Pavia group have decided to not introduce the technical concept of obligation, unknown in the area of common law. They propose to solve the problems relative to the effects of contract, performance and non-performance without this dogmatic superstructure. For their part, the common lawyers of this working group have considered that it is possible to forgo not only the concept of privity of contract but also the rule that consideration is a necessary element of contract. This means that contract law can include the Roman law idea of *pactum*, familiar in many parts of the European Union.

Professor Maria Letizia Ruffini Gandolfi
Universita Degli Studi di Milano

United States

The US smoking settlement – James I's vindication?

by Wilmer 'Buddy' Parker

In the evening hours of Friday 20 June 1997, the Associated Press reported highlights of the tobacco settlement just announced by the Attorney General of the State of Mississippi, Mike Moore, spokesperson on behalf of 39 attorneys general seeking to recover Medicaid funds spent by the states treating individuals whose illnesses allegedly resulted from smoking.

The settlement resulted from intensive negotiation caused by civil litigation brought by 40 states, each a sovereign government, against such tobacco industry giants as Phillip Morris, R J Reynolds Tobacco and others. Associated Press stated that the tobacco companies agreed for the next 25 years to pay $360 billion health care for uninsured children. Funds from the settlement will also finance free smoking cessation programmes for all smokers, anti-smoking education and advertisement and enforcement of the settlement. The companies agreed that the US Food and Drug Administration (FDA) could regulate nicotine as a drug but the agreement stipulated that the FDA could not ban nicotine until 2009. The FDA must also, according to the agreement, approve as safe any new ingredients added to tobacco products. Any individual smoker would still be able to bring a private cause of action against the industry, but punitive damages would be disallowed. Any compensatory damages for medical bills or lost wages would come out of an annual fund.

The agreement also called for prohibitions of 'commercial speech', bans on all billboard and other outdoor advertising of tobacco products, use of human and cartoon characters in tobacco advertisements, internet advertising, product placement in movies and TV, brand name sponsorship of sporting events and brand name promotional merchandise. It further outlawed sales of cigarettes through vending machines and required a nationwide licensing system for tobacco retailers. Other provisions included prohibitions on smoking in public areas and work places without separately ventilated smoking areas. Excepted from such prohibitions were bars and restaurants.

As this commentary is being written, the focus of attention has shifted from the states' attorneys general and their litigation against the tobacco companies, to whether or not Congress and the President will enact laws to implement the terms of the agreement. Minnesota's Attorney General, Hubert H Humphrey III, has been highly critical of the agreement and recently urged Congress to thoroughly review documents discovered by Minnesota in its litigation against the tobacco companies but which remain under seal pursuant to court order. Allegedly, the documents detail:

> *'evidence of a decades-long conspiracy by cigarette makers and their lawyers to suppress evidence and deceive the public about the dangers of smoking.'*

Lawyers representing the State of Minnesota have reportedly reviewed over 30 million pages of documents collectively produced by the major tobacco companies in response to court ordered discovery requests. In fact, many records are maintained in a repository in England which is used to house those records collected from throughout Europe. The tobacco companies were so anxious to avoid discovery, it is reported, that Minnesota authorities:

> *'uncovered evidence that tobacco companies shifted records to operations abroad or destroyed potentially incriminating documents'.*

At least one US senator is reported to have said that he would not vote to grant the tobacco companies immunity from punitive damages unless they engaged in full disclosure of all evidence.

While much remains to be learned by the general public as to the existence, if any, of a conspiracy to conceal from the public the health problems of smoking cigarettes, there can be no question but that the largest factor in the proposed agreement is its cost. Concerns have been raised about the tax deductibility of the tobacco industry's payments, which would result reportedly in a drain of roughly $100 billion on the federal treasury over the next 25 years. Most of the money in the settlement proposal would go to the states that have sued the industry and to plaintiffs seeking individual damage payments. It has been reported that the President is not only concerned about the cost the federal government may bear, but also about the proposed limitations on FDA's authority, i.e. FDA cannot ban nicotine until 2009. The President has directed that a White House panel examine the tobacco settlement proposal from a totally different perspective from that of those who crafted the agreement.

How did the tobacco industry get to this position? Jim Yardly of *The Atlanta Journal* has written that, in May of 1993, a Mississippi trial lawyer, Michael T Lewis, after visiting the dying mother of his secretary:

> *'stepped off an elevator with an idea that would alter the landscape of tobacco litigation.'*

The idea was that, rather than individual plaintiffs bringing a cause of action against the industry (an approach which had produced negligible results), lawsuits should be initiated by the states seeking to recover taxes previously expended on health care payments made to ill citizens.

'Simply put, Lewis changed the equation. Instead of suing cigarette makers on behalf of individual smokers, he proposed a lawsuit on behalf of the Mississippi taxpayers. These taxpayers were bankrolling Medicaid which paid for the health care costs of indigent smokers. Taxpayers, Lewis reasoned, were paying to clean up the cigarette industry's mess.'

Lewis later discussed his proposal with a law school classmate, Mississippi Attorney General Mike Moore who 'liked it'. Other powerful plaintiffs' attorneys were recruited to finance the litigation. Eventually all were hired by the State of Mississippi to represent its interests. Today, they are looking to share in Mississippi's separately settled $3 billion case. While the successful conclusion of the Mississippi litigation is a personal financial and professional reward for Michael Lewis, it can also be said that the settlement will provide a reward for the tobacco companies. Clearly, they escaped the threat of future class action lawsuits, and their profits are expected to hold steady thanks to higher prices and increasing reliance on foreign markets. Indeed, after the announcement of the proposed national settlement, tobacco stocks increased in value. Myron Levin of *The Los Angeles Times* has written that:

'top tobacco executives personally stand to gain more than $200m in stock option profits if Wall Street remains enthusiastic about the giant tobacco stocks ...'

One of my partners, a native of Winston-Salem, North Carolina, the headquarters of R J Reynolds Tobacco Company, has stated that the consensus opinion within the community is that the tobacco deal is good for the company, if it can make enough money to pay settlement costs and keep the plaintiffs and government off its back. Clearly the tobacco company believes that the settlement payments will not put it out of business. If that is correct, then the tobacco deal is good for Winston-Salem. Nonetheless, he reports that Winston-Salem is no longer relying solely on the tobacco industry for its economic subsistence and is seeking diversification of its economic base. The current push by community leaders is to recruit biotechnology oriented businesses.

Although prospects for increased US earnings are dim indeed, the tobacco companies are looking to foreign markets to supplant their projected economic loss. Glenn Frankel of *The Washington Post* has written:

'On the streets of Manila, "jump boys" as young as ten hop in and out of traffic selling Marlboros and Lucky Strikes to passing motorists. In the discos and coffee shops of Seoul, young Koreans light up foreign brands that a decade ago were illegal to possess. Downtown Kiev has become the Ukrainian version of Marlboro Country, with the grey socialist city-scape punctuated with colorful billboards of cowboy sunsets and chiseled faces. And in Beijing, America's biggest tobacco companies are competing for the right to launch co-operative projects with the state-run tobacco monopoly in hopes of capturing a share of the biggest potential market in the world ... Just as the industry's overseas campaign has produced new smokers and new profits, it has also produced new consequences. International epidemiologist, Richard Peto of Oxford University, estimates that smoking is responsible for 3m deaths per year world-wide; he projects that 30 years from now the number will reach 10m, most of them in developing nations. In China alone, Peto says, 50m people who are currently 18 or younger eventually will die from smoking-related diseases.'

Frankel's article further asserts that the US Government, on behalf of the tobacco companies, is promoting the sales of tobacco products.

In 1971 the British Royal College of Physicians of London issued a second report on smoking and found that suffering and shortened life resulted from smoking cigarettes:

'Cigarette smoking is now as important a cause of death as were the great epidemic diseases such as typhoid, cholera, and tuberculosis that affected previous generations in this country. Once the causes had been established they were gradually brought under control ... but despite all the publicity of the dangers of cigarette smoking people seem unwilling to accept the facts and many of these who do are unwilling or unable to act upon them.'

This was not the first English warning of the danger of smoking. History records that tobacco was introduced to England by Sir John Hawkins in or about 1565. In 1604 James I of England wrote in his *Counterblaste To Tobacco* that:

'smoking is a custom loathsome to the eye, hateful to the nose, harmful to the brain, dangerous to the lungs, and in the black, stinking fume thereof nearest resembling the horrible Stygian smoke of the pit that is bottomless.'

James I also noted that the autopsy of smokers found their 'inward parts infected with an oily kind of soot.' James I apparently was the first monarch to place a high duty on the importation of tobacco. Notwithstanding these taxes, tobacco became a chief import from the New World. The economies of Virginia and North Carolina soon became tobacco dependent. It was a cash crop, i.e. tobacco itself was treated like cash and used to barter for other goods and services. Efforts to tax tobacco further contributed to the American Revolution. Today, as part of the budget compromise reached between President Clinton and the Congress, yet another tax increase has been placed on tobacco.

Unlike the pre-American revolution days of the colonists who chaffed at the yoke of high duties and taxes on such commodities as tobacco and tea, today's American political climate is as different as night is from day. The majority of Americans believe that smoking cigarettes causes cancer and other health-related illnesses. The public opposes paying through Medicare and Medicaid taxes for the health costs of those who smoke. The fear of the tobacco industry engendered by the pending civil litigation is of the yet unchosen jury who returns a devastating verdict which imperils their profits. Once such a verdict is returned, the dam having been broken, similar ones will surely follow as an uncontrolled torrent with the culminating effect that the tobacco industry will be plunged into the 'bottomless pit' of economic ruination – a result, no doubt, King James would applaud. Alas, since the tobacco companies' economic ruination is not on the horizon, the proposed settlement appears to perpetuate James I's perceived frustration with the use of tobacco by his subjects.

Wilmer 'Buddy' Parker
Kilpatrick Stockton LLP, Atlanta