



From The Director

This issue of Tobacco Regulation Review comes as the Legal Resource Center for Tobacco Regulation, Litigation & Advocacy begins its second year of operation. During its first year, the Center completed its needs assessment (see Vol. 1, Issue 1) and began assisting local health departments, state legislators and individuals across the state with tobacco control issues.

A focus of the Center is the achievement of 100% clean indoor air in public places and work places in Maryland. In this issue of the *Review*, we describe our efforts in this area, including our work with Smoke Free Maryland, local health departments and coalitions, and the advocacy community. The issue also includes articles on tobacco settlement securitization, tobacco control cases and advice, Maryland's new tobacco tax, and legislation in other jurisdictions requiring smoke-free places.

Kathleen Hoke Dachille, J.D.
Director

Smoke Free Maryland's First Statewide Conference A Great Success

More than 250 tobacco control advocates in Maryland came together in late October 2002 to learn from tobacco control experts and each other at Smoke Free Maryland's conference, *The ABC's of Achieving a Smoke Free Maryland: Advocacy, Bridge-building and Cessation*. The event, Maryland's first statewide tobacco control conference, served as a forum to discuss the local

Center and its ability to assist local jurisdictions in their tobacco control efforts. Michael Strande, the Center's managing attorney, led a roundtable discussion on tobacco product placement initiatives.



Smoke Free Maryland's Michaeline Fedder welcomes former Governor Parris Glendening.

and statewide tobacco control movement and helped create new partnerships in the tobacco control community. Attendees included lawyers, state and local officials, community advocates, and concerned citizens.

Staff from the Legal Resource Center for Tobacco Regulation, Litigation and Advocacy participated in the conference. Center Director, Kathleen Hoke Dachille, spoke to attendees about the mission and recent activities of the Legal Resource

At the conference, Dachille and Strande were able to create new connections and enhance existing relationships as each of Maryland's 24 local jurisdictions was represented. Other participants included local and national experts from the American Cancer Society, American Heart Association, American Lung Association, Maryland Department of Health &

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What's New In Maryland

Continued from page 1

Mental Hygiene, MedChi (the Maryland state medical society), The National Center for Tobacco Free Kids, and The SmokeLess States National Tobacco Policy Initiative.

Keynote speakers included Gregory Connolly, director of the highly successful tobacco control program for the Massachusetts Department of Public Health; former Maryland Governor, Parris Glendening; Maryland Attorney General, J. Joseph Curran, Jr.; and Delaware State Senator, David McBride, sponsor of Delaware's recently enacted clean indoor air legislation. (see article, pg. 17)

The conference provided a forum for tobacco control advocates from across the state to network, share program insights, and gather up-to-date information on advocacy, tobacco cessation programs, efforts to reduce youth access, smoking prevention, and coalition outreach. More importantly, it provided an opportunity for the tobacco control community to solidify its public policy agenda and set strategic goals for the future of tobacco control in Maryland. If the success of a conference is measured by the amount of work it produces for attendees post-conference, the Smoke Free Maryland Conference was a huge success.

Discussions at the conference led several local health departments to seek assistance from the Legal Resource Center. The Center has been asked to help design youth access enforcement programs, draft local and statewide legislation, educate trial judges about youth access violations, and much more. As a result, Dachille and Strande, and law students in the Tobacco Control Clinic taught by Dachille, will be working across the State in the coming year. A significant portion of that work will center on the Clean Indoor Air Campaign launched at the Smoke Free Maryland Conference.

Clean Indoor Air Campaign Announced

Tobacco control advocates officially kicked off Maryland's Clean Indoor Air Campaign at the Smoke Free Maryland Conference. The goal of the Campaign is to insure smoke free workplaces and public places for all Maryland employees and citizens, including those who work in and patronize bars and restaurants.

In 1995, Maryland became one of the first states to recognize the dangers of secondhand smoke in the workplace. That year, the Department of Labor, Licensing and Regulation,

Division of Labor and Industry, promulgated regulations prohibiting smoking in all enclosed workplaces.¹ Despite a report from the Maryland Occupational Safety and Health Advisory Board supporting the agency's broad ban, the Maryland General Assembly later passed legislation exempting bars from the workplace smoking regulations and allowing restaurants to create enclosed smoking areas.² As a result, many hospitality workers remain unprotected from the dangers of working in a smoke-filled environment and Maryland consumers continue to be exposed to second-hand smoke in bars and some restaurants.

To eliminate this legislative exception and better protect hospitality workers and consumers, tobacco control advocates have launched the Smoke Free Maryland Clean Indoor Air Campaign. The Center has been named a charter member of the Campaign planning committee. The Campaign has two components: public education and legislative drafting and advocacy. Much of the Campaign's work will be done at the grassroots level, educating the public about the dangers of exposure to secondhand smoke and empowering hospitality employees to demand safe workplaces. Center staff will play a key role in drafting pertinent legislation, considering issues such as

coverage, preemption, penalties, and enforcement, and will offer technical advice to legislators and other key players during the course of the Campaign. The Center will also identify and recruit medical and public health experts in the State and across the country to provide scientific support for the Campaign. As part of the Campaign the advocacy community, public health experts and citizens will combine efforts to advocate on behalf of legislation creating clean indoor air at all workplaces and public places.

Public concern about secondhand smoke threatens the tobacco industry because smoke-free environments undermine the social acceptability of smoking and reduce cigarette consumption. As a result, the tobacco industry has generally opposed clean indoor air legislation, promoting ineffective alternatives instead.

Campaign leaders expect the industry to oppose any clean indoor air legislation, making the legal assistance provided by the Center a crucial component of the effort.

Secondhand smoke kills. The Environmental Protection Agency, state health boards, courts and administrative agencies have recognized a substantial body of scientific evidence indicating that secondhand smoke is causally related to lung cancer and other tobacco-related diseases in nonsmoking adults.³

Studies have shown that nonsmokers

who are exposed to secondhand smoke absorb nicotine and other carcinogenic compounds just as smokers do. The overwhelming amount of evidence has prompted Philip Morris to recognize that secondhand smoke causes disease in non-smokers and that regulation of second hand smoke in public places is warranted.⁴

Everyone has the right to breathe clean, safe, smoke-free indoor air.

The tobacco industry has long trumpeted “smokers’ rights” as a reason smoking restrictions should be avoided. However, there is no unfettered right to smoke. Rather, smoking restrictions have been upheld on the grounds that the protection of employees’ health overrides so-called smokers’ rights.⁵ The fact is that nonsmokers, who greatly outnumber smokers, have the right to breath air

free of secondhand smoke.

Ventilation systems do not protect the health of patrons or workers. Ventilation systems and air purifiers cannot effectively control the harm caused by secondhand smoke. Nevertheless, the tobacco industry has spent considerable effort promoting ventilation as a “solution” to the problem. In fact, the tobacco industry has significant influence with the American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc. (ASHRAE), a trade organization that develops standards for ventilation systems that are used by contractors and engineers throughout the country.⁶ Not surprisingly, ASHRAE’s ventilation standards are based on comfort rather than health and make no representations as to the ability of a standard system to remove the harmful components of smoke from



At Smoke Free Maryland’s Conference, Joan Stine, Director of the Maryland Office of Health Promotion Education and Tobacco Use Prevention, praises public health workers and challenges them to do more in 2003 and beyond.

the air. Scientific studies, including one by ASHRAE members, and the nation's experts in indoor air quality agree that ventilation systems cannot protect the public from the dangers of secondhand smoke.⁷

Smoke-free public places make cents. For years the tobacco industry has perpetuated the myth that smoking bans will result in economic loss for business. The truth is that the only business hurt by such bans is the tobacco industry. California, Delaware, and a number of cities and counties throughout the country have 100% smoke-free public places. According to independent and reputable studies of sales tax data in many of these areas, smoke-free laws have not caused declines in restaurant business, bar business, or tourism. In fact, many studies have shown an increase in restaurant and bar business after smoke-free laws went into effect.⁸ For an excellent discussion of the fiscal impact of smoke-free legislation on the hospital-ity industry, visit www.tobaccoscam.ucsf.edu.

If you would like to support the campaign or learn more about it, visit Smoke Free Maryland's web site at <http://www.smokefreemd.org>.

5. See *Fogle v. H & G Restaurant, Inc.*, 337 Md. 441 (1994).

6. See S. Aguinaga Bialous and S. A. Glantz, *ASHRAE Standard 62: Tobacco Industry's Influence Over National Ventilation Standards*, *TOBACCO CONTROL*, vol. 11, pp. 315-328 (2002).

7. *Id.*

8. See *American Journal of Public Health*, 84(7), pp. 1081-1085 (1994).

Settlement Securitization: An Option for Maryland?

Maryland, along with nearly every other state in the Union, faces fiscal challenges in 2003 due to a significant budget deficit. Governors and legislators in some states are considering securitization of the state's tobacco settlement to raise revenue and alleviate budget woes. Through securitization a state would receive a lump sum dollar amount now in exchange for the payment over time of some or all of the state's anticipated settlement monies from tobacco manufacturers. Whether to go forward with securitization is a question of fiscal and public health policy that will need to be carefully considered in each jurisdiction. Given the significant benefits the state reaps from effective use of settlement monies, it is questionable whether securitization is in the long-term best interest of Marylanders.

Background

On November 23, 1998, the five largest cigarette manufacturers reached a settlement with 46 states ending litigation of state claims for reimbursement of healthcare costs associated with tobacco use and related claims. Pursuant to the Master Settlement Agreement (MSA), cigarette manufacturers will pay participating states \$206 billion over 25 years. Four states (Florida, Mississippi, Minnesota, and Texas) settled suits individually with tobacco manufacturers prior to the 1998 MSA, committing cigarette makers to pay more than \$40 billion over 25 years to those states. MSA payments are divided among participating states according to each state's share of Medicaid funding, which is largely population based. Maryland's share was approximately 2.3 percent (or \$4.7 billion) at the time of execution of the MSA.

Terms of the settlement direct payments to each state's general fund. The exact amount of future settlement payments is uncertain as payments are subject to annual adjustments for changes in cigarette consumption, inflation and other factors. Decisions regarding spending state tobacco settlement funds generally rest with state legislatures. The Maryland General Assembly enacted legislation in 2000, which created the Cigarette Restitution Fund (CRF). The CRF coordinates the

1. COMAR 09.12.23.

2. Md. Code Ann., Bus. Reg. § 2-105 (2002).

3. See *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders*, <http://cfpub.epa.gov/ncea/cfm/ets/etsindex.cfm>.

4. See philipmorrisusa.com/health_issues/secondhand_smoke.asp

distribution of Maryland's MSA funds among smoking cessation and education programs, cancer research, prevention, education, screening and treatment, tobacco crop conversion, and other cancer-related public health and research initiatives.

Eleven states (Alabama, Alaska, Arkansas, California, Iowa, Louisiana, New Jersey, North Dakota, South Carolina, South Dakota, Wisconsin) and the District of Columbia have securitized all or a portion of the money they are due to receive under the MSA. It is likely that other states will join this list in 2003.

What Is Securitization?

Most of us are familiar with the concept of securitization, even if the word is unfamiliar. State lottery jackpots are the most common analogy. Lottery jackpot winners may take a lump sum payment or an annuity, a stream of annual payments, over many years. The lump sum payment is the present value of the annuity, generally discounted to 40 cents on the dollar. Securitization works in much the same way as the lump sum option.

When securitizing settlement cash, a state sells bonds backed by all or part of the state's future payments. As a result, the state receives a discounted lump-sum payment today, rather than a series of payments in the future. In securitization, the bond

buyer assumes some of the risk associated with the future value of the payments. In return for assuming that risk, the buyer receives a discount and pays less today to receive the full value over time.

Pro-Securitization Arguments

The main advantage of securitization is that the state receives some protection from inherent instability in the tobacco settlement funding structure while also receiving an immediate influx of cash. The payments due a particular state may decline in the future as each state's payments are adjusted annually based on fluctuations in the volume of cigarette sales, changes in participating manufacturers' market share, and inflation. The combined effect of all adjustments has been to lower payments by about \$1.6 billion between 1999 and 2001, nearly 11 percent below original payment estimates. The settlement also assumes continuing financial strength of the manufacturers, not a certainty in any sense, as states work to decrease tobacco consumption.

Those in favor of securitization argue that cigarette consumption has declined since the MSA was signed in November 1998 and that ongoing state efforts will cause that trend to continue. Analysts project that future total cigarette consumption will decline by an average of nearly two percent per year. As a result, cigarette

consumption is estimated to decline by 33 percent between 1999 and 2020. Declining consumption will result in decreasing MSA payments. Thus, securitization based on estimated total payments today may allow the state to command a greater purchase price than may actually be paid over the course of time.

By adopting securitization, a state can pass to the bond buyer the risk that tobacco manufacturers may suffer severe financial hardship, even bankruptcy, as revenues decline and litigation costs rise. Although the MSA insulates the tobacco industry from additional government litigation, the industry is not immune from suit by individuals and groups. Some argue that large judgments in personal litigation, such as the \$28 billion Bullock judgment (See p. 15), could devastate or bankrupt participating tobacco companies, jeopardizing future settlement payments. By getting paid today, states that securitize their MSA payments need not worry about the financial viability of the tobacco manufacturers.

Finally, advocates argue that securitization removes a conflict of interest between the state's fiscal and public health interests, delinking the state's payout and tobacco consumption. Because vested interest in the continuing viability of the tobacco manufacturers could influence policymakers not to make decisions that would result in lower cigarette

sales, securitization frees decision makers to pass meaningful legislation designed to greatly reduce cigarette consumption.

Anti-Securitization Arguments

The principal concern of tobacco control advocates who oppose securitization is that a state will use all the monies it receives from securitization to alleviate current budget deficits, leaving little future funding for prevention, cessation, education and other tobacco control programs. Generally there is no commitment to continued funding of such programs after securitization. Another key objection to the sale of future settlement payments is that the state must forfeit too much of its potential future revenue to investors for too little. Bond investors are compensated for the risk of declining payments by a sale price that is significantly lower than the total expected payout. For example, South Carolina securitized \$2.3 billion in tobacco receipts over a 25 year period for \$934 million in 2001 (just over 40 cents on the dollar). Similarly, Florida was offered 29 cents on the dollar in preliminary discussions with investment banks about bond issuance in 2000.

The view that states are selling too low is based in large part on the belief that the risk protection states purportedly receive from a bond sale is greatly exaggerated. Investment firms

involved in securitization have carefully considered and estimated all future adjustments or threats to the state settlement payments; the risks are taken into consideration by all rational buyers. That those risks are perceived to be slight is evident by the fact that the securitization bonds that have been issued have received top rankings by Moody's and Standard and Poors. Those rankings are based on evaluations of the financial health of the cigarette companies over the next 20 or more years and projections of the reliability and size of future tobacco settlement payments. It is unlikely that these reputable bond rating companies would give top rankings to the bonds if they were predicting financial devastation for tobacco manufacturers.

Another argument is that any sales volume decline will be offset by the settlement's adjustment for inflation, resulting in no significant decline in payments. The inflation adjustment in the MSA equals the actual percentage increase in the Consumer Price Index for the preceding year or three percent, whichever is greater. The effect of compounding, especially given that the payments are made in perpetuity, is significant. Assuming a three percent inflation adjustment and no decline in base payments, settlement amounts received by states would double in 24 years. Some analysts estimate the positive inflationary adjustments to be greater than any

negative adjustments for consumption. One investment firm concluded that future state settlement payments are likely to be secure and lucrative, even if some event forced the cigarette companies to make additional annual payments larger than those the companies are already making to the states.

The structure of most securitization agreements also minimizes the amount of risk protection securitization provides. Examination of past securitization deals shows that investors are often willing to securitize only a portion of a state's MSA payments. The investors then structure the securitization agreement so that any decline in future payments will first be taken out of the portion of MSA payments the state retains. Only when a payment reduction exceeds the monies retained by the state will the balance be taken from the investor's portion. Such arrangements do little to protect the state from payment depreciation.

Finally, a state may experience negative consequences if the manufacturers default on payments even if the settlement monies have been securitized. Despite the insulation from risk that securitization provides, a default of settlement-backed bonds is likely to cause a deterioration in the state's relationship with underwriters. This could result in increased issuance costs in the form of higher interest rates for future bond issues

and decreased bond ratings for the state. Thus, the risk of default is not entirely carried by the investor.

The issue of securitization is a complex one, requiring consideration and assessment of many variables. Securitization may cause states to give up too much for too little, diverting funds from the goals of the settlement that linked smoking to health care costs, to a “one-time budget fix.” Although a balanced budget and resulting improved economy may prove beneficial to public health departments generally, the risk that tobacco control programs will never again receive funding at the level provided by the MSA settlement is significant.

Sources:

1. Campaign for Tobacco Free Kids Fact Sheets, www.tobaccofreekids.org/research/factsheets.
2. American Lung Association, www.lungusa.org/press/tobacco/download/securitization.pdf.

Did you know?

Securitization can prompt reductions to the State's bond and credit ratings, increasing its costs.

Inside the Center for Tobacco Regulation

Tobacco Control Attorneys Join Forces And Create National Consortium

Center for Tobacco Regulation staff have joined their colleagues around the country to create the National Tobacco Control Legal Consortium, a group committed to providing and helping others provide technical legal assistance on tobacco control issues. A group of attorneys and public health advocates first met to discuss the possibility of creating the Consortium at the Legal Partnerships in Tobacco Control Conference in La Jolla, California in late May 2002. After spending the day discussing the need for legal services within the tobacco control community and brainstorming about ways in which the loosely formed group could help, attendees became committed to making the Consortium a reality.

The Consortium is currently led by a steering committee of representatives of the existing legal resource centers around the country. In addition to Maryland's Center for Tobacco Regulation, Litigation and Advocacy, Consortium members include California's Technical Assistance Legal Center, Massachusetts' Tobacco Control Resource Center, Minnesota's Tobacco Law Project,

Michigan's Smoke-Free Environments Law Project, and Wisconsin's Center for Tobacco Research and Intervention. Representatives of tobacco control advocacy organizations round out the Consortium's membership. Kathleen Dachille, Director of Maryland's Center, serves on the Steering Committee and as co-chair of the Recruiting Committee. The Steering Committee recently hired D. Douglas Blanke, who has served as the Director of Minnesota's Tobacco Law Project, to serve as Executive Director.

The Tobacco Technical Assistance Consortium (TTAC) in Atlanta, Georgia, an organization committed to enhancing and expanding state and local tobacco control programs, has agreed to fund the Consortium's operations. TTAC was created and is funded by the American Cancer Society, The Robert Wood Johnson Foundation and the American Legacy Foundation.

Working together, Consortium members will seek to raise awareness in the legal, public health and tobacco control communities about the valuable role attorneys can play in implementing and defending tobacco

control policy change. Members will work to assist interested states in creating new tobacco legal resource centers across the country, recruit experienced and new attorneys into the tobacco control legal community, and create a network for those attorneys to benefit from each others' experience and insights. Once formally established and staffed, the Consortium will implement a Rapid Response Team that will provide legal

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assistance to local governments or communities facing legal threats from the tobacco industry. Services will include telephone and e-mail consultation with attorneys representing local governments and communities, in-person training of such attorneys and submission of amicus curiae briefs in support of the challenged program, ordinance, law, or other tobacco control measure. This assistance will undoubtedly empower local governments and communities to take a more proactive approach to tobacco control without fear of abandoning a program because of a legal threat by the industry. One of the first tasks for the new staff will be the creation of a website, a valuable resource for communities and attorneys working on tobacco control issues.

The real impact of the Consortium should soon be felt in the tobacco

control community. A retreat held in San Francisco on November 18, 2002, in advance of the National Conference on Tobacco or Health, provided an opportunity for Consortium members to put the finishing touches on a Mission Statement which will guide the work of the Consortium through its first years of operation.

Center Gains Affiliated Faculty

The University of Maryland School of Law is pleased to announce that Allyn Taylor, JD, LL.M., JSD, has become an adjunct in residence at the University of Maryland School of Law. Dr. Taylor is a health policy adviser to the World Health Organization (WHO) and is the senior legal adviser on the WHO Framework Convention on Tobacco Control (FCTC).

As an adjunct professor of law Dr. Taylor is teaching a seminar on International Public Health Law. The seminar emphasizes the role that international organizations can serve in developing global health standards. Students in the course will specifically examine the proposed FCTC. The FCTC is being developed under the auspices of WHO's Tobacco Free Initiative, a WHO cabinet project created to focus international attention, resources and action on the global tobacco epidemic. Dr. Taylor is a welcome addition to the Center's affiliated faculty.

Center Staff Participate In 2002 National Conference On Tobacco Or Health

For the second year, Center staff members have attended the National Conference on Tobacco or Health to learn about innovative tobacco control legislation and cutting edge research and to network with their colleagues from across the country. At the 2002 Conference, held November 19-21 in San Francisco, the staff not only learned but also taught.

Center Director, Kathleen Dachille, participated in a panel discussion entitled *What's The Law Got To Do With It: How and When to Work with Lawyers for Policy Change*. More than thirty attendees, from at least twelve states, learned from the panelists about the role lawyers can play in designing, implementing and defending tobacco control programs and legislation.

Managing Attorney Michael Strande also contributed to a panel discussion that focused on the existing tobacco legal resource centers in Maryland, California, Minnesota, Massachusetts, Michigan, and Wisconsin and the development of a center in Arkansas. The panel provided the attendees with information on the many ways a

center can be established and funded and the significance of the work a center can perform for the tobacco control community. Audience reaction made clear that Maryland and other states with centers have a resource that many other states covet and that will be replicated across the nation in the years ahead.

Tobacco Control Cases and Advice

Recent Advice from the Maryland Attorney General on Tobacco Control Issues

The Maryland Office of the Attorney General recently issued an Opinion describing local government authority to regulate smoking and a Letter of Advice explaining the application of laws prohibiting youth access to tobacco products. Both documents should assist local governments in developing and implementing tobacco control policies addressing these issues.

The Opinion, No. 02-016,¹ concludes that home rule counties in Maryland have the authority to pass legislation restricting smoking on private, residential property if a harmful or offensive quantity of the smoke enters onto public property or the private property of others. A home rule county's police power authorizes legislation designed to maintain the health and welfare of the county, including the authority to define and suppress public nuisances. Because secondhand smoke undoubtedly is harmful to health, legislation regulating exposure to that nuisance would be a proper exercise of the police power. Furthermore, the General Assembly has not abrogated local

authority to regulate smoking in private residences by excluding such locations from the impact of the workplace smoking regulations. Nor would constitutional limitations prohibit such local legislation as smoking is not a fundamental right and regulation of smoking need only survive a rational basis examination to survive constitutional challenge. According to the Attorney General, with sufficient factual and scientific bases, local legislation regulating the emission of tobacco smoke from private residences should survive challenge.

The Letter of Advice, issued October 1, 2002,² answers a number of questions concerning the liability of tobacco retailers for selling cigarettes to minors. Several local jurisdictions expressed confusion about whether, when, and to whom local law enforcement could issue citations for youth tobacco sales. The letter explains that a law enforcement officer may issue a citation to a store clerk and the store owner for a youth sale made by the clerk, even if the owner was not on the premises at the time of the sale. Further, sales made to youth via a

vending machine that does not operate by token, as required by law, subject the vending machine operator and any person in control of the vending machine to citation for the youth sale and for violation of the token requirement. Similarly, if a clerk sells a tobacco vending machine token to a minor, both the clerk and the vending machine operator are liable for the youth sale. With this comprehensive explanation of the youth access and vending machine provisions, local jurisdictions should be better prepared to work with local law enforcement to create and implement effective youth access programs.

1. Document available at www.oag.state.md.us/Opinions/2002/02-016.pdf.
2. Document available at www.law.umaryland.edu/tobacco/text_pdf_files/agletter.pdf.

Did you know?

A non-smoking spouse of a regular smoker has a 20% increased chance of developing lung cancer, and a 30% increased chance of developing heart disease.

Canadian Waitress Wins Landmark Secondhand Smoke Claim

A non-smoking, former waitress who was diagnosed with terminal lung cancer after decades of working in smoky restaurants was awarded worker's compensation for her condition. This decision sets a precedent for hospitality workers throughout Canada and may stimulate similar litigation in the United States.

Last March, Heather Crowe, a 57-year-old former waitress who never smoked a day in her life, was diagnosed with a terminal lung tumor during a checkup. Her doctors say her cancer was caused by exposure to the secondhand smoke Ms. Crowe breathed over the course of her 40 years working as a waitress. In July 2002, Ms. Crowe submitted a claim to Ontario's Workplace Safety and Insurance Board seeking compensation for her cancer as a workplace injury. To prove the significant level of exposure to tobacco smoke suffered by Ms. Crowe, her attorneys submitted the results of studies done on the California food-services industry demonstrating that heavily exposed restaurant workers inhaled the equivalent of one and one-half to two packs of cigarettes during an eight-hour shift. Doctors for Ms. Crowe provided the causal link between the exposure to secondhand smoke and her lung cancer.

On October 8, 2002, Ms. Crowe received notice from the Board that her claim would be granted. A formal decision on the exact amount of the award is pending, though it will likely include compensation for Ms. Crowe's permanent impairment, lost wages, medical expenses and other undisclosed needs. The ruling catapults secondhand smoke from mere annoyance to a workplace health hazard, a conclusion public health and tobacco control advocates have been arguing for years.

Although this landmark case was decided in Canada and based on Canadian workplace safety laws, the decision may give American workers and those in other countries the confidence to pursue similar claims. All states have some form of workers' compensation board, a number of which have already addressed whether secondhand smoke in the workplace may cause injuries for which employees can receive workers' compensation benefits. Undoubtedly that issue will be posed to many more boards in the coming years. Whether illnesses linked to exposure to secondhand smoke constitute compensable injuries will be determined in each jurisdiction by reference to the existing workers' compensation statute.

The Maryland Worker's Compensation Act (MWCA), §§9-101 *et seq.*, Maryland Labor and Employment Article, provides employees suffering from work-related injuries with compensation, regardless of fault, but bans employees from pursuing tort or other remedies against their employers for those injuries covered by the Act. The MWCA divides compensable injuries into two categories: "accidental injuries" and "occupational diseases."¹ An accidental injury is "some unusual and extraordinary condition or happening in the employment not usually and naturally incident thereto."² A covered injury may be caused by conditions "extending over a substantial period of time;" the injury need not have occurred at a specific time.³ A compensable occupational disease is an ailment, disorder, or illness that is the expectable result of working under conditions naturally inherent in and inseparable from the employment, and is usually slow and insidious in its approach.⁴

Maryland courts have not addressed whether an injury or illness caused by exposure to secondhand smoke may constitute an accidental injury or occupational disease. Based on the definitions of the terms, however, it is reasonable to predict that Maryland courts would conclude that such injury or illness falls within the scope of the MWCA. The federal district court in Maryland so predicted in *Rhoads v. Federal Deposit Insurance Corporation*.⁵ The plaintiff in *Rhoads*

sued her employer in tort for breach of the alleged common-law duty to provide a safe workplace, complaining that the employer allowed smoking in the workplace to the detriment of the plaintiff's health. The court granted summary judgment for the employer on the tort counts, concluding that the plaintiff's injuries were accidental personal injuries within the scope of the MWCA.⁶ Such claims fall within the exclusive purview of the Workers' Compensation Commission.

Other jurisdictions have considered workers' compensation claims based on exposure to environmental tobacco smoke with mixed results. Although the analyses vary as greatly as the facts, generally courts and administrative tribunals have awarded workers' compensation benefits for aggravation of pre-existing conditions caused by exposure to secondhand smoke in the workplace.⁷ The question of whether a new condition related to exposure to tobacco smoke is compensable will depend significantly on the claimant's ability to prove the causal connection between the exposure and the illness. Once established, however, coverage under a workers' compensation statute should be available.

Ms. Crowe's case in Canada and the slowly growing case law in this country provide fuel for the argument that injuries caused by exposure to secondhand smoke in the workplace are compensable under workers' compensation statutes. Although this

conclusion means that employers may not be subject to tort actions for the exposure, it does not limit an employee's ability to seek compensation from the tobacco industry. Because worker's compensation cases are more quickly resolved, generally favor the employee and often provide for the payment of the claimant's attorney's fees, Worker's Compensation Commissions throughout the country may experience a significant increase in these kinds of cases.

1. *Means v. Baltimore Co.*, 689 A.2d 1238, 1239-40 (Md. 1997).

2. *Holbrook v. GM Assembly Division, General Motors Corp.*, 291 A.2d 171, 174 (Md. 1972).

3. *Id.*

4. *Luby Chevrolet, Inc. v. Gerst*, 684 A.2d 868, 874-75 (Md. App. 1996).

5. 956 F. Supp. 1239, 1259 (D. Md. 1997), *rev'd in part on other grounds*, 257 F.3d 373 (4th Cir. 2001).

6. *Id.* at 1258-59.

7. See, e.g., *Schober v. Mountain Bell Telephone*, 600 P.2d 283 (N.M. App. 1978); *Johannsen v. New York City Department of Housing Preservation & Development*, 638 N.E. 981 (N.Y. 1994).

Did you know?

Secondhand smoke is classified by the Environmental Protection Agency as a known human carcinogen.

Family Courts Protect Children From Secondhand Smoke

While state and local governments have been quite active in passing legislation prohibiting smoking in public places and workplaces, the home has remained beyond the reach of even the most comprehensive smokefree laws. Two recent family court decisions demonstrate, however, that the judiciary may regulate smoking in the home or personal vehicle to protect a child subject to an order of custody and visitation. Given the high rate of divorce, if these cases spark a trend in family court decisions, thousands of children may receive protection from secondhand smoke in their homes.

The New York case, *DeMatteo v. DeMatteo*,¹ originated with fourteen year old Nicholas filing a complaint seeking to enjoin his mother from smoking in his presence during court-ordered visitation. According to Nicholas, his mother smoked in her apartment and car when he was present. His mother, however, denied exposing the child to secondhand smoke. Ms. DeMatteo also contested the court's interim decision to take judicial notice of the fact that secondhand smoke poses significant health risks to nonsmokers, presenting evidence in opposition to that finding.

The court conducted its own research and review of scientific data and analyses of secondhand smoke. Based on the results of that research and on the fact that the New York State Legislature in 1989 passed a law recognizing the dangers of secondhand smoke, the court took judicial notice of the fact that secondhand smoke is a carcinogen that can cause lung cancer in otherwise healthy non-smokers. The court also took notice that children of smoking parents suffer increased incidence of respiratory infections and diminished lung capacity. Although Ms. DeMatteo was provided the opportunity to appeal that decision, it does not appear that she has taken any further action.

As a result of its findings, the court ordered that Nicholas' home with his father be smokefree and that the boy's mother not smoke in her apartment when Nicholas is present or for twenty-four hours in advance of a scheduled visit. The order also prohibits both parents from smoking in a car when Nicholas is present. The court considered it to be in Nicholas' best interest to limit the boy's exposure to secondhand smoke.

An Ohio court similarly used the best interest standard to reach a comparable decision in *In re Julie*

Anne.² In that case, the Court of Common Pleas of Ohio issued a restraining order prohibiting Julie Anne's parents from smoking, or allowing others to smoke, in the child's presence. Interestingly, in this case, the court independently raised the issue of the dangerous effects of childhood exposure to secondhand smoke during a routine visitation hearing. The court was quite clear in its opinion that family courts have the unqualified duty to consider the harm

caused by secondhand smoke to children subject to a custody or visitation order.

In reaching its decision, the court examined numerous scientific studies finding a causal

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relationship between exposure to secondhand smoke and health problems in children. Concluding that secondhand smoke is a human carcinogen, responsible for more than 3,000 lung disease deaths annually in the United States, the court looked at the specific harm faced by children exposed to secondhand smoke. The court noted that every independent scientific study on secondhand smoke has concluded that exposure causes and aggravates numerous diseases and illnesses in children, including bronchitis, pneumonia, asthma, chronic respiratory problems, and middle ear infections. Also

persuasive to the court were studies showing that children are more likely to become smokers when exposed to their parents' smoking. Because of the egregious harm to Julie Anne from her parents' or others' tobacco use in her presence, the court ordered that the parents not smoke and not allow others to smoke in the child's presence. The court noted that although "[a] man's home is his castle, . . . no one is allowed to hurt little children—even in his castle."

That the Ohio court considered this matter of critical importance for all children under the family court's jurisdiction is demonstrated by the depth of research the court performed and the language in the opinion: "[T]he inescapable conclusion [is] that a family court that fails to issue orders restraining persons from smoking in the presence of children within its care is failing the children whom the law has entrusted to its care." The statement is clearly a call to action for family law judges everywhere.

These cases may be the first of many similar cases and may pave the way for comparable court orders in other jurisdictions. Given the significant number of children subject to custody and visitation orders, a trend in that direction could have a profound impact on the health of our children and those in generations to come.

Fourth Circuit Rules EPA Report Beyond Challenge

For almost ten years, public health experts, tobacco control advocates and research scientists have relied on an EPA report entitled *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders*.¹ That 1993 report conclusively established that exposure to secondhand smoke increases the risk of lung cancer in healthy nonsmokers, categorizing secondhand smoke as a known human carcinogen.

On December 11, 2002, the Fourth Circuit Court of Appeals found that the report is not subject to legal challenge under the Administrative Procedures Act (APA). Members of the tobacco industry had sued the EPA in 1993 claiming that the report was based on unsound science, was an unlawful regulation under federal law and violated the due process rights of the plaintiffs. They sought as relief an order requiring the EPA to vacate the report and vacate the finding of secondhand smoke as a known human carcinogen. In 1998, the United States District Court for the Middle District of North Carolina entered partial summary judgment for the plaintiffs, striking major portions of the report and the classification of secondhand smoke as a known human carcinogen. The EPA, sup-

ported by the American Cancer Society, the American Heart Association, The Campaign for Tobacco-Free Kids and other national tobacco control organizations, appealed the case to the Fourth Circuit.

The Fourth Circuit found that the report was not reviewable agency action under the APA, vacated the lower court's decision and remanded the case to the District Court for dismissal of the complaint.² Without addressing the merits of the report or the plaintiffs' substantive challenge, the court found that the report is merely published research of the agency that imposes no legal or direct consequences that would constitute final agency action. The court stated that "holding the report . . . subject to review under the APA would expose to immediate court review the various results of governmental research as soon as published" regardless of whether the research has any regulatory effect. Although the court clearly was disturbed by the EPA's failure to include tobacco industry representatives on the advisory committee responsible for review of the report, the court found no basis for vacating the comprehensive report.

On January 15, 2003 Philip Morris representatives announced they would not appeal the decision. Thus, after ten years, the 1993 report can take its unconditional place in scientific, public health literature.

1. 749 N.Y.S. 2d 671 (2002).

2. 780 N.E. 2d 635 (2002).

1. Document available at www.epa.gov/nceawww1/ets/etsindex.htm.
2. *Flue-Cured Tobacco Cooperative v. EPA*, 313 F.3d 852 (4th Cir. 2002).

Maryland Updates

The Maryland Court of Appeals case, *Anchor Inn v. Montgomery County*, reported on in our first Newsletter, remains pending as the Court has not yet issued a decision.

The Circuit Court case of *Xcel Enterprises, Inc. v. City of Gaithersburg*, also reported on in our previous Newsletter, has been terminated. Xcel Enterprises voluntarily dismissed the suit. Therefore, the product placement ordinance passed by the City is in full force and effect.

Did you know?

Secondhand smoke may cause many diseases in children, including asthma, bronchitis, pneumonia, and Sudden Infant Death Syndrome.

Philip Morris Hit with Record-Setting Damages Award

A California jury recently returned a verdict against Philip Morris Inc., ordering the cigarette manufacturer to pay a staggering sum to a 64-year-old former smoker. On September 26, 2002, a Los Angeles jury awarded Betty Bullock, a 64-year-old former smoker, \$850,000 in compensatory damages. In October, the same jury awarded Ms. Bullock \$28 billion in punitive damages. This is the largest individual punitive damages award ever issued against a tobacco company.

Bullock, who started smoking when she was 17, was diagnosed with lung cancer in 2001. Since her diagnosis, the cancer has spread to her liver. Bullock argued that Philip Morris was responsible for her cancer because the company concealed the dangers of cigarettes with a widespread misinformation campaign that began in the 1950s. In a shift from its standard legal strategy, Philip Morris did not defend its past action, but focused on Bullock and her decision to smoke and failure to quit despite knowledge of the dangers associated with cigarettes. The jury did not accept Philip Morris' argument, and

found the cigarette manufacturer liable for fraud, negligence and product liability.

During the punitive damages phase of the trial, attorneys for Philip Morris argued that while the company may have acted inappropriately in the past, the company is now so closely monitored that punitive damages were unnecessary. Jurors obviously disagreed. Juror Jose Farinas said that the jury decided that punitive damages had to be awarded "in a way

THE PUNITIVE DAMAGES REDUCTION WAS NOT UNEXPECTED BECAUSE THE SIZE OF THE ORIGINAL AWARD GREATLY EXCEEDED THE FOUR-TO-ONE RATIO SUGGESTED BY THE SUPREME COURT.

that's a deterrent, in a way that actually hurts [the industry] and in a way that sets an example for the corporate world." With Philip Morris' estimated market

value at \$83 billion at the time of the verdict, the punitive damages award amounted to nearly one-third of the company's value.

Philip Morris appealed the size of the award and moved to have the judge find the company not liable despite the jury's finding or, in the alternative, for a new trial. In response, the judge reduced the punitive award to \$28 million, finding the jury's award to be "legally excessive," but denied the other two motions. This result was not unexpected because the size of the original award, nearly 33,000 times larger than the compensatory damages award,

greatly exceeded the four-to-one ratio suggested by the Supreme Court.¹ Philip Morris previously succeeded in having a \$3 billion punitive damages award to another former smoker reduced to \$100 million.

Aside from the size of the monetary penalty, this case is significant because it is the first verdict against a tobacco company since the Supreme Court of California granted cigarette manufacturers a window of immunity for their actions. In *Myers v. Philip Morris Companies, Inc.*,² the Supreme Court of California ruled that statements and actions of tobacco companies made or occurring between 1988 and 1998 could not be used as evidence in California suits because of a now-repealed state law. That window of immunity covers the testimony tobacco company executives gave to Congress in 1994, including statements that their products were not addictive. The Bullock verdict is significant because it shows that there remains sufficient evidence to establish tobacco company liability in California in spite of the court-imposed conduct exemption period.

1. *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991).

2. 50 P.3d 751 (Cal. 2002).

Clean Indoor Air and Other Tobacco Control Legislation

Maryland's New Tobacco Tax Eleventh Highest in Nation

Effective July 1, 2002, Maryland's tobacco tax was raised 34¢ for a total tax of \$1.00 per pack. The increase moves Maryland into a tie for the eleventh highest tobacco tax in the country. Massachusetts and New York lead with \$1.51 and \$1.50 per pack, respectively, and North Carolina and Kentucky bring up the rear with 2.5¢ and 3.0¢, respectively. Although tobacco control advocates, including Smoke Free Maryland, the American Cancer Society of Maryland and the American Lung Association of Maryland, supported the increase as a method to reduce youth smoking, the Maryland General Assembly passed the tax in April 2002 as a method of funding public schools. Specifically, the funds will be used to achieve the public schools funding recommendations made by the Thornton Commission, a two-year study of Maryland's public school system and its financial needs. Whether those funding recommendations will be met by the increase in tobacco tax revenue is an open question. The coming year will provide the opportunity to assess whether the increased tax has had an

impact on youth smoking and whether additional increases would make an even greater impact on reducing youth smoking.

Public health research demonstrates that significant increases in tobacco prices, generally through increased taxes, reduce tobacco consumption by youth. Much of this research is collected and summarized at www.tobaccofreekids.org. As noted on that website, tobacco industry documents discovered in the Attorneys General litigation reveal that the industry also is aware of the price sensitivity of youth smokers. Although the Master Settlement Agreement (MSA) limited the lobbying activities of the industry, the MSA contains no prohibitions on the industry opposing increased tobacco taxes. Therefore, such proposals are typically vigorously opposed by the tobacco industry. With a massive budget deficit looming in Maryland for the 2003 fiscal year, and a pending bill that would increase the tobacco tax another 36 cents (S.B. 324), tobacco control advocates in the state are watching to see if the tobacco tax will increase again.

Impact of Tobacco Tax Measured by Maryland Comptroller

When the Maryland General Assembly passed the 2002 tobacco tax increase, legislators required that the Comptroller study the impact the increase had on cigarette sales. The Comptroller's report submitted to Speaker of the House, Michael Busch, and Senate President, Thomas "Mike" Miller, on January 15, 2003, found "no evidence that the increase in tobacco taxes has had a direct and measurable impact on gross revenues."

The legislation sought to measure tobacco sale changes in areas of the state within 30 miles of another state. Because virtually all of Maryland meets this geographic description the study addresses the measurable impact of the increased tobacco tax statewide.

The Comptroller requested tobacco sales revenue data from the Mid Atlantic Region Petroleum Distributors' Association (MAPDA), the Maryland Retailers Association (MRA) and an agent for 7-Eleven stores. The MAPDA and 7-Eleven stores provided data; the MRA expressed an initial willingness to share the data but ultimately did not. Although the Comptroller did not question the accuracy of the data provided, he acknowledged an inherent bias in these sources. Naturally retailers that

had not experienced declines in revenue lacked the motivation or incentive to expend resources collecting and sharing the data. On the other hand, those that had experienced declines had the incentive to provide that information to the Comptroller. Despite this natural bias, the data revealed that while there apparently has been some increase in cross-border sales as a result of the tax hike, only select stores quite close to borders with other states have felt the fiscal impact of that increase. Overall, the Comptroller found "no reason to conclude that there is necessarily any correlation between the cigarette tax rate and total retail sales" in Maryland.

Did you know?

Smoking costs the United States approximately \$97.2 billion each year in health care costs and lost productivity.

Delaware's Smoke-Free Public Places Law One of the Toughest in the Nation

In May 2002, Delaware enacted a comprehensive state law banning smoking in public places. With this law, Delaware becomes the first state in the nation to overturn a previously enacted state pre-emption clause allowing local governments to adopt tobacco control measures, and the second to establish smoke-free public places, including bars and restaurants, statewide.

After a legislative battle lasting more than two years, the Delaware legislature approved the Clean Indoor Air Act and Governor Ruth Ann Minner signed Senate Bill 99 into law on May 31, 2002. The law, which took effect on November 27, bans smoking in public places including bars, casinos, taverns, restaurants, health care facilities, schools (public and non-public), bowling alleys, pool halls, gaming facilities open to the public, and all common-use public areas such as hallways, restrooms and hotel lobbies. This law is one of the most comprehensive in the nation and, according to Delaware officials, is the only law to require smoke-free casinos. The law does not regulate smoking in outdoor areas, such as decks, outdoor tables, or the stands at Dover Downs.

State Senators David McBride and Patricia Blevins introduced SB 99 to protect public health by banning smoking in all indoor public places. During the deliberations in the Senate, provisions excluding taverns, bars and casinos and providing special treatment to the hotel at Dover Downs were inserted into the bill. The Senate passed this less comprehensive version of the bill. The weakened bill was sent to Delaware's House of Representatives for consideration. The amended bill was met with opposition from advocates for the restaurant industry who argued that the exclusion of bars, taverns and casinos created an unfair playing field. Rather than adding an exemption for restaurants and having an ineffective law, the House removed the exemption for bars, taverns and casinos, creating an even playing field within the hospitality industry. The bill—revived to its original, comprehensive form—was sent back to the Senate for reconsideration.

The Senate now faced the choice of passing the bill as originally introduced or passing no clean indoor air bill, as the House members made clear that they would not pass the less restrictive version. A voter poll showing that 76 percent of Delaware voters supported the comprehensive ban was too significant to be ignored; the Senate passed the bill with an 18-3 vote. Governor Minner signed the bill into law on World No Tobacco Day.

Not long after the bill was signed another legislative proposal surfaced seeking to amend the law by exempting bars and casinos. This proposal died after the June 30 deadline to act passed without legislative action.

Thanks to an organized campaign and heavy lobbying, supporters of the Clean Indoor Air Act were able to convince lawmakers to pass the comprehensive smoking ban. Significant in this effort were the results of the influential voter poll showing that a large majority of Delaware citizens approved of the ban, frequent and numerous constituent telephone calls, e-mails and letters of support, and positive media coverage. In the end, the health of the public and the will of the constituents won out over the opposition of the hospitality industry.



Delaware State Senator, David McBride, served as lead sponsor of Delaware's Clean Indoor Air Act.

New York City Bars and Restaurants Smoke Free in 2003

Smoke Free in 2003 is now the mantra in New York City. On December 31, 2002, Mayor Michael Bloomberg signed into law a bill passed by the City Council prohibiting smoking in all workplaces, including bars, restaurants and nightclubs. The much anticipated vote of the City Council took place on December 18 after two extensive Council hearings on the bill. The hearings gave voice to dozens of restaurant and bar workers and entertainers who are exposed daily to secondhand smoke of their patrons. At the hearings, smoke-free advocates produced scientific studies demonstrating the high levels of secondhand smoke in typical bars and nightclubs and how that smoke imposes significant health risks to the exposed workers. Advocates, including some members of the hospitality industry, also produced studies concluding that smoke-free legislation does not cause a decrease in bar and restaurant revenues. Opponents argued that the bill would cause a financial hardship on bars, restaurants and nightclubs, ultimately decreasing taxes paid to the City, and that individuals should have the freedom to choose whether to smoke in such places.

Mayor Bloomberg initiated the legislation before the Council and was a staunch supporter during the difficult hearings; he rejected a weaker version of the bill suggested by some Council members as a way to achieve passage of the bill. The Mayor appeared pleased to sign the comprehensive bill, commenting: "With the passage of this legislation, we have taken a major step toward becoming one of the healthiest cities to live and work in. The air we breathe will be cleaner than it has ever been before." The law will go into effect April 1, 2003.

Many other local governments have chosen to go smoke free in 2003 along with New York City. For example, as of January 1, 2003, employees and patrons of bars and restaurants, and all other employees, in Pueblo, Colorado are breathing clean indoor air. The city of Dallas passed a bill that took effect March 1, 2003, making all public places, except free-standing bars, smoke free. The City of Boston will enjoy clean indoor air in all workplaces, including bars and restaurants, effective May 5, 2003. For a comprehensive listing of jurisdictions with smoke-free legislation, visit the website of Americans for Non-Smokers' Rights at www.no-smoke.org/100ordlist.pdf. To register your support for clean indoor air in your jurisdiction, go to www.smokefree.org.

Proposed Legislation to Give FDA Authority Over Tobacco

During the last Congressional session, Senators

Edward Kennedy (D-MA) and Michael DeWine (R-OH) introduced a bill that would have granted the Food and Drug Administration (FDA)

regulatory authority over the manufacture, sale and promotion of tobacco products. The legislation would have given the FDA the authority to regulate the ingredients allowed in cigarettes, including the elimination of harmful products or reduction of nicotine yields. Although the bill was not voted

on during the 2002 Congressional session, introduction of the bill

allowed the initial sponsors to build a coalition of co-sponsors and to be better prepared to address potential opponents' criticisms. Sponsors

vowed to reintroduce the bill in 2003.

The bipartisan Senate Bill 2626 would have subjected the tobacco industry to the same basic consumer protections that are applied to other consumer products, including ingredient disclosure, manufacturing regula-

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SENATE BILL 2626 WOULD HAVE CLOSED A REGULATORY LOOPHOLE BY GRANTING THE FDA OVERSIGHT OF CURRENTLY UNREGULATED CIGARETTES.



Tobacco Regulation Review

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tions, agency approval of new products and changes made to existing ones, and mandatory health warnings and other truthful packaging and advertising requirements. Ironically, these common sense protections apply to food products made by Philip Morris, such as Kraft macaroni and cheese, but not to the cigarettes made by the company. The proposed legislation would have closed this regulatory loophole by granting the FDA oversight of currently unregulated cigarettes which contain ingredients including ammonia, formaldehyde and arsenic.

This legislative effort is a response to the Supreme Court's decision in

FDA v. Brown & Williamson Tobacco Corp.,¹ finding that the FDA lacked the authority to regulate cigarettes and striking down regulations adopted by the agency in 1996. The Kennedy-DeWine bill would have established the FDA's authority over tobacco by creating a new category under the Food, Drug and Cosmetic Act devoted to the regulation of tobacco products and would have codified provisions of the 1996 FDA regulations concerning tobacco sales practices and advertising.

Because of a heavy docket and a focus on homeland security, the Kennedy-DeWine bill was never brought to a vote. The 2002 session did, however, provide sponsors with

the opportunity to build momentum for the bill. The legislation closed with twenty-one co-sponsors.

Despite ruling in *FDA v. Brown & Williamson* that Congress did not intend to delegate authority over tobacco products to the FDA, the Supreme Court has recognized the serious health consequences of tobacco and its deleterious effect on the public. The Court's statements appear to invite some form of congressional response.

1. 529 U.S. 120 (2000).