SPECIAL COMMUNICATION

Application of consumer protection authority in preventing tobacco sales to minors

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Tobacco Control 2002;**11**:109–111

In the USA, the enforcement of state sales of tobacco products to minors laws has had only limited impact upon reducing youth access. The application of consumer protection authorities by state attorneys general to alter the sales and promotion practices of tobacco retailers provides a complementary and highly leveraged strategy to increase compliance with tobacco sales to minors laws

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Received 23 May 2001 and revision requested 31 August 2001. Accepted 14 February 2002

Tobacco dependence begins for the majority of smokers before age 18 years.[1] In the USA every day at least 5000 minors try their first cigarette and 2100 minors become daily smokers.[2] Reducing teenage tobacco use is thus a critical strategy in reducing tobacco related morbidity and mortality; central to this strategy is the enforcement of state and local laws to prohibit the sale of tobacco products by minors.[3] Under the mandate of the Federal Synar regulations, all states and territories are required to institute and enforce laws that prohibit tobacco sales to minors under the age of 18 and to achieve a targeted compliance rate of 80%[4]; 46 states reached or exceeded this rate in fiscal year (FY) 2000 (up from 43 states in FY1999).[5] But recent research on the impact of youth access enforcement programmes on teenage tobacco use rates[6 7] has led to the suggestion that rates of 90% or higher may be necessary to have any significant impact upon teenage tobacco use patterns[8]—a compliance rate which only three states achieved in FY2000, Synar reports.[9]

The application of state consumer protection laws to achieve compliance with tobacco sales to minors laws represents an additional approach which complements and reinforces the enforcement programmes conducted by state public health and inspectional agencies. Every state has enacted legislation designed to protect consumers against merchant practices which are "unfair or deceptive acts or practices". These state "UDAP" statutes are modelled on the Federal Trade Commission's Unfair Trade Practices and Consumer Protection Law and are loosely referred to as "consumer protection laws". In many states, consumer protection authority resides primarily in the office of the attorney general. In the application to tobacco sales to minors, the illegal sale of a harmful and addictive product to a minor is characterised as an "unfair", "deceptive", and/or "unconscionable" act. The legal remedy for violations of consumer protection laws are penalties which are usually much greater than those provided for in a state's sales to minors law—as much as $40 000 per violation per defendant.[10] Violations of consumer protection law often result instead in voluntary agreements between the violator and the state—in this case, an agreement to implement changes in the underlying training, supervisory and point-of-sales practices which can prevent tobacco sales to minors.

TEST CASE: *KYTE V STORE 24*

The first application of consumer protection statutes to tobacco sales to minors was a private civil action instigated in 1987 by members of GASP of Massachusetts (later renamed the Tobacco Control Resource Center). Although the Massachusetts legislature had banned tobacco sales to minors since 1886, there was no record that this law, MGL c.270 Sec 6, had ever been enforced. GASP identified Theresa Kyte, who had begun smoking at age 12 and had tried unsuccessfully to quit on her own, as the primary plaintiff. Her friend, Sean Cann, who had begun smoking at the age of 14, also chose to join the case. Store 24, Inc was selected as the defendant. Although the two teenagers had purchased tobacco from a number of retailers, individual Store 24s repeatedly sold tobacco to them without ever requesting identification. Additionally, since Store 24 was a fairly large regional chain, any changes in sales policies that might result would apply to all the stores in the chain. Philip Morris, manufacturer of the Marlboros and Parliaments which the two teens smoked, was named as a co-defendant: plaintiffs argued that Philip Morris and Store 24 engaged in a civil conspiracy to sell tobacco to minors. The court eventually dismissed all claims against Philip Morris.

The complaint against Store 24 asserted that the store's illegal sale of tobacco to minors constituted a public nuisance and violated Massachusetts' Consumer Protection Act.[11] The specific injuries asserted in the case were both the harm to the teens' health caused by smoking (such as persistent coughing) and their addiction to nicotine. A settlement of the suit was announced on 18 June 1991. Although the terms of the settlement were sealed, one condition was made public by all parties: Store 24 agreed to implement an aggressive training and supervisory programme for store employees, to post signage, and to require positive proof of age from young customers wishing to purchase tobacco products.

ATTORNEY GENERAL ACTIONS UNDER CONSUMER PROTECTION AUTHORITY

Massachusetts actions against grocery store chains 1994

In 1994, investigators from the Massachusetts office of the attorney general conducted inspections of more than 200 retailer outlets and determined that more than two thirds sold tobacco to minors, including multiple outlets of a number of supermarket chains. The attorney general approached these supermarket chains to initiate negotiations under the Massachusetts Consumer Protection Act. This effort resulted in assurances of discontinuance with six supermarket chains calling for changes in their tobacco retailing practices, including placing tobacco products in locked cabinets and implementing scanner locks which prompt clerks to verify the customer's age. Penalties of approximately $1250 per package of cigarettes sold were imposed.

Multi-state enforcement effort by Massachusetts, New York, and Vermont 1998

In 1996, the attorneys general of Massachusetts, Minnesota, New Mexico, New York, and Vermont conducted coordinated tobacco sales compliance checks. Out of 1405 attempted purchases, minors were able to purchase 463 times for an illegal sale rate of 33%. Subsequently, the attorneys general of Massachusetts, New York, and Vermont decided to use these results to contact the companies in their region that had sold to minors at a rate above 33%. The three states agreed to employ the recommendations outlined in a 1994 report, *No sale: youth, tobacco and responsible retailing*,[12] as a basis for their negotiations. On 4 May 1998, the attorneys general announced assurances of discontinuance with four national tobacco retailers: CVS, Shell, Kmart, and Texaco (through Star, its east coast retailing subsidiary). In addition, New York announced an assurance of discontinuance with Duane Reade, a pharmacy chain. In these assurances, the retailers agreed to take steps to reduce the possibility for minors to obtain tobacco products from their stores, including:

- removing cigarettes and smokeless tobacco products from the aisles
- cash register prompts to remind cashiers to check the age of all purchasers who appear to be under the age of 27 or "scanner locks" which require the cashier to input the customer's date of birth (appearing on the driver's licence) to complete the transaction
- monitoring the success of these programmes with internal mystery shopper inspections.

While these assurances of discontinuance require that these changes be implemented only in the three signatory states, some chains have implemented some or all of the required practices corporate wide. In addition, the assurances required each of the four retail chains to contribute between $50 000 and $150 000 to implement a programme to prevent youth access to tobacco.

Multi-state enforcement effort by 22 offices of attorneys general 2001

In 2000, the attorneys general of Iowa and Vermont invited other attorneys general to consider the uses of consumer protection authority to reduce illegal tobacco sales to minors. This new work group of 22 offices of attorneys general employed data from the Food and Drug Administration tobacco retailer inspections to identify national chains with high non-compliance records. Discussions were subsequently begun with four gas station/food mart chains, one pharmacy chain, and one department store chain.* As with the Massachusetts, New York, and Vermont action, the proposed assurances stipulate training, supervisory and point-of-sales practices. In these negotiations, the attorneys general group seeks to include: restrictions on tobacco sales by employees under 18; limits on self service displays and in-store advertising; use of electronic age verification technology to scan IDs and calculate age; periodic review of videotapes to inspect sales conduct; and the inclusion of performance measures as a basis for determining whether employees are requesting and checking IDs before making sales.

DISCUSSION

The enforcement of state sales to minors laws has had only limited impact upon reducing youth access to tobacco. Enforcement of sales to minors laws is based upon the theory that aversion to risk (penalties) will produce changes in retailer conduct. But several factors have inhibited the effectiveness of enforcement schemes:

- Penalties under many state sales to minors laws are relatively low—typically $100 or less. Although penalties increase with subsequent infractions, few states inspect with sufficient frequency to expose retailers to these higher penalties
- Penalties for sales to minors are applied to individual clerks and/or stores—and sometimes to the minor—but not to the chain to which a store might belong
- Because of high turnover rates for sales personnel, the deterrence effect of prior inspections is lost on sales clerks who were hired recently
- Minors often find ways around the laws, including strategies involving sales clerks and friends who are at least 18 years old.[13]

Consumer protection actions can offset many of these limitations inherent in current enforcement programmes. Penalties under consumer protection statutes are typically much higher than for sales to minors laws—as much as $5000–$10 000 per infraction in a number of states. Individual infractions can be adduced as an underlying pattern of non-compliance for which the corporate parent is held responsible. The remedy to this pattern of non-compliance can include fundamental changes in corporate behaviour, including the way in which sales personnel are hired, trained, supervised, promoted or terminated. Whereas enforcement of sales to minors laws through state and local inspectional agencies can only penalise a single illegal act, consumer protection initiatives focus on corporate responsibility and stipulate a process of conduct throughout the chain.

A major policy implication of consumer protection actions relates to the re-allocation of resources and responsibilities for youth access prevention. Recently, the tobacco control community has begun to consider the relative cost effectiveness of youth access enforcement programmes in comparison to other tobacco control policies (such as excise tax increases and clean indoor air acts), which may impact teenage tobacco use patterns more dramatically than youth access enforcement.[14] Although enforcement of youth access laws has been a cornerstone of state tobacco control programming[15] whose cost effectiveness has recently been defended,[16] few states appear likely to allocate sufficient resources to their enforcement programmes to achieve high compliance rates (in excess of 90%) which recent research suggests may be needed to impact teenage tobacco use rates. Consumer protection initiatives, however, require fewer resources—especially when Synar and other state inspections serve as documentation of patterns of non-compliance and

*Walgreen became the first chain to execute an assurance of voluntary compliance on 13 March 2002. The attorneys general work group prefers that the names of the remaining chains be withheld until individual negotiations are concluded.

obviate the need for additional inspections. Large multi-state attorneys general work groups can be supported by staff from only a few offices of attorneys general. And since the signatory chains are apt to implement the stipulations in all the states in which they operate in order to maintain consistent practices within their companies, consumer protection actions produce enormous leverage.

In a similar way, consumer protection actions shift much of the financial burden of responsible retailing to the stores themselves. To date, the costs of inspecting tobacco permit holders has been borne by public health and inspectional agencies. But in consumer protection actions, the costs for specific actions designed to increase compliance (including mystery shopper programmes) are borne by the signatory firms. Synar and state inspection programmes would no longer be the sole means of establishing compliance.

There are several limitations to consumer protection actions. Not all states vest consumer protection authority with their attorney general; and in states which do, consumer protection laws are not always suitable. In Maine, for instance, the consumer protection statute allows violators to agree to a consent order where they admit to a violation but pay no penalty unless they commit future violations. The Maine office of the attorney general has found that state sales to minors laws afford stronger penalties for current infractions. Additionally, court challenges are possible. In Kansas, the attorney general filed several consumer protection suits against retailers with mixed results. Lower courts were divided over the applicability of the Kansas statute to tobacco sales to minors and no appellate ruling has resolved the issue.[17] Another limitation is that consumer protection actions are apt to be directed only against larger chains; and as these larger chains become more compliant, illegal sales to minors are likely to shift more towards independent stores. However, shrinking the non-compliant retailer universe enables tobacco control programmes to husband their resources by narrowing their educational and inspectional focus. Moreover, consumer protection actions raise the bar for all retailers and may lead to more aggressive responsible retailing laws and regulations at the local and state level.

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