11 might happen three or four years from now, what, you know,  
12 multinational company might all of a sudden decide that,  
13 Hey, you know, we can put up billboards or we can advertise  
14 in youth magazines and maybe we can get a market share and  
15 we're going to start marketing the tobacco product. And  
16 they pick off a part of the market share.

17 So although it doesn't exist today, the way  
18 markets change, I think there's a real possibility that you  
19 could find that situation appear somewhere in this country  
20 in the future. And it would not necessarily be just in  
21 Pennsylvania. They are able to measure that market share  
22 change nationally.

23 And if it got to that 4 percent level, then it  
24 could cost us. So this is a recommendation for the  
25 enactment of a statute that, in effect, creates an

1 insurance policy against future reductions in our payments.  
2 And we think it's important to get it done now when the  
3 issue is before you. And so I thank you for your interest  
4 in this.

5 REPRESENTATIVE PETRARCA: Thank you.

6 CHAIRPERSON CLARK: Attorney General, if that  
7 multinational company would appear and they would take some  
8 market share against participants, by enacting the statute,  
9 we are protected and we still get whatever dollar amount  
10 we've agreed to in the statute and we're not affected by  
11 that?

12 MR. FISHER: That's correct.

13 CHAIRPERSON CLARK: Is there anything to deter  
14 that multinational person to come in? Can we single them  
15 out and tax them? You know, how do we get at that  
16 scenario? Or are we just satisfied that, you know, we're  
17 getting our money from the participants and if this  
18 multinational company comes in, you know, so be it?

19 MR. FISHER: Well, what you will be doing here  
20 is the creation of the reserve fund will mean that that  
21 company will be making payments to put into the reserve  
22 fund, into the Pennsylvania escrow account and the escrow  
23 accounts in other states that's related to the number of  
24 cigarette packs that they sell.

25 So that's, you know, a financial tool that can

1 be used. You know, obviously, so long as the product  
2 remains a legal product and there aren't other federal  
3 controls on it, absent the -- what's been given up in this  
4 agreement, in our Master Settlement Agreement, which is a  
5 lot, that company, if they don't sign on and aren't bound  
6 by it, will have free rein.

7 But at least there will be the equality on  
8 what they're paying into the reserve fund versus what the  
9 other companies are paying to make the payments under the  
10 MSA.

11 CHAIRPERSON CLARK: Okay. So if they appear  
12 on the scene in Pennsylvania or register in Pennsylvania,  
13 we can say, Look, we have a statute and under that statute,  
14 we control what you're selling here and, you know, you need  
15 to account to us and make a payment to the escrow account?

16 MR. FISHER: That's correct.

17 CHAIRPERSON CLARK: Does this settlement, does  
18 it cover anything other than cigarettes, like snuff,  
19 cigars, pipe tobacco, anything like that?

20 MR. FISHER: It does cover chew.

21 CHAIRPERSON CLARK: It does?

22 MR. FISHER: There's a separate settlement  
23 with a US tobacco company that covers -- that covers  
24 chewing tobacco.

25 CHAIRPERSON CLARK: Okay. Is chewing tobacco

1 and snuff the same thing?

2 MR. FISHER: Yes, at least as I understand it.

3 CHAIRPERSON CLARK: Are there any other  
4 questions?

5 (No response.)

6 CHAIRPERSON CLARK: With that, why, we  
7 certainly want to thank you for your testimony. And we  
8 look forward to your continuing participation in the  
9 process.

10 MR. FISHER: Thank you, Mr. Chairman.

11 CHAIRPERSON CLARK: Why don't we -- at this  
12 point in time, why don't we take a ten-minute break, let  
13 the stenographer rest her legs. And we'll reconvene in  
14 about ten minutes.

15 (A brief recess was taken.)

16 CHAIRPERSON CLARK: The next individual to  
17 testify before the Subcommittee is the Honorable Thomas G.  
18 Paese, who is the Secretary of Administration, Office of  
19 the Governor. We welcome you this morning, and we look  
20 forward to your testimony and comments.

21 MR. PAESE: Thank you, Mr. Chairman. Thank  
22 you for providing me the opportunity to testify here today  
23 on the subject of House Bill 445 and the model act as  
24 specified in the tobacco company's Master Settlement  
25 Agreement. I'd like to follow up briefly on some of what



1 Attorney General Fisher has stated and emphasize the  
2 importance of enacting the model act as opposed to a  
3 qualifying act. But first let me start by giving a very  
4 succinct background on the Master Settlement Agreement.

5           This is probably information you're well aware  
6 of, but I'll just take a few minutes. As you know, the  
7 Attorneys General of 46 states, 5 commonwealths and  
8 territories, and the District of Columbia reached a tobacco  
9 settlement agreement on November 23rd, 1998 worth 206  
10 billion over the next 25 years.

11           The State's Attorneys General consummated the  
12 deal with tobacco manufacturers Philip Morris,  
13 Incorporated; R.J. Reynolds Tobacco Company; Brown &  
14 Williamson Tobacco Corporation; Lorillard Tobacco Company;  
15 and the Liggett Group.

16           Together, these companies represent  
17 approximately 99 percent of the tobacco industry.  
18 Pennsylvania stands to receive approximately 11.3 billion  
19 over 25 years and actually some payments beyond that time  
20 period. Several adjustments in the settlement could reduce  
21 the amount of money that Pennsylvania will get.

22           To limit one of these adjustments,  
23 Pennsylvania, we submit, needs to enact a model act. I  
24 will explain the importance of passing the model act and  
25 outline the differences between a model act and a

1 qualifying act.

2           A model act: It can be said that the  
3 underlying goal of the Master Settlement Agreement is to  
4 hold tobacco manufacturers accountable for the costs  
5 associated with their cigarette sales in the Commonwealth.  
6 To ensure the long-term public health gains of the Master  
7 Settlement Agreement in Pennsylvania, it is important that  
8 all cigarette manufacturers, both participating and  
9 nonparticipating, be encumbered with their fair share of  
10 the health burden.

11           The purpose of the model act or statute as  
12 specified in Exhibit T of the Master Settlement Agreement  
13 is to attempt to ensure that all cigarette manufacturers in  
14 any given state are equally accountable. In addition,  
15 passage of the model act is also important to protect the  
16 amount of settlement payments that Pennsylvanians will  
17 receive.

18           As you know, the Governor has indicated that  
19 the reason these funds are important is we want to make  
20 sure that they go to making Pennsylvanians healthier. To  
21 the extent there's any diminution of what we receive or in  
22 any way affect the flow of funds, we believe that hurts our  
23 ability to invest these funds to make Pennsylvanians  
24 healthier.

25           Furthermore, to understand the effect of the

1 model act, two terms in the Master Settlement Agreement  
2 must first be explained: A participating manufacturer and  
3 the nonparticipating manufacturer adjustment. A  
4 participating manufacturer is a tobacco company that has  
5 signed onto the MSA.

6           The nonparticipating Master Settlement  
7 Agreement -- the nonparticipating manufacturer adjustment  
8 is a formula in the agreement that allows the participating  
9 manufacturers to reduce their payments to states by a  
10 preset proportion corresponding to the amount of market  
11 share they lose to nonparticipating manufacturers.

12           Thus, it can be said that the model act is in  
13 some ways an attempt to limit the competitive advantage  
14 that nonparticipating manufacturers would have over  
15 participating manufacturers. In essence, the model act  
16 requires nonparticipating manufacturers to either  
17 participate in the MSA, which is what we want, or to pay  
18 into an escrow account amounts based on a specific rate per  
19 unit of cigarettes that they sell.

20           These payments are required for a 25-year term  
21 with the nonparticipating manufacturer only allowed to  
22 access the interest on the account during the term and the  
23 principal being returned only at the end of 25 years. This  
24 limits any potential advantage a nonparticipating  
25 manufacturer would have over participating manufacturers

1 for that term, 25 years.

2 By enacting a model statute, we would also  
3 limit the amount of the nonparticipating manufacturer  
4 adjustment that is deducted from the Master Settlement  
5 Agreement that would be due to Pennsylvania. This is most  
6 effective only when the model act or statute is enacted  
7 exactly as it is presented or attached to the MSA.

8 Any statute that is textually different from  
9 the model act but accomplishes the same goals can only be  
10 deemed what we referred to earlier as a qualifying statute  
11 by the Master Settlement Agreement. Whether the effect is  
12 the same or whether the act is -- or is a qualifying  
13 statute is left up to an independent third party designated  
14 by the MSA whose decision would be final if submitted to  
15 them.

16 The important difference between a model act  
17 and the qualifying statute is made clear when you look at  
18 the varying limits to the nonparticipating manufacturer  
19 adjustment that directly depend upon whether a model act or  
20 a qualifying statute is passed.

21 If Pennsylvania passes that model act and it  
22 is declared unconstitutional, we may lose -- although  
23 significantly -- only up to a maximum of 65 percent of our  
24 settlement payment to the nonparticipating manufacturer  
25 adjustment. If we enact a mere qualifying statute and it

1 is deemed unconstitutional or if we don't enact any kind of  
2 statute at all, our payments would be reduced to zero.

3 Further, this would mean that nonparticipating  
4 manufacturers are selling cigarettes in the state without  
5 any compensation or liability to the state for harm they  
6 are inflicting. Nor would they be limited by their  
7 restrictions under the MSA.

8 However, if we enact the model act, actively  
9 enforce it and it is deemed constitutional, it is a safe  
10 harbor with no reductions in our payments by a virtue of  
11 that nonparticipating manufacturer adjustment. Here in  
12 Pennsylvania, the Attorney General and the Governor's  
13 Office of General Counsel are working to achieve a bill  
14 that is consistent with Pennsylvania law and will be deemed  
15 a model act by the participating manufacturers' attorneys.

16 We want to get to the model act. For these  
17 reasons, we would ask that the model legislation not be  
18 encumbered with details or mandates about the actual  
19 allocation of these funds. I assure you the Administration  
20 will work with the General Assembly to develop a plan to  
21 use the settlement funds to improve the health of all  
22 Pennsylvanians as the Governor indicated over six months  
23 ago.

24 However, to muddy the model act with  
25 extraneous amendments will place these funds in jeopardy.

1 We must do whatever we can to make sure that we maximize  
2 the number of dollars that can be used to make  
3 Pennsylvanians healthier. This settlement is an historic  
4 opportunity to invest in our citizens' health, and the  
5 model act is one of our most important tools to protect  
6 that investment.

7 In closing, Mr. Chairman, members of the  
8 Committee, again, we urge you, on behalf of the Governor's  
9 Office and all of the departments that will deal with this  
10 settlement, to enact a model act and to take the time  
11 necessary to make sure that the model act is in fact what  
12 is passed by the legislature and signed by the Governor.  
13 Thank you.

14 CHAIRPERSON CLARK: We thank you very much for  
15 your testimony. Now, I'm trying to -- to understand the  
16 model act and what happens if we don't have a model act.  
17 And what I think is that if we have a model act, then the  
18 tobacco industry will absorb any loss in their market share  
19 through nonparticipating.

20 MR. PAESE: That's my understanding. Again, I  
21 think the term I used was safe harbor, as I understand it.  
22 Now, again, the enforcement and the interpretation is more  
23 appropriate for the Attorney General. Although I am a  
24 lawyer, I have tried to stay away from the -- from the  
25 nuances of parsing words for some time.

1                   CHAIRPERSON CLARK: Okay. And I understand  
2 that, and I appreciate that. But the tobacco industry also  
3 wants this model statute enacted.

4                   MR. PAESE: Right.

5                   CHAIRPERSON CLARK: And they want it enacted.  
6 And in order to do so, what they're putting on the table is  
7 that they will absorb the loss of any of their -- of their  
8 share, market share in Pennsylvania.

9                   MR. PAESE: Attributable to the  
10 nonparticipating manufacturers, that's correct.

11                   CHAIRPERSON CLARK: So that's what they're  
12 putting on the table in order to get this act agreed to by  
13 all the 46 states. And I assume it behooves them so that  
14 they don't have this continual litigation with  
15 commonwealths and states across the nation.

16                   MR. PAESE: I also think the purpose of it is  
17 also to encourage those companies that are out there not  
18 participating or that couldn't enter the market to join the  
19 MSA because that also limits the manner in which they can  
20 advertise or not.

21                   They want to be on equal footing. And I think  
22 this is an attempt to encourage them, to make sure that  
23 they participate in the model -- in the Master Settlement  
24 Agreement so they all compete and sell on the same terms.

25                   CHAIRPERSON CLARK: And then the

1 nonparticipating, by joining this agreement, get the  
2 benefits from it as far as legal action by the  
3 Commonwealth?

4 MR. PAESE: Right.

5 CHAIRPERSON CLARK: Now -- and this agreement  
6 only affects the Commonwealth's lawsuits against tobacco  
7 industries. If an individual wants to sue the tobacco  
8 industry, they can.

9 MR. PAESE: That's correct.

10 CHAIRPERSON CLARK: They can obtain a  
11 judgment. And the money would come from the escrow funds  
12 or the funds that are being paid to the state by the  
13 tobacco industry.

14 MR. PAESE: Individuals can sue the  
15 participating manufacturers today. This MSA only limits  
16 the Commonwealth and municipalities. Right now, if an  
17 individual believes they're -- they still have the ability  
18 to proceed against the tobacco industry. This is dealing  
19 with the Commonwealth and municipalities.

20 CHAIRPERSON CLARK: But the -- but the payment  
21 the successful client will receive will come from this  
22 fund?

23 MR. PAESE: No, that's not the case.  
24 Individuals -- that's separate. They still have to  
25 absorb -- they would still have to absorb that on their



1 own.

2 CHAIRPERSON CLARK: On their own?

3 MR. PAESE: That's correct. There's a  
4 reduction in what the state would receive in the  
5 event -- let's say Allegheny County or Philadelphia County  
6 had chosen to go and to proceed on their own against these  
7 companies. Had they been successful and, let's say,  
8 recovered a billion dollars, then there would have been a  
9 billion dollar offset from our 11.3 billion because that  
10 was a municipality in the Commonwealth of Pennsylvania.

11 If, however, a class action is put together by  
12 individuals in the Commonwealth that sue Lorillard or  
13 R.J.R. Reynolds and they receive a billion dollar  
14 settlement, that does not offset what the state is to  
15 receive under the Master Settlement Agreement. That is  
16 separate.

17 The Master Settlement is to deal with the  
18 issue of states and municipalities and government entities  
19 within the Commonwealth.

20 CHAIRPERSON CLARK: Okay. So that will  
21 include everybody in the Commonwealth except an individual?

22 MR. PAESE: That's correct.

23 CHAIRPERSON CLARK: So if a tobacco company  
24 owes the Commonwealth \$100 next year and an individual sues  
25 the tobacco company and gets a settlement for \$10, the

1 tobacco company pays the 100 to the state and they also  
2 need to pay the individual the 10?

3 MR. PAESE: That's correct.

4 CHAIRPERSON CLARK: Representative Masland.

5 REPRESENTATIVE MASLAND: Maybe I can just  
6 follow up on that. And I'm maybe partly confused by the  
7 questions and answers that were attached to Representative  
8 Armstrong's testimony. And there's one dealing with what  
9 circumstances -- under what circumstances would the funds  
10 be removed from the escrow account.

11 Now, they're talking about the escrow account  
12 established by nonparticipating manufacturers. It's my  
13 understanding in reading this that if there's a judgment  
14 against a nonparticipating manufacturer, that they could  
15 use the money in the escrow account then to pay that.

16 But we're not talking about the overall fund  
17 that's set aside for the Commonwealth. We're just talking  
18 about that escrow fund?

19 MR. PAESE: Yeah. And I believe that the  
20 judgment they're referring to would be in the event the  
21 Commonwealth decided to proceed against one of these  
22 nonparticipating or a county or a township or something  
23 like that, I believe. That still does not address the  
24 issue of individuals. That's my understanding. I could be  
25 wrong.

1                   REPRESENTATIVE MASLAND: Okay. Well,  
2 hopefully, everybody will be participating. We won't have  
3 to worry about that too much.

4                   MR. PAESE: Right.

5                   REPRESENTATIVE MASLAND: But as we know, those  
6 instances can arise. Now, I know you're a lawyer. I've  
7 seen you in law school. In fact, I think I've seen you in  
8 my class in law school.

9                   MR. PAESE: You did. Probably not as often as  
10 you were there but --

11                   REPRESENTATIVE MASLAND: But I do have a  
12 question about the qualifying and the model statute. And  
13 it relates to your request, which I think is a good one,  
14 that we restrain ourselves from dealing with how the funds  
15 should be allocated when this -- when this bill comes  
16 before the General Assembly.

17                   And I'm sure you can appreciate that will  
18 require an incredible amount of communal restraint,  
19 heretofore not seen in the General Assembly, to not get all  
20 these amendments on to say it's going to pay for X, Y, Z.

21                   MR. PAESE: Right.

22                   REPRESENTATIVE MASLAND: Hopefully, it can.  
23 But if we would amend the statute in that fashion and  
24 otherwise it would be a model statute or model act,  
25 would -- would those amendments potentially take it out of

1 the model act and just be a qualifying act?

2 MR. PAESE: It's my understanding from my  
3 staff's work with the Attorney General's Office that there  
4 is that danger, and we'd rather not take that danger. We'd  
5 rather deal with the issue of allocation of the funds,  
6 whether it be for uncompensated care, children's health,  
7 whatever it might be, on the merits for those and  
8 not -- and not cloud the issue of whether or not the  
9 tobacco company attorneys would say this is not what we  
10 agreed to in the model act.

11 Deal with them separately. Deal with the  
12 model act, and separately deal with the legislature on how  
13 the funds should be allocated and spent once the funds  
14 start to flow. That's the position we're taking and I  
15 believe what the Attorney General's Office believes also.

16 REPRESENTATIVE MASLAND: And I agree that  
17 that's the way it should be done. In my mind, I say, Well,  
18 it probably wouldn't make it technically, you know, take it  
19 out of the realm of the model act because you're dealing  
20 with things on the one end of the pipeline as opposed to  
21 what's coming in the pipeline.

22 But I'd just assume not create that  
23 possibility. So hopefully, we will exercise restraint.  
24 And thank you for your testimony.

25 MR. PAESE: Thank you.

1 CHAIRPERSON CLARK: Representative Armstrong.

2 REPRESENTATIVE ARMSTRONG: Thank you,  
3 Secretary Paese. I would just say as prime sponsor of the  
4 bill, I would be very diligent and oppose any attempt to  
5 amend this, especially as in regards to trying to divert  
6 the funds to any particular entity.

7 MR. PAESE: We appreciate that because  
8 the -- the Administration has been working with the  
9 legislature and interest groups. We've had literally  
10 hundreds of meetings with groups about how to best allocate  
11 this money. It is really an historic opportunity.

12 People may argue that we should have gotten  
13 more, whatever. The funds are available. Let's use them  
14 for health care, and let's get on with the business of  
15 using them effectively. So we appreciate that effort on  
16 behalf of the Governor's Office and all the departments.

17 CHAIRPERSON CLARK: Representative Petrarca.

18 REPRESENTATIVE PETRARCA: Thank you,  
19 Secretary. I have a -- one comment as the only Democrat on  
20 the panel. And they make me sit between these Republicans  
21 in case I get out of line here.

22 CHAIRPERSON CLARK: There were more invited.

23 REPRESENTATIVE MASLAND: You can sit on our  
24 left if you'd like.

25 REPRESENTATIVE PETRARCA: My comment is that I

1 can't see why House Democrats would not try to amend this  
2 house bill or take any shot at having some say in how this  
3 money is going to be spent in time because I guess at least  
4 since I've been here or a brief history, House Democrats  
5 have been cut out of this budgetary process. So I would  
6 certainly --

7 MR. PAESE: I respectfully disagree.

8 REPRESENTATIVE PETRARCA: Okay. Well --

9 MR. PAESE: We have -- we've talked to members  
10 of your caucus. And we are ready to talk at any time. In  
11 fact, I was in the Senate yesterday with a Senate Democrat.  
12 And I will be seeing a group of them on Monday. So to say  
13 that there hasn't been a dialogue is -- again,  
14 respectfully, I disagree. I met with everyone that have  
15 asked.

16 REPRESENTATIVE PETRARCA: Well, a dialogue is  
17 one thing. I think, you know, what the dialogue is and  
18 what the final product is or has been here I think is a  
19 different matter. But again, my only comment is I  
20 can't -- my only comment is that I can't see House  
21 Democrats not taking every opportunity to have some say in  
22 how this thing is shaped.

23 MR. PAESE: I understand.

24 REPRESENTATIVE MASLAND: That's what I was  
25 talking about when I said --

1 MR. PAESE: The communal -- the tremendous  
2 communal -- yeah, I understand.

3 CHAIRPERSON CLARK: Any further questions or  
4 comments?

5 (No response.)

6 CHAIRPERSON CLARK: We want to thank you very  
7 much for coming out this morning. And we look forward to  
8 working with you to further this process. And we'll do the  
9 best we can.

10 MR. PAESE: Thanks very much.

11 CHAIRPERSON CLARK: The next individual to  
12 testify before the Subcommittee is Dr. Robert Sklaroff,  
13 Sklaroff. Maybe he can help us with the pronunciation.

14 DR. SKLAROFF: Greetings. It's Sklaroff. And  
15 my mother's here if there's any question about  
16 pronunciation. First of all, let me say hello. And  
17 specifically, thank you, Representative Clark. And also, I  
18 want to say thank you for listening to me on a sidebar,  
19 Representative Armstrong. And hello to everyone on the  
20 Committee.

21 I am Robert B. Sklaroff, M.D. And I am  
22 testifying as an individual. I have various roles in  
23 organizations that have provided and will provide input.  
24 But to ensure that there is no chance for confusion  
25 regarding my comments today, I will not formally identify

1 them.

2 I will explain why I oppose passage of this  
3 bill, which is drawn from the Master Settlement Agreement  
4 with the tobacco industry, for it carries tremendous  
5 implications both with regard to big tobacco and to the  
6 societal import of indemnifying any industry for  
7 unspecified future crimes.

8 The language in this bill relates directly to  
9 litigation that I filed, cases that when I typed this I  
10 thought were currently pending both in Pennsylvania  
11 Commonwealth Court and the Philadelphia Court of Common  
12 Pleas. I find out today something that may have occurred  
13 last Friday in Commonwealth Court, but I haven't seen any  
14 documentation.

15 The purpose of this testimony is to unravel  
16 the clever plan of big tobacco. And because I recognize  
17 your expertise as a judicial body, you are being provided  
18 extensive primary resource data so that you can trace my  
19 logic. First, I will provide a chronologic narrative of  
20 the history of my litigation, emphasizing frightening  
21 issues that are raised by the bill.

22 Secondly, I will excerpt the MSA to show why  
23 this bill has been submitted for legislative approval.  
24 Third, I will cite sources that illustrate the implications  
25 of this bill. Your prior speakers, Messrs. Fisher and



1 Paese -- I didn't know that Mr. Armstrong was -- or  
2 Representative Armstrong was going to be speaking. But  
3 he's included in this -- no, he's not included in this  
4 sentence; but I recognize he also was speaking.

5           Your prior speakers, Messrs. Fisher and Paese,  
6 have consistently failed to address the legal concepts that  
7 have driven my litigation. And I just had a sidebar with  
8 Mr. Paese, and maybe we'll have a chat later on about this.  
9 Thus, by releasing my testimony ahead of time, my intent  
10 has been to use this forum as a site where constructive  
11 dialogue regarding my concerns with the MSA could occur.

12           Indeed, if any further information is needed  
13 with regard to the strident assertions herein, please so  
14 inform; and the data will be researched and presented in a  
15 supplemental report. I recognize that I have been  
16 portrayed as blocking release of monies to the  
17 Commonwealth.

18           But understand that pursuing public health  
19 does not require availability of MSA resources. And I  
20 might add that the Attorney General again characterized  
21 what I was doing as frivolous, and he's wrong. He's wrong,  
22 and he can be proven wrong if anyone wishes to read the  
23 Minority opinion filed by the Commonwealth Court Judge  
24 Kelley.

25           And this carries implications relative to

1 whether or not he is going to even address the points that  
2 Judge Kelley elucidated. In an effort to save a tree, I  
3 have provided voluminous information to the Judiciary  
4 Committee staff as written testimony -- that's 63 pages  
5 worth, plus 11 appended documents -- whereas you have  
6 received only the key data therefrom as oral testimony.

7           To save another tree, despite tremendous  
8 temptation, no documents are attached to this presentation.  
9 Even those appended to the written testimony are  
10 necessarily incomplete, but they provide documentation of  
11 the profound roots to my litigation.

12           As has been validated by Judge Kelley, this  
13 cannot be viewed as a superficial effort, despite the view  
14 harbored by the Governor and the Attorney General. The  
15 Commonwealth Court has weighed my motion for  
16 reargument/reconsideration now for a month.

17           It has been asked to address the issues raised  
18 in the Minority opinion in light of its superficial  
19 dismissive Majority opinion. My two major legal concerns  
20 are the MSA's immunity and offset provisions, but the focus  
21 of the bill under discussion today is only the former.

22           Pivotal here is the fact that adoption of this  
23 bill must not be perceived as perfunctory, inasmuch as it  
24 would necessarily yield backdoor legislative approval of  
25 unconstitutional language that contravenes sound public

1 health policy.

2           Indeed, such stealth immunization endangers  
3 the American legal system, for others could subsequently  
4 clamor for comparable protections. Thus, both as an  
5 isolated event and as a precedent, this bill should strike  
6 fear into anyone who values the fundamental right of the  
7 people to petition their government.

8           And anyone who suggests this concern is unduly  
9 alarmist should be confronted with the question as to why  
10 big tobacco has mandated adoption of this bill if the  
11 Commonwealth is to receive its entire fiscal carrot. Each  
12 time one rereads the MSA, another light goes on in one's  
13 head.

14           As lugubrious a task as it is, someone has to  
15 do it. And presently, that task is before you. The  
16 implications of the MSA are also being weighed by the  
17 Philadelphia Court of Common Pleas Judge John W. Herron,  
18 inasmuch as his prior approval of the MSA was predicated on  
19 the absence of any clear, quote, legally enforceable  
20 interest harbored by the activists.

21           He has now been provided one, enforcement of  
22 the MSA that I am pursuing because the Attorney General  
23 isn't. Clearly, the ability to have cross-ruffed filings  
24 between these two courts has afforded significant insight  
25 as to big tobacco's plan, as well as the effort of the

1 Attorney General to have run interference for the Evil  
2 Empire during this yearlong approval process.

3           The most obvious example is the contradiction  
4 that has emerged regarding the proper venue for airing my  
5 concerns. Whereas the tobacco industry currently invokes  
6 the MSA in its motion to dismiss, asserting it is a fait  
7 accompli, the Attorney General's attorney has repeatedly  
8 advised the activists to air their concerns anywhere else,  
9 any time else, other than at that time at that site.

10           And I have an extensive quote from the January  
11 12th transcript which I excerpted in what you're going to  
12 read below. Reeder Fox is the attorney representing the  
13 Attorney General during the January debate before Judge  
14 Herron.

15           "To say that it's ultra vires would be to read  
16 out the language 'To the full extent of the power of the  
17 signatory hereto to release.' We never in any way, by  
18 signing this agreement, took the position that the  
19 Pennsylvania Attorney General had that authority. That's  
20 for another day. It's for another court."

21           I have been trying during the past year to  
22 place this issue into the court of public opinion. And  
23 presently, it is before this court of public inquiry. If  
24 the Attorney General avers he does not have the power, then  
25 I have asked him to so stipulate legally; and he has not.

1                   Now, however, he seeks legislation --  
2 litigation -- no. Actually, it should be legislation.  
3 Now, however, he seeks legislation -- that's the one typo  
4 in the transcript -- that would embed this precise language  
5 and its known vagaries and built-in precedent value within  
6 the statutes of the Commonwealth.

7                   Indeed, he undermines what had been averred  
8 from the January 12th hearing transcript, convoluted  
9 double-talk that represents the closest the Attorney  
10 General has ever come to speculating as to the implications  
11 of the MSA. And I'd read this quote to you recalling we  
12 just heard from Mr. Paese, again giving his individual  
13 nonlawyer/lawyer interpretation.

14                   And this is the problem that I have. I think  
15 it's necessary to stipulate legally so everyone understands  
16 what's going along in the future. And another fast  
17 digression is the fact that the spokesperson for the  
18 Attorney General, Shawn Connolly, when first confronted  
19 with the existence of the Wawa billboards, suggested that  
20 he had to study the issue before they had decided what to  
21 do.

22                   And I would aver that it's appropriate to make  
23 sure that we've studied these issues prospectively before  
24 we sign onto these documents because certainly the tobacco  
25 people have. Anyway, here comes the quote from Mr. Fox.

1 "We have looked at the current law of Pennsylvania, Your  
2 Honor, and I stress the word current because, as Your Honor  
3 is well aware, in some states" -- he's referring  
4 particularly to Florida -- "the plaintiffs got somewhat of  
5 a boost in the merits of their claims by significant  
6 substantive amendments to support their claims against the  
7 tobacco industry."

8 He has no idea -- "I have no idea what the  
9 future Commonwealth statutes could be, which might affect  
10 this. But based upon our review of the current  
11 Pennsylvania law, we are not aware of any authority under  
12 the current law that gives the Attorney General the  
13 authority to release the claims of political subdivisions  
14 or -- by that, I'm including municipalities or counties.

15 This is one lawyer's opinion, and it's not an  
16 opinion that's based on a really thorough saturation of  
17 work. It's just a preliminary review." It is truly  
18 frightening to read of such indecision for, surely, big  
19 tobacco has already done its homework.

20 Inasmuch as the bill that is the subject of  
21 this hearing was introduced on February the 9th and was  
22 mandated as Exhibit T to the MSA, it stretches credulity to  
23 swallow the assertion that the Attorney General's attorney  
24 was unaware of its existence nor of his mandated intent to  
25 submit this legislation for your approval a month later if

1 he was going to get the entire complement of money.

2           Inasmuch as the Attorney General himself was  
3 in attendance, it is disillusioning that he did not take  
4 the opportunity during his subsequent remarks to correct  
5 the record. Thus, we have the master plan of big tobacco  
6 elucidated. Although current law did not empower the  
7 Attorney General to immunize the Evil Empire, big tobacco,  
8 contemplated was enactment of future law -- this  
9 bill -- to signal legislative intent to do so.

10           Further, your leaders were to facilitate this  
11 plan, yielding statutory language that could be invoked  
12 subsequently to place these killers above the law. This  
13 was to yield a judicial legislative one-two punch that  
14 would insulate big tobacco from the public forever. It is  
15 up to you to stop this from occurring at this place now  
16 burying all your doubts. Specifically, you should not feel  
17 compelled to provide rubber-stamp approval to this bill.

18           The Attorney General would argue this language  
19 does not comport with my fears. Clearly, he would  
20 say -- or has said actually -- the current legislation is  
21 intended only to prevent companies that did not settle from  
22 attaining an unfair market advantage.

23           But even were this perspective adopted without  
24 challenge, there is no mandate that the definition of  
25 releasing parties be adopted concomitantly. The creation

1 of this refundable escrow account need not be conditioned  
2 as to those who could trigger its potential application,  
3 inasmuch as one cannot now anticipate the scope of future  
4 legal theories and statutes that may invoke it.

5           Deleting this definition on page 6, line 9 to  
6 page 7, line 4 is absolutely mandatory, despite  
7 typographical errors such as omitting "-ing" from "follow"  
8 on page 6, line 14 if you compare it with the model statute  
9 in the MSA, as is modification of the key paragraph that  
10 follows which is on page 9, lines 8 through 11:

11           In referring to escrow funds being released,  
12 they shall be released to pay a judgment or settlement on  
13 any released claim brought against such tobacco product  
14 manufacturer by the Commonwealth or any releasing party  
15 located or residing in this Commonwealth.

16           Well, here, it may appear neat to invoke the  
17 same language as is portrayed as binding the settling  
18 parties. But in order to attain the stated goal of the  
19 Attorney General and to afford fairness to the  
20 nonparticipating manufacturers, it is not necessary to do  
21 so.

22           Why? Merely assume XYZ Tobacco Company is  
23 financing the placement of large billboards greater than 14  
24 square feet advertising its wares. This entity had already  
25 placed monies in escrow and has successfully been



1 sued -- let's say by myself -- and ordered to pay a fine  
2 of \$15,000.

3           That's exactly what occurred in Rhode Island  
4 when the MSA was enforced successfully against one violator  
5 thereof. Thus, a released claim encompassed by the MSA  
6 filed by a releasing party having asserted a civil right on  
7 behalf of the public interest would yield disbursement from  
8 escrow funds rather than burdening XYZ additionally,  
9 placing it at a market disadvantage due essentially to its  
10 having, quote, paid twice for the same responsibility.

11           The Attorney General would argue, therefore,  
12 such a constraint is mandated. One could parenthetically  
13 suggest the tobacco industry could decide to go naked on  
14 its -- essentially its insurance as opposed to having these  
15 monies put into escrow. That's an antitrust argument that  
16 is extensively studied in the written testimony.

17           But absent this definition of releasing party,  
18 XYZ could still invoke the escrow, arguing it had  
19 contributed annually to this fund to provide a pool from  
20 which its liabilities could be financed regardless of the  
21 litigant who had prevailed.

22           The Attorney General would argue next this  
23 payment could imbalance the system, allowing XYZ to invoke  
24 these monies indiscriminately, placing it at a market  
25 advantage due essentially to its ability to finance any

1 nonspecified liability purported to have transpired, even,  
2 for example, an unrelated slip and fall.

3           But language carrying uncertain vagaries that  
4 is admittedly unnecessary should be struck, affording  
5 clarity and focus without adversely affecting outcome. If  
6 the Attorney General cannot restrict any party from suing,  
7 then any result thereof from order or settlement would then  
8 justifiably invoke the escrow account.

9           Otherwise, his publicly-asserted goals could  
10 be subverted by future administrative, legislative, and/or  
11 judicial actions. How MSA monies are to be expended is not  
12 overtly associated with this hearing; although, reference  
13 has been made to this topic in the recent past and will be,  
14 according to testimony I've already read, made later on.

15           This issue has been extensively studied by  
16 others and represents a covert motivation for you to  
17 approve this bill, regardless of its gross deficiencies and  
18 dangerous implications. Know that -- just know, in my  
19 view, the MSA money should be spent principally to decrease  
20 the need for future expenditures, focusing upon prevention  
21 and cessation programs.

22           I might add that the Hospital Association of  
23 Pennsylvania presentation later on represents an  
24 improvement but not a resolution of the prior attack that I  
25 rendered to them. Initially, they suggested that none of

1 the money should go to anything that's being taken care of  
2 on the national level until those programs have been proven  
3 to be deficient.

4           Now they're suggesting that there shouldn't be  
5 any overlap, which I suppose is an incremental improvement.  
6 But as far as I'm concerned, cessation and prevention  
7 programs must be emphasized. And indeed, the Legacy  
8 Foundation that's been created will mandate that matching  
9 funds be generated on the state level accordingly.

10           Nevertheless, it bothers me that the HAP  
11 people were seemingly blocking off money from going to the  
12 most appropriate place relative to the reason for the money  
13 existing in the first place. In this regard, it is  
14 necessary to quote the most recently articulated views of  
15 the Governor with regard to how the windfall could be  
16 spent.

17           A fortnight ago in Pittsburgh, a meeting was  
18 held on this very topic, organized by the National  
19 Association of Governors. At this conference, the Governor  
20 signalled his intent to direct the proceeds to programs and  
21 initiatives that fulfill or enhance state government's  
22 existing areas of service before creating new ones,  
23 eschewing any that would require significant growth or  
24 expansion of government bureaucracies.

25           He wants to set aside a portion of the funds

1 to benefit future generations of Pennsylvanians, and he  
2 wants to ensure these efforts can be easily adjusted to  
3 correspond to the likely fluctuation in the tobacco  
4 payments. Nowhere mentioned in this press release were the  
5 myriad topics discussed at the meeting by national experts  
6 on tobacco control, prevention, and cessation programs.

7           The Centers for Disease Control, CDC, Best  
8 Practice Guidelines for states to invest tobacco settlement  
9 funds were detailed. And speakers from California and  
10 Massachusetts health departments shared their states'  
11 experiences in reducing tobacco use rates by more than 30  
12 percent in the past decade.

13           Particularly problematic was the lack of an  
14 endorsement of the plan issued by the Coalition for a  
15 Tobacco Free Pennsylvania, which was based upon the CDC  
16 guidelines. We submitted an extensive budget accordingly.  
17 Thus, although the focus of this testimony is on the  
18 indemnification clause in the proposed bill, the  
19 implication of this testimony is that the public health may  
20 have to be served by the use of ongoing litigation rather  
21 than depending upon government if we are to confront public  
22 health enemy number 1.

23           You may recall this phrase was coined by  
24 former HHS Secretary Joseph A. Califano, Junior two decades  
25 ago. And I might add that I read in the paper today that

1 the number one preventable cause of death and disability in  
2 the Americas has again been shown to be tobacco.

3           The world has not changed, and we're not  
4 making very much progress. And I feel these monies should  
5 be spent accordingly instead of using the windfall to  
6 balance the annual state budget. Thus, the orthodoxy I  
7 espouse is rooted in common sense and science. It cannot  
8 be ignored.

9           Appended to the written testimony are two  
10 essays I have authored alone to physicians and with Messrs.  
11 Godshall and Barg to the lay public that illustrate how,  
12 within days of the release of the text of the MSA on  
13 November the 16th of last year, we were anticipating this  
14 day when the Attorney General was going to manifest his  
15 desire to achieve ultimate control over all public interest  
16 litigation related to tobacco use and ultimately to  
17 immunize big tobacco.

18           Now, Mr. Paese said in his arguments that the  
19 intent is not to block public interest lawsuits and  
20 individual lawsuits and that the offset would not be  
21 applied to the former. And all I am suggesting is that  
22 that information be stipulated for court approval, and then  
23 I'll go home.

24           He has not done that. And he and the Attorney  
25 General have been provided plenty of opportunities to do

1 so. It is now necessary to excerpt from the MSA those  
2 clauses that are intended to force the legislature to do  
3 its bidding. The key phraseology is included in Section  
4 IX, Payments.

5           Rather than attempting to excerpt legal  
6 phraseology, I will create a narrative that will be  
7 punctuated by appropriate references. Due to the  
8 complexity and ambiguity of the MSA, this will necessarily  
9 be an incomplete pathway but one that can be retraced  
10 individually by anyone who wishes to use this testimony as  
11 a study guide through the morass.

12           Although tempting, this opportunity will not  
13 be used to criticize the document's faults, inasmuch as  
14 editorialization may impede appreciation of the application  
15 of raw power.

16           Payments made by the settling states are  
17 subject to a set of reductions, one of which is the NPM or  
18 nonparticipating manufacturers adjustment. Quote, Each  
19 allocated payment shall be adjusted by subtracting from  
20 such allocated payment the product of such allocated  
21 payment amount multiplied by the NPM adjustment percentage.

22           This percentage calculation is based upon  
23 parameters that may easily be appreciated. If the  
24 participating manufacturers do not lose market share; i.e.,  
25 if they gain business, there's no reduction in payments.

1 If the participating manufacturers -- insert that in the  
2 text -- lose market share; i.e., lose business because of  
3 the MSA, however, payments are to be reduced via the NPM  
4 adjustment.

5           Thus, government is provided a fiscal  
6 incentive to see the participating manufacturers flourish  
7 and the nonparticipating manufacturers flounder. The key  
8 operational clause is that the NPM adjustment will not be  
9 applied if the bill currently before the Committee has  
10 been -- or actually, the Subcommittee -- has been passed  
11 and implemented.

12           The bill must comport precisely with Exhibit  
13 T, as does this bill, for if it does not, a nationally  
14 recognized firm of economic consultants will be invoked to  
15 determine whether or not it suffices. Regardless of the  
16 reason for an amendment thereof, if its tenets are not in  
17 force, the NPM adjustment will be.

18           And in this regard, I'm now going to discuss,  
19 from my perspective, how to differentiate the model statute  
20 with a qualifying statute. Pivotal, perhaps, is the  
21 definition of what would be perceived as a qualifying  
22 statute. And here is the quote directly from the MSA.

23           The law must, quote, effectively and fully  
24 neutralize the cost disadvantages that the participating  
25 manufacturers experience vis-a-vis the nonparticipating

1 manufacturers due to the MSA. Because the legal definition  
2 of a releasing party would not have an economic impact,  
3 noting that all unspent monies held in escrow are to be  
4 returned after a quarter century, there is no reason why  
5 deleting this admittedly unnecessary definition would carry  
6 any risk of causing the NPM adjustment to be invoked,  
7 thereby decreasing the payments.

8           Specifically, regardless of how these monies  
9 are or are not disbursed from escrow, calculation of  
10 amounts of monies transacted based upon the MSA's dictates  
11 are constant. Thus, how the money is spent and how the  
12 money is accrued are mutually exclusive issues.

13           And in this regard, I have to, I think, point  
14 out a contradiction in the Attorney General's testimony of  
15 a few minutes ago. He said, on page 3 at the top, that  
16 these escrow monies are to be held in reserve for the  
17 state's cost in treating tobacco-related illnesses. That's  
18 not true.

19           As he says later on, the monies in escrow are  
20 to be released only to pay judgments or settlements on any  
21 claims brought against the manufacturer by the Commonwealth  
22 or a party residing in Pennsylvania. To continue, know  
23 that current litigation challenging the MSA for favoring  
24 the settling parties specifically employs an antitrust  
25 cause of action, ultimately charging the following:



1                   The Attorneys General, National Association of  
2 Attorneys General, and the tobacco companies have engaged  
3 in a collusive monopolistic practice of acting like  
4 commercial thugs against the discount cigarette  
5 distributors in violation of the law and constitution.

6                   Again, I have many quotes from the Internet  
7 that I downloaded and put in the written testimony so you  
8 can read the primary data and judge for yourself what is  
9 going on here legally. Thus, the fundamental rationale for  
10 this law is currently being adjudicated.

11                   And it would be wise to acquire key filings in  
12 this matter, if only to ensure comparable antitrust charges  
13 could not be sustained in the Commonwealth. Clearly, the  
14 involvement of the nonparticipating manufacturers in this  
15 legislative process mandates that their input, and not just  
16 that of the settling parties, be specifically entertained  
17 prior to your issuing a formal recommendation on this bill.

18                   In a recent article that reviewed the  
19 additional litigation filed by Philip Morris's competitors,  
20 again detailed in the written testimony, the US market  
21 shares of each company was listed. And I list them as  
22 Philip Morris, 50 percent; R.J.R. Reynolds, 24 percent;  
23 Brown & Williamson, 13 percent; Lorillard, 9 percent; and  
24 others, 4 percent.

25                   And I think we listened to the fact that 3

1 percent of the 4 percent, or 75 percent of them, have  
2 subsequently signed on. So now you're dealing with a one  
3 percent group of nonparticipating manufacturers who have  
4 not signed onto the MSA.

5           Based on the above figures, the fiscal impact  
6 of not approving this bill can be provided. It will be  
7 assumed that market share data have been relatively  
8 constant, inasmuch as there have been no articles  
9 identified in the lay literature suggesting that during the  
10 recent years there has been any market shift to or from the  
11 products of the participating manufacturers.

12           Assuming there was no market share loss by the  
13 participating manufacturers, then the MSA payment would not  
14 be affected. If the participating manufacturers suffered a  
15 mild market share loss up to 16 and two-thirds percent, the  
16 NPM adjustment percentage would be triple that figure up to  
17 50 percent.

18           Inasmuch as the 4 percent figure above must  
19 include other entities that now have been identified as  
20 having been included in the MSA, it is assumed when I typed  
21 this -- and now it's been validated -- that the NPM  
22 constitutes, perhaps, one percent of the overall market.  
23 This will fluctuate maybe .1 percent annually.

24           I'm composing that figure for the purposes of  
25 calculating a representative number. Thus, the NPM

1 adjustment would decrease the \$400 million to be received  
2 this year by 0.3 percent or perhaps \$1.2 million and  
3 perhaps zero if that 2 percent cutoff that was cited  
4 earlier is operational. Otherwise, I would adopt by  
5 reference what the Attorney General stated because he's  
6 much more well-informed relative to the economics of this  
7 entire situation.

8           In my written testimony, extensive citation  
9 from the current lay literature has been given to  
10 illustrate the legal implications of granting big tobacco  
11 any special legal protections. Illustrative of potential  
12 future litigation is an article from the Boston Globe of  
13 last August the 24th, an expert from which provides a cause  
14 of action related to Internet tobacco sales to minors.

15           There's a quote. "The Massachusetts Attorney  
16 General acknowledged the problematic nature of enforcing  
17 any law upon a medium like the Internet, which crosses  
18 international boundaries. Different countries' laws  
19 governing alcohol and pornography have already come into  
20 conflict, he said. 'It's very difficult,' Reilly said of  
21 tackling inappropriate behavior on the Internet. This is  
22 an increasing problem."

23           It is advised that the reader feel comfortable  
24 reading the primary data contained in this discussion at  
25 the following sites on the Internet. And actually, if you

1 e-mail this document to yourself, you can hyperlink just by  
2 double clicking the blue print under each one of these  
3 documents.

4           And they include the initial civil action  
5 complaint filed by the Pennsylvania Attorney General; the  
6 Master Settlement Agreement, which is available both at his  
7 Web site and also on that of the National Association of  
8 Attorneys General; Judge Herron's opinion; Judge Kelley's  
9 opinion; and additional key documents, which are at  
10 globalink, which is headquartered in Geneva; a search  
11 engine site for tobacco industry documents from multiple  
12 sources, including one that I found that cites me when I  
13 was on television in 1980 debating a lady named Ann Broda  
14 from the Tobacco Institute; a listing of all Pennsylvania  
15 precedents regarding tobacco, smoking, and cigarettes which  
16 was performed by a -- a nonlawyer who's invested in this  
17 movement; and also, the recently filed federal litigation  
18 against big tobacco that was cited earlier today.

19           In closing, I recommend either nonadoption of  
20 this bill or, in the alternative, elimination of all  
21 references to the settling parties. And this can be  
22 accomplished by striking from page 6, line 7 to page 7,  
23 line 3 and by striking the following quote from page 9,  
24 lines 9 to 11; and that is, quote, by the Commonwealth or  
25 any releasing party located or residing in this

1 Commonwealth. Thank you for your consideration.

2 CHAIRPERSON CLARK: Thank you, Doctor. And  
3 we've also had some additional members of the House join  
4 us. And I'd like them to introduce themselves for  
5 everybody, and I'll start down at my far left.  
6 Representative James.

7 REPRESENTATIVE JAMES: Thank you, Mr.  
8 Chairman. Harold James from Philadelphia.

9 REPRESENTATIVE WASHINGTON: Thank you, Mr.  
10 Chairman. LeAnna Washington from Philadelphia County.

11 CHAIRPERSON CLARK: Thank you, Doctor, for  
12 your testimony. If we forget this model statute, how do  
13 you propose or how do you see the matters with tobacco use  
14 and the tobacco industry proceeding?

15 DR. SKLAROFF: How do I see the use of the  
16 monies?

17 CHAIRPERSON CLARK: No. If we don't have a  
18 model statute, we don't have any monies, we go back to  
19 square one.

20 DR. SKLAROFF: What you're saying, I believe,  
21 is incorrect. If you do not adopt a model statute, okay,  
22 then, as the Attorney General pointed out and as I have  
23 also provided in some detail, the decrease in monies would  
24 only occur if the participating manufacturers lost a  
25 significant amount of their market share. Understand that?

1 CHAIRPERSON CLARK: Okay.

2 DR. SKLAROFF: Okay. That's point A. Point B  
3 is that my suggestion here to strike the definition of  
4 releasing parties should not be controversial because, as I  
5 pointed out, the firm that would be appointed, which has  
6 some representation on a national plane in accounting,  
7 would be charged with applying that specific definition  
8 from the MSA to whatever amended document you would be  
9 considering.

10 And it only can deal with the economics. And  
11 so therefore, by striking the definition of releasing  
12 parties, you're not changing any of the economics. And  
13 therefore, there would be no difference between the model  
14 statute and the qualifying statute that you would  
15 potentially be adopting.

16 And the proof that there shouldn't be any  
17 difference rests with all of the assertions made by the  
18 Attorney General and, to a secondary degree, by the tobacco  
19 industry; although, generally they've been hiding behind  
20 him. And that is that he says that he doesn't have any  
21 power to block.

22 So therefore, that operational clause being in  
23 the releasing party's power invalidates it. So all I'm  
24 saying is if this is invalid, then dump it instead of  
25 leaving it in and then allowing the tobacco industry to use

1 that as a foot in the door for future reference. And know  
2 that they will because they already have.

3 And the proof of that is what occurred in  
4 Oregon -- and that's in my written testimony -- where an  
5 individual -- I think his name was Williams -- won a  
6 judgment. And then a certain percentage of the monies in  
7 Oregon must go to punitive -- punitive monies must go to  
8 the state.

9 And so the tobacco industry is coming in and  
10 saying, Well, since money is going from a tobacco company  
11 to the state, we want to invoke that as part of the offset.  
12 Excuse me, but you heard from Mr. Paese just now that the  
13 offset is not supposed to be invoked for individual  
14 lawsuits.

15 Guess what they're doing? They're  
16 contravening what they have been saying because it's not  
17 stipulated in court. And that's what I'm trying to achieve  
18 here.

19 CHAIRPERSON CLARK: Now, how --

20 DR. SKLAROFF: They cannot be trusted.

21 CHAIRPERSON CLARK: What was the outcome in  
22 the Oregon --

23 DR. SKLAROFF: It's still being litigated.

24 CHAIRPERSON CLARK: Still being litigated?

25 DR. SKLAROFF: The Attorney General in Oregon

1 is going to fight vigorously to uphold her interpretation  
2 of the MSA -- excuse me -- his interpretation. But the  
3 bottom line point is that shouldn't even be necessary. It  
4 should be obvious.

5           And the fact that the tobacco industry is  
6 getting this kind of vagary written into the law through  
7 this statute, you know that they're going to try to use it  
8 in the future.

9           CHAIRPERSON CLARK: So your primary objection  
10 to the statute is you believe the tobacco industry will use  
11 it not to pay individuals' claims when they sue the tobacco  
12 industry?

13           DR. SKLAROFF: My primary concern is if you  
14 have the claim of the definition of releasing parties in  
15 the statute, then that will be invoked by the tobacco  
16 industry to cover itself on many levels not just, in the  
17 case that I described here, to say that the releasing  
18 parties have to be thrown out of court if they try to sue  
19 in the future, but also through the offset mechanism  
20 because I don't feel there's any justification for the  
21 tobacco industry to be able to say, Well, we're paying all  
22 this money because of the fact that we caused all these  
23 health problems.

24           And then if they commit another crime and  
25 they're going to be fined \$15,000, let's say, for that,



1 that that money should come out of their capitated losses.  
2 They should have to be able to be forced to pay more.

3 CHAIRPERSON CLARK: Now, those are all  
4 arguments that they're making in court?

5 DR. SKLAROFF: No, these are arguments that  
6 I've made in court. And the Attorney General has been  
7 scrupulously silent regarding the details thereof in all of  
8 his filings, and this is what bugs me. Maybe you can fix  
9 that problem.

10 CHAIRPERSON CLARK: What did Judge Kelley say  
11 in his Minority opinion?

12 DR. SKLAROFF: Okay. That's also available on  
13 the Internet. And I'd be more than happy to provide you an  
14 extra copy.

15 CHAIRPERSON CLARK: If you can summarize that.  
16 Maybe you can summarize that.

17 DR. SKLAROFF: Okay. Well, he said a lot of  
18 different things. First of all, he pointed out that the  
19 origins of what occurred here are based from merry old  
20 England's idea of parents patriarch where the government  
21 functions as parent of the people.

22 And that concept is not just emblazoned in our  
23 law but is specifically cited in the definition of the  
24 parties by the Attorney General when he filed his lawsuit  
25 on April 23rd of '97. So you now have a situation where

1 he's acting on behalf of the people.

2           And this, therefore, makes it a class action  
3 situation. And that includes youth, and he specifically  
4 refers to youth in his filing. Therefore, the rights of  
5 youth, according to what my understanding is and having  
6 read the various Pennsylvania Rules of Civil and Appellate  
7 Procedure, the rights of the unrepresented parties are to  
8 be predominant over the rights of the settling parties.

9           And if these incompetent or unrepresented  
10 individuals are potentially going to be damaged, then they  
11 have to have their rights weighed. And the final judgment  
12 has to be shown to be fair, equitable, and reasonable. The  
13 judge in the lower court, John W. Herron, did not reach  
14 that determination.

15           And this is one of the key points made by  
16 Judge Kelley, that he didn't take any evidence in order to  
17 justify reaching that kind of a determination. Now, that's  
18 one point of what he said. In addition, he pointed out  
19 that the PRAP, Pennsylvania Rule of Appellate Procedure,  
20 was violated when Allegheny County was allowed to withdraw  
21 without even filing an application pursuant to the rules.

22           And why didn't they file an application?  
23 Because they didn't want to explain why. Why didn't they  
24 want to explain why? Because their lead attorney, Mr.  
25 Pietregallo, wrote an essay in the Greensburg/Pittsburgh

1 Tribune Review that the reason they withdrew is because the  
2 Governor threatened -- get this -- to cut off funds for  
3 the expansion of the International Airport in Pittsburgh.

4           Isn't that cute? What does that have to do  
5 with the price of bread? And in addition, I, as another  
6 party, should have had the opportunity to respond to any  
7 application to withdraw. This never was afforded to me,  
8 and this is a violation of PRAP.

9           So again, Judge Kelley points out that there  
10 are many mistakes that have occurred here and they have to  
11 be fixed. Now, I understand from what I heard from the  
12 Attorney General a few moments ago that my motion to  
13 reconsider/reargue was denied; although, I don't know  
14 whether or not there's an appended opinion.

15           All I did was, in my motion, ask the Majority  
16 to address the issues that Judge Kelley raised in his  
17 Minority report because in the Majority report, all Bonnie  
18 Brigance Leadbetter wrote was something along the following  
19 quote lines, that Dr. Sklaroff seeks standing; but other  
20 entities, including the Commonwealth, have direct  
21 substantial and immediate interest and indeed are  
22 vigorously litigating on behalf of the public interest  
23 relative to tobacco.

24           Guess what? That is an untrue statement. It  
25 is not supported by any data that had been

1 supported -- submitted to the court on any level; and it's  
2 irrelevant. All it says is the Attorney General has  
3 standing. It does not deal with whether or not anyone else  
4 such as myself could potentially merit standing.

5           So these are the problems that I have. And I  
6 guess I would potentially announce right now that I will  
7 file an appeal to the Supreme Court unless some sort of a  
8 settlement conference can be initiated and these problems  
9 can be resolved.

10           If the Attorney General says things in every  
11 other forum other than in the court, there's no reason why  
12 he can't so stipulate. And that's basically my problem  
13 with what's occurring right now.

14           CHAIRPERSON CLARK: And the one thing that  
15 you're interested in -- and I think at one point I wrote  
16 down that you'd go home.

17           DR. SKLAROFF: Yes.

18           CHAIRPERSON CLARK: -- is verification of a  
19 scenario I went through with Secretary Paese where if, you  
20 know, if there's \$100 put into a fund and an individual  
21 sues and gets \$10, the tobacco company pays the \$100 plus  
22 pays the 10. And if that scenario is -- is upheld by this  
23 piece of legislation, you are happy?

24           DR. SKLAROFF: Yeah. In fact, if you want to  
25 add an amendment to the legislation that would so stipulate

1 that, I'd be thrilled. That might be another way out of  
2 the problem.

3 CHAIRPERSON CLARK: Where -- where did you get  
4 your idea that we might be using this money to balance our  
5 state budget?

6 DR. SKLAROFF: All right. The problem that I  
7 have had for a long time -- and I don't want to digress too  
8 much -- is I feel that the current anti-tobacco efforts of  
9 the Commonwealth of Pennsylvania are grossly deficient. A  
10 minor example, but just to illustrate that, I went to a  
11 wedding in Fogelsville, just west of Allentown, Saturday a  
12 week ago.

13 And there right off the lobby of the Holiday  
14 Inn Conference Center was a tobacco vending machine  
15 carefully walled off so that any kid could walk in there  
16 and do whatever he wanted to do and walk out. And to me,  
17 it's comparable to the State Store situation.

18 It's such an obvious violation of youth access  
19 if you allow these tobacco vending machines to function as  
20 black holes. Well, where are we in fixing that problem?  
21 Otherwise, youth clients checks are a joke because you have  
22 an unlimited capacity to violate the law.

23 So I have had a problem with the way we have  
24 handled problems in Pennsylvania in the public health  
25 world. Now, correlating that perspective with what I'm

1 doing here is, on the one hand, arm's length because I  
2 could argue that I'm only focusing on the legalities of the  
3 situation.

4 But the linkage that I placed carefully into  
5 this oral testimony and underlined is the fact that if I  
6 can't trust government to do the job, then I want to be  
7 able to petition the courts to get it done myself in the  
8 future. And that's the essence of what's going on here.

9 You hear what everyone's promised last  
10 November being abrogated constantly when we see what  
11 actually is being written and submitted.

12 CHAIRPERSON CLARK: So you would like a cause  
13 of action to influence the distribution of these settlement  
14 monies --

15 DR. SKLAROFF: I would like the --

16 CHAIRPERSON CLARK: -- if the legislature  
17 doesn't, you know --

18 DR. SKLAROFF: Okay. I'm not exactly sure  
19 what you mean, I would like a cause of action.

20 CHAIRPERSON CLARK: Well, I'm trying to find  
21 out. You know, you indicated that this money would be used  
22 to balance the state budget.

23 DR. SKLAROFF: Right.

24 CHAIRPERSON CLARK: Okay. And I asked you,  
25 you know, where you picked up on that notion.

1 DR. SKLAROFF: Okay. Well, then I'm going  
2 to --

3 CHAIRPERSON CLARK: And in a roundabout way,  
4 you know, you indicated to me that maybe, well, that's a  
5 possibility and that could be done and if that is the way  
6 the money is going to be spent, you know, then you don't  
7 think it's right or you don't think there's commitment on  
8 the part of the Commonwealth and, therefore, you think you  
9 ought to be able to do something about it.

10 DR. SKLAROFF: Okay. So now I will correlate  
11 that with greater specificity. When the Governor talks  
12 about basically mainstreaming in the money in what  
13 occurred, well, now 15 days ago in Pittsburgh at the NAAG  
14 conference, I don't have enough specificity to know what  
15 exactly that entails.

16 But from my perspective as I've detailed in  
17 the three appended documents where I've given testimony to  
18 the House, State, and also to the Administration on how to  
19 spend the money, I point out that you could additionally  
20 make money available for cessation programs and  
21 pharmacologic aids accordingly.

22 So for example, Nicoderm, Nicorette,  
23 psychological support systems to help people who are  
24 addicted shake the habit, these are not covered by  
25 insurance programs that are mainstreamed. So add a program

1 that would help people kick this addiction which they got  
2 when they were kids and, therefore, didn't know that they  
3 were getting addicted.

4 I listened -- my mother tells me that last  
5 night again on Politically Incorrect they were talking  
6 about tobacco and how individual responsibility should be  
7 the driving force. My problem is people got addicted when  
8 the tobacco industry knew they were addicting people. And  
9 now they're adults; and it's very, very tough to shake this  
10 behavior.

11 So additional programs are going to be needed  
12 and should be drawn from these tobacco monies in order to  
13 do what I underlined in my quote, which is from the  
14 Pennsylvania Division of the American Academy of Family  
15 Practice, that the money should be spent with one purpose;  
16 and that is to decrease the need to spend future money.  
17 The rest is commentary.

18 CHAIRPERSON CLARK: Questions? Representative  
19 Masland.

20 REPRESENTATIVE MASLAND: Thank you, Mr.  
21 Chairman. Just initially, I note, Dr. Sklaroff, that you  
22 are testifying as an individual and that you have filed  
23 your action as an individual. But you've alluded a couple  
24 times to how long you have been involved in this type of  
25 issue.



1           At one point, you mentioned you were, I guess,  
2 referenced in an article on the Internet from back in 1980.  
3 And you said this has been a problem for a long time. And  
4 I'm not asking you to digress, as you say, greatly. But  
5 I'd be interested in your background as it relates to this  
6 issue.

7           DR. SKLAROFF: Okay. I was a fellow for two  
8 years at the Memorial Sloan-Kettering & Cancer Center from  
9 1977 to 1979. And I was amazed at the fact that a lot of  
10 people gave lip service but did not really work hard at  
11 fighting the tobacco problem.

12           So I got involved in some coalitions under the  
13 auspices of a lady named June Walzer (Phonetic) of the New  
14 York City Division of the American Cancer Society, and we  
15 lobbied in Albany. And actually, I testified in 1979  
16 before the Board of Estimate of the City of New York  
17 against having tobacco ads on bus stop shelters, which I  
18 believe is two decades prior to the time when SEPTA finally  
19 came to these conclusions.

20           So I saw people whom I liked die. Two of my  
21 aunts, smokers, have died from lung cancer. A guy named  
22 Rodney Adera (Phonetic), who headed our task force, again  
23 two decades ago, died from recurrent lung cancer. This is  
24 a disease that causes tremendous distress because it's very  
25 difficult to treat. I see that as a cancer doctor.

1           And nothing much has changed over the past two  
2 decades accordingly, notwithstanding all these cures that  
3 are always being touted in the medical literature, perhaps,  
4 which are self-referential more than really making  
5 incremental improvements in what's going on. So the bottom  
6 line is, I've seen unnecessary suffering.

7           And I feel that, you know, you could talk  
8 about diet, you could talk about other things that people  
9 should do; but here you have a definable problem. Let's  
10 fix it, and let's do the stuff that's obvious, and then see  
11 where we are.

12           And there should be no charge, for example,  
13 regarding these vending machine problems that the public  
14 right of speech under the Bill of Rights is going to be  
15 violated against the tobacco industry if we put a lock on  
16 the machines or put them where only adults can get to them.  
17 To me, it's obvious.

18           And why public officials haven't fixed that  
19 kind of a problem when we've known about that for so long  
20 escapes me.

21           REPRESENTATIVE MASLAND: And your involvement  
22 with this lawsuit with respect to the MSA is motivated, I  
23 guess, in large measure because you don't have faith that  
24 the government is doing the right thing, number one; or  
25 that if they do the right thing, they won't be spending it

1 in the proper fashion?

2 DR. SKLAROFF: Okay. I don't know about the  
3 spending situation in Pennsylvania. But I --

4 REPRESENTATIVE MASLAND: You talk -- and this  
5 gets back -- you've already answered the aspect of the  
6 budget --

7 DR. SKLAROFF: Yeah.

8 REPRESENTATIVE MASLAND: -- that we would just  
9 shift the pool of money around and we wouldn't really use  
10 it, as you say, for prevention and cessation.

11 DR. SKLAROFF: Yes.

12 REPRESENTATIVE MASLAND: That's your concern?

13 DR. SKLAROFF: Yes. And I would say to you  
14 that I would love to hear -- not the Attorney General  
15 because he's not involved in administrative activities.  
16 It's the Governor. I'd like to hear the Governor say he  
17 will follow the CDC guidelines when he makes his formal  
18 recommendation regarding these monies. He has not.

19 So to whatever degree, there is a linkage  
20 between what one does legally and what comes out  
21 economically. Of course, I'm interested in continuing to  
22 monitor the situation.

23 REPRESENTATIVE MASLAND: Are you representing  
24 yourself in this lawsuit?

25 DR. SKLAROFF: Okay. The story is that when

1 we initially filed, I filed pro se. We then acquired legal  
2 services of another attorney, who then has not been  
3 involved in the appellate process. And four organizations  
4 rejoined me after the decision was rendered by Commonwealth  
5 Court two months ago.

6 And I have one particular lawyer who is  
7 submitting key legal references for me to type into what  
8 I'm doing.

9 REPRESENTATIVE MASLAND: You say four  
10 organizations have rejoined you. You mean they're  
11 supporting your appeal efforts?

12 DR. SKLAROFF: On paper. But of course, not  
13 fiscally. I'm doing it all by myself.

14 REPRESENTATIVE MASLAND: What are those  
15 organizations?

16 DR. SKLAROFF: There is a Smoke Free  
17 Organization headed by Joe Cherner in New York. There is  
18 the American Council of Science and Health in New York,  
19 which also has members in Pennsylvania, both of them; plus  
20 the People's Medical Society.

21 And of course, I'm blanking on the fourth.  
22 But I'll think -- oh, American Association of Public Health  
23 Physicians, the -- the chair of which is a physician who I  
24 think is located in New Orleans. There were initially 13  
25 organizations, and I haven't really beat the drums to get

1 others.

2           The purpose of getting just those four to say,  
3 yeah, I'm still with you was essentially to show that I'm  
4 not alone in this process. You see, in answer to the first  
5 question that you asked about whether I can trust  
6 government, I already told you the problem I have with the  
7 Governor's behavior with particular regard to the  
8 state -- I mean to the airport in Pittsburgh which has  
9 absolutely nothing to do with tobacco. I have to turn --

10           REPRESENTATIVE MASLAND: And that's something  
11 that you got secondhand from someone else?

12           DR. SKLAROFF: From the essay that was  
13 published. And I would call for someone to investigate  
14 that because as far as I'm concerned, that could possibly  
15 border on efforts to obstruct justice because people have  
16 legitimate claims in Allegheny County which are being  
17 abrogated inappropriately by political pressure, raw  
18 political pressure because it was not only motivating  
19 Allegheny County to withdraw from the MSA process appeal  
20 but also motivating Allegheny County to stop its lawsuit  
21 against the tobacco industry for legitimate county-level  
22 costs that have been recovered by other counties in other  
23 states such as Arizona, Texas, and New York. Now --

24           REPRESENTATIVE MASLAND: If I can just -- I  
25 know other people have some questions so --

1 DR. SKLAROFF: Well, I wanted to tell you what  
2 was going on with my trust.

3 REPRESENTATIVE MASLAND: You have concern  
4 about the trust. That's fine. A lot of people have  
5 concern about that from time to time for a variety of  
6 reasons. But if you can somehow be reassured that these  
7 funds will be spent appropriately and that citizens will  
8 still have the ability to sue or petition for redress, then  
9 you would be satisfied?

10 DR. SKLAROFF: No, not yet. You didn't cover  
11 the offset because there's an -- a distrust relationship  
12 created between the big government, big tobacco, which was  
13 discussed earlier. I do not want that offset applied to  
14 anything other than the causes of action in the lawsuit  
15 which have to do with Medicaid losses sustained by the  
16 government over the decades.

17 I don't want those monies used for anything  
18 else, and I want that so stipulated. And they have refused  
19 to do so on paper despite oral declarations, including some  
20 of those you heard today. Look at the Attorney General  
21 referring to me on three occasions as dangerous.

22 Look at the Attorney General sending a letter  
23 to all litigants on March 1st threatening us, basically,  
24 with personal bankruptcy and organizational bankruptcy by  
25 saying that our cases were frivolous and that he would sue

1 for us to pay the legal expenses and the millions of  
2 dollars plus 6 percent per anum of the \$11.6 billion.

3 This was totally inappropriate because the  
4 attorneys in Glen Justice's article published two weeks  
5 thereafter -- \$8 million when they're getting \$50  
6 million from the MSA. That's double dipping and  
7 threatening us inappropriately. And they knew or should  
8 have known this information, and they're trying to  
9 manipulate us.

10 I would consider that to be potentially an  
11 issue that you should investigate relative to obstructing  
12 justice and obstructing the people's rights to petition the  
13 government for their rights.

14 REPRESENTATIVE MASLAND: You've made a lot of  
15 allegations.

16 DR. SKLAROFF: No, I'm not making allegations.  
17 I'm raising concerns.

18 REPRESENTATIVE MASLAND: Okay. Well, when you  
19 say you've been threatened --

20 DR. SKLAROFF: That's correct.

21 REPRESENTATIVE MASLAND: -- that's raising an  
22 allegation that you have been threatened.

23 DR. SKLAROFF: I am stating a fact. I've got  
24 a copy --

25 REPRESENTATIVE MASLAND: That's a legal term,

1 allegation.

2 DR. SKLAROFF: I'm not making a legal  
3 allegation right now. I'm raising issues that you should  
4 investigate.

5 REPRESENTATIVE MASLAND: It sure sounds like  
6 it to my legal ears that you're saying --

7 DR. SKLAROFF: Okay. I'm not a lawyer.

8 REPRESENTATIVE MASLAND: Regardless --

9 DR. SKLAROFF: Okay.

10 REPRESENTATIVE MASLAND: And I'm not conceding  
11 that you have been.

12 DR. SKLAROFF: Thank you.

13 REPRESENTATIVE MASLAND: But the fact is, even  
14 if you were threatened, it does not appear that you're  
15 going to back down; that you're going -- you will take  
16 this, as you said, probably to the Supreme Court of  
17 Pennsylvania and do whatever you can.

18 So it's -- it's very unlikely, given the  
19 stance you've taken today, that we're going to see  
20 Pennsylvania as the state that puts this whole agreement  
21 over the top.

22 DR. SKLAROFF: Not necessarily. If we sit  
23 down this afternoon and the Attorney General puts on a  
24 piece of paper what he has averred over the past almost one  
25 year, I'll go home. He has said he doesn't have this



1 power. So write down I don't have this power and withdraw  
2 that paragraph that is totally irrelevant.

3 He has said they're only going to use this  
4 offset monies for Medicaid-related causes of action. Fine.  
5 Put that on a piece of paper, and I'll go home. Why won't  
6 they? Ask them. I've tried.

7 REPRESENTATIVE MASLAND: Thank you.

8 CHAIRPERSON CLARK: One last question.

9 DR. SKLAROFF: Okay.

10 CHAIRPERSON CLARK: Allocation of the money  
11 for Medicaid-related expenses.

12 DR. SKLAROFF: Yes.

13 CHAIRPERSON CLARK: Now we're talking about  
14 this \$100 pot that I have.

15 DR. SKLAROFF: Yes.

16 CHAIRPERSON CLARK: Okay. And we have the  
17 whole -- the separate \$10 pot that individuals get from the  
18 tobacco industry directly. But the \$100 they put in and  
19 sign this agreement, you want that -- you want assurance  
20 that that \$100 all goes to Medicaid-related expenses?

21 DR. SKLAROFF: No. What I was saying was that  
22 in terms of the offset, that the offset monies should only  
23 be invoked if the cause of action of future litigation --

24 CHAIRPERSON CLARK: Excuse me. Then maybe I'm  
25 missing what offset monies --

1 DR. SKLAROFF: Okay. I'll explain it to you.  
2 Let's pretend that I sue Philip Morris because on its  
3 billboards advertising Marlboro for \$2.19 a pack was on the  
4 Wawa billboards a statement that this was a  
5 manufacturer-sponsored promotion. Okay.

6 Therefore, Philip Morris paid for illegal  
7 billboards. And that's the suit that's in a court of  
8 common pleas, and I want them fined. And I want an  
9 appropriate stipulation. Okay. I file that suit, and  
10 they're fined \$15,000.

11 I don't want that \$15,000 to be taken from the  
12 right-hand pocket and put into the left-hand pocket.

13 CHAIRPERSON CLARK: So it would come out of  
14 that \$100 pool?

15 DR. SKLAROFF: Right. And therefore, that has  
16 to do with future litigation. It makes sense, right?

17 CHAIRPERSON CLARK: Violation -- yeah, they  
18 violated an agreement they entered into.

19 DR. SKLAROFF: Right. And why should they be  
20 able to play that game like they're doing in Oregon? Ask  
21 yourself that, and then ask yourself why we have not heard  
22 a public outcry in Pennsylvania accordingly.

23 CHAIRPERSON CLARK: Well, we don't know  
24 whether they're going to get away with that.

25 DR. SKLAROFF: That's not the point. They

1 shouldn't even be allowed to do it. There should be people  
2 rising up and saying the tobacco industry is being  
3 disingenuous again. No one's doing that because everyone's  
4 mesmerized by millions of dollars.

5           And I'm thrilled to hear all of this  
6 discussion of tobacco control finally in the mainstream  
7 world of politics and economics, but let's do it properly.  
8 And let's not just be bought off by blood money.

9           CHAIRPERSON CLARK: So we have the 100 and \$10  
10 pot. And the allocation of the money of the offset and the  
11 Oregon case, those are your two concerns?

12           DR. SKLAROFF: Conceptually.  
13 Metamorphically --

14           CHAIRPERSON CLARK: If you can sit down with  
15 the Attorney General this afternoon and iron out those two  
16 things and you would be --

17           DR. SKLAROFF: Well, this afternoon at 1  
18 o'clock --

19           CHAIRPERSON CLARK: Well, no. I don't mean  
20 this afternoon literally. I mean, you know, that when  
21 someone calls me into their office tomorrow morning --

22           DR. SKLAROFF: Yes.

23           CHAIRPERSON CLARK: -- and they say, What  
24 would the good Doctor like, I can summarize that in those  
25 two points?

1 DR. SKLAROFF: Yes.

2 CHAIRPERSON CLARK: Thank you.

3 DR. SKLAROFF: It's all those documents that I  
4 have sent you. And it's taken many, many words to say  
5 those same things in many different ways. But ultimately,  
6 those are the causes of action we've had. Now, we have  
7 other problems with the MSA, such as the intent of the  
8 beneficiary section and so forth.

9 But I don't think you want to hear me discuss  
10 that right now. So let me suggest that those are the two  
11 conceptual legal points that we have emphasized that now I  
12 have continued to emphasize.

13 CHAIRPERSON CLARK: Any additional questions?

14 (No response.)

15 CHAIRPERSON CLARK: We thank you very much.

16 DR. SKLAROFF: Thank you for your time.

17 CHAIRPERSON CLARK: The next individual to  
18 provide testimony before the Committee is Mr. Robert  
19 Burkley, Urban Health Care Coalition.

20 MR. BURKLEY: Good afternoon, I believe it is.  
21 I'm Assistant Senior Vice President at West Penn Hospital.  
22 And I also serve as the Interim Executive Director of  
23 Oncology Services. West Penn Hospital is a component  
24 member of the Urban Health Care Coalition. It's a trade  
25 association in Pennsylvania, primarily of urban teaching

1 hospitals in both Pittsburgh and Philadelphia.

2 Both of these -- all these hospitals provide a  
3 significant amount of uncompensated care in addition to  
4 Medicaid patients in these areas. For those unfamiliar  
5 with the organization, the list of the member hospitals is  
6 attached.

7 I would like to again thank you on behalf of  
8 the Coalition for allowing me to review a couple key  
9 components of our proposal on how the tobacco settlement  
10 money should be spent. The Coalition would like to first  
11 support the efforts and thank the efforts of Representative  
12 Armstrong, the Subcommittee on Courts of the House  
13 Judiciary Committee, Attorney Fisher for negotiating a  
14 settlement, and the Governor for his leadership in  
15 directing the proceeds to provide Pennsylvanians with a  
16 healthier environment.

17 We have in the past presented on several  
18 occasions presentations to both the House and Senate  
19 Committee in Pittsburgh, Philadelphia. The Coalition has  
20 participated in work groups assembled by Secretary Paese as  
21 it relates to uninsured and uncompensated care. And  
22 therefore, my testimony will follow in those two areas.

23 I believe it's important for the Committee to  
24 first understand the environment in which we operate today.  
25 Many of the funding sources have continued to decrease over

1 the years. BBA in terms of Medicare payments based upon  
2 the Balanced Budget Act of 1997 proposes to decrease  
3 reimbursement to Pennsylvania hospitals alone by \$2.7  
4 billion over the next five years.

5 Commercial insurers, which were a relatively  
6 high paying, good profit center in the past, provided funds  
7 to cover those uncompensated care or uninsured payments.  
8 This option is no longer available, as many of these payers  
9 are moving to a managed care approach. And in some cases,  
10 their payments are substantially less than Medicare.

11 Managed care has increased dramatically. And  
12 as we say, we agree with the concept of managed care in  
13 controlling cost, preventing unnecessary utilization. In  
14 many cases, we continue to fight, particularly in health  
15 choice managed care companies, inappropriate denials of  
16 care.

17 Not only does it reduce the cash flow; but in  
18 addition, it creates additional burdens on the institutions  
19 to collect those funds to appeal those denied days.  
20 Managed care companies have the opportunity to optimize  
21 proper billing at the expense of both the patients and the  
22 hospital needs.

23 The cost of providing care continues to rise.  
24 Technology continues to rise. In my particular case, I can  
25 speak to issues such as chemotherapy drugs, which in one

1 sitting could be \$4,000. We receive payments in case of  
2 uninsured on zero payments; in the case of Medicaid, below  
3 the cost of acquiring those drugs.

4           The number of uninsured in Pennsylvania  
5 continues to grow not for lack -- over the five years, it's  
6 been roughly -- or over the last four years, it's been  
7 roughly 4 percent a year. There's roughly 1.2 million  
8 Pennsylvanians under the age of 65 who are uninsured.

9           Sixty percent of the uninsured live in  
10 households of \$25,000 income or less, leaving them little  
11 option to expend dollars for health care benefits. Sixty  
12 percent of the uninsured adults are employed full time, and  
13 25 percent of those uninsured are under the age of 18.

14           Other entitlement programs such as General  
15 Assistance have reduced the roles of those who are eligible  
16 for MA benefits, but the important point to remember here  
17 is they still present in our emergency rooms and our  
18 clinics for care. Regardless of ability to pay, we treat.

19           Hospitals and health systems in the state of  
20 Pennsylvania are the health care safety net, the health  
21 care source of last resort. Uncompensated care continues  
22 to grow, and ability of hospitals to provide that care  
23 continues to decrease.

24           Uncompensated care quite straightforward is  
25 the inpatient and outpatient care provided by hospitals

1 which are not reimbursed through any programs or through  
2 private pay. In 1997, the last HC-4 data available, \$790  
3 million of uncompensated care was provided for in the state  
4 of Pennsylvania.

5           This proportionate share to some degree, both  
6 on the Medicaid and Medicare front, provide some coverage  
7 but clearly only a fraction of the uncompensated care. The  
8 cost of providing those services are covered through a  
9 disproportionate share.

10           The burden is unduly spread, focused clearly  
11 in the rural areas of the state of Pennsylvania as well as  
12 the urban areas. Of the \$790 million of uncompensated  
13 care, 13 hospitals provide 245 million or roughly 30  
14 percent. Thirty hospitals out of Pennsylvania's 250  
15 provide over half of that uncompensated care amount.

16           Our proposal has been worked on with many  
17 groups, including the Hospital and Healthsystem Association  
18 of Pennsylvania. And we clearly believe that a large -- a  
19 substantial -- the majority portion of those dollars should  
20 be provided for uncompensated care.

21           We believe the approach should follow three  
22 key principals: One, the dollars are spent on health care;  
23 two, they should be used to supplement, not supplant; and  
24 three, that those monies are entrusted for future  
25 Pennsylvanian's health care needs.



1           There are five key components to our proposal.  
2 One, as I mentioned, the key portion of these dollars  
3 should be spent on providing a health care safety net and  
4 provide uncompensated care coverage in support of those  
5 hospitals who provide a substantial portion of those  
6 dollars.

7           And at the same time, it should provide  
8 incentives and opportunities for those employers who cannot  
9 afford to provide health care benefits to their employees  
10 to be supplemented or incentivized to provide them or to be  
11 subsidized in that regard.

12           Two, we would like to encourage dollars to be  
13 used for medical research and tobacco-related diseases as  
14 well as other related oncological diseases. We believe  
15 this could support a strong -- as you're probably all  
16 aware, well aware, Pennsylvania leads the country in terms  
17 of biotech companies.

18           We believe this could further enhance that  
19 image. We believe in oncology and cancer research. Just  
20 as a little note, Pennsylvania is the 5th in lung cancer,  
21 new cases projected based upon the American Cancer Society.  
22 Only four other states lead us in terms of new cases.

23           We also believe some of these dollars should  
24 be used to reuse or reconfigure current hospital facilities  
25 and also train employees in the new areas of biotech.

1 We've heard currently that there are too many hospital  
2 beds. We believe the biotech incubator sites and some of  
3 these hospitals to provide clinical and bench trial  
4 research would be very advantageous.

5 We believe that the dollars should be spent in  
6 good old-fashioned health care prevention at a level and  
7 quality that all Pennsylvanians could participate. And  
8 finally, we believe that the monies, as I said earlier,  
9 should be controlled and entrusted in such a way that those  
10 dollars are ensured for future generations.

11 We believe -- in our proposal, we believe it  
12 provides a solid start to how the tobacco settlement  
13 dollars should be spent. We believe this addresses many of  
14 the problems of the uninsured and the uncompensated as well  
15 as the teaching hospitals in the urban areas and the rural  
16 areas of Pennsylvania.

17 Again, we appreciate the opportunity to  
18 present our perspective to the Committee. Should you wish  
19 any additional information on the topics that I've covered,  
20 please let me know; and we'll provide those. If you have  
21 any questions, I'd be more than happy to answer those now  
22 or get those answers for you.

23 CHAIRPERSON CLARK: Thank you very much, Mr.  
24 Burkley. Although this isn't a hearing to disburse the  
25 monies from the settlement, why, we appreciate your input.

1 And I don't believe anything you've testified to today is  
2 new or any revelation to the legislature.

3 I think your hospital problems and problems  
4 with Medicare and Medicaid, uninsured, uncompensated care  
5 have been around for years and have been lobbied in the  
6 legislature for years. And hospitals get a significant  
7 amount of money through nonpreferred appropriations.

8 And I also think that some program changes  
9 could be made to assist your situation. And I'm somewhat  
10 dismayed that a pot of money becomes available and everyone  
11 thinks that, Well, that will take care of our problem of  
12 costs medically but not under the surface.

13 So with that, I'd ask if there's any other  
14 questions? Mr. Armstrong.

15 REPRESENTATIVE ARMSTRONG: Mr. Burkley, we  
16 heard earlier that there may be threats to amend House Bill  
17 445 to deal with the disbursement of funds. By doing so,  
18 we risk the chance that it could become a qualifying  
19 statute rather than the model act that it is.

20 And I'm just putting this out to your  
21 organization. Would you join the parties that recognize  
22 that threat and reserve the amendment for another bill that  
23 does deal with the distribution of funds?

24 MR. BURKLEY: I believe we would.

25 REPRESENTATIVE ARMSTRONG: Thank you.

1                   CHAIRPERSON CLARK: We thank you for your  
2 testimony. And the next individual to testify before the  
3 Committee is Nancy Heffernan. She is the Vice President of  
4 Health Care, Finance and Insurance for the Hospital  
5 Association of Pennsylvania.

6                   She's the last individual to testify but  
7 certainly not the least. We appreciate you sticking around  
8 with us.

9                   MS. HEFFERNAN: Well, I'm the last person.  
10 And between all of us and lunch, I will be brief. Not only  
11 that, I think my -- a lot of the things that the Hospital  
12 and Healthsystem Association have said before have already  
13 been said in the room today. So I will -- as I said, I  
14 will be brief.

15                   Chairman Clark and members of the House  
16 Subcommittee on Courts, I am Nancy Heffernan, Vice  
17 President, Hospital Finance and Insurance of the Hospital  
18 and Healthsystem Association of Pennsylvania. HAP  
19 represents and advocates for more than 225 acute care and  
20 specialty hospitals and health systems in the Commonwealth.

21                   I appreciate the invitation to present our  
22 views on House Bill 445, known as the Tobacco Settlement  
23 Agreement Act. The human tragedy of tobacco-related  
24 diseases is enormous in Pennsylvania. 22,000  
25 Pennsylvanians die each year from tobacco-related diseases.

1 Tobacco use is responsible for 30 percent of  
2 all deaths from cancer, 80 percent of all deaths from  
3 pulmonary disease, and one of the major causes of coronary  
4 heart disease. These tobacco settlement funds provide new  
5 hope for improving our ability to prevent, diagnose, treat,  
6 and help the many thousands of Pennsylvanians suffering  
7 from tobacco-related diseases.

8 Over the past several months, HAP has been  
9 consulting with our members and leaders in the health care  
10 field on ways to use these funds and has developed the  
11 following principles. All funds should be deposited into a  
12 segregated fund and dedicated to new health care  
13 initiatives.

14 These funds should be used to support and  
15 supplement activities related to the following five  
16 purposes: Health care services for the uninsured with a  
17 priority towards uncompensated care provided by hospitals;  
18 medical research in tobacco-related diseases such as  
19 cancer, heart, and lung disease; health promotion,  
20 preventive health, rehabilitative and smoking cessation  
21 programs; health education for children, adolescents and  
22 other high-risk populations; and improvement in health care  
23 delivery and the containment of health care costs.

24 These funds should supplement rather than  
25 replace existing state funds and programs. These funds

1 should complement and not duplicate the federal initiatives  
2 of the foundation which are educating -- education and  
3 anti-smoking advertising for youth, which was established  
4 by the Master Settlement Agreement.

5           These funds should be invested so that annual  
6 disbursements can be projected to be constant over the next  
7 five to ten years. Allocation of these funds shall follow  
8 guidelines established by experts in health care delivery  
9 and public health. The use of these funds must demonstrate  
10 and document specific health or economic benefits.

11           House Bill 445 is an important step in making  
12 sure that Pennsylvania maximizes the benefits from the  
13 national settlement. Under the master settlement, if a  
14 state does not pass qualifying legislation to include  
15 nonparticipating tobacco manufacturers, there is an  
16 adjustment to the amount of funds that Pennsylvania would  
17 receive.

18           House Bill 445 would provide an incentive for  
19 nonparticipating manufacturers to join the national  
20 settlement. HAP looks forward to working with members of  
21 the General Assembly and the Governor on this most historic  
22 opportunity. And in all probability, none of us will see  
23 again in our lifetimes another opportunity to do so much  
24 good with a single infusion of resources.

25           Our potential legacy is that we planned

1 prudently and spent wisely. Let's ensure that we make that  
2 potential legacy a reality. A critical first step -- first  
3 step is prompt consideration of this bill. Thank you.

4 CHAIRPERSON CLARK: Thank you. Representative  
5 Armstrong has a question for you.

6 REPRESENTATIVE ARMSTRONG: Yes. I would like  
7 to ask you the same question. We're all concerned, whether  
8 it be the Attorney General's Office, Secretary Paese's  
9 Office, the Governor himself, that we do not find ourselves  
10 with a qualifying statute and risk the chance of losing  
11 some of those funds.

12 So by doing so, we really need to focus in and  
13 make sure that this bill itself stays to the contents of  
14 what it basically is today and not be amended. With that  
15 in mind -- and I fully support a lot of what you're  
16 saying -- would you support not amending this bill?

17 MS. HEFFERNAN: Yes, we do.

18 REPRESENTATIVE ARMSTRONG: Thank you.

19 CHAIRPERSON CLARK: I have one question to  
20 the -- Dr. Sklaroff had talked about the Center of Disease  
21 Control's Best Practices Guidelines. And I was wondering  
22 how that differed from the Hospital Association's 5-point  
23 or 6-point plan to expend these funds?

24 MS. HEFFERNAN: I think where we will find the  
25 differences is that the CDC guidelines deal a lot with

1 control issues, tobacco control. And the Hospital and  
2 Healthsystem's aren't focused in that avenue of the tobacco  
3 dollars. We're focused in the dollars for research,  
4 education, smoking cessation.

5           So I think you really find the difference is  
6 simply that that's not our area of expertise, the control  
7 of the cigarette vending machines in hotel lobbies. It's  
8 simply something that is not in our -- our scope of  
9 concern. We do support a lot of the anti-smoking  
10 education.

11           Many of our hospitals are the entities that  
12 are providing that education right now for the communities.  
13 So I think it's a question of scope really.

14           CHAIRPERSON CLARK: I thank you very much for  
15 your testimony. With that, that concludes our hearing on  
16 House Bill 445. We certainly want to thank everyone for  
17 coming out and giving us your perspective.

18           (Whereupon, at 12:20 p.m., the hearing  
19 adjourned.)

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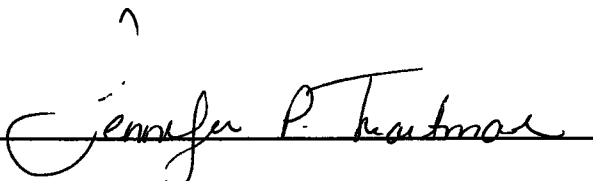
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I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me during the hearing of the within cause and that this is a true and correct transcript of the same.



JENNIFER P. TROUTMAN

Registered Professional Reporter

My Commission Expires:  
April 30, 2001

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