

ROADMAP TO A NATIONAL SETTLEMENT AGREEMENT

How the Tobacco MSA Helps Frame a Juul Settlement



As states pursue their lawsuits against Juul Labs, Inc., on a variety of claims, one possible outcome of this litigation may be a national settlement between state attorneys general and Juul. Such a settlement could provide parties with an opportunity to address the e-cigarette epidemic in a way that best protects public health and advances health equity.

Inevitably, a civil settlement of this magnitude draws comparisons to the 1998 Master Settlement Agreement (MSA) between the major cigarette companies and forty-six states — the largest legal settlement ever executed in the United States. Understanding the successes, shortcomings, and lessons learned as a result of the tobacco MSA could be of help in framing a national settlement agreement with Juul.



MSA Background

The MSA followed decades of litigation against the tobacco industry, starting in the 1950s and continuing through the early 1990s, by injured smokers suing for the harm caused by tobacco products. These lawsuits were based on a variety of legal theories and were almost all unsuccessful. In the mid-1990s, state attorneys general began suing tobacco companies to

recover Medicaid costs associated with the smoking-related illnesses of their residents, often invoking RICO statutes, and seeking sweeping injunctive and equitable relief.

In 1998, the Minnesota Tobacco Settlement, led by Minnesota Attorney General Hubert Humphrey III, resulted in billions of dollars in payments to the state, and forced the disclosure of millions of internal tobacco company documents that showed that the industry had denied and concealed the health risks of its products even as it sought to enhance their addictiveness. The Minnesota settlement and those of three other early settling states (Mississippi, Florida, and Texas) led to a push for a global settlement. On November 23, 1998, the remaining forty-six states, the District of Columbia, and five territories reached agreement with the industry on the tobacco MSA.

The MSA required the tobacco companies to make annual payments in perpetuity to the settling states; to restrict their advertising, promotion, and marketing of tobacco; to create an independent tobacco prevention foundation; and to make public millions of internal industry documents uncovered in the litigation. These documents showed the extent to which the industry had denied the health risks of their products even as it sought to enhance their addictiveness. In exchange, the tobacco companies received liability relief from state and local governments.

MSA Outcome

The MSA directly contributed to reduced smoking rates in the United States by raising cigarette costs and by increasing public awareness of the health risks of tobacco use through effective national public education and prevention campaigns. Also, the disclosure of internal industry documents, revealing a wealth of evidence of the industry's deceitful practices and tactics, paved the way eventually to long overdue federal tobacco regulation and legislative restrictions, and helped bolster a raft of other successful lawsuits against the tobacco companies, such as *United States v. Philip Morris USA Inc.*¹ Moreover, the MSA made it possible to restrict tobacco advertising in ways difficult to do through legislation, due to the First Amendment.

Although the MSA was a landmark achievement, it was not without shortcomings. On the negative side, because the MSA did not require that the funds be devoted solely to tobacco control and prevention programs, many state legislatures have diverted MSA payments for non-tobacco control and prevention purposes. The result has been a lack of sustainability for tobacco prevention programs. In addition, tobacco companies have exploited MSA loopholes on tobacco advertising and promotion restrictions and have continued to advertise and promote tobacco use using marketing strategies not covered by MSA guidelines. Another significant flaw was the exclusion of American Indian/Alaskan Native (AI/AN) populations

in MSA negotiations.² Tribal populations bear significant health cost burdens related to commercial tobacco use, and despite the lack of tribal participation in MSA negotiations, the settling states still factored in their AI/AN populations in determining the amount of MSA compensation each state would receive from tobacco manufacturers. Not giving tribes a seat at the table in MSA discussions or allowing them to benefit directly from MSA payments has resulted in MSA enforcement confusion and controversy. Yet another consequence of the MSA was that by providing the tobacco companies a level of legal immunity from settling states and related public entities — a concession necessary to complete the agreement — the industry was able to preserve its market share in the U.S. and grow its revenue abroad.

Given the complex trade-offs involved in these settlement negotiations, some MSA shortcomings may have been difficult to avoid, but most were neither unavoidable nor inevitable. State AGs considering a national settlement with Juul will need to balance competing needs and interests in resolving this litigation to the satisfaction of all parties.

Building a Successful National Settlement Agreement

The public health community's experience with the MSA provides a few takeaways that state AGs might want to consider in framing any national settlement agreement with Juul.

Appropriate Stakeholders

To avoid future controversy and maximize the benefits to various communities, all appropriate stakeholders should be identified and invited to participate in the national settlement. The exclusion of tribes in the MSA litigation and negotiation caused long-standing problems, spawning several tribal lawsuits. Possible stakeholders to a Juul settlement might include states, territories, and Native American tribes.

Public Health Goals

Despite the extent of tobacco-related health harms and significant cost of treating tobacco-related illnesses, the purpose of the MSA was not to ban all tobacco products or to require the tobacco companies to compensate each individual victim. Instead, state AGs set a public health goal of reducing U.S. smoking rates by restricting the industry's egregious marketing to youth, funding an independent entity (originally the American Legacy Foundation, now known as the Truth Initiative), to create and administer an aggressive anti-smoking campaign known as the truth[®] campaign. The Truth Initiative conducted groundbreaking research and policy studies, gave young people the facts about smoking, vaping, nicotine, and the tobacco industry, engaged individuals and groups to make change in their communities, innovated new ways to

end tobacco use, and joined forces with collaborators committed to making tobacco use and nicotine addiction a thing of the past. The foundation's twenty years of lifesaving work helped drive down the youth smoking rate from 23 percent in 2000 to a historic low of 3.7 percent in 2019 by preventing millions of young people from becoming smokers, including 2.5 million between 2015 and 2018 alone.

As a result of this work and the MSA's focus on public health, the settlement had a major impact on tobacco use. At the height of the epidemic in 2000, 23 percent of teenagers reported regular cigarette use. By 2019, only 4 percent were current users.

State lawsuits against Juul Labs have generally focused on the company's deceptive and misleading marketing of dangerous products that increase nicotine addiction, as well as the intentional targeting of youth in its advertising and promotions. Juul users have suffered breathing problems, serious lung injuries and diseases, seizures, and strokes, as well as nicotine addiction. Much as the MSA prioritized a national approach to address the tobacco use epidemic, a Juul settlement might focus on a national approach to address the Juul (and e-cigarette) epidemic — particularly among youth.

Linking explicit public health goals to the means of achieving them through remedies in the settlement provisions could prevent the problems caused by ambiguous language in the MSA. For a national settlement agreement with Juul, states might want to consider including the following public health provisions:

① **Restrictions on Juul advertising, marketing, and promotion programs and activities.**

Although MSA provisions restricted tobacco product advertising, marketing, and promotion, the tobacco industry was able to circumvent the settlement's public health goals and promote tobacco products in ways neither identified nor anticipated in the 1998 MSA.

To prevent Juul from continuing to target youth in its marketing, a Juul settlement could include explicit provisions on Juul advertising, marketing, and promotion in print, mass and electronic media, point-of-sale, and other venues. These provisions could be drafted to cover a wide range of Juul products, component parts, and accessories, whether sold together or separately, and a broad array of advertising, marketing, and promotion activities, including online sales and age-verification procedures. Provisions need to be broad enough to address current media or marketing practices and those that might emerge in the future. Rather than define the media, the test could be if a material portion of media consumers is under the age of 21. In such instances, the duty should be upon Juul to ensure that those under 21 are not exposed to the media. An independent third party that monitors advertising and marketing practices could ensure that Juul abides by these obligations.



Given the difficulty in isolating the dissemination of advertising and marketing content, the restrictions on marketing should be national in scope. Also, because the tobacco industry has a history of redesigning products to escape regulatory requirements, the settlement agreement should define covered products to include any current or future product containing nicotine that is for non-medical use.

Prohibitions of deceptive and misleading practices and conduct. State lawsuits catalog numerous examples in which Juul has undertaken a systematic campaign to target children and youth by — for instance — offering free sampling events, using social media and email marketing campaigns, employing social media influencers, making false claims about product safety and efficacy, failing to disclose adverse health consequences resulting from product use, and other deceptive and misleading practices. As with marketing restrictions, settlement provisions that prohibit such illegal conduct should explicitly identify the consequences for such illegal practices, as well as information on the enforcement process.

Funding of vaping prevention program. Despite the stated intentions of many of those involved in the tobacco litigation, only a small percentage of each state’s annual MSA proceeds are allocated to tobacco prevention and cessation efforts. The MSA’s failure to ensure that a portion of each state’s MSA proceeds was dedicated to alleviating the root causes of the tobacco epidemic, and to preventing its continuation, resulted in a missed opportunity to build a sustainable tobacco control infrastructure. A Juul settlement should require that a significant amount of each state’s settlement proceeds be allocated to a national program focused on preventing and denormalizing Juul and e-cigarette use and on treating nicotine addiction. A key focus of this program would be *counter marketing and education campaigns*. Given that approximately 3.6 million youth use e-cigarettes³ and roughly 60 percent of e-cigarettes sold in the U.S. are Juul,⁴ Juul Labs has clearly succeeded in glamourizing and normalizing vaping in youth culture. Unless resources are committed to counter this trend, youth will continue to move from one e-cigarette product to another year after year. To be effective, the counter-marketing campaign should have a broader focus than just Juul, since many other vaping and related products have piggy-backed off Juul’s popularity with youth.

One of the successes of the MSA was the creation of an independent foundation to counter-market to and educate youth. This foundation, now known as Truth Initiative, has demonstrated an ability to reach and educate youth and impact their attitudes, beliefs, and behaviors.⁵ A centralized counter-marketing program is important because it creates economies of scale for the development, distribution, and evaluation of counter-marketing campaigns. Using existing structures created by the MSA — such as the truth® campaign — would be both cost-effective and efficient. In addition, a Juul settlement could leverage Truth Initiative’s 20-year history of monitoring youth usage and researching effective prevention and cessation techniques to distribute essential educational tools to schools, youth, and families.

A *public education campaign* would provide parents, teachers, youth-based organizations, and the general public with useful information about Juul products, health risks, dual use, and the dangers of nicotine exposure and addiction. Schools and youth-based organizations could benefit from resources on how to address youth use of e-cigarettes, including teacher training.

Nicotine addiction treatment. Given the high levels of nicotine in Juul pods, many users quickly become addicted to these products. Nicotine can have long-lasting neurochemical effects, especially on youth, including cognitive harm. Although no FDA-approved nicotine replacement therapy is currently available for minors, and no medical interventions are approved for vaping, other clinical and behavioral support options can help treat nicotine addiction. Some settlement funds should be allocated to making vaping cessation

programs available for youth, for evaluating existing programs, and for funding the development of clinically approved vaping cessation products.

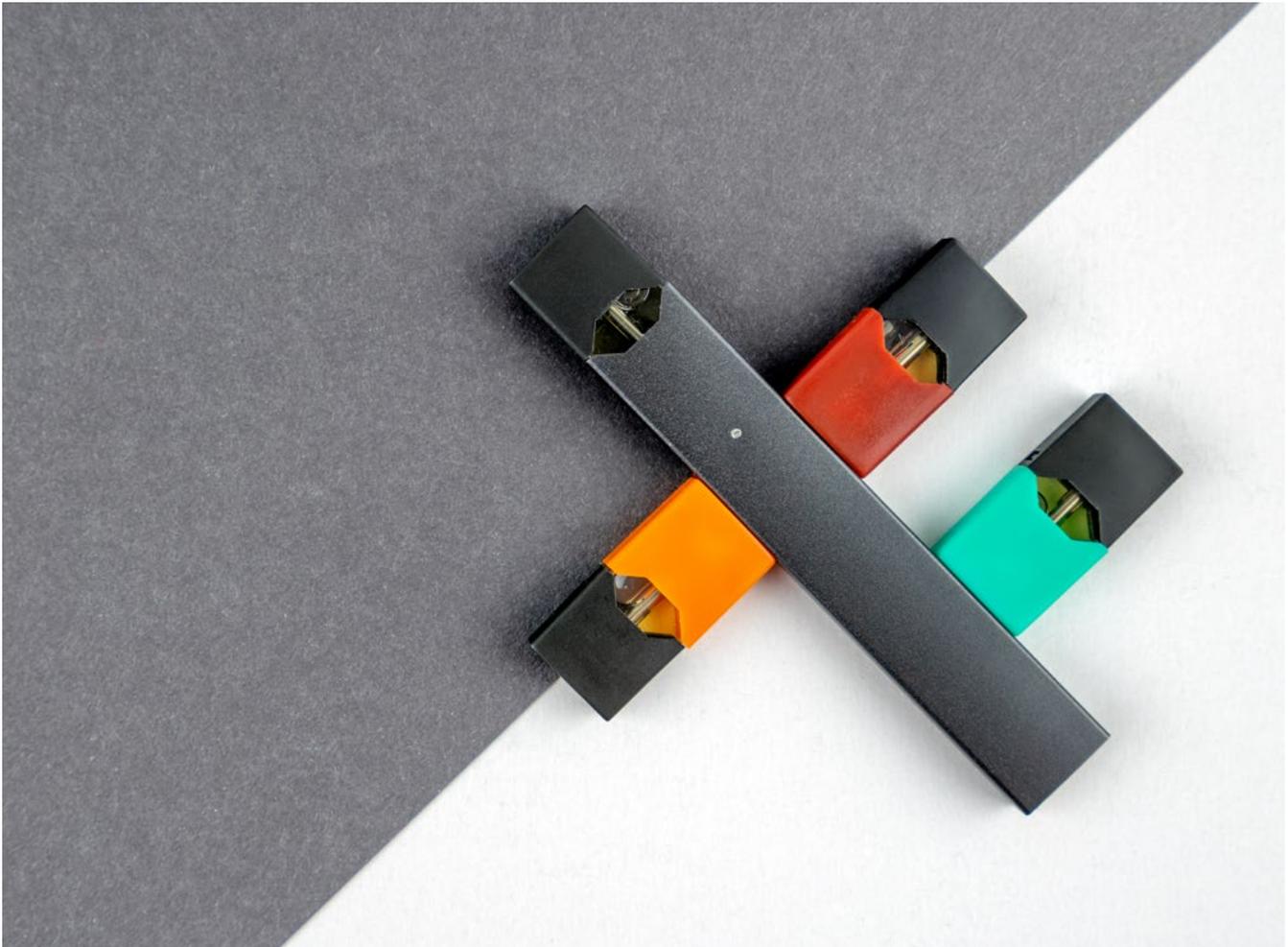
Payments

The MSA set up initial, annual, and “strategic contribution” payments from tobacco manufacturers participating in the agreement to the settling states.⁶ Each year, based on national sales information submitted by the tobacco companies, an independent auditor calculates the settlement payment to be made by each participating tobacco manufacturer and the amount to be received by each settling state.⁷ The MSA may provide an example of a formula for dividing revenues and governmental entities. The MSA also provided a mechanism for the National Association of Attorneys General to monitor the funds. It should be more efficient for a multi-state settlement to build off existing structures rather than to create new ones.

Importantly, the payments made to governmental entities should be restricted to mitigating the harm caused by Juul specifically and vaping in general. States, cities, schools, and public health systems are struggling to respond to the vaping crisis. Notably, it is unlikely that funds available through a Juul settlement will have a material impact on state and municipal finance in the near future. However, failing to address the nicotine addiction crisis among youth now will have devastating consequences in both the short-term and long-term. In this context, the Juul settlement funds must be restricted to uses that would mitigate the harms created by Juul and vaping. If, however, this is not possible under the provisions of a particular state’s constitution or case law, then the funds should be restricted to the maximum extent permitted by the state’s law.

Disclosure of Internal Juul Documents

In developing its business, Juul Labs drew heavily on once-secret documents of the tobacco industry, building on tobacco companies’ nicotine research to maximize the addictive impact of Juul products. Moreover, after studying the ways the tobacco industry had expanded and preserved its market, despite numerous individual and class action lawsuits, Juul modeled its marketing and advertising techniques on those the tobacco industry uses to attract youth to its products.⁸ Just as the disclosure of the tobacco industry documents has been critical to combatting the tobacco epidemic, any Juul settlement must make public Juul Labs’ internal documents relevant to the issues in the litigation. Disclosing the evidence of Juul misconduct and deceptive practices would bolster counter marketing and educational campaigns and would raise public and political awareness of both the health risks of these products and the misconduct of their manufacturer. Again, the settlement could capitalize on existing MSA infrastructure by directing that the documents be catalogued, stored, and administered as part of the existing Truth Initiative Tobacco Documents Library at the University of California San Francisco.



Enforcement Provisions

Under the MSA, the National Association of Attorneys General counsels settling states on enforcement of the settlement. The states can bring actions to enforce the MSA with respect to disputes or alleged breaches within their territories. State AGs in the Juul litigation could consider the feasibility of a similar enforcement arrangement.

Effective enforcement of Juul settlement provisions could require coordination among different enforcement agencies and consistent procedures throughout each settling state for receiving, tracking, and following up claims. States could also use existing consumer protection laws to ensure that the public is protected from false claims made about these products, failure to warn consumers about dangers, and consumer fraud.

Conclusion

By drawing from the best outcomes of the MSA, but correcting some of its weaknesses, AGs can maximize the public health impact of a national settlement with Juul. The goal of any settlement should be to prevent youth use of e-cigarettes, to preserve youth health, and to ensure that states and local governments do not bear significant costs resulting from the e-cigarette epidemic.

This publication was prepared by the Public Health Law Center at Mitchell Hamline School of Law, St. Paul, Minnesota. The Public Health Law Center provides information and legal technical assistance on issues related to public health. The Center does not provide legal representation or advice. This document should not be considered legal advice.

Endnotes

- 1 United States v. Philip Morris USA Inc., 449 F. Supp. 2d 1 (D.D.C. 2006).
- 2 Makani Themba-Nixon et al., *More Money More Motivation? Master Settlement Agreement and Tobacco Control Funding in Communities of Color*, 5 *Health Promotion Practice* 113S-128S (2004). doi:10.1177/1524839904264609.
- 3 Teresa Wang et al., *E-cigarette Use Among Middle and High School Students — United States, 2020*, 69 *Morbidity & Mortality Wkly. Rep.* 1310-12 (2020).
- 4 Statista, *Dollar Share of Nicotine Vaping Sales in the United States in 2020, by Brand (2020)*, <https://www.statista.com/statistics/1096995/vaping-market-share-us-by-brand>.
- 5 Matthew C. Farrelly et al., *Getting to the Truth: Evaluating National Tobacco Countermarketing Campaigns*, 92 *Am. J. Public Health* 901-7 (2002); Donna Vallone et al., *The Effect of Branding to Promote Healthy Behavior: Reducing Tobacco Use among Youth and Young Adults*, 14 *Int'l J. Env'tl. Research and Public Health* 1517 (2017).
- 6 Initial upfront payments were required to be made in each of the five years after the MSA's execution, in addition to annual payments made in perpetuity. These annual payments represent each state's allocation of payments based on a pre-determined percentage and each manufacturer's shares of national cigarette sales and shipments. The "strategic contribution" payments are essentially bonus payments that participating manufacturers are required to make to states that invested resources into the litigation that led to the MSA. See Joelle Lester & Kerry Cork, *A Complex Achievement: The Tobacco Master Settlement Agreement, Looking Back to Move Forward: Resolving Health & Environmental Crises* 41, 58-60 (2020), NY U. School of Law (2020), <https://www.publichealthlawcenter.org/sites/default/files/resources/A-Complex-Achievement-The-Tobacco-Master-Settlement-Agreement-Chapter-3.pdf>.
- 7 See *id.* at 58.
- 8 For example, Juul advertisements often copied themes from traditional cigarette advertisements that were later banned for their appeal to youth, such as the themes in popular Camel ads of the past claiming its products were exceptionally "smooth." Complaint at 22, *State of Washington v. JUUL Labs* (King Cty Superior Ct, 2020).