



Tobacco Control
Legal Consortium



The Essential Guide to the Master Settlement Agreement

June 22, 2015



Public Health
Law Center

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Tobacco Control Legal Consortium

Attorneys supporting tobacco control policy change.

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The Master Settlement Agreement

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Overview

- Background to MSA
- Purpose and Impact
- Payments
- Public Health Provisions
- History of Enforcement
- Post-1998 Developments Affecting MSA
- Impact of FDA Regulation
- Q & A

Background

- Several States sued major tobacco companies in 1990s to recover Medicaid costs and other damages.
- Allegations included:
 - Marketing to youth
 - Fraud relating to health consequences of tobacco use
 - “Light” cigarette hoax
 - Conspiracy to prevent development of less harmful products
 - Defective design
 - Manipulation of nicotine content to maintain addiction
 - Abuse of attorney-client privilege

Background (cont'd)

Thorough history of industry actions underlying state lawsuits:

United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1 (D.D.C. 2006)

Background (cont'd)

- States and companies agreed on a settlement in 1997
 - One component was legislative authority for FDA to regulate tobacco (a 1996 FDA tobacco regulation was then being challenged in court, ultimately successfully)
 - Historical account of FDA's actions to regulate tobacco: David Kessler, *A Question of Intent*
- Legislation failed, so settlement failed
 - Historical account: Michael Pertschuk, *Smoke in Their Eyes*

Background (cont'd)

- Four States (Florida, Minnesota, Mississippi, Texas – collectively, the “Previously Settled States”) settled separately
- Negotiations took place between companies and a group of States, culminating in the MSA in November 1998, to which the other 46 States, DC, Puerto Rico, and four territories (collectively the “Settling States”) signed on.
- Some MSA provisions clearly influenced by the 1996 FDA regulation.

Why Is It the “Master Settlement Agreement”?

- “Master”: a series of separate agreements between each of the 52 Settling States and each of the 45 or so Participating Manufacturers.
- “Settlement”: a compromise in lieu of litigation; no party got everything it wanted
- “Agreement”: A contract enforceable in court, not by government fiat
- Also a Consent Decree enforceable through court’s contempt powers.

Smokeless Tobacco MSA

- U.S. Smokeless Tobacco Co. is the sole Participating Manufacturer (now an Altria subsidiary)
- Payment structure different from MSA's
- Advertising and marketing restrictions are identical

NAAG's Role

- To “provide coordination and facilitation for the implementation and enforcement of this Agreement on behalf of the Attorneys General of the Settling States....” (Section VIII(a).)
- Tobacco Committee sets policies and priorities and speaks for NAAG on tobacco issues.
- Tobacco Center provides support to Settling States.
- Only States have power to enforce the MSA (see Section VII).

Means of Enforcement

- Disputes arising out of or relating to calculations or determinations by Independent Auditor (which calculates payments) are submitted to binding arbitration before three neutral arbitrators who must be former federal judges. Section XI(c).
 - To date, two payment-related issues have been submitted to and decided by arbitration.

Means of Enforcement (cont'd)

- The courts in which the MSA was entered as a judgment have exclusive jurisdiction to implement and enforce the Agreement and the Consent Decree, including actions for breach. Section VII.
 - There have been about 20 such actions by Settling States, relating to compliance with the payment obligations and the advertising restrictions.

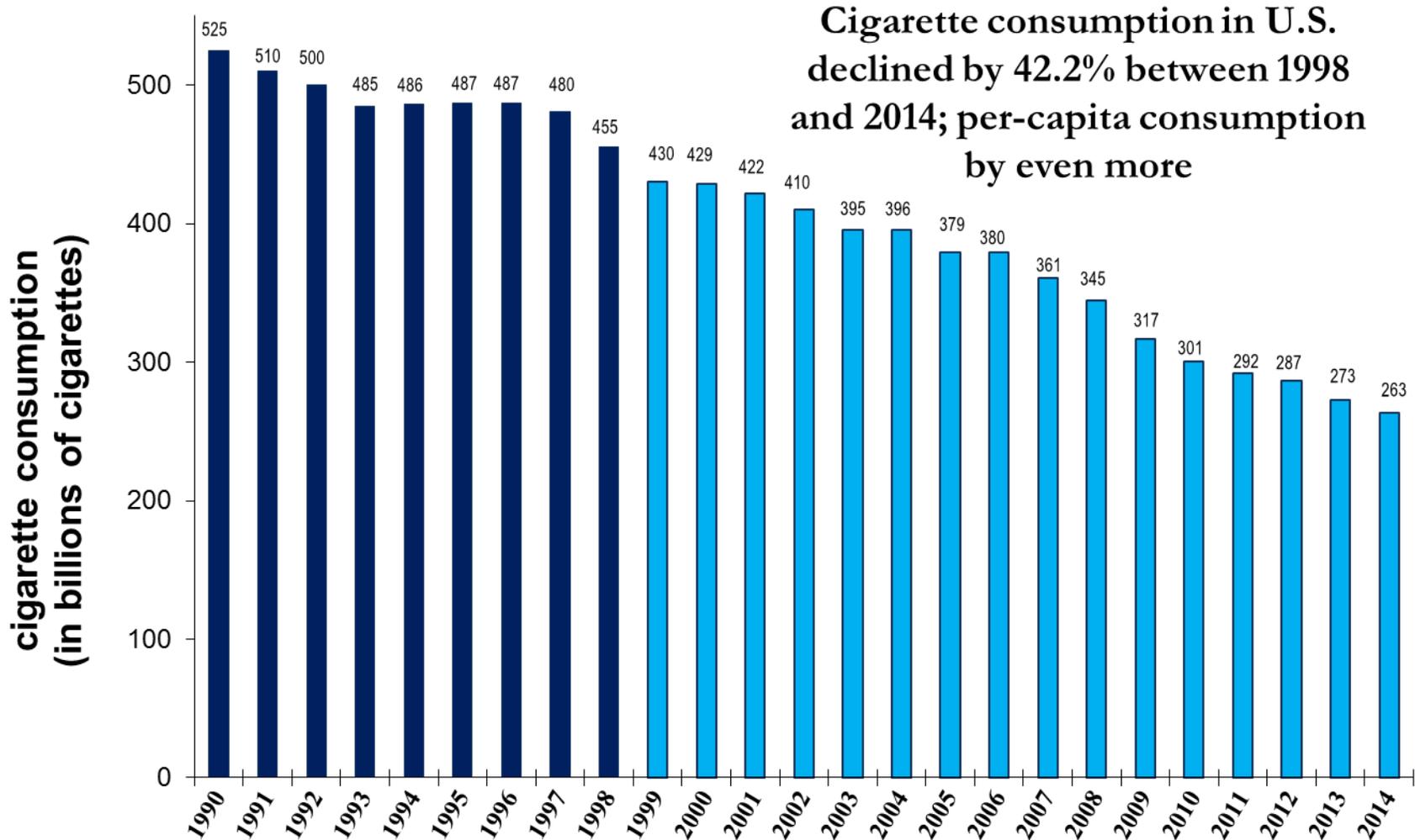
Focus of MSA is on Youth Smoking

- Section I: the parties “are committed to reducing underage tobacco use by discouraging such use and by preventing Youth access to Tobacco Products.”
- Obvious long-term benefits of reducing smoking prevalence among Youth.
- Reduced smoking consumption means:
 - reduced MSA payments, but also
 - reduced smoking-related death and disease,
 - so it’s a *good thing*.
- “Best money we never got.” (AG Miller of IA).

The MSA Fights Youth Smoking Four Ways

1. Raises price of cigarettes through payments by companies.
2. Advertising, marketing and promotion restrictions.
3. Provides funds that states can use for youth smoking prevention – if they choose.
4. Established the American Legacy Foundation.

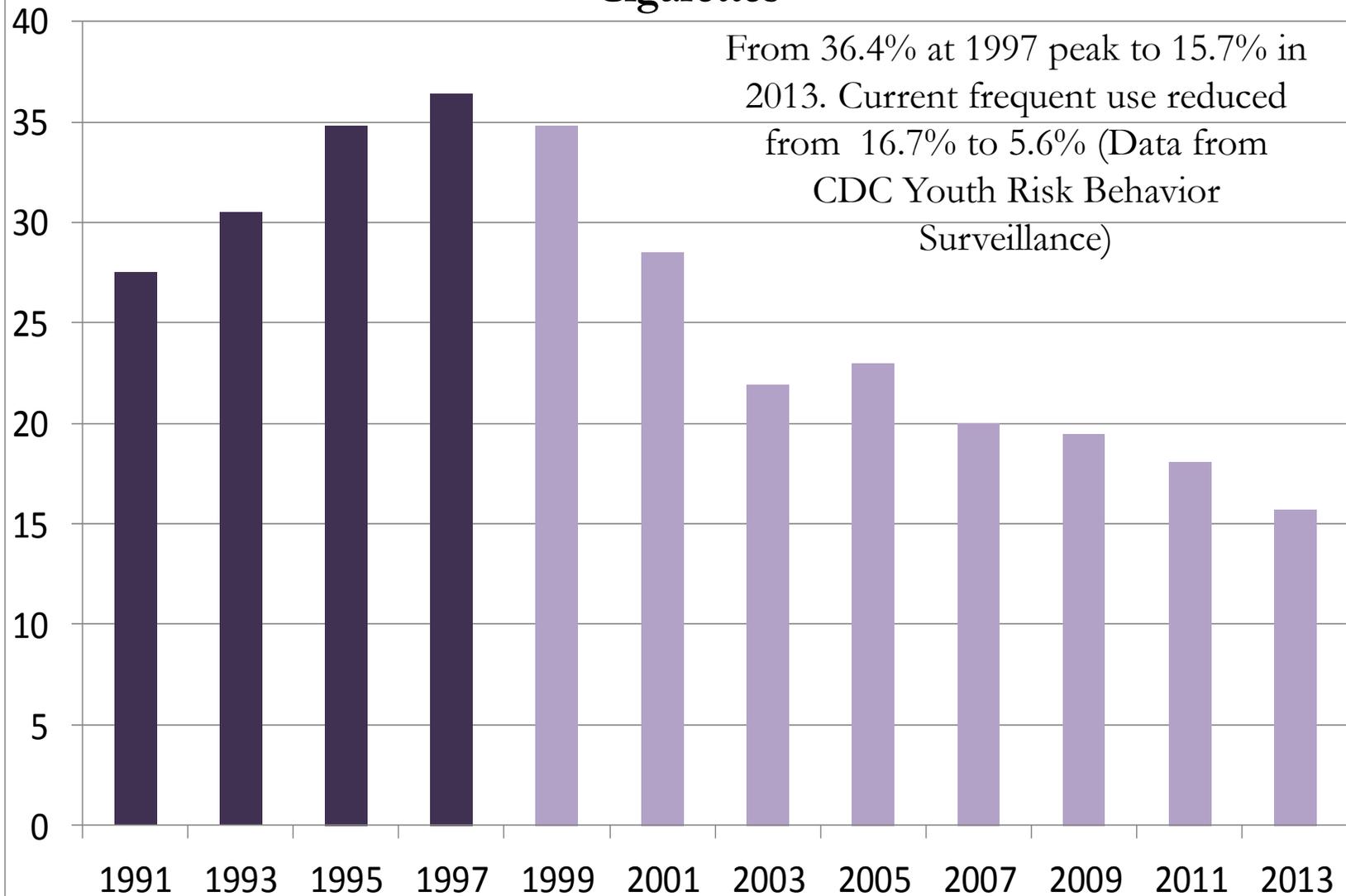
Declines in U.S. Cigarette Consumption 1990-2014



Sources: 1993 -1996 US Department of Agriculture

1997-2014 Alcohol & Tobacco Tax and Trade Bureau, Bureau of the Census

Percentage of High Schoolers who Currently Smoke Cigarettes



Youth Tobacco Consumption

- The reductions in teen smoking prevalence had reached a plateau after 2001, but there appears to have been a significant reduction from 2013 to 2014.
- Teens have also been using other tobacco products, including smokeless e-cigarettes, hookah pipes, and cigars.
- Total current tobacco use (including e-cigarettes) by high school students in 2014 was 24.6%. (Some teens use more than one category of tobacco product.)

Payments – In General

- Each Participating Manufacturer makes a payment in proportion to its sales in the U.S. of its cigarettes and RYO.
- The payments are then allocated among the Settling States according to percentage shares specified in the MSA.

Payments – Adjustments

- The starting point for a year is the Base Payment specified in the MSA for that year.
- That amount is then adjusted for volume, inflation, and payments to the Previously Settled States.
 - Volume adjustment is currently 52.37%.
 - Inflation is currently 63.83%.
 - The Previously Settled States reduction is currently 12.24%.
- The Volume Adjustment has the effect of making MSA payments equivalent to a per-cigarette payment applied to total U.S. cigarette sales volume (before other adjustments).

Payments – Adjustments (cont'd)

- There is also a potential adjustment (the NPM Adjustment) if the total market share of all Participating Manufacturers in a particular year is less than their market share in 1997 by more than 2 percentage points, and certain other conditions have been met.
- Disputes over the application of this adjustment were settled for 1998-2002 and have been adjudicated for 2003. Approximately half of the Settling States have settled with the Participating Manufacturers for 2003-2012, and have agreed to a new regime for this adjustment for 2013 and subsequent years.

Payments – Amounts Paid

- For sales in 2014, the total Participating Manufacturer payment obligation was approximately \$6.8 billion.
- After settlement credits, adjustments for prior years, and amounts paid into the Disputed Payments Account or withheld on account of disputes over various issues, including the NPM adjustment, the States actually received \$ 5.98 billion.
- Payments to the Settling States have totaled \$106 billion since the MSA's inception.

Advertising and Marketing Restrictions

- The restrictions are directed at the types of marketing that were prevalent in the 1980s and 1990s:
 - Cartoons – for example, Joe Camel (III(b))
 - Brand name sponsorships – for example, Winston Cup NASCAR Series (III(c))
 - Billboards and transit ads (III(d))
 - Brand name appearances in movies, other media (III(e))
 - Brand name merchandise (III(f))
 - Free samples III(g))

Tobacco Marketing Pre-MSA – Cartoons



Tobacco Marketing Pre-MSA – Billboards



Tobacco Marketing Pre-MSA – Brand Name Sponsorships



Tobacco Marketing Pre-MSA – Brand Name Appearances in movies



Tobacco Marketing Pre-MSA – Brand Name Merchandise



Advertising and Marketing Restrictions

- The MSA prohibits or restricts each of the foregoing marketing methods, as well as others, such as free samples.
- Also prohibited:
 - Any action by a Participating Manufacturer, directly or indirectly, to target Youth in advertising, promotion or marketing of tobacco products (III(a))
 - Any material misrepresentation of fact regarding the health consequences of using any tobacco product (other than in judicial, legislative or regulatory forum) (III(r))

Other Key Provisions

- Creation of American Legacy Foundation. (VI)
- Establishment of OPM document websites through June 30, 2010. (Continued by judgment in RICO case and by UCSF in Legacy Tobacco Documents Library.) (IV)
- Dissolution of tobacco-industry organizations, including the Tobacco Institute and the Center for Indoor Air Research. (III(o))
- Limits on lobbying. (III(m))
- Creation of Tobacco Enforcement Fund to help cover state attorney general costs of investigating and litigating breaches of the MSA and violations of state laws on tobacco. (VIII(c))

History of Enforcement of Marketing Restrictions

- Early years – 1999-2006
 - Numerous issues raised and settled through negotiation – e.g., flavored cigarettes
 - Some issues required litigation:
 - Ad placements in print media as youth targeting (CA)
 - Matchbooks as brand name merchandise (OH)
 - Limits on signs placed at sites of brand name sponsored events (AZ, CA, NY)
 - Kool Mixx ad campaign directed at urban youth (IL, MD, NY)

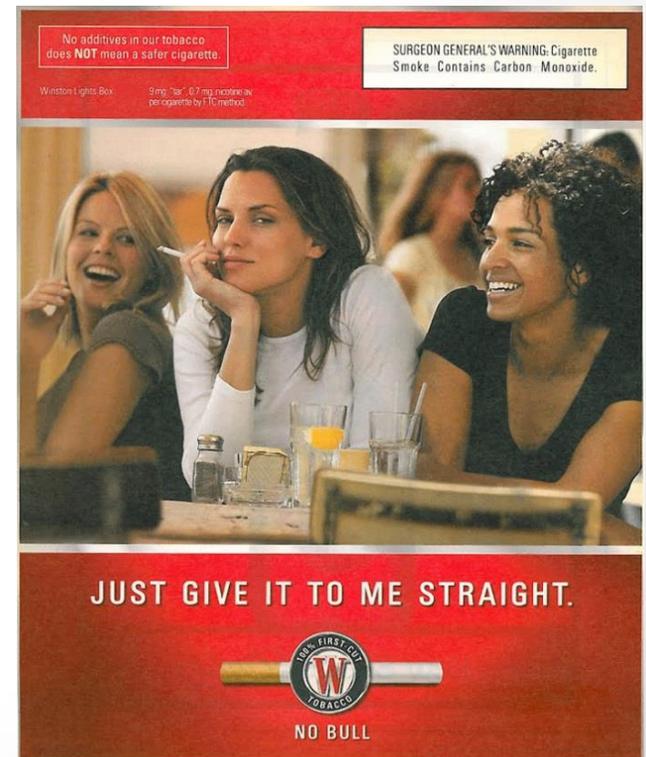
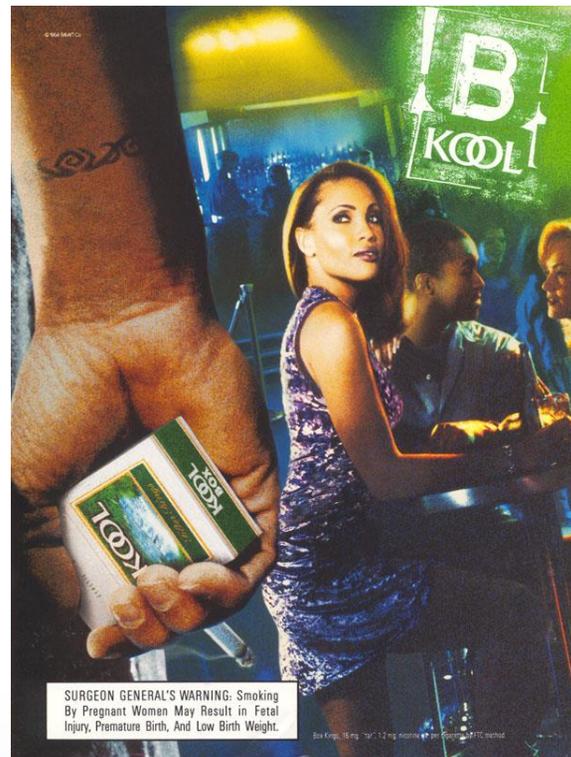
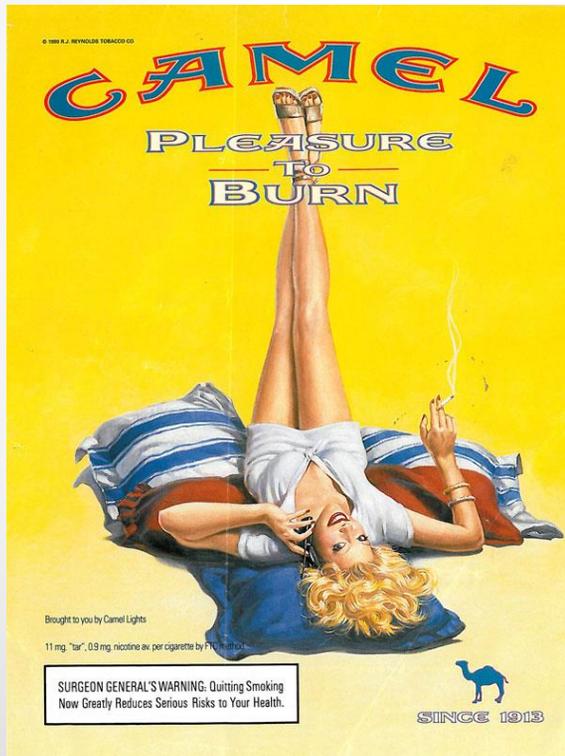
History of Enforcement of Marketing Restrictions (cont'd)

- Early years - negotiation
 - Flavored Cigarettes as Youth Targeting:
 - RJR and 41 states entered into a settlement agreement effective October 11, 2006 limiting marketing of cigarettes based on flavor in names or imagery, but not limiting use of flavoring in cigarettes
 - Tobacco Control Act has enacted a ban on cigarettes with a characterizing flavor other than tobacco or menthol

History of Enforcement of Marketing Restrictions (cont'd)

- Early years – Litigation

Ads in Print Media



History of Enforcement of Marketing Restrictions (cont'd)

- Early years – Litigation

Matchbooks as brand name merchandise



History of Enforcement of Marketing Restrictions (cont'd)

- Early years – Litigation

Signs at brand name-sponsored events



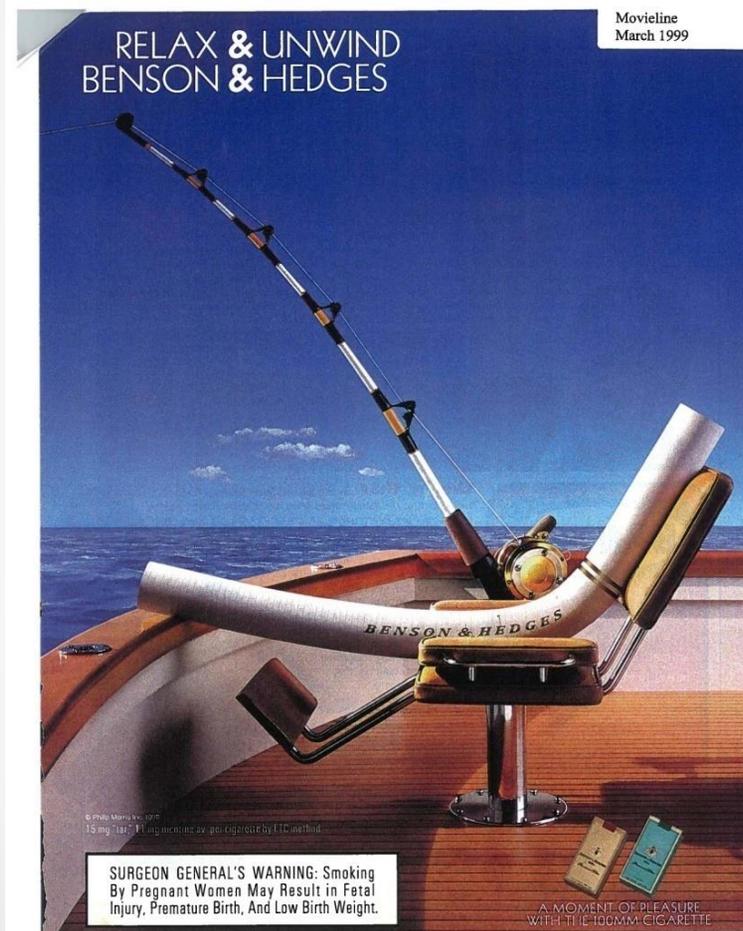
History of Enforcement of Marketing Restrictions (cont'd)

- Early years – Litigation

- Ad campaign directed at urban youth (Kool Mixx)



History of Enforcement of Marketing Restrictions (cont'd)



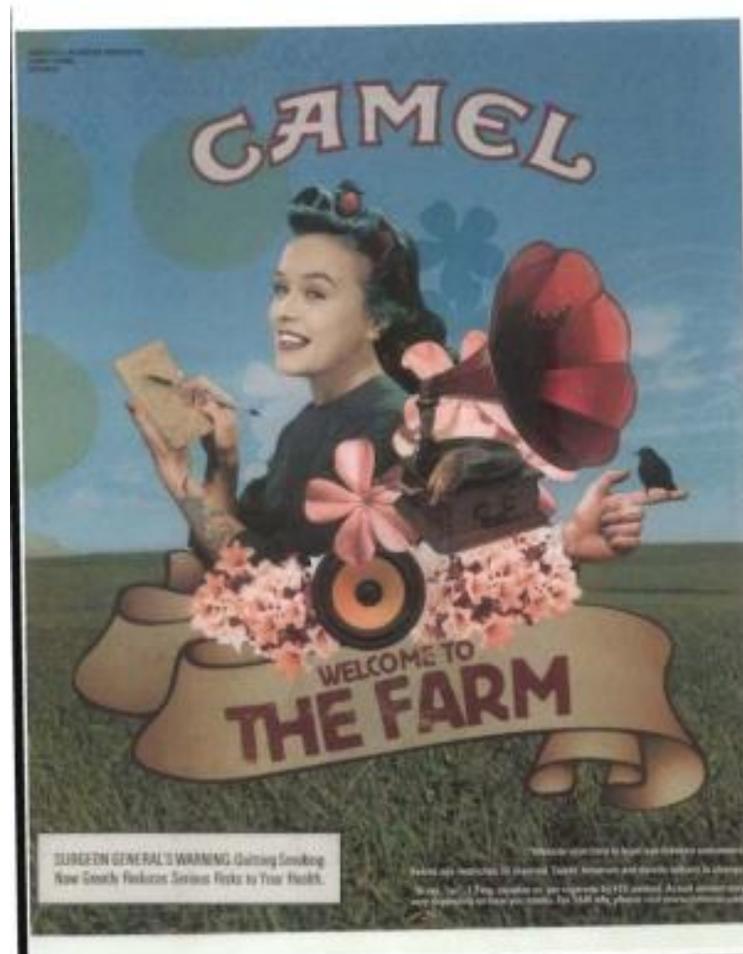
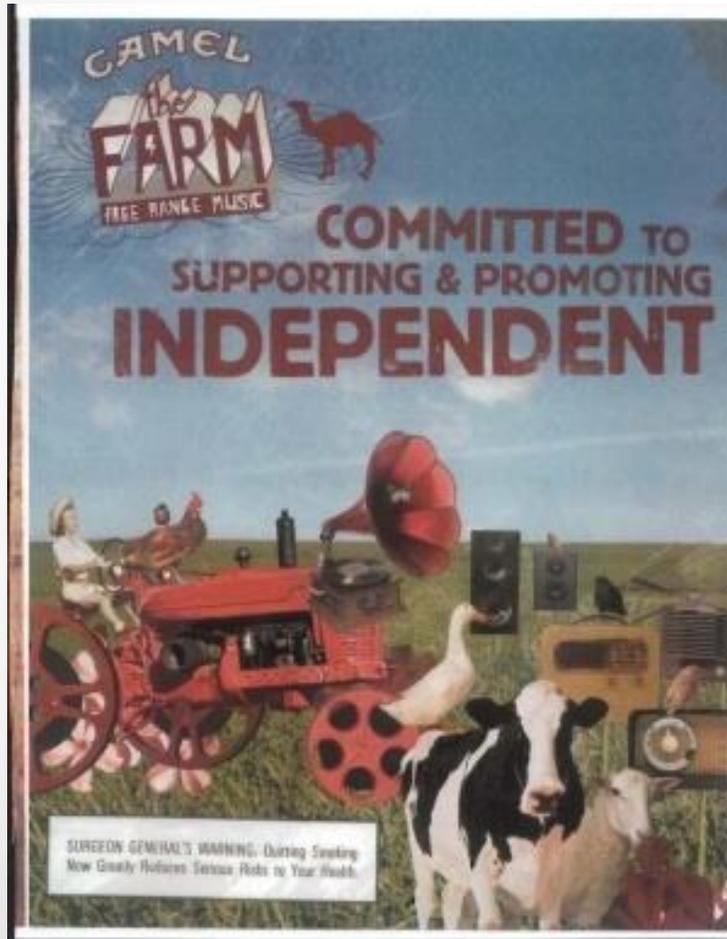
- Definition of “Cartoon”:
Includes drawing or other depiction of object, person, or animal that shows “comically exaggerated features,” “attribution of human characteristics to animals, plants or other objects,” or attribution of “unnatural or extrahuman abilities....” Section II(l).

History of Enforcement of Marketing Restrictions (cont'd)

- Camel FarmRocks and the Issue of Cartoons
 - Arose from eight-page gatefold spread in November *Rolling Stone* magazine – four-page Camel ad wrapped around four pages of magazine-created drawings

Camel Farmrocks

Images from the Camel ad: unnatural or extrahuman abilities



Camel Farmrocks

Images from the editorial content: Indisputably cartoons



Camel Farmrocks

○ Issues in Case:

- Were images in the Camel ad cartoons?
- Was RJR responsible for cartoons in Rolling Stone editorial content because of their proximity to the ad?

Camel Farmrocks

- Nine states sued RJR in late 2007 for using and causing to be used cartoons in issue of Rolling Stone devoted to independent rock.
- Results:
 - Four settlements
 - Three final judgments for RJR
 - Two courts held images in Camel ad were cartoons

Advertising and Marketing Restrictions: Prohibition on Material Misrepresentations of Fact

- Section III(r) bans material misrepresentations of fact regarding the health consequences of using any Tobacco Product.

Prohibition on Material Misrepresentations of Fact (cont'd)

Based on decades of misrepresentations on that subject.



*The figures quoted have been reviewed and certified to by LYBRAND, ROSS BROS. AND HOFFENBERG, Accountants and Auditors.

20,679* Physicians
say "**LUCKIES**
are *less irritating*"

"It's toasted"
Your Throat Protection against irritation against cough

NOSE, THROAT, and Accessory Organs not Adversely Affected by Smoking Chesterfields

**FIRST SUCH REPORT EVER PUBLISHED
ABOUT ANY CIGARETTE**

A responsible consulting organization has reported the results of a continuing study by a competent medical specialist and his staff on the effects of smoking Chesterfield cigarettes.

A group of people from various walks of life was organized to smoke only Chesterfields. For six months this group of men and women smoked their normal amount of Chesterfields - 10 to 40 a day. 45% of the group have smoked Chesterfields continually from one to thirty years for an average of 10 years each.

At the beginning and at the end of the six-months period each smoker was given a thorough examination, including X-ray pictures, by the medical specialist and his assistants. The examination covered the sinuses as well as the nose, ears and throat.

The medical specialist, after a thorough examination of every member of the group, stated: "It is my opinion that the ears, nose, throat and accessory organs of all participating subjects examined by me were not adversely affected in the six-months period by smoking the cigarettes provided."

ASK YOUR DEALER FOR CHESTERFIELD... EITHER WAY YOU LIKE 'EM

CONTAINS TOBACCO OF BETTER QUALITY AT HIGHER PRICE THAN ANY OTHER KING-SIZE CIGARETTE

Buy **CHESTERFIELD** *Much Milder*

Prohibition on Material Misrepresentations of Fact (cont'd)

- Exception for exercise of First Amendment rights or assertion of defense or position in judicial, legislative or regulatory forum.

Prohibition on Material Misrepresentations of Fact (cont'd)

- Principal applications to date:
 - Claims made before Tobacco Control Act for modified risk products.
 - B&W's Advance – “all of the taste, less of the toxins”
 - Vector's Omni – “reduced carcinogens, premium taste”
 - Vector's Quest – “step your way to nicotine-free smoking”
 - RJR's Eclipse – “Eclipse is a cigarette that may produce less risk of cancer, chronic bronchitis and possibly emphysema.”
 - Statements downplaying health risks of secondhand smoke.

Prohibition on Material Misrepresentations of Fact (cont'd)

- One litigated case: *Vermont v. R.J. Reynolds*, 2010 Vt. Super. LEXIS 11 (2010).
 - Claims:
 - “Eclipse is a cigarette that may produce less risk of cancer, chronic bronchitis and possibly emphysema.”
 - “The best choice for smokers who worry about their health is to quit. Eclipse is the next best choice.”
 - “Extensive analysis of Eclipse shows that the smoke it creates contains far less of many of the compounds that have been linked to the risk of cancer and associated with other smoking-related illness.”
 - These are both express and implied claims.

Eclipse Case

- Vermont brought case in its state court in 2005, with support from other states.
- Trial court found in 2010 the first claim violated Section III(r) and the Vermont consumer fraud statute:
 - “the State has proven that the three Eclipse ad claims either expressly or by implication indicate that sufficient, and acceptable medical and/or scientific evidence exists to substantiate the affirmative health benefit claims actually made; that the required substantiation does not in fact exist; and that these claims were therefore material misrepresentations of fact.” March 10, 2010, decision.

Eclipse Case (cont'd)

- After litigation on remedies, court enjoined RJR from marketing any nontraditional cigarette as a “potentially reduced exposure product” unless it can provide certain specified types of scientific substantiation.
- Court assessed civil penalty of \$8.328 million against RJR.
- Parties later settled question of costs and fees, and RJR agreed not to appeal judgment.

Prohibition on Material Misrepresentations of Fact (cont'd)

- Potential overlap with Tobacco Control Act Modified Risk Tobacco Products provisions:
 - Claims that product presents lower risk of tobacco-related disease or is less harmful than other products or presents reduced exposure to a substance, or labeling or advertising using descriptors “light,” “mild,” “low” or other similar descriptors may not be marketed without FDA review and approval.
 - Burden is on manufacturer to satisfy Act’s requirements, rather than on government to show violation.

History of Enforcement of Marketing Restrictions (cont'd)

- Overall, level of MSA enforcement activity has declined in recent years as rules have become clearer and limits have been set.
- Also, the PMs have shifted promotional efforts away from areas specifically addressed by the MSA (billboards, sponsorships, free samples, merchandise) and toward:
 - areas excluded by the MSA (e.g. price promotions at retail, age-restricted venues like bar nights); and
 - new media not specifically addressed by the MSA (e.g. Internet sites, direct mail to age-verified consumers)

MSA Enforcement Issues in Recent Years

- Promotional websites: Do they have adequate controls on Youth access? (Section III(a).)
- Claims for modified risk products. (Section III(r).)
- New media as promotional tools. (Section III(a).)
- Signs in retail locations. (Sections III(d), (i).)

-- Most of these issues are also within the FDA's purview.

Enforcement Issues – Beyond the MSA

- Smoking in movies and TV
 - Internet sales and promotion as public health concern
 - PACT Act changed the enforcement landscape
 - Enforcement of laws prohibiting youth access to tobacco products at retail
 - Electronic Cigarettes
 - FDA has issued proposed “deeming rule”
 - They raise numerous public health concerns
- Each subject area has an active NAAG working group.

Enforcement Issues – Impact of FDA Regulatory Authority

- There are areas of overlap with MSA. *E.g.*:
 - Regulations prohibiting or restricting free samples, brand name sponsorships, brand name merchandise, modified risk products
- The Tobacco Control Act has a preemption provision that, while not very clear, appears to leave considerable scope for states and localities to act by legislation or regulation
 - Ban on flavored tobacco products not preempted (*Nat'l Ass'n of Tobacco Outlets v. City of Providence*, 731 F.3d 71 (1st Cir. 2013); *U.S. Smokeless Tobacco Mfg. Co. LLC v. City of New York*, 708 F.3d 428 (2d Cir. 2013)).
- The MSA, being a contract, isn't subject to preemption

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