



From the Director

As state and local governments continue to make strides in reducing youth access to tobacco products and in protecting workers and the public from secondhand smoke, advocates have long known that federal action is necessary for regulation of the manufacturing and marketing of tobacco products. A glimmer of hope from last year's Congressional session has given rise to optimism about this year's bills that grant the FDA authority to regulate tobacco products. Read about those efforts in this issue of *Tobacco Regulation Review*.

Success at all levels of government depends on creative and bright advocates with legal training. Highlighted in this issue are the many law students who have already contributed to tobacco control and who epitomize a new generation that will continue to protect the public health. We are proud to play a role in educating and inspiring these future lawyers.

Kathleen Hoke Dachille

Center Director

Congress Considers FDA Regulation of Tobacco Products

Public health advocates have campaigned for federal legislation granting the Food and Drug Administration authority to regulate tobacco products since the Supreme Court ruled in 2000 that the agency lacked such authority in *FDA v. Brown & Williamson Tobacco Corp.* 529 U.S. 120 (2000). A close call on legislative efforts in 2004 inspired advocates to return to Congress this year with clear, comprehensive and bipartisan bills giving the FDA that authority. The DeWine-Kennedy bill (S. 666) and the Davis-Waxman bill (H.R. 1376) were introduced March 17, 2005 with the support of the Campaign for Tobacco-Free Kids, American Cancer Society, American Heart Association, and American Lung Association.

During the 2004 Congressional session, the FDA regulation bill was merged in the Senate with an important corporate tax bill and in the House with a bill that would provide \$10 billion as a "buyout" to tobacco growers. Both the tax bill and the buyout bill were destined for passage and tobacco control and public health advocates were optimistic that as an add-on to these bills, FDA regulation

of tobacco would pass as well. Despite Herculean efforts by advocates and key legislators, the tax and buyout bills passed without the FDA provisions. In response, a free-standing bill providing FDA regulation of tobacco was introduced. That bill passed the Senate (78-15) but died in the House without a vote.

Like the 2004 version, the 2005 FDA bills create a new standard by which the federal agency is to evaluate tobacco products. Currently the FDA may approve a drug or device if there is a reasonable assurance that a product is "safe and effective." As there is no safe and effective tobacco product, the bills provide that the agency would evaluate whether an action regarding a tobacco product would protect the public health. In addition, the bills would grant the FDA authority to:

- Restrict tobacco advertising;
- Require disclosure of all ingredients and additives in tobacco products;
- Prohibit candy and fruit flavored tobacco products;
- Alter health warnings on cigarettes

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and smokeless tobacco and in advertisements;

- Prohibit the use of “light,” “mild,” or “low-tar” because those terms mislead consumers into believing that the marketed product is somehow safer, or less harmful, than a regular cigarette; and
- Prohibit tobacco companies from marketing “modified risk” products unless the FDA approves of the product and the marketing plan.

The bills revive the 1996 regulations adopted by the FDA designed to reduce illegal tobacco sales to minors by, for example,

requiring that a sales clerk examine identification of any customer appearing to be 27 or younger. The broad advertising restrictions, both in-store and by billboard

near schools, are also revived. FDA lawyers must examine the 2000 Supreme Court decision, however, to ensure that the new regulations comply with the First Amendment standards expressed in the *Brown & Williamson* decision.

In addition to the ingredient disclosure provisions, the bills would allow the FDA to require that tobacco companies disclose to the agency the

company’s internal research on the health, behavioral and physiologic effect of their products. The agency may also inquire about company research on methods to reduce the harm caused by the regulated products.

Although the bills allow the FDA to require product modifications, such as the reduction of nicotine, Congress retains exclusive power to require the elimination of nicotine or to ban the sale of cigarettes, cigars or smokeless tobacco. In contrast to an existing federal law with a broad preemption clause, the bills grant

state and local governments some authority over tobacco marketing. Importantly, the bills require adequate finding for the FDA to fulfill the responsibilities provided by the legislation.

FDA regulation of tobacco is considered an essential element in a comprehensive public health plan to reduce tobacco-related illness and death. Effective federal regulation should result in diminished youth access to tobacco, decreases in adult smoking prevalence and a better-educated consumer. Such regulation would complement and extend the effectiveness of smoke-free workplace laws, youth sales enforcement programs, cessation

services, and other regulatory, economic and social strategies to improve public health by reducing tobacco use. For more information about the 2005 bills or to track the legislation, visit www.tobaccofreekids.org/reports/fda. *Tobacco Regulation Review* will also update readers on the progress of the bills this session.

IN CONTRAST TO AN EXISTING FEDERAL LAW WITH A BROAD PREEMPTION CLAUSE, THE BILLS GRANT STATE AND LOCAL GOVERNMENTS SOME AUTHORITY OVER TOBACCO MARKETING.

Maryland Happenings

Charles County Implements Smoking Restriction in Public Parks

Beginning on March 1, 2005, the air and grounds of Charles County's public parks became cleaner thanks to new smoking restrictions implemented by the County's Department of Public Facilities. The new policy was created to provide a healthier atmosphere, where children can participate in sports and individuals can enjoy the County's abundant outdoor resources without being exposed to the danger and annoyance of secondhand smoke.

Under the new restrictions, the use of any form of tobacco, including cigarettes and chewing tobacco, is prohibited in restrooms, spectator and concession areas, dog parks, playgrounds, and other county park property. Signs will be posted, informing park visitors about the new smoke-free zones. Staff members of the County's Department of Public Facilities are authorized to have violators removed from the park if such individuals refuse to cease smoking.

For more information about the new policy, contact Thomas Roland, chief of the Parks and Grounds Division at rolandt@govt.co.charles.md.us.

Montgomery County Councilman Reports on Economics One Year After Ban

On February 22, 2005, Councilman Phil Andrews, lead sponsor of Montgomery County's smoking ban, held a press conference to discuss the impact the ban has had on restaurants and bars. The press conference was held just before the General Assembly was scheduled to hear debate on a proposed statewide ban (see next issue for a full discussion of the 2005 General Assembly session). Economic data compiled from sales tax data and restaurant applications shows the County's hospitality industry has not suffered a dramatic decrease in business, as opponents have argued it would.

In addition to meeting its goal of providing safe air for workers and patrons of Montgomery County restaurants, Councilman Andrews reported that the County's smoking ban has also provided a healthy economic environment. In the first full year following the ban's October 9, 2003 implementation, sales tax receipts of Montgomery County restaurants increased by 7.6 percent, up \$ 4.4 million from the twelve-month period preceding the ban. This increase surpassed the 6.5 percent growth rate average seen in the State's county sales tax receipts over the same period. The County also

saw full service restaurant applications increase from 80 to 87 over the period in question. This 8.7 percent increase included only those restaurants that could have been affected by the ban, not fast food establishments.

While legislation prohibiting smoking in public places is firmly supported solely on public health grounds, the Montgomery County data will help quiet claims that smoking bans are bad for the hospitality industry. This data is likely to play a prominent role in other Maryland jurisdictions considering similar regulations.

Sales Tax Receipts for Montgomery County Restaurants

October 2002 to October 2003:
\$57.7 million.

October 2003 to October 2004:
\$62.1 million

Average Monthly Tax Revenue in Restaurants and Night Clubs with Beer and Wine License

October 2002 to October 2003:
\$2,314,397

October 2003 to October 2004:
\$2,320,638

Average Monthly Employees in Restaurants with Liquor Licenses

November 2002 to June 2003:
11,728.4

November 2003 to June 2004:
12,621.9

Prince George's County Passes Ban on Single Cigarette Sales

The last issue of *Tobacco Regulation Review* contained an article about pending legislation in Prince George's County, Bill No. CB-73-2004. (See *Tobacco Regulation Review*, Volume 3, Issue 2 at 5 (October 2004)). In December 2004, the Prince George's County Council unanimously passed the bill banning the sale of cigarettes in packs of less than 20. Tobacco enforcement officer, Ron Salisbury, enforces the County's laws prohibiting youth tobacco sales and self-service tobacco displays. During those efforts, Salisbury learned that many retailers are willing to sell single cigarettes or "loosies." Minors are more likely to try to purchase a single cigarette because of limited funds; adult smokers generally purchase by the carton or pack to meet their consumption needs. With this new local law, Prince George's County solidifies its position as a strong county for youth tobacco sales enforcement.

Inside the Center

Law Students Tackle Emerging Issues in Tobacco Control

Students enrolled in the Tobacco Control Legal Theory and Practice course spend the majority of their time developing and seeking implementation of public policy initiatives under the direction of Center Director, Kathleen Dachille. Whether the project involves drafting and advocating for legislation, working with State agencies to promulgate and enforce regulations or educating the public about a tobacco control matter, students must employ creative thinking, precise drafting and persuasive oral advocacy skills to achieve success. During the Fall 2004 semester, students researched and analyzed fire-safe cigarettes, mandated insurance coverage for tobacco cessation, candy-flavored cigarettes, and foster care regulations to protect children from secondhand smoke.

Fire-Safe Cigarettes

Sarah Brull and Scott Chutka tackled the question of whether Maryland should mandate that all cigarettes sold in the State be "fire safe." The students gathered data from the State Fire Marshal on the costs—injuries, deaths and property damage—of fires caused by cigarettes. Researching public health and

safety literature and tobacco industry documents, the students learned about the lethality of fires started by cigarettes and how certain design changes could reduce the likelihood that an unattended cigarette would cause a fire. After consulting with the New York agency responsible for promulgating and enforcing that state's fire-safe cigarette regulations, the students drafted legislation and a significant policy paper in support of that legislation. Having satisfied themselves, and Professor Dachille, that fire-safe cigarette legislation is necessary and appropriate, the students began to identify likely supporters and opponents of the proposed legislation and testified in a mock legislative hearing in support of the proposal. The students' work will contribute significantly to the effort to pass fire-safe cigarette legislation in Maryland.

Mandated Insurance Coverage for Cessation

Joal Barbehenn and Zara Friedman wrote a policy paper explaining why Maryland should mandate that health insurance policies cover certain expenses associated with tobacco use cessation. The report describes the resources available to those who want to quit smoking as well as the efficacy of each method, concluding that comprehensive coverage will increase the number of Marylanders

who try to quit and, most importantly, enhance their likelihood of success. The students explain why, in the long term, the investment from insurance companies and employers will result in net savings as well as a healthier community.

Candy Flavored Tobacco Products

Twista Lime, Midnight Berry, Cherries Jubilee, and Sunrise Strawberry are not the newest craze in bubble gum or lollipops, though these flavors could easily translate into success for such products. These flavors belong, however, to the newest craze in tobacco—candy-flavored cigarettes and chew tobacco. Students Brooke Courtney and Gabby DiFabbio researched the impact of this trend, concluding that the marketing is targeted at kids, the demographic most important to the continued viability of the tobacco industry. Having prepared a comprehensive report on their research and findings, the students recommended a ban on the sale of candy-flavored tobacco products in Maryland, a legislative proposal that is presently being considered in Minnesota and Massachusetts. The report that Gabby and Brooke prepared was shared with advocates in those states, who unanimously praised the content, writing and recommendations in the report.

Foster Child Exposure to Secondhand Smoke

When the State takes custody of a child and places the child in foster care, the State is obligated to care for and protect the child. Students Lane Hodes and Caroline Hecker examined the issue of the State's obligation to protect a child from secondhand smoke when in foster care as a natural extension of the State's existing obligations. After thoroughly researching public health and scientific literature on the health effects of secondhand smoke and analyzing the Maryland Department of Human Resources, Social Services Administration's regulatory authority, the students recommended that the agency promulgate regulations to forbid foster parents from smoking in the home or car when a foster child is present.

All of these projects required law students to research legal issues, but also to understand the public health and scientific literature relevant to the project. Students employed critical analysis and writing skills, but also employed their creative thinking to problem solve in the public policy realm. As work on these projects continues, a new class of students will seek to have the ideas become law or agency policy in Maryland, having a positive impact on the health of the community.

Dynamic Guest Speakers Add Dimension to the Tobacco and the Law Seminar

In her third year of teaching, Center Director, Kathleen Dachille, assumed responsibility for the Tobacco and the Law Seminar previously taught by Professors Percival and Bailey. Dachille created a substance-packed syllabus for the class such that important issues in tobacco control, past, present, and future would be covered thoroughly and expertly. Drawing on the tobacco control community in Baltimore and D.C., Dachille was able to present the issues to the class with the help of several interesting and informative guest speakers.

Dr. Allyn Taylor, former advisor to the World Health Organization, explained to the law students how the Framework Convention on Tobacco Control came into existence, why it is such a unique document and how its terms may effect global tobacco control efforts. Former legal advisor to the Food and Drug Administration (FDA), Mitch Zeller told the story of the FDA's efforts to regulate tobacco products, the Supreme Court's questionable dissolution of the FDA's 1996 regulations and recent efforts to achieve federal legislation granting FDA authority to regulate tobacco

products. Enhancing Mr. Zeller's presentation, Matt Barry from the Campaign for Tobacco-Free Kids showed the class the new types of tobacco products hitting the market, explaining why federal regulation of tobacco products is essential to protect consumers and reduce youth smoking. Mr. Barry's colleague, Eric Lindbloom, inundated the class with information about internet tobacco sales and tobacco taxes, explaining how advocates use legislation to meet tobacco control goals.

Commingled with Dachille's classes on the Master Settlement Agreement (MSA), legal challenges to clean indoor air laws and the Department of Justice lawsuit were guests Marlene Trestman and Sherri White. Ms.

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Student Awards and Publications

Congratulations to second-year law student, Cori Annapolen, for her first place prize in the student writing competition held at the Second World Conference on Nonsmokers' Rights. Cori's paper, *Maternal Smoking During Pregnancy: Legal Responses to the Public Health Crisis*, prevailed over 19 other finalists and has been accepted for publication in the University of Virginia Journal of Social Policy and the Law. Included in the list of finalists was second-year law student, Jeremy Rachlin, whose paper *A Tale of Three Counties: Local Efforts in Maryland to Extend Clean Indoor Air Laws to Bars and Restaurants* was praised by the judges for its clear writing and substantial research.

Congratulations also to third-year student, Matthew Fuchs, whose paper, *Big Tobacco and Hollywood: Kicking the Habit of Product Placement and On-Screen Smoking*, will be published by the Maryland Journal of Health Care Law & Policy.

Third-year law student, Michael Clisham's article, *Commercial Speech, Federal Preemption, and Tobacco Signage: Obstacles to Eliminating Outdoor Tobacco Advertising* was published in the Fall 2004 volume of the *Urban Lawyer* (36 *Urban Lawyer* 713 (2004)). Congratulations, Michael.



Matthew Fuchs' paper will be published by the Maryland Journal of Health Care Law & Policy.



Michael Clisham's article was published in Urban Lawyer last fall.



Cori Annapolen received first place in The Second World Conference on Nonsmokers' Rights student writing competition.

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Trestman, a Special Assistant to the Attorney General, spoke to the class about recent tobacco control work in Maryland and with the National Association of Attorneys General. Students were pleasantly surprised to find that the states' tobacco control efforts did not end with the MSA. Former American Cancer Society employee, Sherri White, addressed tobacco buyout programs with the class. Ms. White's unique perspective—she is both a tobacco control advocate and the holder of land formerly used to grow tobacco—made for lively debate and interesting conversation.

Seminar students enjoyed a well-rounded and information-packed semester. An interesting array of seminar papers demonstrated the students' varied and wide-ranging interests in tobacco control. Student papers addressed Hollywood's role in youth smoking, why FDA regulation of tobacco is essential, how state agencies can and should protect children from secondhand smoke, whether product liability suits are viable in cases concerning cigarette-caused fires, and much more. While national, state and local tobacco control movements press on, no doubt the Fall 2005 students will benefit from an interesting and lively semester of lectures and discussions.

National News

Boston Requires License Suspension for Stores That Repeatedly Sell Cigarettes to Kids

Faced with an increase in youth smoking and cigarette sales to kids, the City Council of Boston passed an ordinance to strengthen its youth access laws. Adding to existing fines, the new law doubles the annual cigarette retailer's licensing fee and provides for mandatory suspension of a retailer's tobacco sales license. These changes make Boston's law one of the toughest in the country.

Passed on December 8, 2004, the new law went into effect in January, 2005. Among the new provisions was an increase in the license fee tobacco retailers must pay to sell tobacco. The law raises the annual fee from \$50 to \$100 dollars. Revenue generated from the increase, expected to be around \$50,000 annually, is dedicated to the Boston Tobacco Control Program and will be used to fund enforcement of the city's underage smoking laws. This ensures that retailer "stings" will continue to be funded – a welcome guarantee at a time when other cities and states are being forced to cut funding for such programs due to budget constraints.

The new law also strengthens the punitive component tied to illegal cigarette sales. In addition to escalating fines - a first time offender is subject to a \$100 fine, and penalties increase incrementally to \$400 for a fourth offense - the amended law requires a mandatory 30-day license suspension for a third violation within a 12-month period. If a store illegally sells four times within one year, a 60-day license suspension is mandated and, upon public notice and comment, the retailer's license may be permanently revoked at the discretion of the Public Health Commission. *City of Boston Municipal Code, § 16-40.2.*

These changes not only ensure sustained and consistent enforcement of Boston's youth access laws, they also emphasize the retailers' responsibility to ensure tobacco is not sold to kids. While checking identification for tobacco sales should be a routine sales practice, experiences in other jurisdictions show that tough penalties, like those now in effect in Boston, are among the only methods successful in bringing large scale retailer compliance.

Flavored Tobacco Products – The New Youth Smoking Issue

Twista Lime, Deep Freeze, Cherries Jubilee, Sunrise Strawberry, Swiss Chocolate, and Caribbean Chill. Are these new ice cream or popsicle flavors? Or the newest flavor-blasted lollipops? Although these flavors could easily be identified as such, they are actually flavors of cigarettes currently marketed by tobacco manufacturers. Fearing that minors are the target of these new products, tobacco control advocates across the country have asked state Attorneys General to investigate whether the marketing of the products violates the Master Settlement Agreement (MSA), encouraged legislatures to pass laws banning the products and demanded that manufacturers stop selling these cigarettes.

The state legislatures of Minnesota and Massachusetts are considering bills that would ban the sale of cigarettes enhanced with fruit and



candy-like flavors. Both bills are in the early stages of the legislative process and will be watched closely by tobacco control advocates. Success in these leader states may result in additional states seeking such bans. Additionally, in Congress, bi-partisan bills have been introduced to grant FDA authority to regulate tobacco products and prohibit manufacturers from adding artificial flavors to tobacco products. Enactment of the FDA bill may ameliorate the need for state legislatures to act. (See article p. 1 for a full discussion of the pending bills.)

Attorneys General across the country are examining the marketing of the flavored tobacco products and considering whether MSA violations have occurred. For her health-conscious state, Hawaii Governor Linda Lingle asked R.J. Reynolds Tobacco Company to stop marketing pineapple-flavored cigarettes called Kauai Kolada as the state does not want to be associated with those deadly, youth-enticing products.

The Center has done preliminary research on the flavored cigarette dilemma and will be tracking legislative and Attorneys General efforts to



Skoal's candy flavored chewing tobacco.

stop the sale of the products. Depending on the outcome of those efforts, the Center will work with the Maryland Attorney General and the Maryland General Assembly to address this youth-centered problem.



Harvard School of Public Health Studies Fire-Safe Cigarettes

As we reported last year,¹ New York state adopted fire-safety standards for cigarettes that became effective June 28, 2004. Seven months later, a preliminary report demonstrates the regulations' positive impact on fire safety and lack of impact on the New York economy. Authored by Dr. Greg Connolly and others, the report was a joint effort of the Harvard School of Public Health and the American Legacy Foundation and is entitled: *"Fire Safer" Cigarettes: The Effect of the New York State Cigarette Fire Safety Standard on Ignition Propensity, Smoke Toxicity and The Consumer Market* (January 24, 2005).²

This preliminary report finds that cigarette manufacturers readily satisfied the New York standards, shipping only reduced ignition propensity cigarettes to that state. More than 700 brands of cigarettes have been certified as of April 2005. Dr. Connolly also demonstrated that the New York cigarettes do, in fact, fail to achieve a full-length burn 90% of the time; cigarettes from Massachusetts and California achieved full-length burn 99.8% of the time. An analysis of statistics on cigarette-caused fires in New York will be available in coming months as the data is collected and reviewed.

Not only technologically feasible, the fire-safe cigarettes do not cost more than traditional cigarettes and

cigarette sales have remained steady in New York. Further examination of the smoke emitted from fire-safe cigarettes revealed no substantial difference than that from traditional cigarettes. The report concludes: "There is no valid reason why cigarette manufacturers should not sell [fire-safe] cigarettes nationwide."

Echoing the Harvard report, the National Association of State Fire Marshals (NASFM) issued a paper entitled: *Facts About the Tobacco Industry's Arguments Against Laws Regulating The Ignition Strength of Cigarettes* (March 2005). The paper explains that cigarettes "remain the leading cause of fatal structure fires in the United States such that the fire-safety standards for cigarettes should be imposed across the country." To assist efforts to impose fire safety standards on cigarettes beyond New York, NASFM sets out the typical

arguments raised in opposition to such legislation and cogently and persuasively explains the fallacy in the opposition arguments. For example, in response to common industry concerns that "upholstered furniture and mattresses are the real problems," NASFM explains the detailed federal regulation of fire-safety standards for these consumer products.

Together the Harvard report and the NASFM paper provide public safety advocates with tremendous support for efforts to impose fire-safety standards on cigarettes. The progress of state and federal efforts will be chronicled in the *Tobacco Regulation Review* as legislative efforts continue.

¹*Tobacco Regulation Review, Volume 3, Issue 1 at 8 (April 2004).*

²Available at www.hsph.harvard.edu/php/pri/tcrtp/Fire_Safer_cigarettes.pdf

Statistics for Cigarette-Caused Fires in Maryland		
	2001	2002
Dead	15	15
Civilian Injured	25	40
Fire Service Injured	25	18
Property Damage	\$3.5 M	\$7.1 M

Restaurant and Tavern Association Loses Challenge to NY Smoking Ban

The United States District Court for the Northern District of New York rejected the Empire State Restaurant and Tavern Association's bid to have the State's smoking ban overturned. Plaintiffs challenged the law on the grounds that it was preempted by the federal Occupational Safety and Health Act and unconstitutionally vague. The Honorable Lawrence Kahn dismissed both arguments in a ruling that ensures the law's uninterrupted enforcement and clean indoor air for patrons and hospitality workers.

On March 26, 2003, New York amended its clean indoor air law to prohibit the use of tobacco in various public places, including bars and restaurants.¹ The law prohibits smoking in all bars but allows smoking in outdoor seating areas of "food service establishments." The law imposes civil penalties on individuals caught smoking in a restricted area and on any person or entity that controls a smoking restricted establishment and allows smoking. It also includes a provision allowing enforcement officers to grant waivers from compliance with the restrictions upon a showing of "undue financial hardship" or that compliance would be

"unreasonable."² The amended law became effective July 24, 2003.

In a preemptive strike, the Empire State Restaurant and Tavern Association brought suit two days prior to the law's implementation, asking the federal District Court to declare the law unconstitutional and permanently enjoin the State from enforcement. Plaintiffs argued that the law was unconstitutional on two grounds: first, that it was preempted by the Occupational Safety and Health Act (OSH Act), and second, that it contained unconstitutionally vague provisions. The court addressed each of these arguments.

Preemption

It is well established that state and local laws are preempted where they conflict with federal law. Preemption may be expressly stated in a statute's language or may be implicitly contained in a statute's structure and purpose. In either case, state or local laws in conflict with federal statutes are trumped.

The United States passed the OSH Act to ensure safe working environments. To that end, the Department of Labor created the Occupational Safety and Health Administration (OSHA) to promulgate and enforce national standards regarding safe exposure levels for certain substances. Thus, federal law does preempt state and local regulation of those substances regulated by

OSHA. However, the Act clearly provides states with the authority to regulate any occupational safety or health issue for which no standard has been established.³

While OSHA has not established a standard for environmental tobacco smoke (ETS), Plaintiffs argued that each of the individual components of ETS were regulated,⁴ thus establishing a de facto standard. The court dismissed this claim, finding that an individual assessment of each component does not presume a standard for the particular combination of contaminants comprising ETS. Moreover, the court found that formal OSHA policy acknowledges state and local smoking legislation and uses the existence of such legislation as a reason why a formal ETS standard has not been promulgated. The court pointed to this policy as proof of the compatibility between state and local smoking regulations and the OSH Act.

Vagueness

The Due Process Clause requires that laws be crafted with sufficient clarity to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and to provide explicit standards for those who apply the law. Thus, a statute is void for vagueness if persons of ordinary intelligence must guess at a law's meaning or differ as to its application. Plaintiffs argued two sections of the smoking ban were of

this nature.

New York's law prohibits smoking in indoor and outdoor seating areas of bars, but allows smoking in the outdoor seating areas of food service establishments. The law distinguishes bars as those establishments whose business is "devoted to the sale and service of alcoholic beverages for on-premise consumption and where the service of food is only incidental to the consumption of such beverages."⁵ Plaintiffs argued that the "incidental to" language would leave owners, patrons, and enforcement officers unaware of which businesses were bars or food service establishments, and therefore unable to determine which were permitted to allow smoking in outdoor seating areas.

The court rejected this argument on several grounds. First, it relied on Supreme Court precedent finding that the phrase "incidental to" is constitutionally acceptable.⁶ The court explained that the term was of a nature generally understood through ordinary business experience and common sense. The court continued that those who remained confused could easily determine a business' designation by contacting the local board of health, designated county official or other health department

official responsible for business designation. Finally, the court noted that patrons would be able to determine whether smoking was allowed by simply asking the establishment or by viewing the smoking/non-smoking signage required under the law.

Plaintiffs brought a second vagueness claim, arguing that the law's waiver provision was unconstitutional because the New York legislature had not established specific criteria

for enforcement officers to use when determining whether to grant a waiver. The law's waiver provision states that an enforcement officer "may grant a waiver" if the establishment can show either: 1) compliance would "cause undue financial hardship" or 2) other factors exist which would render compliance "unreasonable." Judge Kahn similarly dismissed this claim.

The court began by noting that enforcement officers are not required to grant waivers to businesses meeting the waiver criteria. The statute's language plainly states that officers may, not shall, grant a waiver. The court recognized the statute's inherent flexibility in providing discretion to waiver decisions even where compliance is "unreasonable" and causes "undue financial hardship."

Moreover, the court found that both phrases were commonly used and accepted phrases in a variety of laws which have survived constitutional challenges on vagueness grounds.⁷ Thus, the court concluded that the waiver provision provided enforcers with sufficient guidance, despite the fact that different people could reach different decisions within the same statutory criteria.

After a year and a half of legal fighting, this decision reaffirms the sound legal standards upon which New York's smoking policy was enacted. Representatives of the Empire State Restaurant and Tavern Association report that no decision has been made on whether to appeal the case.

1 N.Y. PUB. HEALTH LAW § 1300 *et al* (2003).

2 N.Y. PUB. HEALTH LAW § 1399-u (2003).

3 29 U.S.C. § 655.

4 29 C.R.F. 1910.100.

5 N.Y. PUB. HEALTH LAW § 1399-n (2003).

6 *McGowan v. Maryland*, 366 U.S. 420, 428 (1961).

7 *Cameron v. Johnson*, 390 U.S. 611, 616 (1968); *Sanitation and Recycling Industry v. City of New York*, 107 F.3d 985 (2d Cir. 1997).

Smoke Free Laws Proliferate

Tougher smoking regulations are going into effect as more cities, counties, states, and even countries enact laws prohibiting smoking in public places. Massachusetts, Rhode Island and Montana recently became the sixth, seventh and eighth states to take decisive action to protect the public's right to breathe clean air by passing statewide smoking restrictions for most enclosed workplaces, including bars and restaurants. The movement toward providing clean indoor air has also found its way outside the United States, with countries such as Ireland, Italy, Cuba, and New Zealand enacting comprehensive smoking restrictions.

Massachusetts' smoking ban, signed by Governor Romney on June 18, went into effect July 5, 2004. Under the law, nearly all workplaces are smoke free. Less restrictive rules apply to a handful of facilities including residential areas of nursing home and hotel guest rooms. Private clubs and cigar bars are also exempt. Under the law's penalty provisions smokers could face a \$100.00 fine for each violation and business owners discovered permitting smoking in their establishments face fines of up to \$300.00 per incident. Statewide legislation found little opposition given that approximately 100 cities and towns in Massachusetts, including

Boston, had already enacted workplace smoking bans.

Rhode Island's law began being enforced in restaurants and most bars on March 1, 2005. The restrictions will expand to bars with 10 or fewer employees and to private clubs on October 1, 2005. Gambling centers, retail tobacco stores, designated hotel and motel rooms, and bars that derive more than 50% of their profits from the sale of tobacco are exempt from the ban.

Most recently, Montana Governor Brian Schweitzer signed smokefree legislation into law. Montana's new smoking restrictions will take effect in all restaurants on October 1, 2005, and will expand to include all bars four years later. Though the long phase-in for bars was opposed by health advocates, the compromise was necessary to reach common ground in the legislature. Despite this concession, the legislation is still being hailed as a victory for the health of the state's residents.

These states join California, Connecticut, Delaware, Maine, and New York on the growing list of states that have found bipartisan support for smoking legislation. But the movement to protect the public's right to clean air has not been limited to the progressive democracy of the United States. Ireland, a country who proudly identifies itself with its pubs, became the first European nation to pass clean indoor air legislation in late

March, 2004. That law, which includes bars and pubs, was passed under the auspices of protecting employees and non-smoking patrons from the dangers of secondhand smoke exposure. New Zealand followed suit on December 10, 2004. Then Italy not only made it illegal to smoke in any public building, but established a range of fines which are subject to doubling for offenders who light up in the presence of children under 12 and pregnant mothers. Even Cuba, a communist country where some of the greatest cigars are made, has banned smoking in enclosed public places.

With the proliferation of smoke free laws finding their way across the globe, Americans can remain confident that similar restrictions will eventually find their way to a city and town nearby.

Credit Card Companies Join Effort to Stop Illegal Tobacco Sales on the Internet

At the behest of a group of Attorneys General and the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), major credit card companies have agreed to take significant steps to curtail illegal tobacco sales over the Internet. Although in Maryland, all Internet tobacco sales are illegal, enforcement

is difficult. The agreement by American Express, Visa/MasterCard, Discover, and Diner's Club will enhance the efforts of the Maryland Attorney General, J. Joseph Curran, Jr., and the Comptroller, William D. Schaefer, to stop the illegal sales.

Attorneys General and public health advocates across the country have been concerned about the impact of Internet tobacco sales. Because they typically avoid state tobacco and sales taxes, Internet vendors are able to sell tobacco at lower prices than brick-and-mortar establishments. Lower prices lead to higher smoking prevalence and the related negative impact on public health. Consumers also are led to believe that their tax-free purchases are legal when in many states, including Maryland, the consumer is in violation of the law for possessing the untaxed cigarettes. Further, although brick-and-mortar retailers often check customer identification for age verification, or suffer penalties for selling to minors during enforcement efforts, the vast majority of Internet tobacco vendors make no effort to verify the age of the purchaser. The low price and anonymity in purchasing make Internet sites attractive to minors.

After learning from the Attorneys General and the ATF that the majority of tobacco sales over the Internet are in violation of federal and state laws,

CONSUMERS ARE ALSO ARE LED TO BELIEVE THAT THEIR TAX-FREE PURCHASES ARE LEGAL WHEN IN MANY STATES, INCLUDING MARYLAND, THE CONSUMER IS IN VIOLATION OF THE LAW FOR POSSESSING THE UNTAXED CIGARETTES.

the major credit card companies agreed to adopt policies prohibiting the use of their cards to purchase tobacco over the Internet. Understanding that it

may be difficult to stop all such sales with such a prohibition, the companies also agreed to investigate and take action against Internet tobacco sellers who have been identified by law enforcement as having used a company's card for online tobacco sales. Together state and federal law enforcement and the private credit card companies will have a profound impact on Internet tobacco sales and, consequently, public health.

Secondhand Smoke Suit Drifts Toward Court

Tax attorney Herbert Paul saw his suit against fellow tax attorney Richard Anderson over uncontrolled smoke drift move one step closer to a court date. Paul filed suit claiming that secondhand smoke was drifting into his work suite from Anderson's

adjacent suite, rendering Paul's office unusable. On March 7, 2005, Manhattan Supreme Court Justice Richard F. Braun ruled on a motion for summary judgment, finding that the suit is permissible and should proceed to trial.

Paul first leased office space in a New York City building in 1991. He remained in those offices for nearly eight years without incident. In 1999, Anderson moved into an adjacent suite. Shortly after Anderson took occupancy, cigarette smoke began to infiltrate Paul's office. According to the suit, the smoke caused Paul to seal off his conference room and kept him from using other rooms in his suite. Paul further alleges that despite repeated complaints to Anderson and the building managers the smoke infiltration persisted. Eventually, Paul abandoned his office and brought suit against Anderson and the building owners and managers seeking damages for moving costs and his inability to use the suite. Paul alleged breach of the covenant of quiet enjoyment, nuisance, and violation of the city's public health laws regulating smoking. Defendants responded with a motion for summary judgment.

New York, like Maryland, requires that a covenant be implied into all leases giving the lessee the right to "quiet enjoyment" of the property. A breach of this covenant can be

The Center Welcomes Sophia Rose Strande



Jessica Strande, Sophia Rose Strande, and Center Managing Attorney, Michael Strande.

Center for Tobacco Regulation Managing Attorney Michael Strande and his wife, Jessica, had their first daughter, Sophia Rose Strande on March 23, 2005. Please join us in welcoming the newest member of the Center's family.

Kristine Callahan Joins Center Staff as Research Fellow

Kristine Callahan joined the Center's staff as a Research Fellow. Kris is a 2004 graduate of the University of Maryland School of Law and received a certificate in Health Law from the law school's nationally ranked Law and Health Care Program. Kris also served as the Editor-in-Chief for the *Journal of Health Care Law & Policy*. Kris holds a B.S. in Health Policy and Administration from the Pennsylvania State University. Kris is married with two children, Abbie and Evan.



Kristine Callahan, JD, joined the Center for Tobacco Regulation in September 2004.

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predicated upon a “partial eviction,” where the lessee is deprived use of part of the property. Here, Paul argued that he was partially evicted from the property because he could not use the suite for its intended purpose due to smoke infiltration and that ultimately forced him to abandon the property. Defendants argued that the suit should be dismissed as a matter of law because the plaintiff extended his lease in October of 2000, a few months after the alleged problem became apparent and that such action was not reasonable if a breach existed at that time. In deciding the motion, Justice Braun acknowledged the plaintiff had abandoned the property after signing a lease extension, but ruled that a determination as to whether that move should have occurred earlier raises issues of material fact that must be decided at trial. The court also noted that the sealing of the conference room and unusable condition of the suite’s other rooms may have constituted a partial eviction prior to the lease extension, constituting a breach of the covenant of quiet enjoyment. Thus, a trial was required with regard to the breach claim.

Justice Braun dismissed plaintiff’s claim that the smoke drift violated the city’s smoking restrictions. While sections of the city’s Public Health

Law do regulate smoking in enclosed public places, like Paul’s office, the law does not create a private action for a violation. Moreover, the court noted that at the time of the incident the city’s law allowed smoking in offices that were occupied by no more than three people and where all employees consented to the smoking. Though this provision was later removed, the law at the time of the incident is controlling.

Because defendant Anderson and his wife were the only two employees in the office and

both smoked, there was no violation of the law. Thus, the court dismissed the second cause of action.

Finally, Justice Braun considered the nuisance claim. Justice Braun found that while Anderson may be liable for nuisance, the building owner and its managers did not create the complained of condition and did not have control of the premises because it was leased. Therefore, the court dismissed the third claim with regard to the building owner and managers, but allowed the claim to go forward against Anderson.

This is one of only a few cases

considering secondhand smoke drift in a commercial setting. The ultimate disposition of the case will stand as a benchmark for others considering similar action in the future. The *Tobacco Regulation Review* will continue to report on developments in this case.

THE COURT ALSO NOTED THAT THE SEALING OF THE CONFERENCE ROOMS MAY HAVE CONSTITUTED A PARTIAL EVICTION PRIOR TO THE LEASE EXTENSION, CONSTITUTING A BREACH OF THE COVENANT OF QUIET ENJOYMENT.