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The Tobacco Master Settlement Agreement: Enforcement of Marketing Restrictions

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The Tobacco Master Settlement Agreement: Enforcement of Marketing Restrictions

Dennis Eckhart

On November 23, 1998, forty-six states and six other U.S. jurisdictions entered into the largest civil litigation settlement in the nation's history. The tobacco Master Settlement Agreement (MSA) resolved litigation brought by over forty states in the mid-1990s against the major U.S. cigarette manufacturers, including Philip Morris, R.J. Reynolds, Brown & Williamson, and Lorillard, along with the tobacco industry's trade associations and public relations firms. By signing the MSA, the states gave up their legal claims that the defendants had been violating state antitrust and consumer protection laws for decades. In return, the companies agreed to pay the states billions of dollars in yearly installments and to change the way they advertise and market their products. Since November 1998, about twenty-five other tobacco companies have signed onto the MSA and are also bound by its terms.

A separate settlement, called the Smokeless Tobacco MSA (STMSA), resolved the states' claims against U.S. Smokeless Tobacco Company (USSTC). The marketing and advertising restrictions in the STMSA parallel the MSA, although the agreement does not require USSTC to make settlement payments to the states.

Enforceable in each "Settling State" by the state's attorney general, the MSA restricts how the companies ply their wares in all but four states. Mississippi, Florida, Texas and Minnesota settled separately, but may utilize many of the MSA's marketing and advertising restrictions when enforcing their respective agreements.¹ Although the MSA has been criticized by many as not going far enough to reform an industry that for decades knew more about the addictive nature and deadly effects of tobacco use than it ever acknowledged publicly, the MSA's importance as a virtually nationwide set of standards of industry conduct became even more significant in the spring of 2000, when the U.S. Supreme Court ruled that the Food and Drug Administration's effort to regulate the tobacco industry had not been authorized by Congress.²

Section I of this law synopsis summarizes the MSA's restrictions on tobacco product marketing and advertising, as well as the types of conduct the MSA does not affect. Section II provides a step-by-step description of the enforcement process, from informal inquiry to litigation. Section III reviews several enforcement actions, which have helped flesh out the meaning of some of the MSA's marketing and advertising restrictions. Section IV notes other areas of industry conduct that raise current and likely future challenges for MSA enforcement.

Section I — Overview of MSA's Marketing Restrictions

The MSA opens with an expression of intent "to further the Settling States' policies designed to reduce Youth smoking, to promote the public health and to secure monetary payments," and cites a joint commitment by the states and the tobacco companies "to reduc[e] underage tobacco use by discouraging such use and by preventing Youth access to Tobacco Products."³ Importantly, the MSA's focus on prevention of tobacco use by minors does not define the limits of the settlement.⁴ Many provisions affect how the companies market their products to adults.

Following these and several other expressions of overall purpose and intent, a lengthy list of definitions is set forth in section II of the MSA. These defined terms are capitalized throughout the MSA; and when those terms appear in this synopsis, they are capitalized

as well. The non-economic or "public health" provisions of the MSA are established in section III. Some, but not all, of the section III provisions are also set forth in section V of a separate Consent Decree and Final Judgment, which was approved by

Key Points

- In 1998, the MSA settled lawsuits brought to enforce state laws and recover the medical costs incurred by states in treating sick and dying cigarette smokers in exchange for monetary payments and marketing restrictions on cigarettes.
- Under the MSA, state attorneys general are responsible for enforcing the restrictions on cigarette marketing and advertising with the primary goal of reducing youth addiction to tobacco.
- Enforcement efforts clarify the meaning and reach of the MSA's marketing and advertising restrictions.
- Recent enforcement efforts involve restrictions on magazine advertising, free samples, outdoor ads, branded merchandise and more.

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a court in each state to facilitate enforcement of the MSA. If conduct violates the Consent Decree as well as the MSA, the court can find the company in civil or criminal contempt of court, impose monetary fines and penalties on the company, and order the company to pay the state's costs and attorneys' fees. The availability of monetary penalties and attorneys' fees in actions filed to redress violations is a key difference between enforcement of the MSA and enforcement of the Consent Decree.

Principal Restrictions on Tobacco Company Conduct

The MSA provides state officials with a new and powerful tool to affect tobacco company marketing practices. Among other things, section III:

- Bans direct and indirect targeting of Underage persons in advertising, marketing and promotion of Tobacco Products (section III(a));
- Bans "Cartoons," as defined in section II(l), including "Joe Camel" and any drawing or other depiction of an object, person, animal, creature or any similar caricature that has comically exaggerated features, attributes human characteristics to animals, plants or other objects, or uses similar anthropomorphic technique; or attributes unnatural or extrahuman abilities, such as imperviousness to pain or injury, X ray vision, tunneling at very high speeds or transformation (section III(b));
- Limits each company to a single Brand Name (e.g., Winston, Marlboro, Skoal, etc.) sponsorship in a 12-month period (section III(c));
- Prohibits billboards and other Outdoor Advertising, but allows signs up to 14-square-foot where tobacco is sold (section III(d));
- Bans payments for product placement of branded cigarettes and tobacco products in entertainment media (section III(e));
- Bans distribution of Brand Name merchandise,

except in limited circumstances (section III(f));

- Bans distribution of free samples except in Adult-Only Facilities or to consenting adults for product testing or evaluation (section III(g));
- Bans gifts to Youth in return for proofs of purchase (section III(h));
- Prohibits allowing third parties to use tobacco Brand Names (section III(i));
- Bans lobbying against certain kinds of tobacco control legislation (section III(m));
- Bans agreements between tobacco companies to suppress health-related research and product development (III(q)); and
- Bans material misrepresentations of fact regarding the health consequences of using Tobacco Products (section III(r)).

Limitations of the MSA's Marketing and Advertising Restrictions

The MSA is necessarily limited to the concessions the major tobacco companies were willing to make voluntarily to settle the states' lawsuits. Efforts to achieve broader concessions, including sweeping federal legislation, failed. The states believed that the possibility that they could achieve greater public health gains by going to trial against the tobacco industry was outweighed by the substantial risks associated with continued litigation.

For these reasons, it is not surprising that the restrictions contained in the MSA are only a partial response to the public health threat posed by tobacco advertising and marketing. This is illustrated by the fact that cigarette industry advertising budgets ballooned from \$6.7 billion in 1998 to \$11.2 billion in 2001, an increase of 66 percent in just three years, despite the MSA's restrictions.⁵ The only spending categories that have declined significantly are transit advertising, outdoor advertising and magazine advertising. All other categories have grown or stayed approximately the same.⁶

The MSA allows many forms of marketing, subject only to the general and undefined prohibition of direct and indirect targeting of Youth,⁷ including:

- Continued use of image advertising, including the use of human images with proven youth appeal, such as the Marlboro cowboy;
- Continued promotions in bars and other locations popular with “young adults” who serve as role models for younger teenagers;
- Continued brand sponsorship of events, such as NASCAR racing, limited to one series of events per manufacturer, with no restrictions on the televising of brand-sponsored events;
- Unlimited sponsorship by the corporate parent companies (not brands), such as Philip Morris, R.J. Reynolds and U.S. Smokeless Tobacco Company;
- Direct mail solicitations and advertising;
- Advertising and sales of Tobacco Products on the Internet;
- Point-of-sale advertising inside stores selling tobacco products;
- Outdoor advertising on the property of more than 500,000 retail businesses where tobacco products are sold, provided the signs are smaller than 14-square feet; and
- Use of coupons, promotional allowances such as slotting fees, retail value-added programs such as “two-for-one” offers, and other efforts to boost the appeal of tobacco products at the point of sale.

As this list of permitted activities makes clear, there is a continuing need for much broader regulatory authority over tobacco product marketing, such as

that provided by the federal Food and Drug Administration with respect to other drugs and drug delivery devices marketed in the United States. Until such authority is established, the limited restrictions contained in the MSA are among the best tools available for restraining harmful tobacco industry marketing practices.

Section II — The MSA Enforcement Process

As is appropriate for an agreement enforceable by the attorneys general of fifty-two states and other U.S. jurisdictions, the MSA (section VII(f)) encourages and, in some respects, requires the states to coordinate their enforcement efforts. In early 1999, the National Association of Attorneys General (NAAG) formed a Tobacco Enforcement Committee comprised of several attorneys general to coordinate the companies’ compliance, a staff-level Enforcement Working Group to assist and advise the Enforcement Committee, and the “Tobacco Project” to coordinate and support the states’ enforcement efforts and serve as a clearing house of information.

Over the past four and one-half years, the Enforcement Committee has reviewed and confronted tobacco companies on over twenty different matters that the Committee believed involved violations of section III. The Committee’s official positions on issues, ranging from whether certain cigarette ads used Cartoons to whether a company was making misleading statements about the health effects of exposure to secondhand smoke, are summarized on NAAG’s public website.⁸ Each of the major companies has been implicated in at least one enforcement matter. The number two cigarette maker in the United States, R.J. Reynolds, has been the focus of a disproportionately large number of disputes.

The MSA enforcement process typically begins when a member of the public, a public health organization, or another tobacco company makes a complaint to a state attorney general or the Tobacco Project at NAAG. Because of resource limitations, the states necessarily rely on reports from concerned citizens or groups to help monitor compliance. In some instances, the Tobacco Project or state staff

monitoring MSA compliance discover the questionable conduct. Some issues are of local concern. For example, prohibited outdoor advertising in one location would be investigated and prosecuted by that state's attorney general. Other states are kept informed in case the same issue arises elsewhere. Issues of broader concern, such as a nationwide advertising campaign, are discussed in the Enforcement Working Group. Typically, a state or the Tobacco Enforcement Counsel at NAAG asks the company for information about its policy or practice and its legal rationale. If deemed a potential violation, the matter is referred to the Enforcement Committee. The committee's first step is usually a letter to the company, stating the committee's belief that the conduct violates the MSA and asking for specified action or response.

A number of disputes have been resolved through discussion, with the company agreeing either to terminate or modify the practice or stating that it has no plans to continue. In some instances the states and the company involved have negotiated a formal, written settlement agreement. Such agreements supplement and clarify the MSA, but they do not alter its terms. The Enforcement Committee reviews and endorses such supplemental agreements if they have nationwide consequences. Several of these agreements, however, have involved just the enforcing state and the tobacco company.

If a dispute cannot be resolved through discussion with the company, the Enforcement Committee decides whether to recommend or authorize formal enforcement action by a state or states under section VII(c) of the MSA and, if appropriate, under section VI of the Consent Decree, as well. However, even absent a determination by the Enforcement Committee, any MSA state has the right to initiate a formal action against the offending company.

A state must give thirty days' advance notice of its intent to sue to enforce the MSA, while only ten days' advance notice is required to enforce the Consent Decree.⁹ This allows the company time to decide to voluntarily discontinue the offending practice. Multiple states can sign onto the notice. If the conduct violates the MSA but not the Consent Decree, the court can enter either an enforcement order (similar to an injunction) or a declaratory order interpreting the MSA

provision at issue. Monetary penalties are available under the Consent Decree in each participating state. Each state may sue only for alleged violations of the MSA that occur in that state, but states can and do coordinate their enforcement efforts. In one instance, four states filed parallel lawsuits against a single company, and in another instance five states formally pooled their resources to pursue one state's lawsuit. Not only do such cooperative efforts conserve state resources, but they also help the states reach settlements that the tobacco companies agree to implement in every state. Although a court decision interpreting the MSA in one state does not automatically apply in all other states, state court decisions provide guidance to courts and enforcement personnel in other states.

Section III — MSA Enforcement Actions

Misrepresenting the Health Effects of Tobacco

In April 1999, Rhode Island became the first state to call a tobacco company to task for violating a provision of the MSA. The dispute involved the ban on misrepresenting the health consequences of using tobacco—a violation of the MSA, the STMSA and the Consent Decree. A spokesperson for U.S. Smokeless Tobacco Company (USSTC) was quoted in a Providence newspaper as saying that smokeless tobacco had not been proven to cause oral cancer and other diseases. This statement was directly contrary to findings of the U.S. Surgeon General and other public health officials. The next day the Rhode Island Attorney General demanded USSTC cease and desist from such statements because it violated section III(p) of the STMSA.¹⁰ A month later, the state and the company entered into a written agreement in which USSTC formally withdrew the statement and promised it would no longer make statements that misrepresented the health effects or the addictive nature of its products. The company paid the state of Rhode Island \$15,000 to be used for prevention of youth tobacco use.

Targeting Youth in Magazine Advertising

The most significant MSA enforcement issue to reach the courts thus far began in the spring of 1999 with a multi-state investigation of the tobacco companies' advertising in national magazines. Several attorneys general and their staff became concerned about the content and placement of ad campaigns the companies were running at the time. Some of the content and images were cartoon-like and/or otherwise seemed to target young readers, and the ads appeared frequently in magazines with high levels of youth readership.

The MSA does not expressly address magazine advertising, but the tobacco companies' magazine advertising practices implicated at least two of its provisions: section III(a) prohibits youth targeting in advertising and section III(b) prohibits the use of Cartoons, as defined in MSA section II(l). The ban on targeting youth appears in both the MSA and the Consent Decree,¹¹ but the MSA's ban on Cartoons has no counterpart in the Consent Decree.

During 1999 and 2000, a multi-state working group examined a number of advertising campaigns in light of section III(b), including R.J. Reynolds' "Imagine Getting More" ads for Doral and its "Viewer Discretion Advised" ads for Camel, and Philip Morris's "Think Light" ads for Merit and its "Relax & Unwind" ads for Benson & Hedges. In extensive correspondence and several meetings with company representatives, the states made their concerns known, and all these campaigns were either discontinued or modified.

In 1999, a number of states jointly initiated an investigation of Brown & Williamson's "B-Kool" campaign for Kool cigarettes. The states believed the company was violating section III(a), both because the ads appeared in magazines, such as *Rolling Stone*, *People*, and *Sports Illustrated*, which are read by many teens, and because the ads portrayed youthful models engaged in trendy or sexually provocative situations. In short, the company said it was targeting young adults, but the states believed the ads were also targeted at teens. The states obtained documents about the campaign from the company in response to a formal request for information pursuant to MSA section VII(g). While under intense scrutiny and pressure from

the states, Brown & Williamson voluntarily discontinued the "B Kool" campaign in June 2000.

The investigation of "B-Kool" laid the groundwork for the states' ensuing efforts to convince all four major U.S. cigarette makers and USSTC to significantly reduce youth exposure to their ads in national magazines. Unlike the FDA's tobacco advertising regulations, which were nullified by the U.S. Supreme Court in *FDA v. Brown & Williamson*, the MSA does not set youth readership limits for placement of ads in magazines. Nonetheless, prompted by the states, three of the four major cigarette makers substantially revised their magazine advertising policies and practices. Philip Morris adopted a 15 percent or two million standard; that is, the company agreed not to advertise in a magazine if its teen readership was 15 percent or more of its total audience or if two million or more of its readers were teens, as measured by one or both of two nationally recognized advertising survey companies. Philip Morris also agreed not to advertise on the back cover of any magazine. Several months later, Brown & Williamson adopted a 15 percent teen readership standard, and Lorillard committed to an 18 percent standard. These voluntary restrictions meant that these companies' ads would no longer appear in popular magazines read by teens.

R.J. Reynolds was considerably less amenable to changing its advertising policies and practices. In December 1999, the company announced a policy of avoiding magazines with more than 50 percent youth readership. This policy eliminated only those magazines primarily directed at children and teens. In June 2000, the company revised its policy downward to a 33 percent standard, but the change eliminated only one magazine in which Reynolds was then advertising, *Vibe*.

Due to Reynolds' intransigence on this issue, California initiated formal enforcement proceedings. The state sent Reynolds a 30-day notice of intent to sue in February 2001. Twenty-one other states and the Territory of Guam joined in the notice. Informal attempts to resolve the matter, including a meeting in Washington, D.C. between several attorneys general and Reynolds' CEO Arthur Schindler, failed to resolve the dispute. California sued Reynolds in March 2001.

On the day the state's suit was filed, Reynolds announced it had changed its standard once again, this time to 25 percent youth readership. However, this change eliminated only one additional magazine, *Spin*.

Although California took the lead in the litigation, Connecticut, New York, Maryland, Pennsylvania and NAAG's Tobacco Project contributed staff and resources. Assistant attorneys general from these four states and NAAG's Tobacco Enforcement Counsel formally joined the case as attorneys for the People of the State of California. After spending a year engaged in protracted discovery and pretrial motions, California took the case to trial in April 2002 before the Superior Court in and for the County of San Diego. The non-jury trial lasted one month. The states' evidence proved that Reynolds' ads in national magazines were consistently reaching teens twelve to seventeen years of age virtually to the same extent as the company's ads were reaching the stated "target" audience of young adult smokers.

On June 6, 2002, the court issued a written "Statement of Decision" in which it concluded that Reynolds had indirectly targeted youth in violation of section III(a). After considering and rejecting dozens of objections from Reynolds, the court reaffirmed its earlier determination, issuing a final Statement of Decision on July 12, 2002, and entering a Final Judgment on August 23, 2002.¹² The court ordered Reynolds to:

- Refrain from continuing to expose youth to its advertising at levels similar to exposure levels of adult smokers;
- Incorporate as part of its media strategy reasonable measures to reduce youth exposure to its tobacco advertising to a level significantly lower than the level for targeted groups of adult smokers;
- Measure its success in achieving this goal;
- Pay California \$20 million as a sanction for the violation; and
- (In a separate, post-judgment order) pay the

states almost \$4 million in attorneys' fees and costs.

Reynolds filed an appeal. In 2004, the California Court of Appeal for the 4th Appellate District found that Reynolds had violated the MSA by indirectly targeting youth in its magazine advertising campaign, but reversed the \$20 million fine against Reynolds and remanded it to the lower court on grounds that the trial judge had improperly based the fine on the company's national advertising spending rather than on the amount it had spent in California.¹³ The case remains pending.

Sampling Booths and Advertising at Auto Races

In 1999, states began focusing on issues relating to the MSA's restriction on Brand Name sponsorships. In fact, the first 30-day notice of intent to sue for a violation of the MSA was issued by the California Attorney General's office in September 1999, to R.J. Reynolds. The state believed the company's promotional activities at NASCAR and NHRA auto racing events sponsored under the name of Reynolds' Winston brand cigarette violated a number of the provisions of section III. In this instance, however, no suit was filed because just two weeks after receiving California's notice, Reynolds told the state it was willing to make substantial changes to its conduct at such events. A multi-state negotiating team from California, Ohio and Pennsylvania was formed, and along with NAAG's Tobacco Counsel, the group met with Reynolds to negotiate a written settlement agreement, which Reynolds and California signed in May 2000.¹⁴ The agreement was then presented to the Enforcement Committee, which endorsed and recommended it to all the MSA states as a fair and appropriate resolution of the dispute. Although no other state signed the agreement, Reynolds implemented its terms in every MSA state.

In the agreement Reynolds promised to:

- Discontinue posting signs that advertised both cigarettes and the sponsored event, a violation of MSA section III(c)(3)(A);

- Restrict the number and size of signs advertising cigarettes posted where cigarettes are sold at such events—MSA section III(d)(2) restricts the size and arrangement of signs posted on retail establishments selling Tobacco Products;
- Completely enclose its sampling booths so passersby cannot see the sampling activity inside—MSA section III(g) allows sampling in Adult-Only Facilities which are defined in section II(c) as places where no Underage person is present; and
- Pay California \$30,000 to cover its investigative costs.

Unsolicited Free Tobacco Products by Mail

Just as California's first enforcement case with Reynolds was in the wrap-up phase, another dispute with Reynolds arose—this time over section III(g)'s ban on distributing free samples of tobacco product except in adult-only facilities or to adults for product evaluation or testing.¹⁵ In May 2000, California filed the first-ever court action to enforce the MSA. The case arose from citizen complaints to the Arizona Attorney General's Office about unsolicited mailings of Camel and Winston cigarettes. California and Arizona pursued parallel investigations and discovered a number of similar violations in each state. Reynolds was mailing hundreds of thousands of packs of free cigarettes directly to consumers in the two states, violating section III(g)'s ban on distributing free samples to persons who had not agreed to receive free cigarettes, including several nonsmokers and, in at least one instance, to someone who had died several years earlier. The mailers typically held between two and ten packs of cigarettes and included advertising, promotional materials and a consumer survey. Reynolds did not clearly inform potential recipients, either in the mailer or otherwise, that the free cigarettes were being provided for consumer testing and evaluation, nor did Reynolds consistently or adequately verify that the recipients had agreed to receive free cigarettes. California sued Reynolds, alleging that the company's free-samples-by-mail program was

marketing in the guise of product evaluation.

At an initial court hearing the court denied California's request for an immediate cease and desist order, but a short time later, while California was seeking appellate review of that decision, Reynolds asked to meet with Arizona and California representatives about a possible settlement. Several months later a written agreement was reached between the company and the two states.¹⁶ Each state then sought and received court approval of the agreement.

In the settlement Reynolds agreed to:

- Tell prospective recipients of free cigarettes that it would mail them only to adults who had given prior consent in writing to receive the free cigarettes specifically for evaluation or testing purposes;
- Verify that each person who signs a consent form is indeed an adult and to mail free cigarettes only to persons whose consent or evaluation forms were received within the last 180 days;
- Limit the number of packs per mailing (no more than two), the number of mailings per year (no more than five), and the size of mailers (small enough to fit into a mail receptacle that complies with U.S. Postal Service regulations);
- Report to the states on a semiannual basis the number of free cigarettes it has mailed directly to consumers in Arizona and California; and
- Pay the two states a total of \$175,000 to cover their investigative costs.

Matchbook Promotions

In March 2001, the Ohio Attorney General filed suit against R.J. Reynolds for annually distributing over a billion matchbooks covered with Camel and Winston ads, in violation of section III(f)'s ban on Brand Name merchandise. While section V.D of the Consent Decree also bans Brand Name merchandise, Ohio ultimately decided to seek only a declaratory interpretation of the MSA under section VII(c), rather than a contempt determination or monetary penalties.

Ohio's case turned on whether the matchbooks, which retailers give away free-of-charge, usually with a cigarette purchase, are "merchandise," a term the MSA does not define. Branded caps, tote bags, t-shirts, jackets, backpacks and other "gear" were commonplace tobacco promotions before the MSA, and the settlement prohibits all such "walking billboards" and other branded items because they had proved to be immensely popular with children and tended to dispose children who owned them to initiate smoking.

In court, Ohio argued that "merchandise" in common usage means any item that is or could be bought and sold in commerce, while Reynolds argued that the matchbooks were an advertising medium, like magazines, still permitted by section III(f), and in any event they were not merchandise because they were given away free to smokers when they purchased cigarettes.

The trial court agreed with Reynolds that the matchbooks were not prohibited by the MSA. Ohio appealed, and with support from dozens of MSA states, which filed a friend-of-the-court brief, convinced the Ohio Court of Appeals to reverse that decision.¹⁷ The Ohio Supreme Court has heard the case but has not yet issued a decision.

NASCAR's "Winston Cup" and the 90/10 Rule

Also in March 2001, four states—Arizona, California, New York and Washington—simultaneously filed enforcement suits against Reynolds for violating the MSA's restrictions on Outdoor Advertising.¹⁸ The company had posted year round billboards and other signs at auto racetracks in about 16 states. Although the MSA generally bans billboards and other outdoor ads, a limited exception in section III(c)(3)(E)(ii) allows the posting of signs advertising a Brand Name sponsorship at the site of a sponsored event for up to ninety days before the event. The company has up to ten days after the event to remove the signs. Because the NASCAR Winston Cup is a national series of about twenty races held from February to November each year at various tracks around the country, Reynolds claimed the MSA allowed signs advertising the sponsorship to be posted

all year long at each track where a Winston Cup race was scheduled to occur.

California's case was the first of the four actions to be decided, and in June 2003 it became the first MSA enforcement action to be resolved in the courts. Following entry of a favorable trial court decision in December 2001, the Court of Appeals for the 4th Appellate District upheld that decision in the spring of 2003 in a unanimous, published decision.¹⁹ A few months later, the California Supreme Court denied Reynolds' request for review, bringing the case to a close.

Meanwhile, the other three states were getting mixed results in their cases. Arizona won its case in both the trial court and court of appeal.²⁰ In New York, the trial court and the appellate court ruled for Reynolds, and New York's highest court declined to review the case. Washington's case was rendered moot when the racetrack owner removed the offending signs. In each case on appeal, dozens of MSA states filed friend-of-the-court briefs in support of the prosecuting state.

Although the principal issue presented by these four parallel enforcement actions is a narrow question of how to interpret a limited exception to the MSA's broad ban on billboards and other forms of "Outdoor Advertising," the cases hold much significance for future MSA enforcement actions. Reynolds has argued on appeal in Arizona and California that it should be allowed to challenge court interpretations of the MSA with which the company disagrees as infringing on its free speech rights under the First Amendment—this despite the fact that in section XV of the MSA the company expressly waived its right to challenge the provisions of the MSA on constitutional grounds. In California's case, the appellate court soundly rejected Reynolds' argument.²¹

Section IV — Future Challenges for Enforcement of MSA Section III

Since the MSA was signed, the states' enforcement efforts have met with considerable success. While some disputes have been resolved with relatively little effort by the states and voluntary agreements have been negotiated with the tobacco companies, other

disputes have required protracted litigation and thousands of hours by state attorneys. The multi-state team of prosecutors in California's magazine advertising case against R.J. Reynolds logged over 10,600 attorney hours and 2,500 paralegal hours on the case, not counting time spent defending the trial court's decision on appeal.

The cost of MSA enforcement presents a continuing challenge for states, especially as many struggle with dwindling revenues and huge budget deficits. The major tobacco companies compete for market share both among themselves and with hundreds of smaller tobacco companies, many of which have entered the U.S. marketplace since the MSA was signed. In their constant efforts to grow their market share and deliver dividends to their shareholders, the companies are continually devising new marketing strategies, promotional tactics and advertising campaigns. Some companies have already tested the MSA's limits several times. Thus far, states have sent the tobacco companies a strong and consistent message that they will not tolerate deviations from the restrictions and prohibitions of section III. The states, too, have tested the limits of the MSA and have found most courts willing to interpret and apply the restrictions in the spirit in which they were intended. However, unless the states continue to commit substantial, ongoing resources to section III enforcement activities, including litigation if necessary, there is a very real danger that the MSA will become a dead letter.

To cite just one area in which section III could have a major impact on the marketing of tobacco products in the next few years, the states already face serious challenges from the proliferation of a new generation of cigarettes and non-traditional tobacco products, which are being advertised with the express or implied promise that they present fewer health risks to users or are "safer" than other tobacco products on the market. For instance, ads for Brown & Williamson's *Advance* cigarettes claim "fewer toxins," while ads for Vector Tobacco's *Omni* cigarettes claim "reduced carcinogens." Reynolds says that its *Eclipse* cigarettes, in which the tobacco is mostly heated rather than burned, emit substantially less secondhand smoke and present less risk of disease and death to users and

passive smokers alike. And Philip Morris is reportedly on the verge of releasing a new cigarette with fewer toxic ingredients, although it is not yet known what claims the company will make about the product. Monitoring the marketing of these new products and determining whether the claims made about them pass muster under section III(r) of the MSA will require significant state resources, especially in the absence of comprehensive federal regulation of tobacco.

New cigarette products are just one of the major challenges and opportunities presented to states and elected officials as they set priorities for the future of tobacco control. One lesson to be learned from the first five years of section III enforcement is that without constant vigilance and vigorous prosecution of violations by the states, the tobacco companies may not keep the promises they made when they signed the MSA.

Online Resources Regarding MSA Issues

National Association of Attorneys General (NAAG)

NAAG provides access to hundreds of documents related to the MSA and the STMSA: www.naag.org
Documents include the full text of the MSA, including all exhibits and amendments, and more than twenty "Enforcement Committee Summaries." Unfortunately, these summaries do not disclose manufacturer names, brand names or other information that would help provide context.

Campaign for Tobacco-Free Kids (CTFK)

The CTFK site includes more than twenty fact sheets explaining different aspects of the MSA. Topics include a summary of the MSA, shortcomings of the MSA, MSA lobbying restrictions, MSA restrictions on distribution of free cigarettes, and a comparison of MSA provisions to the FDA Rule and federal legislative proposals. In addition, CTFK offers special reports on how the states are using MSA funds: www.tobaccofreekids.org

The California Attorney General's Office (CAAG)

California's Attorney General has been involved in most MSA-related enforcement actions. The website includes an extensive archive of enforcement-related documents: www.caag.state.ca.us

National Council of State Legislatures (NCSL)

NCSL provides a detailed summary, helpful Q&A and related materials at: www.ncsl.org

The National Governors' Association (NGA)

NGA provides an overview of state-by-state plans to spend MSA funds, among other resources: www.nga.org

About the Author

Dennis Eckhart, Senior Assistant Attorney General at the California Department of Justice, leads the Department's enforcement of the MSA in California. Mr. Eckhart wishes to thank John Bloom of Tobacco Policy Matters for his valuable counsel and editorial assistance in producing this synopsis. The views expressed here are those of the author and are not meant to represent the views of the California Department of Justice.

Endnotes

- ¹ See, e.g., State of Minnesota's Settlement Agreement and Stipulation for Entry of Consent Judgment, Limited Most-Favored Nations Provision, available at <http://www.wmitchell.edu/tobaccolaw/resources/MNconsentjudgment.pdf>.
- ² *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).
- ³ The National Association of Attorneys General has posted copies of the MSA and the STMSA on its website, <http://www.naag.org/issues/issue-tobacco.php>.
- ⁴ In addition to imposing marketing and other conduct restrictions on the tobacco companies, the MSA's benefits include creating and funding a national educational and research organization, the American Legacy Foundation (section VI), dissolving the industry's public relations and propaganda organizations — the Tobacco Institute, Council for Tobacco Research, and Center for Indoor Air Research (section III(o)) — and requiring the companies to make their litigation documents available to the public over the Internet until June 30, 2010 (section IV).
- ⁵ Federal Trade Commission, *Federal Trade Commission Cigarette Report for 2001* (June 12, 2003), available at <http://www.ftc.gov/os/2003/06/2001cigreport.pdf>. The increase in marketing by smokeless tobacco manufacturers has been nearly identical to that of cigarette manufacturers. Federal Trade Commission, *Federal Trade Commission Smokeless Tobacco Report for the Years 2000 and 2001* (August 12, 2003), available at <http://www1.ftc.gov/os/2003/08/2k2k1smokeless.pdf>.
- ⁶ Campaign for Tobacco-Free Kids, *The Multistate Settlement Agreement Fails to Reach or Limit Most Cigarette Company Marketing Tactics* (June 23, 2003), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0085.pdf>.
- ⁷ "Youth" includes all persons under 18 years of age (section II(bbb)).
- ⁸ See <http://www.naag.org/issues/issue-tobacco.php>.
- ⁹ MSA section VII(c); Consent Decree section VI(a).
- ¹⁰ Section V.H of the Consent Decree also prohibits such misrepresentations.
- ¹¹ Consent Decree section V.A.
- ¹² The Final Statement of Decision and the Judgment are posted in the "Highlights" section of the California Attorney General's tobacco website, <http://caag.state.ca.us/tobacco>.
- ¹³ *Lockyer v. R.J. Reynolds Tobacco Co.*, 11 Cal. Rptr. 3d 317 (App. 4 Dist. 2004), also available at <http://www.caag.state.ca.us/tobacco>. The day after the trial court announced its initial decision in the Reynolds case, USSTC announced it was suspending its advertising in a number of magazines with large teen audiences.
- ¹⁴ A copy of the agreement is posted in the "Archive" for 2000 on the California Attorney General's tobacco litigation website, <http://caag.state.ca.us/tobacco>.
- ¹⁵ Section V.E of the Consent Decree prohibits this conduct, as well.
- ¹⁶ A copy of the agreement, reached in December 2000, is available in the "Archive" for 2001 on the California Attorney General's tobacco litigation website, <http://caag.state.ca.us/tobacco>.
- ¹⁷ *State ex. rel. Montgomery v. R.J. Reynolds*, 787 N.E.2d 717 (Ohio Ct. App. 2003).
- ¹⁸ The Consent Decree contains no parallel provision.
- ¹⁹ *People v. R.J. Reynolds*, 107 Cal. App. 4th 516; 132 Cal. Rptr. 2d 151 (2003).
- ²⁰ *State ex. rel. Goddard v. R.J. Reynolds*, 75 P.3d 1075 (Ariz. Ct. App. 2003).
- ²¹ *People v. R.J. Reynolds*, 107 Cal. App. 4th at 533.



About the Tobacco Control Legal Consortium

The Tobacco Control Legal Consortium is a national network of legal programs supporting tobacco control policy change by giving advocates better access to legal expertise. The Consortium's coordinating office, located at William Mitchell College of Law in St. Paul, Minnesota, fields requests for legal technical assistance and coordinates the delivery of services by the collaborating legal resource centers. Legal technical assistance includes help with legislative drafting; legal research, analysis and strategy; training and presentations; preparation of friend-of-the-court legal briefs; and litigation support. Drawing on the expertise of its collaborating legal centers, the Consortium works to assist communities with urgent legal needs and to increase the legal resources available to the tobacco control movement.

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