

Tobacco Control: A State Perspective

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Although the November 1998 Master Settlement Agreement (MSA) was a victory for anti-tobacco forces, it left Big Tobacco unvanquished, shifting the battleground to individual states like Connecticut. Since 1998, I have focused my efforts in Connecticut on the key goals of preventing youths from starting to smoke, protecting non-smokers from the dangers of secondhand smoke, and treating tobacco addiction. The obstacles to these goals are no less frustrating and dismaying than before the MSA, however, with progress impeded by the enormous political and economic power of Big Tobacco.

A major frustration has been Connecticut's failure to use the \$3.6 billion tobacco settlement—with \$500 million already paid to the state—to fight tobacco. Our intent in suing Big Tobacco and creating the settlement was to use Big Tobacco's own money to fight tobacco through outreach and education that would stop children from beginning to smoke and through cessation programs and other treatment for people of all ages who are addicted to nicotine. Connecticut is virtually last among states in using settlement money to advance vital public health goals. Furthermore, the average age that people in Connecticut begin smoking is eleven, with sixty more children starting to smoke every day.

Our fight against secondhand smoke dates back to at least 1993. In that year, the Connecticut legislature banned smoking in municipal and state-owned buildings, grocery stores, and hospitals.¹ In spite of the compelling evidence regarding the dangers of secondhand smoke, the legislature attached a major limitation at the tobacco lobby's behest. Specifically, the legislature prohibited municipalities from regulating smoking in other public places, such as restaurants and bars. This preemption of local laws has been an obstacle to further progress against tobacco for almost ten years.

We now know that this preemption was a key element of Big Tobacco's strategy throughout the United States in the early to mid-1990s.² Big

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¹ See CONN. GEN. STAT. § 19a-342 (2002).

² See ROBIN HOBART, AM. MED. ASS'N, PREEMPTION: TAKING THE LOCAL OUT OF TOBACCO

Tobacco concluded that its best chance to fight the anti-tobacco movement was to ensure that the only legislative arena where legislation could be passed that would restrict smoking was at the state level, where Big Tobacco enjoys superior access and a strong track record of success.

In addition, and quite unfortunately, some restaurant and bar owners have supported this preemption of local regulation. Although these owners and their employees have much to gain from smoke-free workplaces, they fear business will drop if smoking is banned in their establishments. Furthermore, Big Tobacco has a long history of funding and supporting restaurant associations and other trade groups who oppose smoke-free legislation. While the owners' fears are understandable, they are in fact unjustified. Numerous studies confirm that no-smoking laws do not hurt revenues of restaurants and bars.³ In fact, there appears to be no objective evidence that these laws harm businesses. There is evidence, moreover, that smoke-free workplaces result in fewer work-related injury claims and fewer sick days.

In the face of this continuing and dismaying opposition to this basic public health measure, I have been proud to be a leader in a broad-based statewide coalition—Mobilize Against Tobacco for Children's Health (MATCH). MATCH's membership now includes 120 organizations, including the American Heart Association, the American Lung Association, the American Cancer Society, the American Academy of Pediatrics, the Connecticut Parent Teacher Association, the Connecticut Association of Directors of Health, major hospitals, and many others.

With MATCH in a leadership role, and with the strong support of the elected officials of many municipalities, we have continued the fight to end state preemption of local no-smoking ordinances—and we have made progress. Currently, more than one hundred of the 169 top, elected municipal officials in Connecticut support allowing towns to regulate exposure to secondhand smoke. In 2001, for the first time, the state Senate passed a bill to end preemption. Unfortunately, the leadership of Connecticut's House of Representatives did not put the bill to a vote in either 2001 or 2002, even though a majority of the House membership had indicated their support of the legislation. The fight will continue, but public health continues to suffer defeat by the power of Big Tobacco and legislative inertia.

CONTROL 5 (2002), *available at* http://www.ama-assn.org/ama/upload/mm/375/preemption_guide.pdf.

³ See CAMPAIGN FOR TOBACCO-FREE KIDS, SMOKE FREE RESTAURANT AND BAR LAWS DO NOT HARM BUSINESS (2001), *available at* <http://www.tobaccofreekids.org/research/factsheets/pdf/0144.pdf>.

In the key area of preventing smoking initiation by young people, we have been active on many fronts. There is strong evidence that people who do not start smoking as children probably never will. Of course, people who become addicted as children are rarely able to quit without help, and they and society suffer the severe health consequences. Children smoke largely because they are targeted by industry advertising and marketing. While this targeting may be increasingly subtle, its effectiveness is obvious in the appalling numbers of children who start smoking each year.

I expect that Connecticut will continue to join with other concerned states in bringing legal actions to fight tobacco advertising aimed at children. One recent important victory in this area was a decision by a superior court in California.⁴ In that case, Connecticut joined California and several other states in challenging cigarette advertising by R.J. Reynolds (RJR) that was placed in magazines that targeted young people. The plaintiffs alleged that RJR was violating a key provision of the 1998 MSA between the major tobacco manufacturers and forty-six states. The MSA states that one of its primary objectives is “to reduce Youth smoking,”⁵ and it provides that no signatory manufacturer “may take any action, directly or indirectly, to target Youth.”⁶ “Youth” is defined as those under the age of eighteen,⁷ the lowest minimum legal age for the purchase of cigarettes in the United States.

In his decision, Judge Ronald Prager concluded that RJR indirectly targeted youth in its print advertising program. Specifically, he ruled:

The evidence reveals that after it entered into the MSA, RJR made absolutely no changes to its advertising campaigns, failed to include the goal of reducing Youth exposure to tobacco advertising in its marketing plans and failed to take any actions to track whether or not it was meeting its professed goal of reducing Youth smoking. Further, while RJR made some changes to its marketing strategies in subsequent years, the changes were minimal and had little, if any, impact in reducing Youth exposure to its tobacco advertising. As a result, since the MSA was signed, RJR has exposed Youth to its tobacco advertising at levels very similar to those of targeted groups of adult smokers.⁸

The court penalized RJR in the amount of \$20 million, plus attorneys’

⁴ *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, No. GIC 764118, 2002 WL 1292994 (Cal. Super. Ct. June 6, 2002).

⁵ Master Settlement Agreement 2 (1998), *available at* <http://www.naag.org/issues/tobacco/index.php?smod=919>.

⁶ *Id.* at 15.

⁷ *Id.* at 13.

⁸ *R.J. Reynolds*, 2002 WL 1292994, at *1.

fees, and ordered it to take steps to measurably demonstrate that it had significantly reduced youth exposure to its print advertising. This case is a major success for everyone concerned about youth smoking, and Connecticut is prepared to join other states in similar efforts if evidence of illegal practices by tobacco manufacturers is found.

Last session, our legislature raised the state cigarette tax by fifty cents per pack, to a total of \$1.11 per pack. This tax increase should not only boost state revenues, but also cause a demonstrable decrease in smoking, especially among youth. In fact, according to the American Lung Association, “[t]here is general consensus among tobacco researchers that every 10 percent increase in the price of cigarettes decreases cigarette consumption by 4 percent in adults and by 7 percent in children.”⁹

However, higher taxes do not address a growing problem—increasing sales through mail order of cigarettes and tobacco products, especially over the Internet. These sales raise two profound concerns: uncontrolled youth access and evasion of state taxes. The access problem is obvious—many children have easy access to the Internet, and our investigations with the Connecticut Department of Revenue Services and the National Association of Attorneys General have shown that Internet tobacco sales outlets almost never make a meaningful effort to enforce age restrictions. In addition, these outlets generally neither sell properly taxed cigarettes nor properly report their sales to state taxing authorities. While it is unclear how many children are ordering cigarettes over the Internet, we know anecdotally how easily kids can purchase them. We also know that some illegal bulk Internet purchasers have made their untaxed purchases for the purpose of illegal resale, and those persons are likely to be just as willing to sell to minors as they are to break other laws.

My office has created a task force with the state’s Department of Revenue Services to attack this important problem. I am prepared to take whatever legal steps are necessary to see that these out-of-state operations do not continue to evade our laws. I will support broad congressional action to clamp down on illegal tobacco sales because this is clearly a national problem. Meanwhile, I have already begun to work with parcel delivery businesses that may be delivering untaxed cigarettes into our state to remind them of their legal obligations. I expect to receive their cooperation, but I will take legal action against both sellers and carriers if necessary.

Connecticut is also making progress in other ways in its continuing

⁹ AM. LUNG ASS’N, STATE LEGISLATIVE ACTIONS ON TOBACCO ISSUES: MIDTERM UPDATE 2 (Aug. 2002) (citing J. TAURAS ET AL., *IMPACTEEN, EFFECTS OF PRICE AND ACCESS LAWS ON TEENAGE SMOKING INITIATION: A NATIONAL LONGITUDINAL ANALYSIS* (2001)).

efforts to reduce children's access to tobacco. After lengthy negotiations and working with other states, Connecticut reached landmark agreements with certain major tobacco retailers, including ExxonMobil, Walgreens, and BPAmoco. Each of these businesses has agreed to take extensive voluntary steps to reduce the risk of tobacco sales to minors. All of these businesses will ban self-service tobacco displays, limit in-store advertising, and provide clear and clearly enforced rules for all staff about underage tobacco sales. These rules include clear instructions to every employee to require proof of age for all tobacco purchasers who appear to be under age twenty-seven, as well as clear disciplinary policies for violations. Perhaps most importantly, these businesses have agreed to institute compliance programs to continually test the efficacy of these policies by hiring independent companies to make unannounced visits to test compliance at all stores. These businesses have also agreed to take action against employees and managers who are not properly enforcing the law and company policy. These programs should be a significant step forward in reducing youth access to tobacco, and I will continue to press for similar agreements with other retailers.

In contrast to this progress, Connecticut's record of spending funds from the MSA has been abysmal. A national report from the Campaign for Tobacco-Free Kids ranked Connecticut forty-fifth out of fifty states and the District of Columbia in using this money to protect children from tobacco addiction and disease.¹⁰ The report also gave Connecticut the dubious distinction of being "by far the worst state in New England in funding tobacco prevention."¹¹ In addition, the report lists Connecticut as one of the ten most disappointing states of 2001 in its allocation of funds for tobacco prevention and cessation programs.¹²

As of January 2003, Connecticut has received approximately \$534 million in tobacco settlement funds, averaging over \$133 million per year. The 2002-2003 budget recently approved by the Legislature and signed by the Governor, however, provides a total of barely \$125,000 for tobacco prevention, a reduction from \$1 million in 2001 and \$4 million in 2000.¹³ In contrast, the Centers for Disease Control and Prevention (CDC) recommends that effective annual tobacco control spending for

¹⁰ CAMPAIGN FOR TOBACCO-FREE KIDS ET AL., SHOW US THE MONEY: AN UPDATE ON THE STATES' ALLOCATION OF THE TOBACCO SETTLEMENT DOLLARS vi (2002), available at <http://www.tobaccofreekids.org/reports/settlements/2002/fullreport.pdf>.

¹¹ *Id.*

¹² *Id.*

¹³ 2003 Conn. Pub. Acts. 03-02 §§ 1, 4.

Connecticut be in the range of \$21 to \$54 million.¹⁴ The continued failure of Connecticut's governor and legislature to spend any significant portion of the tobacco settlement for its intended purpose—tobacco control and prevention—has been extremely disappointing for anti-tobacco forces.

Finally, the states alone will never be able to accomplish all that needs to be done. Not only are they often outgunned and outspent by Big Tobacco's billions, but federal law places grave limitations on their ability to act. Two disturbing decisions of the U.S. Supreme Court make clear that Congress must act to create fully effective tobacco control. In 2000, the Supreme Court ruled, 5-4, that the Food and Drug Administration (FDA) could not regulate cigarettes and most other tobacco products as nicotine delivery devices, even though that is precisely what they are.¹⁵ This setback was important because the FDA had begun to move aggressively to fine tobacco retailers who sold to minors and had developed anti-tobacco advertising to discourage children from smoking. In 2001, the Court ruled that the Federal Cigarette Labeling and Advertising Act, which provides for mandatory health warnings for cigarette packaging and advertising, preempts similar state regulations and bars many state cigarette advertising restrictions.¹⁶

In sum, the Supreme Court has concluded that Congress has barred both the FDA and the states from significant aspects of tobacco control. Only Congress can correct this situation, and all legislators should act to protect our citizens from the deadly and preventable scourge of tobacco addiction and death. Recent achievements offer hope of additional success if we are as relentless and tireless as Big Tobacco has been against us.

¹⁴ CAMPAIGN FOR TOBACCO-FREE KIDS ET AL., *supra* note 10, at 8.

¹⁵ Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

¹⁶ Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).