

Tobacco Regulation Review



Volume 1, Issue 1
July 2002

University of Maryland School of Law
Legal Resource Center for Tobacco Regulation, Litigation & Advocacy
WWW.LAW.UMARYLAND.EDU/TOBACCO

From The Director

The *Tobacco Regulation Review* is a publication of the University of Maryland School of Law's Legal Resource Center for Tobacco Regulation, Litigation & Advocacy. This first edition combines educational articles with timely information about state and local tobacco control efforts. Each issue will include a feature article, a review of pending cases, local ordinances and articles by tobacco control experts in Maryland and around the country. We solicit your ideas and hope that the *Tobacco Regulation Review* will be a forum for the state and national tobacco control community to share best practices and new initiatives in tobacco control.

Kathleen Hoke Dachille, J.D.
Director

Inside the Center for Tobacco Regulation, Litigation & Advocacy

Press Conference

On December 11, 2001, the University of Maryland School of Law announced the creation of the Legal Resource Center for Tobacco Regulation, Litigation & Advocacy.

The Center for Tobacco Regulation is the first of its kind in the nation to be fully funded by monies from the national tobacco settlement. In 1998, the Master Settlement Agreement ended the states' litigation against the tobacco industry and in 1999, the Maryland General Assembly created the Cigarette Restitution Fund to manage the \$4.4 billion awarded to Maryland under the terms of the

settlement. Due to a perceived lack of legal support available to Maryland's local communities in their tobacco control efforts, the Maryland Department of Health and Mental Hygiene's Office of Health Promotion, Education and Tobacco Use Prevention awarded a contract to the University of Maryland School of Law to establish a legal resource center. The Center is dedicated to providing legal support to communities, community groups, employers, local governments, and others wishing to reduce smoking, the sale of tobacco products to children, and exposure to environmental tobacco smoke. At the press conference, Karen H. Rothen-

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Dr. Carlessia A. Hussein, Director of the Maryland Cigarette Restitution Fund, Karen Rothenberg, Dean of the University of Maryland School of Law, and Maryland Attorney General J. Joseph Curran, Jr. at the December 11, 2001 press conference.



Tobacco Regulation Review

is published twice a year by the
Legal Resource Center for Tobacco
Regulation, Litigation & Advocacy

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LEARN MORE ONLINE!

WWW.LAW.UMARYLAND.EDU/TOBACCO

The Center's web site features documents such as the text of the Master Settlement Agreement, court decisions, Maryland model ordinances, and other information on tobacco control issues. There are also links to advocacy groups, information clearinghouses, reference sites, and tobacco company sites. The web site is continually changing, and we welcome content suggestions.

Center Hires Permanent Director

The Legal Resource Center for Tobacco Regulation, Litigation, and Advocacy is pleased to announce that Kathleen Hoke Dachille, a graduate of the University of Maryland School of Law, and formerly a Special Assistant to Attorney General J. Joseph Curran, Jr., has been appointed the Director of the Center and Assistant Professor at the School of Law. Dachille assumed the role of Director on July 1, 2002.

At the Attorney General's Office, Dachille was instrumental in coordinating the Attorney General's extensive tobacco control efforts and worked closely with the Center during its initial year. Dachille's work with the Attorney General's Office included drafting and advocating for passage of legislation, building coalitions and working with governmental and private groups on policies and programs, and handling litigation related to the Attorney General's tobacco control initiatives.

In addition to her duties as Director, Dachille will be teaching courses in the area of tobacco control and supervising students in a related law school clinic.

Inside the Center, cont'd from page 1

berg, Dean of the Law School, commented on the Center's purpose and mission. "A number of local governments in Maryland have been frustrated in trying to pass restrictions or bans on smoking or restrictions on the sale of tobacco products. In some cases, the problems were political, but in other cases the problems were legal. That's why they need the support of a Center like this," said Rothenberg. "The Center has already begun to help local communities planning to pass new ordinances designed to restrict access to tobacco products," Rothenberg added.

Dr. Carlessia A. Hussein, Director of the Maryland Cigarette Restitution Fund, established to manage the funds awarded to Maryland under the Master Settlement Agreement, and Maryland Attorney General J. Joseph Curran, Jr., responsible for Maryland's participation in the settlement, also attended the press conference to speak on behalf of the Center. Dr. Hussein applauded the Center's ability to give specialized advice on tobacco control to local communities. "[The Center] will help bring Maryland to its goal to reduce tobacco use by youth by 50 percent in 2010."

Attorney General J. Joseph Curran Jr., whose office will partner with staff attorneys from the Center on future projects, called its creation "a creative use of some funds captured in the... tobacco litigation. Few people don't

have family members or friends who haven't died from smoking," Curran said. "Now we have the ability of a law clinic to help communities with legislation, regulation and enforcement work. I think [the Center] is going to be very successful."

Needs Assessment

During its first year, the primary task of the Tobacco Legal Resource Center has been to conduct a "needs assessment" of local governments regarding tobacco control assistance. After completing the assessment, the Center will work with state and local agencies to fulfill the needs identified by local jurisdictions.

The needs assessment survey was designed to elicit data on the current laws and enforcement practices of each county, the prior history of tobacco regulation in each county, the perceived need for implementation of future tobacco control strategies, resources currently available to each county, and the need for specific technical and legal services the Center might provide. Michael Strande, Managing Attorney for the Center, began face-to-face interviews with public health officers and local health department tobacco control staff in each of Maryland's 24 jurisdictions in September 2001. Responses from the survey will be used by the Center to determine how to allocate

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Inside the Center, cont'd from page 3

its resources and to establish priorities and long term goals.

Strande commented that he has encountered “a high degree of enthusiasm for the Center from local health departments and community coalitions.” Because of the increasingly complex nature of tobacco control issues, local governments and community coalitions commonly require consultation and collaboration with attorneys to avoid potential pitfalls and to develop new solutions to the public policy problems created by tobacco.

Strande found from his initial interviews that while local governments often have access to a legal service provider such as a county or state’s attorney, these individuals have many issues on their plate and may not have the time to devote to tobacco control issues. County officials have stated a need for a legal resource to provide expertise on tobacco issues and educational and technical assistance to their tobacco control staff.

Requests for Services

While the Center has been primarily devoted to completing the needs assessment and developing infrastructure and internal policy guidance for its legal activities, the

Center has begun to receive requests for services and has responded on a limited basis. The following are brief descriptions of some of those requests.

REVIEW OF TOBACCO CONTROL BILLS.

The Center has been asked to review bills being prepared for introduction to county legislatures. In performing this function, the Center compared proposed bills with similar bills from Maryland counties and local jurisdictions in other states. The Center was able to make suggestions concerning specific wording and substance in order to make each bill stronger and less susceptible to legal challenge. Other counties have requested the Center’s assistance in obtaining model ordinances and providing advice on the drafting process. The Center has provided these counties with the requested information.

PROVIDE INFORMATION TO PUBLIC HEALTH OFFICERS.

In response to requests, the Center has provided information to public health officers and community coalition members intending to testify on behalf of their proposed bills. Such information has included the explanation of the seminal legal decisions in the tobacco control field, anticipation of industry arguments

and discussion of responses.

ESTABLISHMENT OF COMPLIANCE CHECK PROGRAMS.

Eight counties have requested the Center’s assistance in establishing comprehensive and efficient compliance check programs. A number of counties are currently performing compliance checks to monitor retailers’ attempts to sell tobacco products to minors. Among the chief concerns of these counties are issues detailing best practices, agency liability for minors attempting to purchase tobacco products, and the legality of local government practices. Counties have requested that the Center review proposed procedures and practices for performing compliance checks and review liability waiver and parental consent forms for comprehensiveness.

TRAINING AND EDUCATION ON LEGAL AUTHORITY.

Public Health Officers have requested advice and training sessions designed to inform local police and sheriff’s departments about tobacco control enforcement programs. To this end, the Center is preparing educational materials to assist local governments and provide a step-by-step analysis of the legal aspects and public policy considerations involved with tobacco control efforts.

Law Notes - State & Local

One of the regular features of Tobacco Regulation Review is a summary of legal developments in Maryland tobacco control. This section will present information about recently enacted laws and ordinances, lawsuits, enforcement programs and other legal issues affecting tobacco control at the State and local levels.

Recent Passage of Local Tobacco Control Ordinances

Prince George's County

On November 6, 2001, the Prince George's County Council passed bill CB-65-2001 by a vote of 7-0, with one absent vote and one vacant seat. Soon thereafter, County Executive Curry signed the bill into law. The new law took effect January 1, 2002.

The new ordinance controls the placement of all tobacco products, requiring them to be inaccessible to the buyer without the intervention of an employee. The law provides the Health Department with the authority to enforce the placement restriction. It also makes the sale of tobacco products to minors a civil offense and

gives the Health Department authority to enforce those provisions as well.

Wicomico County

On February 19, 2002, the Wicomico County Council voted 7-0 in favor of a tobacco product placement ordinance. The ordinance prohibits retail sellers from displaying or storing tobacco products in any place which is accessible to buyers without the intervention of a store employee. The ordinance does exempt humidor to which youth do not have access. Violators are subject to civil penalties beginning at \$250 and escalating up to \$1000 for subsequent offenses.

Baltimore City

On April 1, 2002, Baltimore City passed a local ordinance providing civil penalties for any business person who distributes tobacco products to a minor. Distribution includes giving away, delivering, selling to, buying for, or hiring someone to give away, sell, dispense, or deliver tobacco products to minors. The ordinance also prohibits any person from buying for or selling tobacco products to a minor.

Settlement Ends Litigation Over Attorney Fees

In a move ending three years of litigation between the State of Maryland and Peter G. Angelos, both sides agreed to a settlement of their dispute regarding fees for Angelos' representation of Maryland in the national tobacco lawsuit. Under the terms of the March 22, 2002 agreement, Angelos will be paid \$150 million over the next five years. The settlement will allow for the release of \$130 million dollars that had been held in escrow, pending the conclusion of the litigation.

In 1996, Maryland entered into a contingent fee arrangement with Angelos to represent the State in litigation against the tobacco industry. The contract provided for a fee of 25% of the State's recovered funds. The lawsuit against the tobacco industry was settled in 1998. As a result of that settlement, Maryland was apportioned approximately \$4.4 billion under the Master Settlement Agreement (MSA).

Following the settlement of the lawsuit against the tobacco industry, the State requested Angelos to first seek his fees from an arbitration panel created by the MSA to pay private counsel for their fees.

Settlement Ends, cont'd from page 5

Angelos contended that his contract entitled him to seek \$1.1 billion directly from the State, a quarter of the State's award. On June 7, 2001, the Court of Appeals of Maryland concluded that Angelos was not automatically entitled to the contract fee and that the case must go to the state Board of Contract Appeals. This set the stage for the protracted legal dispute between Angelos and the State.

During this time, the national arbitration board awarded \$132 million in fees to Angelos. Maryland placed in escrow 25% of the funds it was receiving under the Master Settlement Agreement as security for Angelos' fee. At the time of the settlement of the attorney's fee dispute, the escrow fund was estimated at approximately \$130 million.

The settlement of Angelos' fee for \$150 million is far less than the \$1.1 billion originally claimed. It is also significantly less than the \$250 million that Angelos offered to settle for in January 2002. The agreement frees the money held in escrow for immediate use by the State for health care, education, and environmental initiatives.

Anchor Inn v. Montgomery County

In January 1999, the Montgomery County Council introduced Bill 2-99, prohibiting smoking in bars and restaurants throughout Montgomery County, except in private clubs licensed to serve alcohol for consumption on their premises. In March 1999, the County Council adopted the ordinance by a 5-4 vote, and forwarded the bill to the County Executive. The bill was vetoed and the Council did not override that veto. Later that day, the Council convened as the local Board of Health and passed the same bill as a health regulation. On May 19, 1999, nearly 400 restaurant owners, restaurant employees, affected organizations, and individuals filed suit in the Montgomery County Circuit Court to enjoin the regulation, due to go into effect on January 1, 2002.

On June 15, 2000, the case was resolved in favor of the plaintiffs when the Montgomery County Circuit Court ruled that the ban was invalid. Montgomery County decided to appeal the decision to the Maryland Court of Special Appeals. Before that

court could hear oral arguments, the Court of Appeals, Maryland's highest appellate court, took review of the case. Oral arguments were heard on April 10, 2001, and the Court of Appeals has yet to issue its decision.

The following is a brief summary of the Circuit Court's findings and the County's arguments on appeal. For a more in depth discussion of the issues focusing on Maryland law, please see the Center's website at www.law.umaryland.edu/tobacco.

State Preemption

The Circuit Court considered state preemption of local smoking bans in a key part of its analysis. In 1995, the General Assembly passed a ban on smoking in public places as part of the 1995 "Smoking-in-the-Workplace" Act. Section 2-105 of that Act exempts from the ban bars or taverns and certain clubs and restaurants that possess an alcoholic beverages license and allow the consumption of alcoholic beverages on premises. However, the General Assembly specifically provided that the Act was "not intended to preempt the authority of a county or municipal corporation to enact any law or ordinance that is more restrictive of smoking..." 1995 Md. Laws ch.5, § 2.

THE CIRCUIT COURT FOUND THE RESOLUTION'S EXCEPTION FOR CLUBS WAS "ARBITRARY AND CAPRICIOUS" AND DID NOT HAVE A RATIONAL BASIS.

The Circuit Court recognized the effect of this clause, acknowledging that the legislature preserved the ability of counties and municipal corporations to adopt more restrictive laws or ordinances. Nevertheless, the Circuit Court found that the express non-preemption clause did not apply in this case because the procedure used by the Board of Health created a “regulation,” not a law or an ordinance. The Circuit Court found the regulation impliedly preempted by § 2-105.

On appeal, Montgomery County argued that implied preemption only occurs when the legislature so forcibly expresses its intent to occupy a specific field of regulation or regulates that specific field so thoroughly that there is no room to reasonably allow additional regulation by a different governmental body. In this case, the legislature did not intend to control completely this field of regulation. In fact, it expressly allowed localities to pass more stringent prohibitions on smoking through the savings, or non-preemption, clause. The County argued that the spirit and intent of the broad non-preemption clause should not be ignored.

The County also challenged the Circuit Court’s conclusion that the regulation is not a law as the term is used in the State Act. The County noted that the Maryland Court of Appeals has routinely recognized the

undefined term “law” as a broad, generic term that includes regulations. Moreover, County Code § 1-18(a)(2)(D) defines “county law” as, among other things, “a health regulation adopted by ... the County Board of Health.” For these reasons, Montgomery County argued that it was inconsistent to find that a Board of Health regulation is not a law or ordinance. As a law or ordinance, it should be valid under the non-preemption clause.

Unconstitutional Violation of Equal Protection

The Circuit Court also considered a constitutional challenge. The Court found the Board of Health’s regulation unconstitutional because the smoking ban did not apply to “the bar and dining area of any eating and drinking establishment that: (1) is a club ..., (2) has an alcoholic beverages license issued to private clubs ..., and (3) allows consumption of alcoholic beverages on its premises.” The Circuit Court found this exception violated the Equal Protection Clause of the Fourteenth Amendment because it was “arbitrary and capricious” and did not have a rational basis. As such, it found the regulation denied the members of the community equal protection of the law.

On appeal, Montgomery County argued that the Circuit Court’s conclusion was erroneous because it misapplied the rational basis test. The Board of Health’s prohibition on smoking in restaurants, aimed at protecting the health of patrons and

IMPLIED PREEMPTION OCCURS WHEN THE LEGISLATURE SO FORCIBLY EXPRESSES ITS INTENT TO OCCUPY A SPECIFIC FIELD OF REGULATION OR REGULATES THAT SPECIFIC FIELD SO THOROUGHLY THAT THERE IS NO ROOM TO REASONABLY ALLOW ADDITIONAL REGULATION BY A DIFFERENT LEGISLATIVE BODY.

employees alike, is rationally related to achieving the legitimate governmental interest of protecting the health of its citizens. Montgomery County also noted there was no requirement that a law treat every business the same. If this were the case,

the legislature would be unable to carve out exceptions for businesses deemed to be deserving of separate regulation in light of differing characteristics and/or circumstances.

Additional Findings

In addition to the issues discussed above, the Circuit Court found that the County Charter did not give the Montgomery County Council the authority to sit as the Board of Health without the participation of the County Executive, and therefore the regulation was invalid. The Circuit Court also found that the procedures by which the Board of Health passed the regulation violated the State Administrative Procedures Act. The Court

Anchor Inn, cont'd from page 7

found that by failing to provide an opportunity for public notice and comment, the regulation was passed through invalid means. Finally, the Circuit Court found that the regulation violated the Separation of Powers established in the County Charter.

Conclusion

The fate of the Montgomery County regulation is still uncertain since the Maryland Court of Appeals has yet to rule on the issue. A decision is expected in the near future and the court's opinion will be discussed on our website and covered in the next issue of the Center's newsletter.

Gaithersburg v. Xcel Enterprises, Inc.

The city of Gaithersburg was recently named in a suit brought by Xcel Enterprises, Inc., a corporation that owns and operates several gas stations in Montgomery County. Xcel sells cigarettes and other tobacco products at their service stations. The suit seeks a declaration that Gaithersburg's product placement ordinance is invalid and requests injunctive relief to bar its enforcement.

Effective September 18, 2000, the city of Gaithersburg enacted a product placement ordinance. This ordinance requires all tobacco products to be stored or displayed in a place that is not accessible to customers without the intervention of an employee of the store. This ordinance is similar to the one passed by Montgomery County.

The suit alleges that the product placement ordinance is preempted by state law. Implied preemption occurs when the legislature so forcibly expresses its intent to occupy a specific field of regulation or regulates that specific field that there is no room to allow additional regulation by a different legislative body. Xcel argues that the Maryland General

Assembly has chosen to fully regulate the retail sale of tobacco products because the state regulates the minimum age requirements for purchase, regulates minimum wholesale prices for cigarettes, prohibits selling less than a full pack of cigarettes, provides licensing requirements, and levies taxes on the sale of cigarettes.

In *Fogle v. H & G Restaurant, Inc.*, 654 A.2d 449 (1995), the Maryland Court of Appeals rejected a preemption argument, finding that the General Assembly "has not regulated smoking in so all-encompassing a fashion as to suggest that it meant to reserve to itself for direct legislative action all regulation...." 654 A.2d at 464. Given this precedent and the Supreme Court's decision in *Lorillard v. Reilly*, 533 U.S. 525 (2001), that a Massachusetts product placement ordinance was constitutionally valid and not preempted by the Federal Cigarette Labeling and Advertisement Act (see article, p. 11), Xcel's challenge may be difficult to support.

See our website for updates on this case.

Law School/ Center Initiatives

Law School Offers New Seminar on Tobacco Control and the Law

During the fall 2001 semester, Professor Robert Percival, Director of the Environmental Law Program, taught a new seminar on Tobacco Control and the Law. The seminar was co-taught with Linda Bailey, formerly the associate director of the Office of Smoking and Health at the Centers for Disease Control and currently Director of the Center for Tobacco Cessation at the American Cancer Society.

In the seminar, the first joint offering by the School of Law's Environmental Law and Law & Health Care Programs, students reviewed the history of how science and law have responded to evidence of the enormous health risks inflicted by tobacco use. According to Percival, "by focusing on a set of products that pose high risks to human health from a common source, students develop

a thorough understanding of the science behind regulatory policy and how well the legal system has used scientific information."

Because efforts to protect public health from the risks of tobacco use have raised a variety of legal issues, this seminar exposed students to many important areas of law—how doctrines of tort law, civil procedure, administrative law, constitutional law, and the law of international trade have been applied in response to a major public health problem. The seminar also provided students with a rich understanding of some of the most challenging issues of regulatory policy, including the advantages and drawbacks of alternative approaches to discouraging behavior that harms health. Students in the seminar also attended a national conference on tobacco control in New Orleans (see article, p.10). This seminar will be offered again in the fall of 2002.



Center faculty and staff with law students at New Orleans conference.

Law Students Work With Baltimore Youth To Stamp Out Tobacco

During the past year, Professor Terrence Hickey, Director of the Law

School's Community Law In Action (CLIA) clinic, has been working hand-in-hand with the Center for Tobacco

Regulation and the Maryland Attorney General's Office on tobacco control efforts.

Professor Hickey founded CLIA, a youth advocacy and leadership development program affiliated with the School of Law. CLIA's Youth LEAD (Leaders Exploring and Achieving Dreams) Program is an in/after school program facilitated by students at the University of Maryland School of Law at five different middle schools in Baltimore City. The program teaches students necessary leadership and advocacy skills, which are then practiced in the after school setting through service projects.

STUDENTS WERE TRAINED AS VOLUNTEERS TO ATTEMPT TO BUY TOBACCO PRODUCTS FROM NEIGHBORHOOD CONVENIENCE STORES.

Law Students, cont'd from page 9

Projects for the fall of 2001 focused on the issue of tobacco use among urban youth. Thanks to a partnership with the State Attorney General's office, students were trained as volunteers to attempt to buy tobacco products from neighborhood convenience stores. After extensive training and research, students at both Diggs-Johnson and Pimlico Middle Schools participated in the compliance checks with their law student facilitators.

The program was mentioned by Dean Rothenberg at the Center's press conference held in December 2001. According to Rothenberg, "the Center has trained students at the two middle schools on how to conduct stings on retail outlets that sell cigarettes to minors. This kind of initiative is not new to the law school and will not only be an asset to the state, but will help train new lawyers."

Professor Hickey observed that "ultimately, the students learned much about the deadly effects of smoking and became outraged to find that tobacco manufacturers design their products to insure addiction and target their advertising at kids." The Center will continue its work with CLIA to educate young people and help them find a role in the tobacco control crusade.

Center Co-Sponsors ABA Teleconference

On October 23, 2001, the Center cosponsored an American Bar Association Teleconference on the Supreme Court's decision in *Lorillard v. Reilly*, 533 U.S. 525 (2001). The national teleconference discussed the impact of *Lorillard* on state and local regulation of tobacco sales and advertising. Professor Robert V. Percival, Director of the Law School's Environmental Law Program and an affiliated faculty member of the Center, chaired the program in addition to being a panelist during the teleconference. For more information about the teleconference, please visit <http://www.abanet.org/cle/catalog/home.html>. In the "Alphabetical List" menu, audio recordings of the teleconference are listed under "The Impact of *Lorillard* on State and Local Regulation of Tobacco Sales and Advertising."

Center Participated in National Conference on Tobacco or Health

In addition to assisting in tobacco control efforts on the local level, the Legal Resource Center for Tobacco Regulation, Litigation, & Advocacy has become involved in national tobacco control efforts. Last

fall, the Center took part in the National Conference on Tobacco or Health, held in New Orleans from November 27 - 29. Staff attorneys from the Center and students participating in the Law School's

seminar on Tobacco Control and the Law presented information to conference participants on the new Center during a poster session. The Center was also introduced and discussed at a breakout session on the Legal Environment in Tobacco Control. Other states are looking at the Center as a possible model for their own technical legal assistance efforts.

OTHER STATES ARE LOOKING AT THE CENTER AS A POSSIBLE MODEL FOR THEIR OWN TECHNICAL LEGAL ASSISTANCE EFFORTS.

Legal Briefs at the National Level

An Analysis of Lorillard

On June 28, 2001, the Supreme Court of the United States issued its decision on *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). The Supreme Court ruled that a number of Massachusetts' regulations restricting outdoor and point-of-sale tobacco advertising were preempted by federal law and were violative of the First Amendment. The decision has implications for other states attempting to implement similar regulations.

The Court ruled 5-4 that the Federal Cigarette Labeling and Advertising Act (FCLAA) preempts state regulation of cigarette advertising. It also ruled 6-3 that the proposed restrictions on smokeless tobacco and cigar advertising violate the tobacco industry's First Amendment right to free speech. Finally, the Court upheld by a 6-3 vote that product placement restrictions and other sales practice regulations were constitutional.

THE RESTRICTIONS

The Massachusetts Attorney General, pursuant to his rule making authority, adopted regulations on tobacco advertising and promotions.

The regulations sought to:

- Ban outdoor tobacco advertising within 1000 feet of schools and playgrounds;
- Require cigarette packs to carry health warnings;
- Ban in-store tobacco advertisements visible from outdoors in retail stores close to schools or playgrounds;
- Ban the handing out of sample tobacco products;
- Ban the distribution of tobacco products by mail, unless the purchaser provides a copy of a government issued identification showing the purchaser is 18 years of age or older;
- Require any in-store tobacco ads to be placed at least five feet above the floor;
- Ban self-service displays of tobacco products except in adults-only establishments.

THE DECISION

A. PREEMPTION

The FCLAA preempts any "requirement or prohibition based on smok-

ing and health ... with respect to the advertising or promotion of ... cigarettes." 15 U.S.C. § 1334(b).

Thus, states and localities are prevented from imposing special requirements or prohibitions on the advertising or promotion of cigarettes when those requirements are "based on smoking and health." Justice

O'Connor, writing for the majority, found that "the concern about youth exposure to cigarette advertising is intertwined with the concern about cigarette smoking and health." *Lorillard*, 533 U.S. at 548. Therefore, Massachusetts' argu-

ment that the restrictions were not "based on smoking and health" was rejected.

Moreover, the Court rejected Massachusetts' argument that regulations restricting the location rather than the content of ads were not preempted. Justice O'Connor found that the FCLAA's language "reaches *all* 'requirements' and 'prohibitions' 'imposed under state law,' and that the content/location distinction "cannot be reconciled with Congress' own location-based

WHILE REJECTING THE MASSACHUSETTS ADVERTISING REGULATIONS, THE COURT EXPLAINED THAT THE STATES COULD CONTROL ADVERTISING VIA OTHER MEANS.

An Analysis, cont'd from page 11

restriction, which bans advertising in electronic media, but not elsewhere.” Lorillard, 533 U.S. at 549 (emphasis in original).

Thus, the Court held the advertising and labeling restrictions with regard to cigarettes were within the FCLAA’s express preemption provision.

B. FIRST AMENDMENT

Because the FCLAA’s preemption provision, by its own terms, applies only to cigarettes, the Court analyzed the smokeless tobacco product and cigar restrictions under the First Amendment.

Commercial speech does not fall outside the purview of the First Amendment. Instead, the Supreme Court has afforded commercial speech some protection. According to a prior Supreme Court decision in *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 477 U.S. 557 (1980), commercial speech is protected if:

1. the commercial speech in question concerns lawful activity and the speech is truthful;
2. the asserted governmental interest is substantial;
3. the law directly advances the government’s asserted interest;
4. the proposed law is no more excessive than is necessary to

serve the asserted interest, i.e., the law is a reasonable means to achieve the government’s interest.

The Court noted that the key questions related to Lorillard are numbers 3 and 4. The Court found the Massachusetts regulations restricted more speech than was reasonably necessary and explained that banning all tobacco advertisements within 1000 feet of a school or playground, in conjunction with other zoning restrictions, “would constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers.” Lorillard, 533 U.S. at 562. This was determined to be unduly broad. Because the regulations were not reasonably related to the State’s interest in preventing minors’ access to tobacco products, the regulations were found to be unconstitutional.

C. PRODUCT PLACEMENT

In the final part of its decision, the Court upheld Massachusetts’ regulations barring the use of self-service displays and requiring that tobacco products be placed out of the reach of all consumers in a location accessible only to salespersons. The Court found that these restrictions withstand First Amendment scrutiny because the State demonstrated a substantial interest in preventing access to tobacco products by minors and adopted an appropriately narrow means of advancing that

interest. Lorillard, 533 U.S. at 569. The Court found that such restrictions regulate the placement of tobacco products as a sales practice unrelated to the communication of ideas. *Id.*

WHERE DOES THE DECISION LEAVE US?

TOBACCO USE BY MINORS IS A PROBLEM RECOGNIZED BY THE COURTS.

The Supreme Court found “ample documentation” of the problem with underage use of smokeless tobacco and cigars. Lorillard, 533 U.S. at 561. In its opinion, the Court stated, “We have observed that tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States.” Lorillard, 533 U.S. at 570 (internal quotations omitted). The Court also recognized that advertising and youth consumption of tobacco products have been linked. Thus, there is no question that states have a “substantial interest” in regulating tobacco and that there is sufficient justification to seek tobacco control regulations.

GENERAL BANS FOR AESTHETICS OR SAFETY

While rejecting the Massachusetts advertising regulations, the Court explained that the states could control advertising via other means, stating that “although the FCLAA prevents states and localities from imposing special requirements or prohibitions ‘based on smoking and

health' 'with respect to the advertising or promotion' of... cigarettes, that language still leaves significant power in the hands of States to impose generally applicable zoning regulations and to regulate conduct." *Lorillard*, 533 U.S. at 551. The Court recognized state interests in traffic safety and aesthetics and noted that such interests "may justify zoning regulations for advertising." *Lorillard*, 533 U.S. at 551 (internal citations omitted). Regulations on the location and size of advertisements that apply to cigarettes on equal terms with other products appear to be outside the ambit of the preemption provision.

ATTEMPT TO PASS LESS RESTRICTIVE ADVERTISING BANS

The Court left open the possibility that less restrictive bans for tobacco products other than cigarettes may survive a First Amendment challenge. The Massachusetts regulations prohibited tobacco advertising in up to 91% of areas, including Boston, Worcester, and Springfield. However, if that percentage were

reduced, i.e. by reducing the number of feet from a school or playground that advertising was prohibited, then the regulation might pass the Court's tests. The reasonableness of the restrictions and the ability to pass information on to adult consumers would be key to this determination.

PRODUCT PLACEMENT RESTRICTIONS

The Court expressly upheld the Massachusetts product placement restrictions barring self-service displays and requiring tobacco products to be placed out of the reach of consumers. These restrictions do not implicate the First Amendment.

LAWS BARRING THE SALE AND USE OF TOBACCO PRODUCTS.

The Court recognized a State's ability to regulate conduct with respect to tobacco use and sales. *Lorillard*, 533 U.S. at 550. The FCLAA does not preempt state laws prohibiting sales to minors or regulating the use of tobacco products in public places.

U.S. Department of Justice Sets Aside \$25 Million for Tobacco Lawsuit

On February 4, 2002, the Bloomberg news wire reported that the United States Department of Justice plans to earmark \$25 million in 2003 for its lawsuit against Philip Morris Companies, R.J. Reynolds Tobacco Holdings Corp., and other cigarette manufacturers.

The lawsuit, filed by the Clinton administration, accuses the tobacco companies of misleading Congress and the public about the health hazards of cigarettes and alleges violations of the Racketeer Influenced and Corrupt Organizations Act (RICO).

The budget proposal marks the first time the Justice Department has set aside funds specifically for the suit. In previous years, funding for the litigation has come from other Civil Division programs. Justice Department officials said the suit might cost \$45 million, with the rest coming from other programs. The funding proposal indicates the government's commitment to pursue the litigation, despite earlier indications that settlement was being sought.

Lorillard Threatens Suit Over Anti-Tobacco Ads

The American Legacy Foundation (ALF) was created as part of the 1998 Master Settlement Agreement between cigarette manufacturers and 46 states. The ALF is a national, independent public health foundation dedicated to reducing tobacco use in the United States with major initiatives reaching youth, women, and other priority populations. Since its inception, the ALF has mounted a widespread media ad campaign designed to educate the public about the dangers associated with tobacco use. The truthSM campaign has been airing spots on television and radio since February 2000.

In a recent radio spot, a person identifying himself as a dog walker phones the Lorillard Tobacco Company and tells the operator that he wants to sell the company “quality dog urine” because it is “full of urea,” one of the “chemicals you guys put into cigarettes.”

In a letter dated January 18, 2002, an attorney representing the Lorillard Tobacco Company notified the ALF

that the company plans to take the issue to court, charging that the Foundation’s antismoking ad campaign violates provisions of the Master Settlement Agreement.

Specifically, Lorillard claims the ad campaign is in violation of the agreement’s prohibition on making “any personal attack on, or vilification of,” any person, company or government agency. Aside from alleging a “consistent” pattern of attacking the company’s

employees and vilifying the company, Lorillard asserts the ads are “false, misleading, and unethical.”

Dr. Cheryl Heaton, ALF president and CEO called the attack a “smoke screen to hide the company’s real goal, which is to crush the truthSM campaign....” While acknowledging that the ads are edgy, hard-hitting, and use irreverent humor, Heaton

stresses that the Foundation has “not engaged in personal attacks or vilification of Lorillard or anyone else.”

On February 13, 2002, the ALF

filed a preemptory suit in Delaware seeking a declaratory judgment on the issue. The ALF claims that it was not a party to the Master Settlement Agreement, but was created by it. Therefore, the Foundation argues, it cannot be bound by the settlement’s terms. If the

court declines to issue a declaratory judgment, the Foundation has asked the court to declare that the truthSM ads do not violate the vilification provision. There has been no further word as to when or where Lorillard plans to file its own suit.

See our website for continuing coverage of this case.

LORILLARD CLAIMS THE AD CAMPAIGN IS IN VIOLATION OF THE AGREEMENT’S PROHIBITION ON MAKING “ANY PERSONAL ATTACK ON, OR VILIFICATION OF,” ANY PERSON, COMPANY OR GOVERNMENT AGENCY. ASIDE FROM ALLEGING A “CONSISTENT” PATTERN OF ATTACKING THE COMPANY’S EMPLOYEES AND VILIFYING THE COMPANY, LORILLARD ASSERTS THE ADS ARE “FALSE, MISLEADING, AND UNETHICAL.”

California Attorney General Sues R.J. Reynolds for Violation of the MSA

On March 19, 2001, Bill Lockyer, the Attorney General of the State of California, filed suit against R.J. Reynolds Tobacco Company.

The complaint alleged violations of the Master Settlement Agreement's provisions against youth targeting through print advertising. According to section III(a) of the Master Settlement Agreement, tobacco companies may not directly or indirectly target youth in the advertising, promotion, or marketing of tobacco products. Tobacco companies also may not take any action which has as its primary purpose to initiate, maintain or increase the incidence of smoking by youth.

The suit alleged that, while Philip Morris, Inc., Brown & Williamson Tobacco Co., and Lorillard Tobacco Co. have all taken meaningful first steps to reduce or eliminate their advertising in a number of magazines with substantial youth readership, R.J. Reynolds continues to place advertising in at least 22 magazines whose youth readership

exceeds 15% of the magazines' total readership, as measured by nationally recognized syndicated readership data services. Reynolds has issued an advertising placement policy stating it would not advertise in publications whose youth readership is 33-1/3 % or more. The Attorney General stated in its brief that youth ages 12 to 17 represent less than 9% of the general population.

Consequently youth would have to be disproportionately overrepresented to meet the 33-1/3 limit. Moreover, the Attorney General argued that Reynolds places ads in at least six magazines with more than two million youth readers and in 20 other magazines with youth readership between one and two million.

On June 6, 2002, Judge Ronald S. Prager of the Superior Court of California found in favor of the plaintiffs and fined R.J. Reynolds \$20 million for violating the MSA by indirectly targeting youths. More significantly the Judge ordered Reynolds to cease placing cigarette

advertisements in magazines with a disproportionate number of teenage readers and to make sure that youths come into less contact with the company's advertising.

The court found that in the year 2000 R.J. Reynolds ads reached 95 percent of youths an average of 54.7 times. Moreover, the court found that R.J. Reynolds' advertisements reached youth at about the same frequency as they did adult smokers age 21-34, their claimed target audience.

"R.J.R. made absolutely no changes to its advertising campaigns, failed to include the goal of reducing youth exposure to tobacco advertising in its marketing plans and failed to take any actions to track whether or not it was meeting its professed goal of reducing youth smoking," Judge Prager wrote. He found that the totality of the evidence "casts doubt on R.J.R.'s intent to abide by the terms of the MSA...."

The decision marks the first legal test of one of the most heavily debated provisions of the MSA. R.J. Reynolds has said it would appeal the decision, which the company argues violates its First Amendment right to free speech.

IN THE PAST TWO YEARS, REYNOLDS' ADS HAVE REACHED AN ALMOST EQUAL PERCENTAGE OF YOUTH AS ITS CLAIMED TARGET AUDIENCE: ADULTS WHO SMOKE.

Tobacco Regulation Review

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