

Tobacco Regulation Review

University of Maryland School of Law
Legal Resource Center for Tobacco Regulation, Litigation & Advocacy
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FROM THE DIRECTOR

We hope that this issue of *Tobacco Regulation Review* finds you well in the New Year. The Center has been quite busy in the last several months assisting local health departments and individuals and preparing for the 2006 session of the General Assembly. While much has been accomplished in tobacco control in Maryland and across the country, there is still much work to be done to secure smokefree workplaces, reduce cigarette-caused fires and decrease tobacco consumption. Perhaps the biggest challenge to public health advocates is to stay focused and persevere despite competing demands for their time and resources. By providing technical legal assistance, the Center helps the public health community stay the course.

We welcome to the Center Megan McDonald, our new Administrative Assistant. Megan will monitor tobacco legislation during the 2006 session and assist us in keeping you informed.

Kathleen Hoke Dachille
Center Director

CENTER AND TASK FORCE ASSIST TENANTS AND CONDO OWNERS ELIMINATE SECONDHAND SMOKE

Secondhand smoke knows no boundaries and can be insidious and overwhelming when drifting from one apartment or condo unit into another. Seepage of tobacco smoke readily occurs through light fixtures, common walls, ventilation systems, and crawl spaces. Tenants or condo owners troubled by secondhand smoke drift are not without rights, however. Nor are landlords helpless to stop such problems, whether as to a particular unit or floor or to an entire building. Tobacco-focused public health advocates around the country are working to educate tenants and landlords about their rights and obligations with respect to smoking and secondhand smoke drift. In fact, the Center frequently responds to inquiries from tenants or condo owners troubled by secondhand smoke, providing advice on negotiating with a landlord or talking persuasively with the offending neighbor. Because the problem occurs so frequently, the Center is in the process of preparing educational materials for tenants, landlords and condominium associations and owners. This article summarizes the legal issues to be addressed in the materials.

The Legal Landscape

Tenants' Rights

In most states, including Maryland, a tenant has the right to enjoy leased property without undue or unreasonable interference by others.¹ A tenant suffering from secondhand smoke drifting from an adjacent unit may have a cause of action against the offending neighbor, the landlord, or both. The most likely claims are for nuisance or breach of the implied covenant of quiet enjoyment.

A private nuisance is "a nontrespassory invasion of another's interest in the private use and enjoyment of land."² To be actionable, the interference must "diminish materially the value of the property ... and seriously interfere with the ordinary comfort and enjoyment of it."³ Further, the actions constituting the nuisance must be continuous; rarely will one occurrence of interference be actionable. Typical nuisance claims concern loud noises, such as the playing of music or operation of heavy machinery; drifting smoke or odor, such as from a factory or agricultural operation; or the physical shaking of a building, such as from underground

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blasting or other construction work. Certainly the housing of loud and malodorous pets, the failure to maintain cleanliness resulting in pests, or the frequent hosting of raucous parties could constitute an actionable nuisance in the multi-unit dwelling scenario. Such actions may create a nuisance even if the underlying conduct is lawful.

Although Maryland courts have not addressed the issue, and there is a dearth of reported decisions across the country, “a cause of action for private nuisance may be ideally suited to address situations where smoking conduct by one resident unreasonably interferes with another resident’s use and enjoyment of an apartment or condominium unit.”⁴ Drifting smoke causes a variety of injuries cognizable in a nuisance action: foul odor on furniture, carpeting, clothing, and hair; irritation of the eyes and throat; aggravation of respiratory ailments; and increased risk of cancer and other diseases. Therefore, tenants or condo dwellers may consider a nuisance claim, through which injunctive relief requiring “abatement of the nuisance,” or stopping the smoking, may be awarded.

A nuisance claim may be filed against the offending neighbor, the landlord, or both. To assert a claim against the landlord, however, a tenant must show that the landlord had knowledge or notice of the offending conduct and the harm to the

complaining tenant, had the authority to act, and failed to stop the harm.⁵

Another potential claim that may be made against a landlord is for breach of the covenant of quiet enjoyment. This covenant protects a tenant’s right to use the property free from unreasonable interference by the landlord or other tenants.⁶ Again, although no cases directly address smoke drift in the multi-unit dwelling context, such a claim is consistent with the principles surrounding the covenant. A tenant may seek injunctive relief to stop the smoking, the breach. More likely, though, a tenant would use such a claim in defense to a landlord’s action charging the tenant with breaching the lease by abandoning the premises.⁷

Landlords’ Rights

Landlords have the legal right to prohibit smoking on their leased property—whether in common areas or residential units. Because there is no right to smoke⁸ and because landlords have the right to control their property, instituting a no-smoking policy is certainly within a landlord’s power.⁹ Such a policy could be instituted and enforced no differently than a policy that prohibits pets, water beds, loud music, and the like. In fact, the Department of Justice has advised that landlords participating in the federal government’s “Section 8” housing are

authorized to ban smoking in such housing.¹⁰ Further, landlords should be persuaded to create smokefree apartments because of the potential liability to non-smokers, the cost of clean-up of a smokers’ apartment and the fire risk associated with smoking tenants.

The Task Force

The pioneer of smoke-free apartments is Jim Bergman, Co-Director of the Smoke-Free Environments Law Project (SFELP) in Michigan. The SFELP website, www.mismokefreeapartment.org, contains extensive information to assist tenants concerned about secondhand smoke drift and landlords hoping to establish smokefree buildings. As Jim became aware of other advocates working on these issues across the country, he created a Smoke Free Housing Listserv, through which members can seek advice, share information, or brainstorm. Members comprise the National Smoke-Free Housing Task Force and are geographically diverse, representing Michigan, California, Minnesota, Washington, Maine, New Jersey, Wisconsin, Texas, Utah, Oregon, Ohio, British Columbia, and Maryland.

As the fledgling Task Force takes shape, we expect to accomplish the goal of securing smokefree living for

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MARYLAND HAPPENINGS

PRINCE GEORGE'S SMOKING BAN PASSES UNANIMOUSLY

Following the successes of smoking bans in Montgomery and Talbot Counties, the Prince George's County Council voted unanimously to extend the protections of smokefree workplaces to bars and restaurants. Councilman Doug Peters, who introduced the legislation, stated that "the public's health is paramount" before casting his vote. With County Executive Jack B. Johnson's signing of the bill, Prince George's County becomes the third Maryland County to prohibit smoking in public places.

Council members Bland, Campos, Dean, Dernoga, Exum, Harrington, and Knotts joined lead sponsor Peters as co-sponsors of the bill. Entering the November 8 hearing, Councilman Thomas Hendershot was the only council member who had not sponsored the legislation. After public testimony, each councilman took time to speak on the record before the vote. It was clear from numerous comments that the public health benefits of the legislation outweighed speculative economic considerations. Before unanimously passing the bill, however, the Council stated its intention to revisit the legislation in 18 months to determine whether bars or restaurants suffered significant economic harm due to the smokefree policy.

As originally drafted, the bill exempted only those workplaces which were private clubs serving alcoholic beverages. Before passage, an amendment was offered and accepted adding an exemption for FedEx Field. This change will allow the owners of FedEx Field to continue their current policy of allowing smoking in one cigar bar within the stadium during stadium events.

The law, which will take effect in January 2006, requires a bar or restaurant owner to refuse to seat or serve anyone who smokes in a prohibited place. Owners who continue to serve those violating the law may be fined up to \$1,000. The law also imposes a fine of \$200 on anyone who refuses to comply with a request to cease smoking.

SECOND ANNUAL LATINO TOBACCO CONTROL SUMMIT

The Maryland Hispanic/Latino Tobacco Control Coalition hosted the Second Annual Hispanic/Latino Tobacco Control Summit on June 22nd at Crusader Lutheran Church in Rockville, Maryland. The Summit provided an opportunity for national, state and local public health advocates to focus on special issues that impact the Hispanic/Latino community. This year's Summit, entitled "Mobilizing the Latino Community Against Tobacco," complemented the Coalition's purpose: "[T]o identify the best practices to educate current and future generations of Hispanics/Latinos about the dangers of tobacco use and secondhand smoke exposure."

To that end, the Summit featured speakers who told of the negative health consequences of smoking, the marketing of tobacco products to Latinos and the most effective methods of communication within the community.

During her opening remarks, Dr. Sonia Fierro-Luperini, the Multicultural Outreach Coordinator for Morgan State University, told of the health problems faced by Latinos and how increasing usage of tobacco has deepened and expanded those problems. Dr. Ana Navas-Acien, a researcher for the Johns Hopkins Bloomberg School of Public Health, continued the discussion with her presentation providing statistics on smoking prevalence in the Hispanic/Latino

community. Dr. Navas-Acien also demonstrated how the community is affected by exposure to secondhand smoke at home and at work. The disappointing reality is that as Latino and Hispanic families integrate into American culture, smoking prevalence and exposure to secondhand smoke increase, particularly among youth and women.

One explanation for – or outcome of – this phenomenon is the surge in marketing of tobacco products to the Hispanic and Latino community. Deputy Executive Director and National Network Project Director for the Latino Council on Alcohol and Tobacco, Alejandro García-Barbón, stunned Summit participants with his presentation detailing the tobacco industry's tactics to attract Latino/Hispanic consumers. Many of the advertisements used traditional themes – sex, rebellion, independence – to market the product, but used Latinas as the sexy, independent smokers. Other ads employed traditional Hispanic religious symbols to market deadly tobacco products. These Hispanic/Latino-focused ads increasingly appear in Spanish-language magazines and in stores in Hispanic/Latino communities. Unfortunately, many in the community succumb to the enticement as Hispanic/Latino smoking prevalence increases.

To combat the marketing and the increased usage, Latinos for

Progress has designed a door-to-door tobacco education outreach program. Dr. Fabian Forero, Outreach Director for Latinos for Progress, described to Summit attendees how and why the program works. Key elements of the program include:

- Employing the church community as a place to educate and organize Hispanics/Latinos about tobacco – because churches are central in the Hispanic/Latino community;
- Training Hispanic/Latino youth to serve as peer educators – because kids listen to kid educators;
- Using Spanish-language materials to explain to parents why smoking and exposure to secondhand smoke is harmful – because many new immigrants do not know the facts.

Likewise, Deva Dwarka, Executive Director of Latinos for Progress, outlined the Best Practices for an effective, comprehensive tobacco control program in the Hispanic/Latino community. Mr. Dwarka explained some of the cultural reasons that Latinos smoke, those brought from the “old” home (i.e., machismo) and those resulting from integration in America (i.e., women’s independence). Only when understanding the reasons why Hispanics/Latinos smoke can one effectively assist in cessation.

Juan Carlos Ruiz of Casa de Maryland spoke to Summit

participants about strategies for empowering the Hispanic/Latino community to speak out against tobacco and to support public health measures. This discussion of empowerment served as an excellent transition into three break-out discussions:

- Grant Writing 101 in which Center Director Dacheille explained how to prepare a responsive and effective grant proposal.
- Partnering with the Faith-based Community in which Mr. Dwarka explained in detail how churches can be used to educate and unite the Hispanic/Latino community.
- Latino Community as One-Voice in which Center Managing Attorney Strande explained how a community can identify a public health problem; build bridges between similarly focused groups and entities; create a network; and effectuate change in the community.

Summit participants gathered a significant amount of information about how tobacco use and exposure to secondhand smoke have increased to the detriment of the Hispanic/Latino community. More importantly, however, the participants left with a keen understanding of how the problem developed, why it persists and how it can be addressed in the community.

PRINCE GEORGE'S PRAISES RESPONSIBLE RETAILERS

Although he spends much of his time issuing citations to retailers who sell cigarettes to minors, on June 23, 2005, Ron Salisbury was delighted to recognize responsible retailers who do not sell cigarettes to minors. Salisbury, Chief Investigator of the Prince George's County Tobacco Control Program, organized an awards ceremony to thank the fourteen retailers who refused to sell cigarettes to the County's undercover minors 4 times over 2 years.

Tobacco Control Program Chief, Gordon Barrow, opened the ceremony with praise for both Ron and the successful retailers. Candice Cason, Director of the Division of Addictions and Mental Health for the County, echoed the praise, explaining why preventing youth smoking is an important part of the County's comprehensive program to reduce drug use and improve public health. Other dignitaries offered kudos to Salisbury and the

retailers. Center Director, Kathleen Dachille, and Managing Attorney, Michael Strande, participated in the event, commending the retailers and their employees and handing out awards.

Each honoree was given a Certificate of Appreciation and Accomplishment from the County Health Department as well as the State Comptroller's Office, which has regulatory authority over tobacco retailer licensees. A hardy round of applause from all in attendance, which included officers from several local police departments, accompanied the awards. "We are proud of these retailers who understand the importance of not selling tobacco to minors," commented Salisbury. "Our goal is to give out triple the number of awards at our next ceremony."

Responsible Prince George's Retailers

Astor Liquors

CVS Pharmacy (Campus Way and Domer Avenue)

Giant Food (Campus Way and Fairlawn Street)

Laurel Park Shell

JB Liquors

Sunoco Gas of Laurel

Laurel Meat Market

Cork and Bottle Liquors

Marlboro Country Liquors

Highs (Sandy Spring Road)

Largo Liquors

Eckerd Drugs (Silver Hill)

2005 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 General Assembly session. This section presents information about recently enacted tobacco control laws as well as bills which were introduced, but failed to gain passage.

Each January the Maryland General Assembly convenes for 90 days to act on more than 2300 bills. While partisan bickering often rears its head at some point, this year's session began in a more cantankerous fashion than usual. By the official opening of session on January 12, legislators had already endured a special session called by the Governor to consider medical malpractice, voted to override the Governor's veto of a number of bills, and listened to numerous calls for civility. Despite the rocky start, state legislators and local advocates came together to introduce and support some important tobacco control bills. The following is a brief summary of each and its ultimate disposition.

Senate Bill 127/House Bill 148– Budget Reconciliation Act of 2005. For the third year in a row, the budget bill contained a provision designed to divert money from the Cigarette Restitution Fund permanently. The bill eliminated codified language requiring that \$21 million be allocated for the

State's tobacco control program annually. While the FY06 operating budget allocates only \$10 million (the third consecutive year of reductions), the \$21 million mandate remains intact for subsequent years. Therefore, the Governor must specifically ask permission from the General Assembly to fund less than the mandate in any given year.

Senate Bill 332/House Bill 428 – Clean Indoor Air Act of 2005. For the third year in a row Senator Ida Ruben and Delegate Brabara Frush introduced these bills, designed to close the loophole in current law which allows smoking in enclosed bars and restaurants. The crossfiled bills, as amended during session, exempted tobacconist establishments (stores that primarily sell tobacco products), music or theater performances, up to 25 percent of motel or hotel rooms, and private residences not used for business purposes. Smoking was prohibited in all other indoor public places. The bills failed in both the Senate Finance Committee (on a 5 to 5 vote with the tie breaker vote abstaining) and in the House Health and Government Operations Committee (on an 11 to 12 vote). Despite failing in their respective committees, the bills picked up a number of votes and came closer to passage than ever. A similar bill will

be introduced in the upcoming 2006 session, with certain key legislators announcing they will reconsider their votes at that time.

Senate Bill 546 – Cigarette Direct Sales and Shipping. This bill prohibits retailers from shipping cigarettes to a consumer who purchases cigarettes via telephone, computer, or other electronic network, while providing an exception allowing personal delivery of up to 2 cartons of cigarettes by a retailer or its employee. The bill was drafted to address youth access concerns, consumer protection issues, and lost tobacco tax revenue. Testimony from the Attorney General's Office explained that pursuant to existing laws, internet cigarette sales are illegal in Maryland but that reaching that conclusion requires the analysis of several different sections of the code. The bill was designed to clarify that prohibition, give clear notice of the ban to retailers, and provide the Attorney General and Comptroller new enforcement powers. This bill was a rare collaborative effort between the Maryland Retailer's Association, the Attorney General, the Comptroller, and public health advocates. With support from all of these groups, the bill easily passed through the House and Senate and was signed into law by the Governor.

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Senate Bill 861/House Bill 1258 – Penalties for Youth Possession of Tobacco. This bill would have required the imposition of certain monetary penalties and attendance at an approved cessation class for all minors cited for possessing or using tobacco, as prohibited by Section 10-108 of the Criminal Law Article. The mandated penalties would have removed some of the juvenile courts' discretion when crafting penalties for youth possession violations. The bill failed in the House Judiciary Committee and was withdrawn in the Senate prior to a vote by the Judicial Proceedings Committee. While there has been no firm decision on whether this bill will be re-introduced in the 2006 session, it is clear that there is growing concern among legislators about the effectiveness of the current penalty system.

House Bill 303 – Mandated Cessation Benefits. This bill, introduced and driven by Delegate Dan Morhaim, required health insurers to provide coverage annually for two 90-day cycles of prescription tobacco cessation drugs. In its original form, the bill had also required coverage for over-the-counter nicotine replacement therapy and two doctor's visits for cessation treatment each year. Coverage for nicotine-replacement therapy and the doctor's visits was removed as part of a compromise negotiated to help the bill gain passage. Ultimately, the amended bill

was passed by both the House and the Senate and was signed into law. While only bupropion, commonly marketed as Zyban and Wellbutrin, currently meet the coverage requirement, a host of new prescription cessation drugs are in varying stages of FDA review and are likely to come to market in the near future. The new mandate is poised to provide a significant benefit to current smokers and likely to save the state millions in future health care costs, as mandated cessation benefits have been shown to be among the most cost effective preventative measures.

House Bill 546 – Tobacco License Suspension and Revocation Authority. This bill would have clarified the Comptroller's authority to suspend or revoke the tobacco retailer's license of any retailer who sells tobacco to a minor. The sale of tobacco to a minor is illegal under the Criminal Law Article of the Maryland Code. The Legal Resource Center and the Attorney General have long opined that a violation of tobacco sales laws is sufficient justification to bring an administrative suspension/revocation hearing against tobacco retailers under the Comptroller's powers provided in Title 16 of the Business Regulations Article. This bill, supported by both the Attorney General and the Comptroller, was intended to clarify this authority and give clear notice to retailers of the

possibility of license suspension for illegal tobacco sales. Amendments were offered to the bill that would have made license suspension or revocation a possibility only after a retailer was convicted of selling to a minor three or more times within a two year period. The bill failed in the House Economic Matters Committee on a 13 to 8 vote without regard to the reasonable compromise. Despite the failure of the legislation, the Comptroller has begun to look at individual cases in which stores have repeatedly sold tobacco to minors, vowing to initiate license suspension proceedings against retailers whose activities warrant such action.

House Bill 639 – Supersedeas Bonds Limitation. This bill reduced the amount of a bond a party appealing a civil judgment must post. Currently, the law requires a party to post the full amount of any judgment prior to appeal, unless reduced by the presiding judge at his discretion. This bill set the maximum bond amount at \$25 million, regardless of the amount of the judgment. The bill, driven by the tobacco industry and other large businesses as protection from sizable bonds, was defeated in the House Judiciary Committee (on a 12 to 9 vote). This is the second consecutive year the legislation has been defeated, leaving Maryland as one of a few states without a cap on appeals bonds.

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INSIDE THE CENTER

WORKSHOP REVIEWS SUCCESSES AND FAILURES OF 2005 SESSION IN PREPARATION FOR 2006

Attorneys, lobbyists, legislative staff, and public health advocates representing statewide interests and 12 local jurisdictions gathered at the University of Maryland School of Law to participate in a workshop intended to clarify recent changes to State tobacco control laws and prepare advocates for issues that will be debated during the 2006 General Assembly session. As a result, participants readied themselves for the implementation of new tobacco control laws, learned valuable lessons from the successes of the previous legislative session, and developed strategies to help achieve passage of bills that will be introduced in 2006.

In early June, the Center for Tobacco Regulation hosted a workshop to bring together the State's diverse tobacco control community for a review of the 2005 General Assembly session and a preview of bills expected to be introduced in 2006. After a General Assembly session that included debate on more than 10 tobacco control bills, a number of which covered complex topics, a review of recently enacted legislation would assist program coordinators and enforcement agents dealing with the new laws. In addition, the gathering

would provide an opportunity to preview legislation slated for introduction in 2006, allowing advocates to strategize and plan for the coordination of activities designed to gain passage of anticipated bills. The workshop concept was well-received, attracting more than 30 participants. Attendees included representatives from 12 local health departments, the Department of Legislative Services, the State's Office of Health Promotion, Education and Tobacco Use Prevention, and public health advocacy organizations.

The workshop opened with a review of the past year's major tobacco control bills. Participants were provided with packets containing the text of those bills. Center Director, Kathleen Dacheille, and Managing Attorney, Michael Strande, reviewed each bill, explaining the bill's effect on current law, highlights from committee hearings, and the ultimate disposition. A question-and-answer period allowed attendees to understand the implications of each bill so that those affected would be prepared when the bills became effective October 1, 2005.

In addition, the opening review set the stage for the preview and planning session by covering the 2005 bills that failed to gain passage but will likely resurface in 2006. Naturally,

this sparked comprehensive discussion about why the bills failed, what improvements could be made in the bills and the supporting strategies, and how to best address concerns that caused specific legislators to vote against a particular bill. With failed bills like the Clean Indoor Air Act and the Fire Safe Cigarettes bill certain to be re-introduced, the discussion flowed smoothly into the 2006 session preview portion of the workshop. Although not as certain to be introduced in 2006, strengthening penalties for youth possession and prohibiting the sale of candy-flavored cigarettes were also discussed during the preview session.

After the group had brainstormed activities to support anticipated legislation, Strande provided a brief review of state law regulating lobbying. When advising state and county employees and non-profit organizations during the course of its normal activities, the Center has often encountered employees with serious misgivings about becoming too involved in the support of bills being debated in the state legislature. This hesitation stems from concern about violating the State's lobbying restrictions. However, these groups wrongly presume many permissible activities are out-of-bounds. Strande explained the difference between providing education (which is always permitted)

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and lobbying (which is sometimes restricted). He also explained what lobbying activities, such as testifying in support of a bill, are permitted within the State regulations. While lobbying restrictions may continue to keep state and county employees and non-profit groups away from certain activities, the discussion helped clarify which activities these groups could participate in without running afoul of the law.

After a half day of discussion, the workshop concluded with lunch and an open-mic update, allowing the representatives of each county or organization to describe their recent tobacco control work. This not only helped some of the geographically isolated groups understand what was happening across the State, but allowed for a sharing of best practices by those who had worked through similar scenarios. Based on attendee feedback, the workshop served its purpose. By reviewing the past, participants are sure to avoid the mistakes and pitfalls of prior legislative attempts, and by thinking about the future, participants will be better prepared to support adequately their legislative priorities in what is sure to be a whirlwind 90 day legislative session in 2006.

TCLC PUBLISHES CENTER'S LAW SYNOPSIS

The Tobacco Control Legal Consortium (TCLC) publishes Law Synopsis papers on various tobacco control issues. The publications are designed to assist attorneys, public health advocates and lay people understand legal issues in tobacco control and apply the law to a case or circumstance. In June 2005, TCLC published

"Secondhand Smoke and the Family Courts: The Role of Smoke Exposure in Custody and Visitation Decisions"

written by Center Director Kathleen Dachille and Research Fellow Kris Callahan.

The authors collected and analyzed published cases in which parental smoking was a consideration for a judge in crafting a custody or visitation order. Acknowledging that family law cases almost always involve numerous issues and are fact-intensive, Dachille and Callahan offer suggestions on how, when and why to raise parental smoking in such a case. Privacy and other frequently raised claims are addressed. The Synopsis is available at www.tclonline.org.



STUDENT PRESENTS AT PUBLIC HEALTH LAW CONFERENCE



Second year law student, Brooke Courtney, wrote an excellent paper for the Fall 2004 Tobacco and the Law Seminar taught by Center Director Dachille. The Centers for Disease Control agreed with Dachille's assessment of Brooke's paper when it accepted the paper for presentation at the 2005 Public Health Law Conference in Atlanta. In June, Brooke presented her paper, "Is Obesity Really the Next Tobacco? Lessons from Tobacco for Obesity Litigation" during a poster session, fielding many questions and requests for a copy of the paper. Those interested in the paper will not have trouble accessing a copy as the article was recently published in the winter edition of the *Annals of Health Law*. Congratulations Brooke!

NATIONAL NEWS

2005 NATIONAL CONFERENCE FOCUSES ON FUTURE

With a focus on tobacco control in the decade ahead, the 2005 National Conference on Tobacco or Health brought together advocates, scientists, attorneys and national, state and local government employees for an information-packed three days. Held in Chicago on May 4-6, the Conference was entitled: "Turning Point: Challenges and Opportunities in Tobacco Control in the Next Decade." Acting Director of the Centers for Disease Control and Prevention's Office on Smoking and Health, Dr. Corinne Husten, acknowledged "that there will continue to be daunting obstacles related to economics, changes in policies, and other significant factors" but encouraged attendees to forge bonds and "continue to persevere and make progress."¹

The Center for Tobacco Regulation again played a role in this annual event. Center Director, Kathleen Dachille, participated in a panel discussion entitled "States' Responsibility for Children's Exposure to ETS: Guardianship/Custody" with Chris Bostic, General Counsel for Action on Smoking and Health, and Richard Barnes, Staff Counsel, Center for Tobacco Control Research and Education. Panel members addressed when and how a state court should impose smoking

restrictions on parents or guardians who appear in court in divorce, custody, visitation or abuse/neglect proceedings.² The panel also described successful efforts in Oklahoma and Maine to gain promulgation of regulations requiring that foster parents protect children from exposure to secondhand smoke.

Reaction from the audience confirmed that the issue of children's exposure to secondhand smoke is of vital importance and will be an ever-present theme of state and local tobacco control efforts in the future. Dachille provided participants with a sample Motion to Take Judicial Notice that could be used in a custody or visitation case to request that the judge acknowledge the scientific and medical research proving that secondhand smoke is harmful to a child's health. This simple, yet effective, motion could be used to place an issue before a judge in a professional and non-confrontational manner in a custody or visitation case in which emotions run high. Participants also received Bostic's comprehensive petition that can be used to persuade state foster care agencies to adopt rules or regulations protecting foster children from exposure to secondhand smoke. Dachille and Bostic have used that petition in Maryland and will continue

their efforts to secure smokefree foster homes. Lessons learned from Barnes' experience in achieving success in Oklahoma undoubtedly will help in the Maryland efforts and in all states.

Another youth-focused issue served as the theme for the Center's poster presentation: "Flavored Tobacco: Like Giving Candy to a Baby." Then third-year student, Devorah Pasternak, created an eye-catching poster and an informative handout describing how tobacco companies have started to entice minors to begin using tobacco by marketing kid-friendly flavors. Flavors include wild cherry, berry blend, strawberry, mocha mint, orange, green apple, and many more. Flavored cigarettes, small cigars and chewing tobacco are attractive to youth and serve as a gateway to use of and addiction to traditional tobacco products. With its creative design and interesting issue, the poster was quite popular among attendees and Pasternak answered many questions and handed out dozens of brochures. In response to the poster presentation, the Center received many inquiries from tobacco control advocates from across the country, sending out copies of a substantial report on the topic³ and agreeing to speak on the issue at a statewide conference in New York.

CALIFORNIA AG SUES U.S. SMOKELESS TOBACCO COMPANY

Alleging a variety of violations of the Smokeless Tobacco Master Settlement Agreement (STMSA),¹ California Attorney General, Bill Lockyer, filed suit against U.S. Smokeless Tobacco Company (UST) on July 27, 2005. UST is the maker of Skoal, the most popular brand of moist chewing tobacco among young adults and teens. Advertisements for Skoal blanketed the guardrails, public address system and video megascreen at National Hot Rod Association (NHRA) Drag Racing Series events in 2004 and 2005. Some events featured drag racers displaying the Skoal brand name and the distribution of t-shirts, hats and other merchandise bearing the Skoal brand name. As a part of the NHRA Series, drivers 8-17 years old participated in the Junior Drag Racing League events.

The nineteen-page Complaint details the allegations against UST, explaining that despite significant efforts, a compromise or settlement could not be reached. Attorney General Lockyer alleges that the

Skoal sponsorship of the NHRA Drag Racing Series constitutes more than one brand-sponsored event as allowed by the STMSA. The remaining allegations arise out of that central allegation as the use of outdoor advertising and brand merchandise is limited to the one permitted event. Because the STMSA prohibits “any Brand Name



Sponsorship [of] events in which any paid participants or contestants are youth,” UST’s promotion of Skoal during

the NHRA Junior Drag Racing league events allegedly violated the STMSA.

Although monetary damages and sanctions are sought, it is evident that Attorney General Lockyer’s main goal is to have UST’s promotion of Skoal at NHRA events declared to be in violation of the STMSA and the practice stopped. Given the increasing popularity of racing and the presence of youth participants at some events, the continuing presence of Skoal advertising at NHRA events

undermines the STMSA and contributes to the troublesome increase in youth use of smokeless tobacco. The Center for Tobacco Regulation will track this case and keep readers apprised of the progress in future issues.²

(Reference)

¹ A copy of the STMSA can be found at www.naag.org/issues/tobacco.

² The following states participated in negotiations with UST on this issue: Alaska, Arizona, Arkansas, Connecticut, Georgia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Michigan, Montana, Nevada, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, West Virginia, and Wisconsin.

Recently, Tennessee Attorney General Paul Summers persuaded country-singer Gretchen Wilson to refrain from displaying a tin of Skoal when playing her song “Skoal Ring” at concerts.

VERMONT SUES R.J. REYNOLDS OVER ECLIPSE MARKETING

After a lengthy, document-laden investigation that lasted more than a year and called on resources from ten states, Vermont Attorney General William Sorrell filed suit in July against R.J. Reynolds Tobacco Company (RJR) based on the marketing and advertising of Eclipse brand cigarettes. Since 2000, RJR has marketed a so-called reduced risk cigarette named Eclipse.

Advertisements for Eclipse cigarettes contain unsubstantiated, misleading and deceptive statements, according to the Vermont suit. Such statements include:

“A better way to smoke. The best choice for smokers who worry about their health is to quit. Eclipse is the next best choice.”

“Discover the difference. A cigarette that may present less risk of cancer, bronchitis and possibly emphysema.”

“A cigarette that responds to concerns about certain smoking-related illnesses. Including cancer.”

For more complete information on the marketing of Eclipse, visit www.eclipse.rjrt.com.

Although the July lawsuit was filed only in Vermont, many states assisted in the investigation and will continue to provide legal resources in support of the Vermont lawsuit. States supporting Vermont include California, Connecticut, District of Columbia, Idaho, Illinois, Iowa,

Maine, Maryland, New York, and Tennessee. Center Director Kathleen Dachille has been appointed as a Special Assistant to the Attorney General of Maryland to assist in the Eclipse suit.

The lawsuit alleges that the marketing and advertising of Eclipse comprise unfair and deceptive acts



in violation of Vermont's Consumer Fraud Statute (9 V.S.A. §2453). Most states' consumer protection statutes are substantially similar to Vermont's law. The suit also alleges that the marketing and advertising of Eclipse violates the Master Settlement Agreement (MSA), particularly §III(r), which prohibits RJR from making material misrepresentations of fact regarding the health consequences of using a tobacco product. All states signed the MSA and could make similar claims against RJR under this provision. Attorney General Sorrell alleges that smokers may be discouraged from quitting, and rather will switch to smoking Eclipse, after reading the Eclipse claims. Similarly, those who have successfully quit smoking may be lured into resuming

the deadly habit because of the misleading and deceptive statements about the potential reduced harm in smoking Eclipse. Further, non-smokers may be enticed to begin smoking because they wrongly believe the Eclipse product is a safe choice.

The health consequences suffered by any such individuals, whether current smokers, former smokers or non-smokers, constitute significant damage and give rise to a public interest in pursuing the claims against RJR. The claims in this suit are similar to those made in many suits regarding the marketing, advertising and sale of “light” cigarettes. “Thirty years after the tobacco companies made ‘light’ cigarettes leading sellers by promising smokers a healthier alternative to ‘regular’ cigarettes, we now know these light brands weren’t any healthier at all,” said Attorney General Sorrell.

To prevent future harm, compensate for prior harm, and punish RJR for its violations of law and agreement, injunctive and monetary relief is sought. Attorney General Sorrell requests that the court issue an injunction requiring RJR to stop making health claims regarding Eclipse unless the company has competent, scientific support for the claims. Based on the

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investigation, the Vermont Attorney General has concluded that such support does not exist at this time. Vermont also seeks monetary sanctions, civil penalties (\$10,000 per violation of the Consumer Fraud Statute) and the cost of the investigation and lawsuit born by the Vermont Attorney General. As explained by Attorney General Sorrell in the press release announcing the lawsuit, the State has no opposition to a responsibly marketed, truly reduced-harm product, but that strong proof of any health claims must exist prior to the marketing and sale of any such product: "We encourage the tobacco companies to develop less harmful tobacco products, but until they do – and until they can scientifically demonstrate that new cigarette designs will reduce the risks of smoking – we cannot tolerate misleading health claims about any cigarette product."

DHL WILL NOT DELIVER CIGARETTES TO INDIVIDUAL CONSUMERS

As we explain in the Legislative Wrap-Up (p. 7), the Maryland General Assembly passed a bill that prohibits internet, phone and direct mail cigarette sales. In our Spring 2005 newsletter, we reported that major credit card companies agreed to prohibit the use of their cards for the purchase of tobacco over the internet. On July 5, 2005, the first major shipper, DHL, joined this effort by agreeing to stop delivering cigarettes to individual consumers.

DHL entered into an agreement with the Bureau of Alcohol, Tobacco and Firearms and the Attorney General of New York, Eliot Spitzer, after learning that through internet sales, most of which are unlawful, states lose more than \$1 billion in tax revenue and that such sales are often to minors who are not required to provide age verification to make the purchase. The federal agency and Attorneys General across the country will continue to work with other shipping companies to secure similar agreements.

CENTER WELCOMES MEGAN McDONALD

In September, the Center welcomed a new Administrative Assistant, Megan McDonald. Megan is a 2005 graduate of Susquehanna University in Selinsgrove, Pennsylvania. Graduating with cum laude honors, Megan received her Bachelor of Arts in Political Science and International Studies. Megan has already put to good use her research and organizational skills to assist the Center.

Megan is a Maryland native, enjoys reading and is an avid sports fan, making her a natural fit for the Center. When not cheering on the home team



or deep into a novel, Megan enjoys spending time with her younger siblings, Jared and Mallory, and celebrating her Irish heritage. Welcome Megan!

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those who need or desire such a lifestyle. Efforts vary across the country from education to litigation to legislation, but the goal is the same. Working together, we will be more effective in normalizing for landlords the concept of smokefree apartments and educating the public about the right to be free from unreasonable smoke drift.

Center staff are currently working on educational brochures for tenants and landlords and on identifying smokefree living opportunities throughout the state. The second phase of the project will involve educating condominium associations about how to protect owners from disputes concerning secondhand smoke drift. Publications and resources will be available on the Center website soon.

(References)

¹ The same is true of condominium owners. The discussion about the nuisance cause of action applies to condo owners. Additional claims for condo owners generally arise out of the by-laws and rules of the Condominium Association. Because by-laws and rules vary greatly, we do not discuss those claims here; rather, a case-by-case analysis is necessary.

² Restatement (Second) of Torts, §821D.

³ *Echard v. Kraft*, 159 Md. App. 110, 117 (2003); see also *Rosenblatt v. Exxon Company*, 335 Md. 58, 80 (1994). Although we cite Maryland cases, the principles are consistent with the law in a majority of states.

⁴ D. Ezra, "Get Your Ashes Out of My Living Room!": *Controlling Tobacco Smoke in Multi-Unit Residential Housing*, 54 RUTGERS L. REV. 135, 157 (2001).

⁵ See, e.g., *Gorman v. Sabo*, 210 Md. 155 (1956) (landlord liable for nuisance created by offending tenant because landlord failed to take action to stop offensive behavior of tenant); Restatement (Second) of Property, § 6.1.

⁶ See *Bocchini v. Gorn Management Co.*, 69 Md. App. 1,7 (1986); MD. REAL PROPERTY CODE §2-115 (2003).

⁷ Ezra, *supra* note 4, at 161-63.

⁸ For an excellent article on this point, see Samantha K. Graff, *There is No Constitutional Right to Smoke*, Tobacco Control Legal Consortium (July 2005) at www.tclconline.org.

⁹ Although remedial action due to a nuisance may be taken at any time, we recommend a landlord impose a smoking policy on lease renewals and with new leases.

¹⁰ Letter from Sheila Walker, Chief Counsel, HUD, Detroit Field Office (July 18, 2003), available at www.mismokefreeapartment.org/hudletter.pdf. Current renters must be "grandfathered" should such a policy change occur, however.

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House Bill 791 – Carroll and Garrett County Tobacco Display Prohibition. This bill eliminated self service tobacco displays in Carroll and Garrett Counties, two of eight Maryland counties with a Commissioner form of local government requiring the passage of specific local laws through the General Assembly. The bill required all stores to display and store tobacco so that only a store employee has access to the product. The bill exempted tobacconist establishments and liquor stores. Passed by both the House and the Senate and signed into law, this bill will help ensure that kids in Carroll and Garrett Counties have less access to tobacco. Studies show that kids are less likely to try to buy, less able to steal, and less likely to be sold tobacco when they are required to interact with a clerk prior to purchasing the product.

House Bill 1246 – Fire Safety Standards for Cigarettes. This bill would have required all cigarettes sold in Maryland to meet firesafety standards substantially similar to those established in New York. Currently, New York requires all cigarettes sold in that state to self-extinguish prior to burning their entire length if not actively smoked. This technology has been shown to help

reduce fires caused by unattended cigarettes left smoldering on combustible materials (see related story in *Tobacco Regulation Review* Volume 4 Issue 1, page 10). Despite the sponsorship of 23 Delegates, including a majority in the assigned committee, and an excellent hearing, the bill was withdrawn when Maryland's Fire Marshal requested that the effect of New York's law be studied prior to seeking substantially similar regulations. This bill will be re-introduced during the 2006 session.

Though some high profile tobacco bills were defeated in committee, public health advocates should be proud of the significant accomplishments achieved during the 2005 session. Tobacco control was a prominent issue, youth access to tobacco on the state and local level was addressed, and safety issues regarding cigarettes and tobacco smoke were seriously debated, adding positive momentum to the push for reduced ignition propensity cigarettes and extended workplace smoking protections. These and other accomplishments have enlightened the public about the need for further tobacco control initiatives and helped set the stage for further successes during the 2006 session.

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As is often the case, there were too many presentations and too little time to attend all of the informative sessions. By the end of the three-day Conference, attendees, including those from the Center, were educated about the new issues in tobacco control and had forged new partnerships to help in achieving success.

(Reference)

¹ Welcoming Remarks, Corrine Husten, M.D., M.P.H., Acting Director, Office on Smoking and Health, Centers for Disease Control and Prevention (May 2005).

² See article on p. 10 about the Center's new publication on this issue.

³ For a copy of the report entitled "Protecting Maryland Youth from Candy-Flavored Cigarettes and Smokeless Tobacco Products" go to www.umaryland.edu/specialty/tobacco/documents.asp.