



From The Director

This issue of *Tobacco Regulation Review* features the most current news in Maryland tobacco control, from the passage of a comprehensive clean indoor air law in Montgomery County to the enactment of a law forbidding the giving away of cigarettes in Howard County. This issue also contains a legislative wrap-up of the most recent session of the Maryland General Assembly, a feature that will come each year in the second issue of the newsletter. The volume of news demonstrates the continuing focus on public health and tobacco control with the State and local legislatures.

We also provide information on legal decisions around that country that may foreshadow tobacco control activity in Maryland and other states in the coming year. *Our Inside the Center* section describes our recent conference and the significant contributions to the international tobacco control movement made by affiliated faculty, Dr. Allyn Taylor.

Kathleen Hoke Dachille, J.D.
Director

Court Loss, Council Victory

Montgomery County Adopts
Comprehensive Clean Indoor Air
Act After 1999 Health
Regulations Invalidated

The Maryland Court of Appeals dealt a blow to the Montgomery County Council and smoke free advocates when, more than two years after the case was submitted, the Court invalidated comprehensive clean indoor air regulations that the Council passed sitting as the County Board of Health. The nine-page opinion failed to address many of the legal issues presented on appeal, some that may recur, and decided the case on a single, technical issue. Less than two months after the opinion was issued, however, the County Council passed a comprehensive clean indoor air law, prohibiting smoking in all public places and workplaces, including restaurants and bars.¹ That law will go into effect in October 2003.

The case concerning the 1999 Board of Health regulations, *Montgomery County v. Anchor Inn*,² raised

several issues, including whether the County Council was authorized to sit as the Board of Health to the exclusion of the County Executive. The Court of Appeals found that the Council lacked such authority and, therefore, the regulations were invalid. The opinion traces the lengthy history of Maryland local government law and changes in Montgomery County's form of government over the decades.



The Montgomery County Council

Ultimately the Court concluded that the 1965 designation of the County Council as the Board of Health did not survive the County's 1970 change to Charter form of government, which added the County Executive position. Since 1970, the County Council and the County Executive together comprised, by operation of State law, the Board of Health.

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Local Happenings

Continued from page 1

Legislation specifically designating the Council as the Board of Health was necessary to change this legal fact.³ Having so concluded, the Court refused to address the remaining issues.

Left unresolved were four additional issues presented to the Court, two of which may arise should the recently adopted legislation be challenged.⁴ The Court failed to decide whether the County's exclusion of private clubs from the smoke free provisions violates the Equal Protection Clause, Amendment 14 to the U.S. Constitution, and Article 24 of the Maryland Declaration of Rights. The trial court had found such a violation. The Court also failed to address whether State law preempted the local law. The trial court had found that the 1999 regulations were preempted by §2-105 of the Business Regulations Article of the Maryland Annotated Code. The new legislation, almost identical in substance to the 1999 regulations and including the private clubs exclusion, may be subject to attack on these grounds.

Preparing for a legal challenge to the clean indoor air legislation, the Council passed Bill No. 15-03 with a provision that, should the law be found unconstitutional because of the exclusion of private clubs, the exclusion should be severed from the

remainder of the bill. This would cure the constitutional infirmity and result in the inclusion of private clubs in the smoke free provisions.⁵ Nevertheless, the Council appeared confident in the conclusion that the private club exception does not create an equal protection violation. The law would be reviewed under the rational basis test, the least stringent constitutional test. The privacy interests of private clubs and their members may provide a rational basis for the exclusion, as was discussed during oral argument in the Court of Appeals on the *Anchor Inn* case. Regardless, a legislative body may approach reform "one step at a time;"⁶ "it is no requirement of equal protection that all evils of the genus be eradicated"⁷ by legislation. Confident in the equal protection argument and holding a severability option in case the issue is lost, the County Council passed legislation stronger than the 1999 regulations on this issue.

Although the State law preemption question may remain, the Council appeared confident that State law defining the authority of the Secretary of Labor, Licensing and Regulation and the Commissioner of Labor and Industry⁸ does not preempt a county from passing clean indoor air legislation more stringent than the State Smoking in the Workplace regulations.⁹ Uncodified language in the State law supports the Council's

conclusion: "[T]his Act is not intended to preempt the authority of a county... to enact any law or ordinance that is more restrictive of smoking in establishments open to the public."¹⁰ Thus, the Council is prepared to defend a preemption challenge.

After more than four years and change in the composition of the County Council,¹¹ Montgomery County joins the ranks of municipalities with smoke free public places and workplaces, including restaurants and bars. The race was not swift or without its detours, but, at the finish, the County has a comprehensive and legally sound law.

1 Montgomery County Council Bill No. 15-03, Smoking—Eating and Drinking Establishments. The bill text is available at www.montgomerycountymd.gov/Content/Council/2003bills/15-03e.pdf.

2 374 Md. 327 (2003). For a comprehensive discussion of the issues raised in this case, see Tobacco Regulation Review, Volume 1, Issue 1 at page 6.

3 Prior to the court's decision, the Council, in 2000, passed legislation curing this deficiency; the County Executive signed the bill into law. Montgomery County Code §24-1 provides that the County Council constitutes the Board of Health and has all the powers and obligations provided by law.

4 The two other issues are not present with respect to the Council's passage of Bill No. 15-03. The trial court had found that the Council violated the County's Administrative Procedures Act in 1999 by failing to give certain notices and the opportunity to be heard before adopting the health regulations. Clearly this issue was fact-specific to the 1999 action and not at issue for the 2003 ordinance. The trial court had also found that the Council violated separation of powers principles when acting as the Board of Health to the exclusion of the County Executive.

Because the Council passed the 2003 law as the Council and not as the Board of Health, this issue is not raised with respect to Bill No. 15-03. Montgomery County Code §24-1 also eliminates this issue in any case.

5 Including the private clubs could raise a new issue, specifically whether such a law violates the privacy or association rights of club members.

6 Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 489 (1955)(addressing application of the rational basis test to a less than comprehensive regulation).

7 Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949).

8 §2-105 of the Business Regulations Article of the Annotated Code of Maryland.

9 COMAR 09.12.23.

10 1995 Md. Laws ch. 5, §2.

11 See the accompanying article on the Montgomery County Council hearings on Bill No. 15-03 for more details.

Montgomery County Council 2003 Process

Court of Appeals

Opinion: May 2, 2003—The Council learned that the 1999 Board of Health regulations are struck down by the Court of Appeals.

Bill No. 15-03: May 13, 2003—Councilmembers Andrews, Floreen, Leventhal, Perez, and Knapp introduced a new bill to prohibit smoking in eating and drinking establishments.

Public hearing: June 12, 2003—Approximately 30 people testified at the Council's sole hearing with public participation on Bill No. 15-03; the comments were evenly split in support of and in opposition to the proposed legislation. Supporters included the Montgomery County Community Partnership, Montgomery County

Smoke Free Coalition, Montgomery County Medical Society, Black Ministers Conference of Montgomery County, S.O.S. (Students Oppose Smoking), American Lung Association of Maryland, Smoke Free Maryland, American Cancer Society, American Heart Association, and several individuals. Opponents included the Anchor Inn owners, other restaurant owners and employees, and the Montgomery County Chamber of Commerce.

Public Work Session: June 16, 2003—The Council's Health and Human Services Committee met publicly to discuss the bill, ultimately recommending its passage.

Public Vote: July 1, 2003: The Council set Bill No. 15-03 for vote. An amendment to require the Department of Economic Development to establish a fund which would provide marketing assistance to businesses effected by the bill readily passed. An amendment to allow smoking in separately ventilated, enclosed areas in restaurants quickly failed. Then Councilman Silverman introduced an amendment that would delay for two years the implementation of Bill No. 15-03, arguing that businesses needed additional time to prepare for the changes and market themselves as smoke free and that a court delay may result in any case. Heated debate followed, with Councilman Perez vigorously opposing the delay, arguing that a public and worker

health bill should not be delayed and that the court system would determine the delay if a challenge was filed. The debate was put to an end when, much to the surprise of many in attendance, Councilman Denis declared his opposition to a delay outside the ordinary ninety days after passage of a Council bill. With the two year delay defeated, Councilman Silverman sought to compromise with an amendment for a one year delay. That amendment died without a second from the other Council members. The bill then passed 8 to 1.

County Executive Signature: July 10, 2003—County Executive, Douglas Duncan, who had vetoed a similar bill in 1999, signed the veto-proof legislation.

Effective Date: October 9, 2003—Bill No. 150-3, codified at Montgomery County Code §24-9, goes into effect.

Exceptions: Principles of municipal law in Montgomery County result in the exception of the City of Gaithersburg and the City of Rockville, two major areas of the County, from the smoke free law. The City Councils could adopt the same law, though there is some question as to whether councilmembers support such a law. The County Council could impose the prohibitions in those jurisdictions by passing the law as Board of Health regulations. *Tobacco Regulation Review* will keep you updated on this matter.

Anne Arundel County Parks Department Implements Smoke Free Policy

Effective September 1, 2003, visitors to recreation and parks facilities in Anne Arundel, County, Maryland, will enjoy a smoke free atmosphere and children will participate in sports without being exposed to the unhealthy habit. The

Tobacco-Free Recreational Facilities rule prohibits tobacco use at all times in a restroom, spectator or concession area, dog park,

aquatic facility or playground and within 100 feet of any organized activity, such as a ball game, concert or arts fair. Violators will be provided a verbal warning and be asked to stop the offending behavior; if the violation continues, the individual may be requested to leave the park. Ultimately a violator may face misdemeanor charges carrying a fine of up to \$1,000 and up to six months in jail and may be banned from County athletic programs or recreation and parks facilities.¹

In adopting the rule, the County Department of Recreation and Parks acknowledges its responsibility to protect the health and safety of children and adults who use the recreation and parks facilities and

likens the new rule to the long-standing rule prohibiting the use of alcohol on recreation and parks grounds. The Department hopes that the policy will provide a healthier physical environment as well as communicate to children that smoking is not a healthy behavior. By eliminating tobacco use in facilities commonly used by more than 60,000 Anne Arundel County children, the Department will minimize children's exposure to the behavior. The Tobacco-Free Recreational Facilities rule complements the Department's Tobacco-Free Sports Initiative, launched in January 2003, through which 1,400 youth athletes pledged to live tobacco free and coaches were provided with information on the health risks of tobacco use to share with their athletes. With these policies and programs, Anne Arundel County has taken great strides to prevent youth from initiating tobacco use.

¹ See *Anne Arundel County Code, Article 19, §2-301.*

Howard County Passes Law Prohibiting Free Cigarettes

On March 3, 2003, the Howard County Council voted unanimously to

prohibit the giving away of cigarettes and other tobacco products by individuals engaged in the commercial distribution of such products. Based on information provided by public health advocates, the Council concluded that the giving away of tobacco products at no charge increases youth access. The bill (No. 10-2003), sponsored by all five Council members, was designed to reduce that access. County Executive Robey signed the bill into law shortly after the Council's vote and the ban can now be found in the Howard County Code, Section 12.1400 of the Health and Human Services Title.

Provoking public health advocates to request the bill was the "Camel Casbah" frequently present at Howard County's popular concert venue, Merriweather Post Pavilion, and concerns about free cigarettes at local fairs. In the Casbah, a promotional tool of R.J. Reynolds, concert-goers received free packages of Camel cigarettes and coupons for additional R.J.R. products. R.J.R. representatives also distributed coupons for free cigarettes on the vast Merriweather grounds. Advocates who visited the concert grounds to examine R.J.R.'s practices reported that kids often were given ready access to the Casbah and thereby free cigarettes. Advocates also alleged that R.J.R. representatives approached kids on the concert grounds, gave them coupons for free cigarettes and encouraged them to visit the Casbah. Adults also reported

seeing kids picking up discarded cigarettes that uninterested adults dropped in trashcans or on the lawn. Although a spokesman for R.J.R. denied that the company distributed cigarettes or coupons to kids at Merriweather, the company did not oppose the legislation. In fact, no company or organization opposed the bill at the Council hearing.

Bans on the free distribution of tobacco products are in place in Takoma Park and Bowie, Maryland, as well as parts of Baltimore City. Across the country, many jurisdictions, including the State of California, the Commonwealth of Massachusetts and several towns and municipalities, have successfully passed such bans. Although two federal courts have found that bans on the free distribution of cigarettes violate the Federal Cigarette Labeling and Advertising Act,¹ those cases are not binding in Maryland.² With no opposition at the Council hearing and no challenge to the bill since enactment, Howard County's ban should result in reduced youth access to cigarettes during the concert and fair season.

¹ 15 U.S.C. §1331 et seq. Section 1334 of the Act prohibits any state or local prohibition based on smoking and health "with respect to the advertising or promotion" of cigarettes. ² Jones v. Vilsack, 272 F.3d 1030 (8th Cir. 2001); Rockwood v. City of Burlington, 21 F. Supp.2d 411 (D. Vt. 1998).

Marylanders Mourn the Loss of Dynamic Advocate Alice Helm

Long-time tobacco control advocate Alice Helm died June 22, 2003, of lung cancer most likely caused by exposure to secondhand smoke. Ms. Helm served as co-chair of the Smoke Free Montgomery County Coalition and worked tirelessly on legislation creating smoke free workplaces and public places in Montgomery County. Her efforts did not go unnoticed by her

opponents, who created "Say No To Anti-Alice Helm" buttons as part of their opposition campaign. In response, Ms. Helm offered to autograph the buttons and wore one proudly for weeks. Although Ms. Helm passed away just eight days prior to the County's enactment of a comprehensive clean indoor air law, her colleagues in public health, members of the Council and opponents of the measure know that her efforts were crucial to the law's passage.

2003 Maryland General Assembly Session Legislative Wrap-Up

One of the regular features of the annual second issue of Tobacco Regulation Review is a summary of the past session of the Maryland General Assembly. This section will present information about recently enacted tobacco control laws and bills that were introduced, but failed to gain passage.

The 2003 General Assembly session was both historic and tumultuous. The tobacco control agenda faced the first Republican Governor in more than 30 years, historic turnover in administrative and legislative leadership

(including the loss of key allies), and an unprecedented budget deficit. These factors created what can only be described as a difficult climate.

Despite the specter of huge budget cuts across all areas of state government and a conservative administration, a number of tobacco related bills were introduced. The following is a brief summary of the significant bills and their ultimate outcomes.

House Bill 40 – Governor's Budget Bill /House Bill 935 - Funding for Tobacco Use Prevention and Cessation Program. The fiscal year 2004 operating budget allocates \$18 million for the statewide tobacco use prevention and cessation

program. Although that program suffered a significant cut for FY04, the bill included an amendment recodifying existing language requiring the Governor to allocate at least \$21 million annually for the program, beginning in FY05. As a condition for recodifying the language, a compromise was reached, allowing a one-year \$3 million dip in the minimum funding level for FY04 due to the fiscal crisis. These bills were passed and signed into law.

House Bill 32 – Candy-like Tobacco Products. House Bill 32 adds candy-like products that contain tobacco to the definition of tobacco product, as referenced in numerous sections of the Maryland Annotated Code. The bill ensures that youth access laws apply to candy-like products containing tobacco, specifically Ariva, a mint containing compressed tobacco. The bill was passed and signed into law.

Senate Bill 603/House Bill 889 – Tobacco Product Manufacturers, Escrow Requirements. The cross-filed bills require any tobacco product manufacturer whose cigarettes are sold in the State to periodically submit specified certifications, reports, and notices to the Attorney General, including certification of compliance with the Escrow Act for all Non-participating Manufacturers (those not party to the Master Settlement Agreement). The bill passed the House 130-7, passed the Senate 43-

0, and was signed into law. For a comprehensive explanation of this law, see the companion article in this section.

Senate Bill 261/House Bill 771 – Clean Indoor Air. The companion bills were cross filed by Senator Ida Ruben and Delegate Barbara Frush. The bills make most indoor public places smoke free, including bars and restaurants. Hearings were held in both legislative chambers. The bills failed to pass this year, losing in the Senate Finance Committee by a 3-8 vote. No vote was taken in the House Health and Government Operations Committee, where slightly stronger support was anticipated. It is expected that the bill will be reintroduced during the 2004 session as part of Smoke Free Maryland's Clean Indoor Air Campaign (see Vol. 2, Issue 1 at page 3).

Senate Bill 162/House Bill 631 – Comprehensive Youth Access Enforcement. These cross-filed bills create a statewide youth access enforcement program within the Department of Health and Mental Hygiene (DHMH). The bill would have established civil penalties for retailers who sell tobacco products to minors, allowed for the suspension of a cigarette retailer's license, created a retailer education program, and allowed for enforcement by both DHMH and designated local governments. The bill failed by a 4-6 vote in the Senate Judicial Proceedings

Committee and was not brought to vote in the House Health and Government Operations Committee.

House Bill 439 – Statewide Product Placement. House Bill 439 prohibits tobacco retailers from displaying or storing tobacco products in a manner accessible to consumers without assistance from a store employee. The Health and Government Operations Committee failed to vote on the bill. In 2001 and 2002, similar bills received unfavorable reports from the House Environmental Matters Committee.

Senate Bill 324/House Bill 1124 – Cigarette Tax Increase. These cross-filed bills increase the cigarette excise tax from \$1 to \$1.36 per pack. The bills were rejected by both chambers on the grounds that the legislature had already increased the cigarette tax twice in the last five years.

Senate Bill 766/House Bill 1174 – Tobacco Products Tax Increase. These cross-filed bills increase the tax on tobacco products other than cigarettes (cigars, pipe tobacco, chewing tobacco, and snuff) from 15% to 45% of the wholesale price of the product. The Senate voted in favor of the increase, but the House rejected the bill in conference committee.

Senate Bill 325 – Sealing Cigarette Vending Machines. Senate Bill 325 extends the power of the Comptroller or the Comptroller's designee to

seal cigarette vending machines that are not in compliance with tax stamp and labeling requirements or tobacco product vending machine laws. The bill received an unfavorable report from the Senate Finance Committee.

House Bill 886—Increase in Tobacco Retailer and Manufacturer License Fees. House Bill 886 proposed to increase from \$30 to \$50 the tobacco retailer license fee and from \$25 to \$45 the storage warehouse operator and tobacco manufacturer license fees. Despite the modest increase and the fact that the retailer license fee had not been raised in more than a decade, the bill failed in the House Economic Matters Committee.

While a number of bills were either defeated or died without a vote, tobacco control legislation remained a hot topic in the legislature. The slow progression toward comprehensive tobacco control experienced this year was not surprising given the complexity of issues before the legislature and the tentative approach taken by new legislators and committee leaders. Though few bills were passed, the 2003 session did allow the groundwork to be laid, increasing the chances for success when similar legislation is reintroduced in 2004.

Tobacco Manufacturers Reporting Legislation Passes General Assembly

During the 2003 legislative session, the Maryland General Assembly passed Senate Bill 603/House Bill 889, requiring tobacco product manufacturers whose cigarettes are sold in the State to submit periodically specified certifications, reports, and notices to the Attorney General.¹ The legislation will better enable Maryland to regulate tobacco sales in the State and to ensure that money will be available in the event of settlement or judgment against a tobacco product manufacturer who is not a party to the Master Settlement Agreement (MSA).

In 1998, Maryland, along with 45 other states and the District of Columbia, entered into the MSA with the major tobacco product manufacturers. Under the MSA, those manufacturers agreed to abide by certain restrictions on their marketing and sales practices and to pay the states compensation to offset state-paid medical costs associated with tobacco-related illnesses. At the time of the signing, the State Attorneys General realized that the objectives of

the agreement could be thwarted by non-participating cigarette manufacturers (NPMs) because those entities did not sign the agreement and therefore were not bound by marketing restrictions or payment obligations.

To allay concerns about NPMs, the National Association of Attorneys General drafted model escrow statutes requiring cigarette and roll-your-own tobacco manufacturers to either join the MSA or make refundable deposits into a qualified escrow

THE STATUTE ADDRESSES NON-COMPLIANT NPMs BY MANDATING ALL MANUFACTURERS WHO SELL CIGARETTES IN MARYLAND MUST FIRST REGISTER WITH THE ATTORNEY GENERAL.

account based on the number of cigarettes or amount of tobacco sold in the state. All of the MSA signatory states have enacted a version of the model statutes. Maryland's version, known as the "Escrow Act," was enacted in 1999.² Compliance with the Escrow Act helps ensure that funds will be available should the State or Maryland residents need to bring suit against the NPMs in the future.

Over time it became apparent that a number of NPMs were not in compliance with the State Escrow Act, to the detriment of the State, participating manufacturers and compliant NPMs. Non-compliance is a problem for two reasons. First, by not making the escrow payments, non-compliant NPMs fail to provide funding to satisfy future claims that may be made by the State. Second, non-compliant

NPMs are able to charge less for their product because they do not have to offset the cost of payments to the states. This cost advantage has helped NPMs increase their market share in recent years. Because each participating manufacturer's MSA payment is adjusted annually based in part on market share, growth in the non-compliant NPMs' market share may cause each state's payments under the MSA to decline. Escrow payments help level the playing field by placing payment burdens on each manufacturer, though the NPMs may eventually get their payments back.³

To address concerns about non-compliant NPMs, the Maryland legislature enacted Senate Bill 603/ House Bill 889 and the Governor signed the measure into law. The statute seeks to address the apparent increase in non-compliant NPMs by mandating that all manufacturers who sell cigarettes in Maryland must first register with the Attorney General as either a participating manufacturer (i.e. signatory of the MSA) or as an NPM. The legislation requires, among other things, that NPMs provide specific information as to the brands and numbers of cigarettes sold in the State and certify that they are in compliance with the State's Escrow Act, and makes it illegal to tax stamp products not included in a manufacturer's disclosure list.

The law grants the Attorney General the authority to bring a civil action on

behalf of the State if the NPM does not certify to the Attorney General that it placed the appropriate amount of funds in escrow by April 15 each year. A tobacco product manufacturer who fails in any year to place into escrow the appropriate funds may be subject to civil penalties of up to three times the original amount the manufacturer withheld from escrow. On a second violation, the tobacco product manufacturer is prohibited from selling its products to Maryland consumers for up to two years.

This legislation effectively levels the playing field and helps protect state MSA payments by providing the Attorney General with enforcement tools to ensure escrow payments. The new law makes enforcement easier because it draws attention to all tobacco manufacturers selling within the state. The new requirements will keep the typically small NPMs from operating in the State unnoticed. It also ties state tobacco tax stamps to the directory of certified manufacturers and their specific tobacco brands, as maintained by the Attorney General. These changes will make it easier for the State to track NPM activity and ensure compliance with the Escrow Act.

¹ The legislation is codified at §§16-501 to 16-508 of the Business Regulations Article of the Maryland Annotated Code.

² The uncodified statute was passed as Senate Bill 305 and is available in 1999 Maryland Laws, chapter 169.

³ The money placed in escrow by NPMs is not

available for state use. The money is deposited into an escrow account and is to remain in that account for 25 years in the event that the state files suit against the manufacturer. Prevailing in such a lawsuit is the only way for a state to obtain this money. However, if the state does not sue, the money is returned to the company that paid into escrow.

In compliance with the reporting legislation, the Attorney General of Maryland makes available to tobacco wholesalers and retailers a list of approved products, listed by manufacturer, brand and brand family. That list is available at the Attorney General's website: www.oag.state.md.us. The web page also contains certification forms, a model escrow agreement and other information for NPMs.

Wholesalers will start filing with the Comptroller quarterly reports on tobacco sales volume this year. These filings will provide reliable information on sales trends on a brand and manufacturer basis.

Maryland Tobacco Control Cases

Court of Appeals Rules That Medicaid Recipients Are Not Entitled To MSA Funds

The Maryland Court of Appeals issued an opinion in *Glover v. Glendening*¹ holding that Medicaid recipients are not entitled to funds from the Master Settlement Agreement (MSA) as excess payments under a federal Medicaid law. The decision puts Maryland in line with every other jurisdiction that has addressed the issue.

The class action lawsuit brought by Margie Glover, a Medicaid recipient who has been treated for smoking-related emphysema, sought for all Medicaid recipients who have been treated for smoking-related illnesses the difference between the amount of money the State of Maryland had paid for such medical care and the amount of money the State will receive under the MSA. The claim is based on a section of the Medicaid Act that provides that if the State collects funds under assignment on behalf of a Medicaid recipient, the State must return to the Medicaid patient any funds not used to provide medical care.² For example, if a Medicaid recipient had been injured by a third party and assigned to the State the right to collect damages from the third

party, the State could only keep those funds necessary for the medical care provided to the Medicaid recipient; unused funds would be returned to the patient. The plaintiff claimed that the State's recovery under the MSA constitutes an assignment from

Medicaid recipients because the State's action against the tobacco manufacturers sought recovery for medical expenses paid under the Medicaid program for smoking-related illnesses.

The plaintiff also claimed that the State's recovery under the MSA far exceeds the amount of money the State has paid for medical care for Medicaid patients suffering smoking-related illnesses. According to the plaintiff, the excess funds should be distributed to her defined class.

The question of whether the excess funds provision of the Medicaid Act, standing alone, would allow for such recovery is left unanswered by the Maryland Court because a different section of the Act makes clear that the excess funds provision does not apply to payments made to the State under the MSA.³ The Maryland Court's plain reading of the Medicaid Act echoes the decision of every other jurisdiction to have addressed

the issue in a reported opinion.⁴ Thus, the Court upheld Congress' intent and the State will retain the full amount of its MSA payments.

¹ 2003 WL 21740362 (July 29, 2003).

² 42 U.S.C. §1396k(b).

³ 42 U.S.C. §1396b(d).

⁴ See, e.g., Cardenas v. Anzai, 311 F.3d 929 (9th Cir. 2002); Strawzer v. Atkins, 290 F.3d 720 (4th Cir.), cert. denied, 123 S.Ct. 618 (2002); Tyler v. Douglas, 280 F.3d 116 (2^d Cir. 2001), cert. denied, 122 S.Ct. 2361 (2002); Greenless v. Almond, 277 F.3d 601 (1st Cir.), cert. denied, 123 S.Ct. 75 (2002); Harris v. Owens, 264 F.3d 1282 (10th Cir. 2001); McClendon v. Georgia Department of Community Health, 261 F.3d 1252 (11th Cir. 2001); Watson v. Texas, 261 F.3d 436 (5th Cir. 2001); California v. Superior Court, 99 Cal. Rptr. 2d 735 (Cal. App. 2000); Brown v. Minnesota, 617 N.W.2d 421 (Minn. App. 2000), cert. denied, 121 S. Ct. 1655 (2001).

THE MARYLAND
COURT OF APPEALS'
PLAIN READING OF
THE MEDICAID ACT
ECHOES THE DECISION OF EVERY
OTHER JURISDICTION
TO HAVE ADDRESSED
THE ISSUE.

Maryland Attorney General Sues Online Tobacco Vendor

Maryland Attorney General J. Joseph Curran, Jr., announced in June that the Consumer Protection Division of his office filed charges against the operators of a tobacco sales website, www.dirtcheapcigs.com. In those charges, Curran alleges that the online vendor sells cigarettes to minors and has violated Maryland's cigarette tax and license laws. The charges detail specifically that a minor under the supervision of the Attorney General's staff was able to

purchase a carton of cigarettes from the online vendor without providing proof of age to make the purchase or receive the shipment. The charges request that the operators cease and desist from violating Maryland law and seek restitution, civil penalties and costs. Trial at the Office of Administrative Hearings is scheduled for September 18, 2003. *Tobacco Regulation Review* will continue to cover the matter as the process continues.

Maryland Attorney General Leads 27 Colleagues in Requesting Motion Picture Industry to Reduce Smoking in Movies

Maryland Attorney General J. Joseph Curran, Jr., convinced 27 fellow Attorneys General to sign onto a letter to Jack Valenti, President of the Motion Picture Association of America, requesting that the industry reduce the depiction of smoking in movies of all ratings. In the letter, Curran characterizes the industry as being “uniquely situated to bring about sweeping change to prevent youth smoking” and asks that the industry move from being part of the problem to part of the solution.¹ The impetus for the letter was a June 2003 report by a research team at Dartmouth Medical School, concluding that “viewing

smoking in the movies promotes smoking initiation among adolescents.”² Many studies have revealed the frequency with which smoking is depicted in the movies;³ the Dartmouth study demonstrates the link between those depictions and youth smoking. With that connection firmly established, the Attorney General felt compelled to call for bold action from the film industry “to effect what could be one of the most far-reaching benefits on public health in our generation.”⁴

1 For a copy of the letter and accompanying press release, go to www.oag.state.md.us.

*2 M. Dalton, et al., Effect of Viewing Smoking in Movies on Adolescent Smoking Initiation: A Cohort Study, *The Lancet* (published online June 10, 2003 at [http://image/thelancet.com/extras/03art1353web.pdf](http://image.thelancet.com/extras/03art1353web.pdf)).*

3 For a collection of the research, visit www.smokefreemovies.ucsf.edu/problem/moviessell.html; and www.tobaccofreekids.org/research/factsheets/pdf/0216.pdf.

4 Letter from J. Joseph Curran, Jr., to Jack Valenti, dated August 26, 2003.

Update: The *truth* Campaign Subject to Challenge

The American Legacy Foundation’s truth campaign is the subject of legal challenge. (See related article in *Tobacco Regulation Review*, Volume 1, Issue 1 at page 14.) After the Lorillard Tobacco Company threatened to sue the Foundation on the grounds that its truth ads vilify the industry in violation of the Master Settlement Agreement, the Foundation filed a declaratory judgment action in a Delaware court seeking a judgment that the Foundation is not subject to the MSA or, in the alternative, that the ads do not vilify the industry. In January 2003, the Delaware court ruled that the Foundation is subject to suit under the MSA. The parties are now deep into the discovery phase and ultimately will go to trial on the question of whether the campaign vilifies or makes personal attacks on the tobacco industry in violation of the MSA. *Tobacco Regulation Review* will continue to cover the progress of the case.

Inside the Center for Tobacco Regulation

Center Hosts Enforcement Conference

On June 3, 2003 the Legal Resource Center for Tobacco Regulation, Litigation & Advocacy hosted its first annual conference covering special topics in tobacco control. For this year's conference, Reducing Youth Access to Tobacco at Retail Stores: What Works and How to Get There in Your Jurisdiction, the Center hosted 30 people representing 11 of Maryland's 24 jurisdictions. Attendees from local health departments and police departments reviewed the conference as a great success.

Efforts to prevent minors from initiating tobacco use have traditionally been aimed at reducing young people's demand for tobacco products. Common efforts include school-based education on the dangers of tobacco use, product price increases through high excise taxes, and restrictions on tobacco advertising and promotion. Because minors cannot start smoking without access to cigarettes, however, controlling the supply of tobacco to minors is of equal importance. The availability of Cigarette Restitution Funds for enforcement programs has created local government interest in creating and conducting enforcement programs

designed to reduce youth access to tobacco.

State criminal law has prohibited the sale of tobacco products to minors for decades. While this prohibition applies in all of Maryland's 23 counties and Baltimore City, the law can be enforced only by licensed police officers. Although in some jurisdictions local police and prosecutors are willing and able to actively enforce the youth access prohibitions, in many jurisdictions limited or exhausted criminal justice resources eliminate that possibility. Some jurisdictions have addressed this problem by passing local civil laws that substantively parallel the State prohibition, but allow for enforcement by local government agencies. Other jurisdictions have yet to tackle the youth access enforcement problem.

Because each jurisdiction enforces its tobacco control laws differently, and because a number of jurisdictions are in the process of developing new enforcement programs, the Legal Resource Center designed a conference that would provide vital information to all counties. As a primer for those jurisdictions new to youth access enforcement and a reminder to those with existing programs, Center Director Kathleen Hoke Dachille opened the conference with a discussion of CDC recommended guidelines and commonly held best

practices for youth access programs. A question and answer session following the presentation allowed for attendees to ask about particularly troubling issues and to learn from each other's responses.

Because it is always best to learn from others' mistakes—and successes—a panel of individuals currently working in youth access programs discussed their program histories and lessons learned. Enforcement representatives from Baltimore City, Anne Arundel, Carroll, Howard, Frederick, Montgomery, and Prince George's counties shared important information about how to identify all tobacco retailers in the county, develop a database for data tracking and random sampling, educate tobacco retailers and their employees on youth access laws, and establish youth recruitment and training programs. Lively audience participation enhanced the impact of the presentations and resulted in a truly effective information sharing session.

As the networking of current enforcement officials continued, Dachille and Managing Attorney Michael Strande provided information to those jurisdictions that lack an enforcement program. Center staff discussed legislative options for the different counties and explained the different components of a program, from the

law itself to the hiring and training of an enforcement team. Though perhaps trailing some of their colleagues, these local health officials were eager to learn and to carry their lessons home.

Conference attendees identified the information sharing and opportunity to network as the greatest benefits of the day. Many attendees asked for—and all have been sent—a contact list so that they may continue the networking as their programs change and grow. Based on the number of requests for assistance the Center has received as a result of the conference, enforcement programs in Maryland will undoubtedly continue to grow, improve and multiply.

Inaugural Class of Tobacco Control Clinic Contributes to Local and State Efforts

Having left their mark on tobacco control policy in Maryland, law students wrapped up the inaugural Tobacco Control Clinic. Four students – Dmitry Khrizman, Heather LaPorte, Dondrae Maiden, and Kevin Taheri – spent the year learning about national, state, and local tobacco control issues and applying that knowledge to real-life projects.

In the classroom, students benefited from the knowledge and experience of

Center Director and Assistant Professor, Kathleen Hoke Dachille, and several guest lecturers. Dan Friedman, a University of Maryland School of Law alumnus and associate with Saul, Ewing, provided an in-depth and entertaining explanation of local government structure and authority in Maryland. Mark Pertschuk, Executive Director of The Marin Institute, led a



Heather Laporte and Dondrae Maiden from the 2002-2003 Tobacco Control Clinic

dynamic discussion of the history of tobacco control and how it compares with other public health initiatives. Preparing students for the 2003 session of the Maryland General Assembly, Kristin Jones, Legislative Assistant to Speaker of the House Michael Busch, and Hank Greenberg, Assistant Attorney General, enlightened students about how a bill is drafted and shepherded through the legislative process. Other classroom

subjects included the Master Settlement Agreement, Internet tobacco sales, and best practices for local youth access enforcement programs.

Outside the classroom, students contributed significantly to local government efforts in tobacco control. Dondrae Maiden and Heather LaPorte created a manual to educate trial judges and administrative bodies on

why the law prohibits youth tobacco sales and how local governments enforce the law. The template manual is designed to make judges aware of how devastating youth tobacco sales can be so that enforcement cases are taken seriously and significant penalties will be imposed. Kevin Taheri prepared a paper in support of a comprehensive clean indoor air ordinance on behalf of a local health department. The comprehensive and persuasive document will likely be used in the near future when

the department introduces the ordinance to their legislative body. And LaPorte successfully represented Montgomery County in a civil prosecution of a retail clerk who was cited for selling cigarettes to a minor.

For the 2003 session of the General Assembly, students drafted legislation for several legislators, drafted written testimony, and provided oral testimony at bill hearings. Taheri drafted and testified with sponsor Delegate

Jon Cardin in support of House Bill 886, which would have raised the cost of licenses held by tobacco retailers. In cooperation with Senator Ida Ruben, Maiden drafted and testified in support of Senate Bill 325, which would have allowed the Comptroller, or his designee, to seal tobacco product vending machines that do not comply with existing laws designed to prevent youth access to the machines. Khrizman supported Delegate Carol Petzold in testifying in support of House Bill 439 that would have required retailers to store tobacco products behind the counter, prohibiting customer access without clerk intervention. Not surprisingly, in a session with sharp debates on slot machines, the conversion of Blue Cross/ Blue Shield, and the budget, none of the bills came out of committee.

At the national level, Khrizman contributed to the Quarterly Conference Call of the Tobacco Control Legal Consortium (TCLC). Khrizman educated more than fifty participants on practical steps a tenant can take if exposed to drifting tobacco smoke from a neighboring apartment. He also outlined the causes of action such a tenant may have against a landlord or smoking neighbor. Not only will Khrizman's research assist the Center in advising tenants in Maryland, but will also help make TCLC

members across the country are better prepared to assist such tenants.

Regardless of whether the Clinic students work in tobacco control in the future, they will be better prepared to handle governmental clients, bill drafting and testifying in Annapolis, and public health policy development. If future Clinic students work with the dedication and focus of the inaugural class, local and state tobacco control policy will benefit significantly.

STUDENTS CONTRIBUTED SIGNIFICANTLY TO LOCAL GOVERNMENT EFFORTS IN TOBACCO CONTROL.

Center Affiliated Faculty Plays Key Role in Creation of FCTC

At a meeting in Los Angeles in May 1993, Dr. Allyn Taylor, adjunct professor in residence at the University of Maryland School of Law, and Professor Ruth Roemer, adjunct professor emeritus at the UCLA School of Public Health and past president of the American Public Health Association, gave birth to an idea for an international instrument for tobacco control. Having read Dr. Taylor's work in international law and public health, Professor Roemer suggested to her that she apply her ideas to the problem of global tobacco control.

Dr. Taylor subsequently developed the idea of the framework convention-protocol approach for tobacco control as part of her doctoral dissertation at the Columbia University School of Law. In 1995 Taylor was the lead author of an independent feasibility study, with Roemer, for World Health Organization (WHO) calling for the initiation of a framework convention on tobacco control under WHO auspices. In 1998, Dr. Taylor was brought on the WHO staff to be the senior legal adviser for the treaty as the negotiation process gained momentum. The treaty was formally negotiated between 1999 and 2003 during six sessions.

On May 21, 2003, at the 56th annual World Health Assembly in Geneva, the 192 Member States of the World Health Organization adopted by consensus the WHO Framework Convention for Tobacco Control (FCTC). This groundbreaking treaty is the first Convention to be negotiated under the auspices of the World Health Organization and the first international legal instrument designed to reduce tobacco-related deaths and disease around the world. Among its many provisions, the treaty addresses issues such as tobacco cessation, prevention, clean indoor air, health education, treatment and advertising. Ten years in the making, the historic treaty is designed to strengthen national action and enhance international cooperation to counter the global tobacco pandemic.

While the treaty will not enter into force until it has been signed and ratified by at least 40 countries, the process has already begun. On June 16, Norway became the first country to both sign and accept the treaty. Thirty-nine other countries and the European Community signed the treaty during the first week it was open for signature. To date, 46 countries and the European Commission have signed the treaty and Norway is the only country that has accepted it.

Once the treaty enters into force, state parties to the Convention will be legally obligated to implement its terms. Provisions of the treaty call for instituting large health warnings on all cigarette packaging and a comprehensive ban on tobacco advertising, sponsorship and promotion. The treaty also calls for measures such as promoting tobacco control programs, supporting tobacco taxes, advancing treatment programs and prohibiting tobacco sales to minors. It is anticipated that the treaty will be followed over time by protocols – separate treaties – designed to implement the broad terms of the framework convention on specific areas of tobacco control.

Global health officials are hoping that this landmark treaty will help curb the dramatic rise in global tobacco consumption. WHO predicts that, if the epidemic remains unchecked, the number of annual deaths from tobacco

use will double to 10 million by 2020, with the majority of deaths to occur in the developing world.

In February 2003, Professor Taylor brought third year law students Susan Bankowski and Gemma Vestal as temporary advisers to the WHO legal team for the sixth and final session of the Intergovernmental Negotiating Body of the FCTC in Geneva, Switzerland. Both students had previously worked as WHO interns at a FCTC inter-sessional meeting on tobacco smuggling at the United Nations in New York last August.

Update: Three More States Go Smoke Free

In the last issue of *Tobacco Regulation Review*, we reported that the state of Delaware had passed legislation making all public places and workplaces, including restaurants, casinos and bars, smoke free. At that time, Delaware and California stood alone as states with comprehensive clean indoor air legislation. In the few months since the last issue, three other states have joined the smoke free ranks: Connecticut, Maine and New York. Dozens of cities and municipalities have also been added to the smoke free list in the past several months. As predicted, the smoke free movement is strong and sweeping the nation thanks to a growing, bipartisan movement focused on protecting the public's and employees' right to breathe clean air.

TCLC Launches Website

The Tobacco Control Legal Consortium (TCLC), formed in 2002 (see article in Volume 2, Issue 1), launched a website for members to share questions and advice on legal issues in tobacco control. Public health advocates, attorneys, and legislators across the country ultimately will be able to use the site and thereby the Consortium, making access to legal support a reality. Check out the website at www.tclconline.org.

Legal Briefs At The National Level

Philip Morris Loses Class Action Suit on Light Cigarettes

On March 21, 2003, cigarette manufacturer Philip Morris was ordered to pay \$10.1 billion in damages for misleading smokers into believing that low tar cigarettes are safer than regular brands. Given the profound judgment in favor of the plaintiffs, this case may mark the start of similar class action cases in the years to come.

Price v. Philip Morris Inc.,¹ is a class action lawsuit brought by and on behalf of approximately 1.1 million Illinois consumers who bought Marlboro Lights and Cambridge Lights in recent decades. Judge Nicholas Byron presided over the Illinois Circuit Court bench trial that lasted just under two months.

The class action suit was brought under consumer fraud provisions of the Illinois Consumer Fraud Act.² The plaintiffs argued that Philip Morris intentionally manipulated the design of its so-called light cigarettes to produce test results on cigarette machines that show lower tar and nicotine yields than those people receive when actually smoking the light cigarettes. The plaintiffs also argued that, by placing the words

“lowered tar and nicotine” on every pack of Marlboro Lights, Philip Morris effectively committed fraud each time a consumer purchased a pack.

The plaintiffs supported their allegations with evidence showing that light cigarettes allow natural air to flow through small holes, called ventilation bands, in the cigarette, which dilutes the tobacco smoke and results in lower tar and nicotine yields recorded by testing machines. However, actual smokers partially block ventilation bands with their fingers and lips when they smoke, reducing the natural airflow and increasing smoker ingestion of tar and nicotine.

Based on the widespread belief that the term light, in association with most products, means the product contains less of an unhealthy ingredient, the plaintiffs argued that smokers bought Marlboro Lights and Cambridge Lights because they thought those cigarettes contained less tar and nicotine and therefore a healthier option. By using the term light, Philip Morris intended this deception.

The plaintiffs demonstrated that there was no reliable, publicly available scientific data on the effects of light versus regular cigarettes until a November 2001 report by the U.S. National Cancer Institute, which concluded that light cigarettes do not reduce a smoker’s chances of getting

smoking-related diseases.³ Further, Philip Morris documents and independent test results showed that levels of numerous harmful compounds in smoke from light cigarettes are actually higher than in regular brands because the ventilation used to reduce tar deliveries results in less complete combustion of the poisons in smoke. The plaintiffs also introduced internal Philip Morris documents demonstrating the company’s intent to market light cigarettes to the health-conscious consumer with the intent that consumers would rely on the implicit representation of healthier and less harmful cigarettes.

Two weeks after closing arguments, Judge Byron ordered the company to pay \$7.1 billion in compensatory damages and \$3 billion in punitive damages. In its opinion, the trial court found that Marlboro Lights and Cambridge Lights were introduced into the market with the intent to provide smokers who were concerned about their health with a product that could reduce the cognitive dissonance associated with smoking and thereby allow them to continue their habit.⁴ The compensatory award will be used to reimburse the class and cover attorneys fees and expenses, while the punitive damages will be retained by the State. There is some question as to the ability of Illinois to collect the punitive damages award. Philip

Morris is appealing the decision, arguing in part that Illinois relinquished its claim to the punitive damages award as part of the 1998 Master Settlement Agreement.

This case is a landmark decision because the plaintiffs brought their claims and sought damages under consumer fraud provisions and not under a product liability theory. Unlike product liability suits brought against the tobacco industry on behalf of injured parties, this class action does not seek damages for smoking-related illnesses nor does it rest on medical claims. Rather, the cause of action and compensation are based on the argument that consumers did not get the product they paid for, a safer cigarette, but were defrauded into buying a product just as dangerous, if not more, than the standard cigarette. Without assumption of the risk, contributory negligence or competing causes of illness to counter the charges, Philip Morris could not defeat the plaintiffs' claims. And the lack of need for medical data and evaluation resulted in a more focused and quicker trial.

Similar consumer protection cases have been filed in at least ten states, with a case in Florida certified and awaiting trial. Although no such suit has been filed in Maryland, the State's consumer protection laws are quite liberal and could be used as the basis for a similar suit. We will continue to monitor these cases and report any

updates in future issues.

Since the March 2003 trial court decision, Philip Morris sought to have reduced the \$12 billion bond required to appeal. Attorneys General from 37 states filed an amicus brief in support of Philip Morris' request, asking the trial court to set the bond at an amount that would avoid any adverse effect on tobacco settlement payments to the states. Maryland Attorney General J. Joseph Curran, Jr. was not among those supporting the industry's request. The bond was reduced and eventually set at \$6.8 billion. The plaintiffs challenged the reduction and terms of the bond and prevailed in the Illinois Fifth District Appellate Court, which found that the trial court did not have the authority to reduce the bond.⁵ Philip Morris has appealed this decision to the Illinois Supreme Court.

Philip Morris has also filed an appeal of the \$10 billion judgment with the Illinois Fifth District Court of Appeals. Appellate argument is pending.

1 Cause No. 00-L-112, Circuit Court, Third Judicial Circuit, Madison County, Illinois.

2 815 ILL. COMP. STAT. 505/1 et seq.

3 See Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine, National Institutes of Health, National Cancer Institute (2001).

4 Price v. Philip Morris Inc., Cause No. 00-L-112, Judgment Filed March 21, 2003 at page 9.

5 Price v. Philip Morris Inc., 2003 WL 21675830 (Ill. App. 2003).

In response to the bond issues raised in the *Price* light cigarette case and concerns about the financial strength of tobacco companies, the Oregon legislature passed a bill limiting to \$100 million the bond amount tobacco companies would have to pay if appealing a judgment in a civil suit. The legislature sought to protect the tobacco companies as a way to protect the state's payments under the Master Settlement Agreement. Governor Ted Kulongoski vetoed the bill, citing the Federal Trade Commission's recent report that the six leading tobacco companies increased advertising expenditures by 17 percent in 2001, for a total of \$11.2 billion. The Governor does not think it wise to free up tobacco company funds for more advertising and supports a more flexible bond that takes into consideration the appealing company's financial situation. In contrast, twenty-two other states have adopted appeal bond limits, ranging from \$1 million to \$50 million.

California's Anti-Tobacco Campaign Survives Legal Challenge

California's anti-tobacco media campaign, funded by taxes on wholesale cigarette sales, does not constitute forced speech in violation of tobacco

companies' First Amendment rights according to the U.S. District Court for the Eastern District of California. In *R.J. Reynolds Tobacco Company v. Bonta*,¹ the court found that the media campaign constitutes government speech, controlled by and attributable to the State, rather than compelled speech of tobacco companies. Although the opinion is somewhat lengthy, the court had no difficulty reaching its decision based on a wealth of government speech and compelled speech jurisprudence.

The California Department of Health Services developed a media campaign designed to inform the public of the significant health risks associated with smoking and thereby reduce smoking prevalence. The campaign costs approximately \$25 million annually and is paid for out of a limited-use fund comprised of taxes on wholesale cigarette sales.² According to the plaintiffs, the State uses the campaign to assault the tobacco industry's character and practices.

R.J. Reynolds filed the complaint alleging that using the wholesale cigarette tax resulted in the company, and other tobacco companies, paying for the media campaign with which they vigorously disagree. The company argued that this compelled speech violates their First Amendment rights, relying on the Supreme Court's seminal compelled speech case, *Abood v. Detroit Board of Education*.³ In that case, the Supreme Court found a First Amendment violation because

a public employee union required nonmembers to pay fees that were used for political activities other than collective bargaining. In its most recent compelled speech case, the Court found that the federal government's use of a mandatory assessment on mushroom growers for a generic advertising campaign for mushrooms was compelled speech in violation of the growers' First Amendment rights.⁴ The government could use such fees for operating a regulatory system over mushroom growers, but not for the advertising campaign. R.J. Reynolds alleged that the wholesale cigarette tax ultimately resulted in tobacco companies paying for the anti-tobacco media campaign.

In upholding the constitutionality of the statute authorizing the media campaign, the court found the threshold question to be whether the campaign constitutes government speech—that the compelled speech inquiry would come only if the campaign was not government speech. The government speech “inquiry rests on the level of control and authority that the government exercises over the message conveyed.”⁵ In this case, the court readily concluded that the campaign constitutes government speech. First, the statute authorizing the campaign directs the Department of Health Services to develop a campaign stressing the importance of both preventing the initiation of smoking and quitting smoking using “professional market-research and

surveys.”⁶ The State, therefore, is in complete control of the campaign with respect to substance and coverage. Second, the ads quite clearly indicate that they are government messages, with unambiguous attribution to the Department. Such speech, funded by tax dollars, is government speech and not compelled speech. As government speech, the media campaign does not violate tobacco companies' First Amendment rights.

Given the strength of the tobacco companies' marketing programs and the loss of funds for other states' countermarketing, the survival of California's program, with the tax funding scheme, is important to tobacco control and public health advocates. Perhaps other states will be encouraged to replace lost media campaign dollars through cigarette taxes in light of the *Bonta* decision.

¹ 2003 WL 21708208 (S.D. Cal. 2003).

² In 1988, Californians voted for a 25¢ per pack tax on wholesale cigarette sales with the monies collected to be placed in a limited-use fund.

³ 431 U.S. 209 (1977).

⁴ *United States v. United Foods*, 533 U.S. 405 (2001).

⁵ 2003 WL 21708208 at *12.

⁶ *California Health and Safety Code §104375(e)*.

New York Internet Tobacco Sales Regulation Survives Challenge

After an almost three-year legal battle, the State of New York may enforce a 2000 law designed to eliminate internet and telephone tobacco sales within the state. In *Brown & Williamson Tobacco Corp. v. Pataki*,¹ the United States Court of Appeals for the Second Circuit upheld that statute, reversing a lower court decision that found the law in violation of the Commerce Clause of the U.S. Constitution. As the first appellate court to address the constitutional questions raised by prohibitions on internet and telephone tobacco sales, the influential Second Circuit gave confidence to tobacco control and public health advocates in other jurisdictions interested in such prohibitions.

On August 16, 2000, New York became the first state to ban all internet and telephone tobacco sales.² The public health law prohibits the shipping of cigarettes within the State to any person other than a licensed wholesaler, warehouse operator or governmental agent. Cigarette sellers who ship cigarettes directly to New York consumers and common or contract carriers, such as Federal

Express and UPS, who knowingly transport cigarettes to consumers face civil and criminal penalties. The law contains a presumption that any delivery to a home or residence is to a consumer in violation of the law. A limited exception exists for persons other than a contract or common carrier to transport up to four cartons

of cigarettes at any one time to any one person. The law was designed to reduce youth access to tobacco, as internet and telephone tobacco vendors cannot reliably

insure that their purchasers are at least eighteen years old, and to eliminate the tax loss that the state experiences when consumers purchase online or by phone from vendors who have not secured New York tax stamps.

Brown & Williamson Tobacco Corporation and other tobacco companies challenged the statute shortly after Governor Pataki signed it into law. The United States District Court for the Southern District of New York issued a temporary restraining order against enforcement of the law in November 2000 and in April 2001, following a five day bench trial, it issued an opinion declaring the statute to be in violation of the Commerce Clause.³ The lower court decided that the statute discriminated against interstate commerce by requiring that retail cigarette sales take place only through in-state, face-

to-face transactions. Adopting the plaintiffs' argument, the court found that the law essentially banned interstate commerce to the detriment of out-of-state sellers and to the benefit of in-state sellers. Particularly troubling to the trial court was the exception that allowed for any person, other than a contract or common carrier, to transport up to four cartons of cigarettes to a New York consumer. The plaintiffs had argued and the court agreed that, for practical purposes, this allowed for in-state retailers to self-deliver to New York consumers whereas out-of-state retailers would not be able to make such deliveries. The State of New York appealed.

On February 13, 2003, the Second Circuit Court of Appeals overturned the lower court's ruling, allowing the state to begin enforcement of the almost three-year old statute. The appellate court found that the ban did not discriminate between intrastate and interstate commerce because the statute applied equally to all businesses regardless of location. No retailer may ship cigarettes to New York consumers whether the shipment originates in New York or outside of the state's boundaries. The court acknowledged a minor burden on interstate commerce but found that the burden was not excessive in relation to the local putative benefits. Specifically, the court held that the state's interest in collecting tobacco taxes and in reducing minors' access

THE SECOND COURT OF APPEALS FOUND THE BAN APPLIED EQUALLY TO ALL BUSINESSES REGARDLESS OF LOCATION.

Continued on back cover

Tobacco Regulation Review

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to cigarettes were legitimate reasons underlying the legislation.

It is likely that this decision will encourage legislators around the country to take similar action, as there is significant and diverse support for banning internet and telephone tobacco sales.⁴ Tobacco control and public health advocates support such regulation because of the impact it can have on reducing adult smoking by requiring that consumers continue to pay high excise taxes and limiting youth access to tobacco. State fiscal agents support such legislation because of concerns about loss of excise and sales tax revenue since the attraction of most internet and

telephone tobacco sales is the lesser price due to lesser, or no, taxes. Many tobacco manufacturers support bans on internet tobacco sales because they find it difficult to regulate the sales practices of those elusive sellers and are concerned about diminished product quality tarnishing brand reputation. Certainly brick-and-mortar retailers, a significant force in American politics, support a ban that eliminates a source of competition. With the influential Second Circuit upholding New York's stringent law, legislatures across the country may feel more confident in passing legislation banning internet and telephone tobacco sales restrictions. In fact, Congress is considering a law that would address the loss of

tax revenue caused by internet tobacco sales by requiring such sellers to remit appropriate taxes on all sales, with civil and criminal penalties for violations.⁵ A national law or proliferation of state laws could end all internet and telephone tobacco sales, alleviating concerns about youth access and tax evasion.

¹ 320 F.3d 200 (2d Cir. 2003).

² New York Public Health Code, §1399-11.

³ Santa Fe Natural Tobacco Corp., Inc. v. Spitzer, 2001 WL 636441 (S.D.N.Y. June 8, 2001)(corrected opinion, unreported).

⁴ Two lawsuits have been filed challenging, again, the constitutionality of the New York law. The cases have been brought by the Online Tobacco Retailers Association, Indian tribes and disabled consumers. Tobacco Regulation Review will follow these cases and update as necessary.

⁵ HR 2824, sponsored by Representatives Mark Green (R-WI) and Martin Meehan (D-MA), was introduced July 24, 2003.