PHAI The Public Health Advocacy Institute Case Study

WHAT'S OLD IS NEW AGAIN: MASSACHUSETTS' 1999 TOBACCO ADVERTISING REGULATIONS

Prepared by Patricia A. Davidson, J.D.[1]

I. INTRODUCTION

In 1999, the Massachusetts Attorney General's Office promulgated regulations to limit particular advertising and sales practices for cigarettes, cigars, little cigars and smokeless tobacco products. The regulations were passed under the Attorney General's consumer protection authority pursuant to Massachusetts General Law Chapter 93A. The goal of the regulations was to protect youth from the predatory marketing practices of the tobacco industry. Shortly after the regulations were adopted and before they went into effect, tobacco manufacturers and retailers filed suit in federal court challenging most of the regulations. They claimed that the regulations were preempted by federal law and in violation of the First Amendment. After all of the lower courts largely ruled in the Attorney General's favor,[2] the tobacco industry appealed to the U.S. Supreme Court where the outdoor and point-of-sale tobacco advertising restrictions were struck down. [3] The Court upheld the regulations that covered tobacco sales and distribution.

ABOUT THE DEFENSIVE LITIGATION PROJECT

Funded by the Robert Wood Johnson Foundation's Public Health Practice & Policy Solutions, the Project uses case study research methodology to investigate threats of litigation made during the proposal and passage of public health laws. The case studies examine this experience across a range of public health issues. Public health officials, attorneys and advocates provide insight into their decision-making and planning process in anticipation of and in response to legal challenges.

II. PROTECTING YOUTH FROM TOBACCO MARKETING

A. Underage Smoking

The Massachusetts Attorney General's office sought to stop the tobacco industry from enticing youth to use tobacco products.[4] Massachusetts Attorney General Scott L. Harshbarger developed and promulgated the regulations shortly before leaving office in January, 1999. Then Chief of the Consumer Protection Division Attorney George K. Weber was a pivotal participant, responsible for drafting and circulating the regulations for comment. Assistant Attorney General William Porter argued in support of the regulations in court. Several other organizations, including the Massachusetts Department of Public Health, Massachusetts Medical Association, the Massachusetts Association of Health Boards and the state chapter of the American Cancer Society, worked with the Attorney General's office to shape the regulations and supported the final package.

Years of working on underage tobacco sting operations followed by intense scrutiny of industry practices throughout the multi-state Medicaid litigation convinced the Attorney General and his legal staff that strong, concerted action was needed to loosen the industry's grip on the youth market. The regulations were seen by anti-smoking advocates as another vital tool in a multi-faceted-approach to curtailing tobacco industry marketing abuses, particularly with regard to underage consumers.[5] Stings conducted by the Massachusetts Attorney General's office revealed that illegal sales of tobacco to underage were shockingly pervasive.[6] Proponents also were aware that despite local boards of health and health department's efforts throughout the 1990s

to enact and enforce local ordinances and regulations to prevent youth access to tobacco products, "evaluators found" that these youth access regulations did not reduce "minors' self-reported access to tobacco."[7]

The Attorney General's regulations sought, in part, to reduce children's exposure to tobacco advertising. Research clearly indicates that tobacco advertising is linked with experimentation by children.[8] Indeed, a common strategy of tobacco control is to prevent tobacco products from being marketed to children.

In 1998, when smoking billboards finally came down pursuant to the MSA requirements, "billions of dollars of tobacco money went to putting luscious smoking ads in convenience stores, bus shelters, and other places [where] kids hang out."[9] In fact, in 1999, "$8.24 billion was spent on cigarette advertising and promotion . . . the most ever reported by the major cigarette manufacturers."[10] Spending on outdoor advertising (including billboards) dropped 81.7 % in 1999 compared to 1998.[11] Magazine advertising increased 34.2 % between 1998 and 1999.[12] The industry expended 13.3% more on point-of-sale promotional materials in 1999 compared to 1998.[13] Additionally, in 1999 the amount spent "promotional allowances (e.g. payments made to retailers to facilitate sales) . . . [was] up 23.1% . . . from [that spent in] 1998."[14]

Research also supported public officials' claims that tobacco advertisements were "pervasive" around schools, playgrounds and the like in the Boston area.[15] An observational study that "examined externally visible advertising at a sample of retail stores before and after the MSA" suggested that there was a "significant increase in advertisements at establishments most likely to sell to the young."[16] Additionally,

studies of urban settings have shown pervasive tobacco advertising near schools and in neighborhoods with relatively high proportions of people eighteen years of age or younger.[17]

B. Limits on Tobacco Sales and Advertising Practices

When negotiating the national tobacco settlement, Massachusetts Attorney General Harshbarger was unable to include all of the advertising restrictions he sought, and he saw regulation as an opportunity to close the gap.[18] During a press conference, the Attorney General stated that he was issuing consumer protection regulations to supplement the restrictions provided in the Master Settlement Agreement ("MSA").[19] In remarks prepared for the media, which were subsequently repeated in the U.S Supreme Court decision striking down his regulations, Harshbarger announced that "as one of his last acts in office, he would create consumer protection regulations to restrict advertising and sales practices . . . to 'close holes' in the settlement agreement and 'to stop Big Tobacco from recruiting new customers among the children of Massachusetts.'"[20] Indeed, the regulations had "a broader scope than the master settlement agreement, reaching advertising, sales practices, and members of the tobacco industry not covered by the agreement."[21]

The former chief of the Massachusetts Attorney General's Division of Consumer Protection, George Weber, explained that the Attorney General Office's interest in utilizing the state's consumer protection law to challenge the tobacco industry resulted from successful consumer protection actions brought against tobacco retailers in the early 1990s.[22] Moreover, Attorney Weber's prolonged oversight of the multistate

litigation against the tobacco industry fueled his interest in challenging the industry by using regulatory tools as well as litigation.[23] Weber was "incensed"[24] and "outraged"[25] by industry practices targeting youth, and while he was aware that filing regulations might also lead to litigation, he firmly believed that it was "the right thing to do."[26]

In January 1999, the Massachusetts Attorney General promulgated zoning-like regulations restricting where tobacco advertisements could be displayed in areas around playgrounds, schools and other areas frequented by children.[27] The Attorney General reportedly acted in response to surveys that revealed tobacco advertising was clustered around these areas.[28]

The Massachusetts Attorney General's regulations restricted a number of specific advertising, marketing and distribution activities. With respect to outdoor advertising, the regulations prohibited tobacco ads

- in enclosed stadiums;
- from inside retail establishments facing toward or visible from outside the retail building; and
- in any location "within a 1,000 foot radius of any public playground, playground area in public park, elementary school or secondary school."[29]

With regard to indoor advertising the regulations banned "[p]oint-of-sale advertising . . . any portion of which is placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of any public playground, playground area in a public park, elementary school or secondary school."[30]

Particular tobacco product sales and distribution practices were also prohibited, including the use of self-service displays,[31] in favor of requiring tobacco products to be

placed out of the reach of buyers in a location accessible only to store personnel[32] and giving away free samples.

Before leaving office and only one week after he issued the contested regulations, Harshbarger publicly claimed that "[t]hese landmark rules will be one more step toward denying Big Tobacco new customers in Massachusetts . . . When the 1999 school year starts, our children will no longer be bombarded with highly visible enticements that are designed to make tobacco products seem attractive and cool."[33]

III. RATIONALE BEHIND THE REGULATIONS

The cornerstone public health purpose of the Massachusetts Attorney General's 1999 Tobacco Advertising Regulations was to protect youth from the predatory marketing practices of the tobacco industry. This goal clarified the need for limitations on particular advertising, sales and distribution practices for cigarettes as well as cigars, little cigars and smokeless tobacco. With regard to cigarettes and smokeless tobacco regulation, the stated purpose was "to eliminate deception and unfairness in the way cigarettes and smokeless tobacco products are marketed, sold, and distributed in Massachusetts in order to address the *incidence of cigarette smoking and smokeless tobacco use by children under the legal age* . . . [and] in order to prevent access to such products by underage consumers."[34]

Similarly, the explicit purpose of the cigar and little cigar restrictions was "to eliminate deception and unfairness in the way cigars and little cigars are packaged, marketed, sold and distributed in MA [so that] . . . consumers may be adequately informed about the health risks associated with cigar smoking, its addictive properties,

and the false perception that cigars are a safe alternative to cigarettes . . . [and so that] *the incidence of cigar use by children under the legal age is addressed* . . . in order to prevent access to such products by underage consumers."[35]

IV. PASSAGE OF THE REGULATIONS

The Massachusetts Attorney General's decision to use his regulatory authority to limit tobacco advertising and sales practices coincided with the Federal Drug Administration's ("FDA") attempts to enact similar regulations at the national level. The FDA proposed rules including the following restrictions: "a ban on the use of cartoon characters in ads or promotions, a ban on cigarette advertising on clothing, a ban on cigarette billboards within 1,000 feet of schools and public playgrounds, and a ban on promotional items that target children."[36] The rules also proposed that companies "refrain from sponsoring events that have more than a 15 percent attendance by people under 18."[37]

In an attempt to use Massachusetts' commercial relationship with tobacco companies to influence the nature of advertisements or promotions that would appeal to teenagers and children,[38] then Attorney General Harshbarger wrote a letter to Treasurer Joseph D. Malone suggesting that the state "use its influence as a stockholder to . . . push tobacco companies to voluntarily adopt rules proposed by the Food and Drug Administration (FDA)."[39] In his letter to Treasurer Malone, Harshbarger wrote that "[m]illions of young Americans take up smoking . . . are influenced by the enticements of sophisticated marketing campaigns aimed directly at them, including utilizing cartoon characters and tie-ins to popular entertainment or sports activities."[40]

In pertinent part, the FDA's final regulations, published in August of 1996, prohibited sale of tobacco-related products to those under 18 years of age, required retailers to confirm age by checking photo ID and banned distribution of certain free samples.[41] The FDA regulations were challenged in court by the tobacco industry. Thirty-two Attorneys General filed an amicus brief supporting the FDA in the lawsuits.[42]

By February of 1998, the Massachusetts Attorney General's Office had drafted its own advertising and sales practice regulations, and a draft of the proposed regulations was circulated for comment on Beacon Hill.[43] The *Boston Globe* hailed the regulations as a "first-in-the-nation approach to controlling teenage smoking."[44] While lauding their originality, the Globe article also stated that these regulations "mirror . . . those under consideration in Washington . . . endorsed by the FDA."[45] The draft regulations would have required cash register signs, secret shopper programs and the distribution of fact sheets about the dangers of smoking to any minor attempting to purchase cigarettes.[46]

Apparently the drafters had taken the "narrowly tailored" First Amendment requirement into consideration because the Globe article reported that "[b]y targeting the regulations toward retail outlets near schools, Harshbarger believes he is on more firm legal footing than if the rules were extended to all outlets. If applied to all outlets the regulations could run into constitutional and federal preemption issues."[47] In fact, during prior testimony about other proposed tobacco control regulations, Massachusetts Attorney General Harsbarger mentioned Federal Cigarette Labeling and Advertising Act ("FCLAA") and constitutional issues, suggesting that his office had studied these types

of threats and dealt with them before encountering them in the advertising and sales practice tobacco regulations.[48]

Legal counsel representing Philip Morris, R.J. Reynolds, Brown & Williamson and Lorillard drafted (and presumably sent) a letter to Harshbarger requesting that his office (pursuant to Mass APA, MGL c.30A §§ 2 and 3) provide their client tobacco companies at least 21 days of notice of a public hearing regarding these regulations or any other tobacco-related regulations.[49] Field hearings on the regulations held in May of 1998 gave opponents an opportunity to publicly argue against the regulations.

The Massachusetts Medial Society wrote a letter to Harshbarger to formally voice its support of the proposed regulations.[50] The Massachusetts Association of Health Boards ("MAHB") also sent a letter to Harshbarger[51] stating its support of the regulations with one exception – "MAHB supports the proposed regulations to the extent they govern the distribution of tobacco products . . . [but] the proposed regulations must contain anti-preemption language protecting the ability of boards of health to regulate the distribution of tobacco products."[52] "Tobacco merchants may assert that your regulations, if enacted in their current form, preempt the board of health from enforcing its own tobacco control regulations."[53]

In November of 1998, while announcing his decision to accept the national tobacco settlement, Attorney General Harshbarger said that terms of the settlement are not "ideal,"[54] and that "before I leave this office in January, I will promulgate first-in-the-nation consumer protection regulations that will, among other things, limit the advertising of tobacco products in retail establishments within 1,000 feet of schools."[55]

On January 8, 1999, representatives from New England Convenience Store Association, New England Service Station and Automotive Repair Association, and the Massachusetts Retail Association met with Harshbarger and George Weber to discuss the tobacco regulations that had been debated since May of the previous year.[56] The meeting appears to have been a negotiation of sorts, with the result that "one major concession to the retailers was that the secret shopper program will be voluntary, not mandatory."[57] Weber reportedly agreed to be "flexible on the penalties and would not impose the maximum ($5,000 per violation) unless it was warranted. (i.e. repeat offenses and /or larger corporations)."[58] On January 13, 1999, Attorney General Harshbarger issued the regulations the week before he was due to leave office.[59]

On May 21, 1999 Philip Morris issued a press release announcing that it had filed a lawsuit in federal court to challenge the regulations Harshbarger adopted in January 1999.[60] In the release, the company specifically stated that they were only challenging certain pieces of the regulations and stated that "in an effort to find common ground with the state of Massachusetts, we are accepting the vast majority of these regulations even though we have grounds to challenge them."[61] Cigarette manufacturers Lorillard Tobacco Co., Brown & Williamson Tobacco Corp., R.J. Reynolds Tobacco Co., along with U.S. Smokeless Tobacco Company and several cigar manufacturers and retailers joined the suit.

V. LEGAL AND POLICY CHALLENGES

Prior to passage of the regulations, representatives of the tobacco industry mentioned the potential for litigation both in statements to the media[62] and directly to

regulators.[63] Specifically, the industry challenged the regulations' efficacy. These allegations were aired through media outlets.[64] Opponents of the regulations argued that the policies were anti-business and created a slippery slope toward over-regulating of all products. Fresh out of negotiations over the Master Settlement Agreement ("MSA"), the tobacco industry argued that the MSA should be sufficient and that further attempts at regulation amounted to political grandstanding. Shortly after the regulations were adopted, and before they went into effect, tobacco manufacturers and retailers filed suit in federal court challenging most of the regulations on preemption and First Amendment grounds. Although lower courts upheld most of the regulations, the tobacco industry appealed the case to the U.S. Supreme Court where the outdoor and point-of-sale tobacco advertising restrictions were struck down. The tobacco sales practice and distribution regulations, however, were validated.

A. Policy Arguments

1. Adverse Economic Impact of Regulations on Convenience Stores

During the public comment period on the regulations, selected newswires ran an article discussing the importance of tobacco sales to convenience stores.[65] The article brought public attention to groups opposing the regulations as well as the tobacco companies[66] and featured comments from the executive director of the New England Convenience Store Association Cathy Flaherty, who stated that "25 to 30% of convenience store sales are from tobacco products."[67] The article noted that "[t]obacco companies can also pay store owners thousands of dollars for merchandising displays."[68] Jack Pierce, Executive Director of the New England Service Station and

Automotive Repair Association, opined that "the regulations would bring about a 'serious loss of revenue for the small Massachusetts retailer, one that would be hard to recoup.'"[69] The National Federation of Independent Business and associations representing restaurants, retailers, liquor stores and grocery stores also opposed the regulations.[70] Industry spokesman David Remes issued a legal threat, stating that the industry was "aware of the rules and we're reviewing them from a constitutional and legal standpoint."[71]

Cathy Flaherty, executive director of the New England Convenience Store Association, stated publicly at field hearing on the regulations that the measures were "offensive" and "anti-business."[72] She further argued that the proposed regulations would hurt the association members as well as "set a precedent that opens to door for similar restrictions and bans on any retailer and any manufactured product sold in the commonwealth."[73]

2. The MSA and Political Grandstanding

Having just reached final negotiations of the Master Settlement Agreement, the tobacco industry argued that the MSA adequately regulated tobacco advertising and sales practices. In a May 21, 1999 press release, Philip Morris attempted to characterize its position as moderate, noting both that the advertising restrictions exceed those agreed to in the MSA and touting its acquiescence to some of the regulatory provisions:

> We would like to point out that we are not challenging all of the regulations adopted by former Attorney General Harshbarger, such as the restrictions on self-service displays, sampling, sending cigarettes through the mail and other restrictions. In an effort to find common ground with the state of Massachusetts,

> we are accepting the vast majority of these regulations even though we have legal grounds to challenge them.[74]

Other tobacco manufacturers (e.g., Consolidated Cigars), however, raised legal objections to virtually all of the provisions.

Prior to filing the lawsuit, attorneys representing tobacco manufacturers signaled that legal challenges to the regulations may be forthcoming in written correspondence with the Attorney General.[75] "[Industry spokesman Scott] Williams said the industry would study the regulations before making a decision whether to challenge them in court."[76] One commentator noted that "In the past, tobacco companies have opposed many of the provisions Harshbarger put forth. The companies claimed that advertising restrictions would violate their First Amendment right to free speech."[77]

A January 1999 *Boston Globe* article indicated that a legal challenge was expected: "the 11 regulations that the attorney general issued under the state's consumer protection statute must withstand a likely legal challenge from the tobacco industry before they can take effect."[78] The article quoted tobacco industry spokesman Scott Williams, who accused Harshbarger of "grandstanding" and "public posturing," characterizing the Attorney General as "a politician who prefers rhetoric over results." Williams also asserted that the MSA included adequate restrictions aimed at preventing "deceptive marketing to teenagers."[79]

B. Legal Arguments and Litigation

The plaintiffs challenged the regulations under the two theories that they were preempted by FCLAA and violated the First Amendment right to free speech.

1. The Federal Cigarette Labeling and Advertising Act

The FCLAA preemption provision at issue in this case states that "no requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."[80] Upon appeal, the U.S. Supreme Court found that this provision unequivocally precluded any state from imposing additional advertising and promotion restrictions and requirements if based on smoking and health.[81] In order to interpret the clause, the Court looked to past versions of the preemption provision and the context in which the provision in its current form was drafted.[82]

In key language, the Court reasoned, "we fail to see how the FCLAA and its preemption provision permit a distinction between the specific concern about minors and cigarette advertising and the more general concern about smoking and health in cigarette advertising . . . ." Thus, it held that that both the outdoor advertising and point-of-sale cigarette regulations were preempted.

Rejecting the proponents' argument that the regulations were not based on smoking and health, the Court observed that "The Attorney General argues that the cigarette advertising regulations are not 'based on smoking and health,' because they do not involve health-related content in cigarette advertising but instead target youth exposure to cigarette advertising. To be sure, Members of this Court have debated the precise meaning of 'based on smoking and health' [sic] but we cannot agree with the Attorney General's narrow construction of the phrase."[83]

2. First Amendment

With regard to cigar and smokeless tobacco advertisements, the Court found that the regulations violated First Amendment protections for commercial speech. The outdoor advertising restrictions failed to pass muster under the fourth prong of the *Central Hudson* test applied to commercial speech, with the Court finding that they were more restrictive than necessary to advance the state's interest in preventing underage consumption.[84] Reasoning that the regulations were overly broad, the Court concluded that they "would place an unnecessary burden on the interest of tobacco retailers and manufacturers 'in conveying truthful information about their products to adults [who] have a corresponding interest in receiving truthful information about tobacco products.'"[85] The Court seemed particularly concerned that the outdoor restrictions would ban advertising in most urban areas in the state.[86] A news article reporting on the litigation noted that "'[w]hile many states and cities have restricted tobacco advertising, Massachusetts' measures are viewed as the nation's most far-reaching because they have eliminated almost all cigarette advertising displays in the most heavily populated parts of Boston and other urban centers in the state."[87]

The point-of-sale advertising restrictions were also struck down under the First Amendment, with the Court ruling that they did not meet the third and the fourth prongs of the commercial speech standard.[88] Observing that the Attorney General's goal is "to prevent minors from using tobacco products and to curb demand for that activity by limiting youth exposure to advertising,"[89] the Court concluded:

> The 5 foot rule does not seem to advance that goal. Not all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings.[90]

In the only victory for proponents, the U.S. Supreme Court upheld the tobacco sales and distribution regulations.[91] First, the Court noted that the cigarette manufacturers had not challenged the sales practice restrictions (e.g., ban on self-service displays and requirements that only store personnel have access to cigarettes for purchase) on preemption grounds.[92] Moreover, the Court was not persuaded that the restrictions violated the commercial speech test under the First Amendment, reasoning that although the sales practice provisions regulate conduct that "may have a communicative component,"[93] the Massachusetts Attorney General sought to "regulate the placement of tobacco products for reasons unrelated to the communication of ideas." [94] Thus, the Court recognized a key distinction between regulations that restrict advertising and regulations that limit sales practices under the First Amendment.

VI. PROPONENTS' RESPONSE

Proponents for the Massachusetts Tobacco Advertising Regulations had many years of professional experience litigating industry legal challenges and anticipated a protracted period of strong resistance. Reflecting upon the connection between the state of Massachusetts' participation in the multistate Medicaid litigation and the subsequent plan to file consumer protection regulations, George Weber pointed out that the industry actually attempted to stop the state from joining the Medicaid suits by filing a lawsuit.[95] Moreover, Weber recalled that the state hired renowned constitutional scholar Lawrence Tribe to work on the case and subsequently prevailed.[96] Thus, Weber

and his colleagues in the Massachusetts Attorney General's Office harbored no doubts that the tobacco industry would put up a strong fight in response to a regulatory proposal restricting advertising.[97]

Indeed, Weber acknowledged that he and others in the Attorney General's office expected the tobacco industry to vigorously challenge the regulations in court and accurately predicted that the case would go all the way to the U.S. Supreme Court.[98] Concerns about the potential for litigation and the possibility that the tobacco industry might win such a challenge were reportedly discussed throughout the process.[99] Weber recalled a 1998 internal meeting of the Attorney General's legal staff where these issues were aired and debated. The possibility of a precedent setting Supreme Court challenge was discussed as well. He noted that despite some internal critics, he and the Attorney General were confident that they were on legally solid ground and were committed to going forward.[100] Weber added that during the regulatory process, he and his colleagues considered all suggestions aimed at strengthening their arguments' legal grounding without sacrificing the public health goal of protecting youth from the tobacco industry.

Shortly before they were filed and immediately following a meeting with representatives of the opposition, some of the provisions, including a "secret shopper" program to test if sales clerks are selling tobacco to minors, were dropped.[101] Furthermore, the Attorney General's office carefully considered internal and external criticism, as well as the concern that an industry victory would set a negative legal precedent.[102] Throughout the process, the proponents continuously assessed these

crucial factors and steadfastly concluded that the potential gains to public health outweighed the legal risks.[103]

When asked if he ever considered abandoning the effort, Attorney Weber clarified that despite the lengthy legal challenge, both he and Attorney General Harshbarger did not waver because they believed that it was vitally important to stop the tobacco industry from targeting youth. The U.S. Department of Justice ("DOJ") also actively supported the regulations throughout the litigation, filing an amicus brief supporting the Massachusetts regulations.[104] In addition, the U.S Solicitor General participated in the oral arguments before the Court on behalf of the state of Massachusetts.[105]

Dr. Greg Connolly, then Director of the Massachusetts Department of Public Health's Tobacco Control Program, clarified that he was confident that the regulations were both necessary and justifiable.[106] He cited a solid empirical basis for the regulations and his perception that proponents had "exhausted other measures" to achieve the goal of restricting tobacco advertising to minors. [107]

VII. IMPACT OF LITIGATION THREAT AND LESSONS LEARNED

Several public health law lessons may be gleaned from the history of the Massachusetts Tobacco Advertising regulations. First, proponents were willing to persevere and take risks, including the risk of setting an adverse legal precedent, in order to limit the tobacco industry's ability to market its products to children. While proponents were extremely well prepared and had reason to be optimistic given lower court rulings, they went forward and ultimately lost preemption and First Amendment arguments in the U.S. Supreme Court. Their determination was motivated by a belief

that challenging the industry advertising practices, especially those directed at children, was as George Weber asserted "the right thing to do"[108] and supported by "good faith"[109] legal arguments.[110]

Second, the case study demonstrates the tobacco industry's determination of the tobacco industry to challenge advertising regulations on preemption and First Amendment grounds, with increasing confidence. Interestingly, some of the regulations at issue in this case may once again be the subject of a legal challenge to the recently adopted federal law granting the Food and Drug Authority ("FDA") extensive authority to regulate tobacco products, including advertising.[111] Notably, FDA regulations proposed in 1996 including a ban on outdoor advertising within 1,000 feet of schools is incorporated into the new law.[112] The Findings section of the bill and Committee report declare that the "reasonable restrictions on advertising and promotion of tobacco products,"[113] is "fully consistent"[114] with the First Amendment—reflecting an awareness of the potential for an industry challenge.

A recent *New York Times* article reported that the new federal law's ban on outdoor advertising within 1,000 feet of schools and playgrounds would likely spark First Amendment litigation.[115] Opponents, according to the article, "predict that federal courts will throw out the new marketing restrictions"[116] based on the 2001 U.S. Supreme Court ruling in *Lorillard*.

Supporters, on the other hand, point to studies conducted since the 2001 *Lorillard* decision striking down similar advertising restrictions that "provide evidence that young people respond to cigarette marketing even when it is aimed at adults,

showing that new restrictions are needed to curb illegal, as well as highly addictive and harmful, under-age smoking."[117] Thus, it appears that more recent empirical evidence linking youth smoking to advertising targeting adults may be pivotal to any future First Amendment legal challenges to tobacco advertising regulations.

Strangely, tobacco companies were not listed or quoted among the challengers. Rather, the Association of National Advertisers spoke up on behalf of the opposition: "'Anybody looking at this in a fair way would say the effort here is not just to protect kids, which is a substantial interest of the country, but to make it impossible to communicate with anybody.' Daniel L. Jaffe, Executive Vice President of the Association of National Advertisers said in an interview Monday, 'We think this creates very serious problems for the First Amendment.'" [118]

Thus far, the tobacco industry has not commented publicly on the FDA regulations. It may simply be too early for the industry to signal its plan. Or, considering that the industry was split over the new law empowering the FDA to regulate tobacco with only Philip Morris as an active supporter, it is possible that the industry is divided. Any such division appears to be based largely on the current shares of the youth market held by individual companies. Philip Morris, which presently has the largest portion of the youth market,[119] may be willing to accept advertising limits, hoping to freeze its current market share. Other companies competing for a dwindling domestic market may have more incentive to challenge advertising limits due to fear that less advertising could reduce sales.

Proponents of tobacco advertising regulations will want to watch this unfolding dynamic carefully and consider how to strategically navigate what may be a sea change in industry unity, at least with regard to advertising strategy and practices.

RESEARCH METHODOLOGY

The Project utilized descriptive case study methodology to examine instances of state and local public health legislation that was opposed with legal rhetoric or faced a direct legal challenge. Descriptive case study methodology is designed to present a complete description of a case within its context. The descriptive case study technique was selected because of the lack of prior research on the issue of defensive public health litigation and the resulting lack of established theory in the area. The primary unit of analysis for each study was the proponent of the public health initiative. Background research for each case study included local and national media coverage, legislative and/or administrative documents, documents generated by the opposition, scholarly articles, legal filings and judicial opinions. A minimum of two in-depth telephone interviews were conducted for each case. Where possible, one interview was of a public health official, and one interview was with an attorney affiliated with the public health official. Given the resources available to conduct the studies interviews with opponents were not conducted.

---

[1] The author and PHAI gratefully acknowledge the substantial research and drafting assistance provided by Sumana Chintapali for this case study.
[2] *Lorillard v. Reilly*, 76 F. Supp. 2d 124 (D. Mass. 1999).
[3] *Lorillard v. Reilly*, 533 U.S. 525 (2001).
[4] Telephone Interview with Attorney George K. Weber, former Chief of the Division of Consumer Protection, Massachusetts Attorney General's Office, May 12, 2009 (hereinafter "Weber Interview").
[5] *Id*.
[6] *Id*.
[7] Howard K. Koh, MD, MPH, et al., *The First Decade of the Massachusetts Tobacco Control Program*, 120 PUB. HEALTH REPORTS, 482, 484 (September-October 2005).
[8] John W. Richard, et al., *The Tobacco Industry's Code of Advertising in the United States: Myth and Reality*, 5 TOBACCO CONTROL 295 (1996).
[9] Dahlia Lithwick, *Joe Camel Versus Hamburglar*, Supreme Court Dispatches, SLATE, Apr. 26, 2001, www.slate.com/toolbar.aspx?action=print&id=104973 (last visited Nov. 4, 2009).
[10] Federal Trade Commission, Cigarette Report for 1999, at 3 (2001), http://www.ftc.gov/reports/cigarettes/1999cigarettereport.pdf (last visited Nov. 4. 2009).
[11] *Id*. at 3-4
[12] *Id*. at 3.

[13] *Id*. at 4.
[14] *Id*.
[15] Linda Pucci, et al., *Outdoor Tobacco Advertising in Six Boston Neighborhoods Evaluating Youth Exposure*, 15 AM. J. PREVENTIVE MED. 155 (August 1998),
[16] Howard J. Koh,, *supra* note 7 at 487.
[17] Lisa Henricksen, et al., *Effects of Youth Exposure to Retail Tobacco Advertising*, 32 APP. SOC. PSYCH. 1771 (2002).
[18] Press Release, Office of The Massachusetts Attorney General, Harshbarger Accepts Tobacco Settlement: Outlines Plan to Devote Money to Health Care; Also Moves to Curb Tobacco Advertising Near Schools and & Playgrounds (November 20, 1998) (on file with author).
[19] Scott Harshbarger, Massachusetts Attorney General, Prepared Remarks Accepting National Tobacco Settlement (November 20, 1998).
[20] *Lorillard v. Reilly*, 533 U.S. 525, 533 (2001) App. 251.
[21] *Id*. at 534.
[22] Weber Interview, *supra* note 4.
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] Frank Phillips & Hilary Sargent, *AG Sets Curbs for Tobacco Ads, Seeks to Limit Sales to Children*, BOSTON GLOBE, Jan. 14, 1999, at B4.
[28] Howard K. Koh, *supra* note 7 at 483.
[29] 940 Mass. Code Regs. § 21.04(5)(a) (2000); 940 Mass. Code Regs. § 22.06(5)(a) (2000).
[30] 940 Mass. Code Regs. § 21.04 (5)(b) (2000); 940 Mass. Code Regs. § 22.06 (5)(b) (2000).
[31] 940 Mass. Code Regs. § 21.04 (2)(c) (2000); 940 Mass. Code Regs. § 22.06(2)(c) (2000).
[32] 940 Mass. Code Regs. § 21.04 (2)(d) (2000); 940 Mass. Code Regs. § 22.06(2)(d) (2000).
[33] Frank Phillips & Hilary Sargent, *supra* note 27.
[34] 940 Mass. Code Regs. § 21.01 (2000) (emphasis added).
[35] 940 Mass. Code Regs. § 21.01 (2000) (emphasis added). The cigar regulations originally included warning label requirements, which were later dropped in deference to the Federal Trade Commission's decision to mandate warning labels for cigar products. *See* Press Release, Federal Trade Commission, FTC Announces Settlements Requiring Disclosure of Cigar Health Risks: Landmark Agreements Require Strong Warnings on Both Packaging and Advertisements (June 26, 2000), http://www.ftc.gov/op/2000/06/cigars.htm (last visited Nov. 4, 2009).
[36] Shelley Murphy, *Curbing Tobacco Ads Eyed by Mass. State May Use Its Stockholder Clout*," BOSTON GLOBE, Mar. 25, 1996, at 25.
[37] *Id*.
[38] *Id*.
[39] *Id*.
[40] *Id*.
[41] Press Release, Office of the Massachusetts Attorney General, Harshbarger Joins Minnesota AG to Support FDA Regulations on Tobacco Sales to Minors (December 12, 1996) (on file with author).
[42] *Id*.
[43] Frank Phillips, *AG Targets Smoking by Minors; Plan Sees Consumer Laws Curbing Sales to Teenagers*, BOSTON GLOBE, February 14, 1998, at B1.
[44] *Id*.
[45] *Id*.
[46] *Id*..
[47] *Id*..
[48] Testimony of Massachusetts Attorney General Scott Harshbarger on Proposed Regulations Under Mass. Gen. Laws ch. 94, § 307B, Massachusetts Department of Public Health, June 12, 1997.

[49] Draft Letter from Attorney Henry Dinger, Attorney Goodwin, Procter & Hoar to Attorney General Scott Harshbarger, (May 1998).
[50] Letter from Harry L. Greene, M.D., Massachusetts Medical Society, to Attorney General Scott Harshbarger (June 19, 1998).
[51] Letter from Marc M. Boutin, Massachusetts Association of Health Boards to Attorney General Scott Harshbarger (June 11, 1998).
[52] *Id*.
[53] *Id*.
[54] Scott Harshbarger, Prepared Remarks Accepting National Tobacco Settlement, *supra* note 19.
[55] *Id*.
[56] Weber Interview, *supra* note 4; *See also* E-mail message from Joanne McCarthy, *MA-AG Regulations, Importance – High*, to Dan Smith, Jack Lenzi, Scott Fisher, Virginia Murphy, et al. (January 8, 1999).
[57] *Id*.
[58] *Id*.
[59] Frank Phillips & Hilary Sargent, *supra* note 27.
[60] Press Release, Philip Morris U.S.A., Massachusetts Litigation, (May 21, 1999) (on file with author).
[61] *Id*.
[62] Frank Phillips, *supra* note 43.
[63] Weber Interview, *supra* note 4.
[64] Frank Philips, *supra* note 43.
[65] Associated Press, *Tobacco Sales Called Key to Convenience Stores*, May 20, 1998, (on file with author).
[66] *Id*.
[67] *Id*..
[68] *Id*.
[69] *Id*.
[70] *Id*.
[71] *Id*.
[72] Associated Press, *Hearing Convened on AG's New Tobacco Regs*, May 20, 1998 (on file with author).
[73] *Id*.
[74] Press Release, Philip Morris U.S.A., *supra* note 60.
[75] Letter from Henry C. Dinger, Attorney, Goodwin, Proctor & Hoar, LLP to Virginia Mary Murphy, Senior Assistant General Counsel, Philip Morris Management Corp. (May 19, 2008). This letter referred to an attached draft letter to Massachusetts Attorney General Scott Harshbarger dated May 1998. The draft letter to Harshbarger did not explicitly threaten imminent litigation. However, it pointedly requested notification of all hearings with regard to the proposed advertising regulations, adding: "This formal request is made without waiving any right to submit oral or written comments concerning the proposed regulations or to challenge in any judicial or administrative forum the constitutionality and/or validity of any regulations adopted by you in these areas."
[76] Frank Phillips & Hilary Sargent, *supra* note 27.
[77] *Id*.
[78] *Id*.
[79] *Id*.
[80] 15 U.S.C. § 1334. A preemption challenge to the cigar and smokeless tobacco regulations was not litigated as those tobacco products were not covered by the FCLAA preemption provision.
[81] *Lorillard v. Reilly*, 533 U.S. at 542.
[82] *Id*.
[83] *Id*. at 548.
[84] *Id*. at 565.
[85] Wendy E. Parmet & Jason A. Smith, *Free Speech and Public Health: A Population-Based Approach to the First Amendment*, 39 LOY. L. REV. 363, 415 (May 2006), quoting *Lorillard*, 533 U.S. at 564.
[86] *Lorillard v. Reilly*, 533 U.S. at 562-64.
[87] Mary Leonard, *US Defends Mass. Limits on Cigarette Ads*, BOSTON GLOBE, March 31, 2001.

[88] *Lorillard v. Reilly*, 533 U.S. at 566.
[89] *Id*.
[90] *Id*.
[91] *Id*. at 567-70.
[92] *Id*. at 567.
[93] *Id*. at 568.
[94] *Id*. (citation omitted).
[95] Weber Interview, *supra* note 4.
[96] *Id*.
[97] *Id*.
[98] *Id*.
[99] *Id*..
[100] *Id*. Weber also wondered whether a change in the composition of the U.S. Supreme Court might yield a different result.
[101] Frank Phillips, *supra* note 43
[102] *Id*.
[103] *Id*.
[104] Mary Leonard, *supra* note 87.
[105] *Lorillard v. Reilly*, 533 U.S. 525.
[106] Telephone Interview with Dr. Greg Connolly, former Director of the Massachusetts Department of Public Health Tobacco Control Program (April 23. 2009) (hereinafter "Connolly Interview").
[107] *Id*.
[108] Weber Interview, *supra* note 4.
[114] *Id*.
[110] *Id*.
[111] Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31 (June 22, 2009).
[112] *Id*., *see also* Gregory D. Curfman, MD, Stephen Morrisey, Ph.D. et al., *Tobacco, Public Health, and the FDA*, NEW. ENG. J. MED. (June 2009).
[113] Family and Smoking and Prevention Act, Section-by-Section Analysis of the Legislation, H.R. Rep. No. 111-58, pt. 1, at 32-33 (March 26, 2009).
[114] *Id*.
[115] Duff Wilson, *Tobacco Regulation is Expected to Face Free-Speech Challenge*, N.Y. TIMES, June 16, 2009, at B1.
[116] *Id*.
[117] *Id*.
[118] *Id*.
[119] Philip Morris USA, Market Information, http://philipmorrisusa.com/en/cms/Company/Market_Information/default.aspx (last visited Nov. 4, 2009).