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**Tobacco Industry Political Influence
and Tobacco Policy Making in New York
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This report is the latest in a series of reports that analyze tobacco industry campaign contributions, lobbying, and other political activity in California and other states. The previous reports are:

- M. Begay and S. Glantz. *Political Expenditures by the Tobacco Industry in California State Politics* UCSF IHPS Monograph Series, 1991.
- M. Begay and S. Glantz. *Political Expenditures by the Tobacco Industry in California State Politics from 1976 to 1991*. UCSF IHPS Monograph Series, 1991.
- B. Samuels and S. Glantz. *Tobacco Control Activities and the Tobacco Industry's Response in California Communities, 1990-1991*. UCSF IHPS Monograph Series, 1991.
- M.E. Begay and S.A. Glantz. *Undoing Proposition 99: Political Expenditures by the Tobacco Industry in California Politics in 1991*. UCSF IHPS, 1992.
- S.A. Glantz and L.R.A. Smith. *The effect of ordinances requiring smokefree restaurants on restaurant sales in California*. UCSF IHPS Monograph Series, 1992.
- M.E. Begay, M. Traynor, S. A. Glantz. *Extinguishing Proposition 99: Political Expenditures by the Tobacco Industry in California Politics in 1991-1992*. UCSF IHPS, 1992.
- M.E. Begay, M. Traynor, S.A. Glantz. *Tobacco Industry Political Expenditures in California State Politics, January-June, 1993*. UCSF IHPS, 1993.
- M.E. Begay, M. Traynor, S.A. Glantz. *Tobacco Industry Political Expenditures in California in the 1991-1992 Election*. UCSF IHPS, 1993.
- M.E. Begay, M. Traynor, S.A. Glantz. *The Twilight of Proposition 99: Preauthorization of Tobacco Education Programs and Tobacco Industry Political Expenditures in 1993*. UCSF IHPS, 1994.
- H. Macdonald and S. Glantz. *Analysis of the Smoking and Tobacco Products, Statewide Regulation Initiative Statute*. UCSF IHPS, 1994.
- H. Macdonald, M. Traynor, S. Glantz. *California's Proposition 188 : An Analysis of the Tobacco Industry's Political Advertising Campaign*. UCSF IHPS, 1994.
- S. Aguinaga, H. Macdonald, M. Traynor, M. Begay, S. Glantz. *Undermining Popular Government: Tobacco Industry Political Expenditures in California 1993-1994*. UCSF IHPS, 1995. (<http://galen.library.ucsf.edu/tobacco/tobexp>)
- M. Begay, and S. Glantz. *Question 1: Tobacco Education Outlays From the 1994 Fiscal Year to the 1996 Fiscal Year* UCSF IHPS 1995. (<http://galen.library.ucsf.edu/tobacco/q1>)
- F. Monardi, E. Balbach, S. Aguinaga, S. Glantz. *Shifting Allegiances: Tobacco Industry Political Expenditures in California, January 1995 - March 1996*. UCSF IHPS 1996 (<http://galen.library.ucsf.edu/tobacco/sa>)
- F. Monardi, A. O'Neill, and S. Glantz. *Tobacco Industry Political Activity in Colorado 1979 - 1995*. UCSF IHPS 1996. (<http://galen.library.ucsf.edu/tobacco/co>)
- F. Monardi, and S. Glantz. *Tobacco Industry Political Activity in Washington 1983 - 1996*. UCSF IHPS 1996. (<http://galen.library.ucsf.edu/tobacco/wa>)
- F. Monardi, and S. Glantz. *Tobacco Industry Political Activity and Tobacco Control Policy Making in New Jersey 1982 - 1995*. UCSF IHPS 1997. (<http://galen.library.ucsf.edu/tobacco/nj>)
- E. Balbach, F. Monardi, B. Fox, S. Glantz. *Holding Government Accountable: Tobacco Policy Making in California, 1995-1997*. UCSF IHPS 1997. (<http://galen.library.ucsf.edu/tobacco/ca9596/>)
- S. Aguinaga-Bialous and Stanton A. Glantz. *Tobacco Control in Arizona 1973-1997*. UCSF IHPS 1997. (<http://galen.library.ucsf.edu/tobacco/az/>)
- F. Monardi, and S. Glantz. *Tobacco Industry Political Activity and Tobacco Control Policy Making in Pennsylvania 1979 - 1996*. UCSF IHPS 1997. (<http://galen.library.ucsf.edu/tobacco/pa>)
- B.J. Fox, J.M. Lightwood, S.A. Glantz, *A Public Health Analysis of the Proposed Resolution of Tobacco Litigation*. UCSF IHPS 1998. (Available on the World Wide Web at <http://www.library.ucsf.edu/tobacco/ustl/>)
- L. Goldman, and S.A. Glantz. *Tobacco Industry Political Activity and Tobacco Control Policy Making in Oregon 1985 - 1997*. UCSF IHPS 1998. (<http://galen.library.ucsf.edu/tobacco/or/>)
- F. Monardi, and S.A. Glantz. *Tobacco Industry Political Activity and Tobacco Control Policy Making in Wisconsin 1981 - 1998*. UCSF IHPS 1998. (<http://www.library.ucsf.edu/tobacco/wi>)
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- S. Magzamen and S. A. Glantz. *Turning the Tide: Tobacco Industry Political Influence and Tobacco Policy Making in California: 1997-1999* UCSF IHPS 1999. (<http://www.library.ucsf.edu/tobacco/ca9799>)
- S. Magzamen and S. Glantz. *Analysis of Proposition 28: Repeal of Proposition 10 Tobacco Surtax Initiative Statute*. UCSF IHPS 2000. (<http://www.library.ucsf.edu/tobacco/prop28>)

EXECUTIVE SUMMARY

The tobacco industry is a potent force in Albany. Since 1983 (not including 1988-89, where data are not available) tobacco interests spent \$1.3 million on campaign contributions to candidates and political party committees. Of this, \$277,905 went to legislative candidates, \$38,650 went to candidates for constitutional office, and the remaining \$1 million went to party committees.

The members of the 1997-98 legislature who collected the most money from campaign contributions were Assemblymember Jeffrey Klein(D-Bronx)(\$16,275), Assembly Speaker Sheldon Silver (D-Manhattan)(\$10,425), Assemblymember Michael Bragman (D-Onondaga)(\$8,420), Senator Ronald Stafford (R-Plattsburgh)(\$7,500), and Senate Majority Leader Joseph Bruno (R-Brunswick)(\$7,300).

The tobacco industry spent \$5.9 million on lobbying expenditures between 1992 and 1998.

Of the \$998,884 contributed to party committees between 1983 and 1998 (not including 1988-89), \$815,840 (81.7%) was donated after 1994, when contributors realized that contributions to party committees were unlimited.

As in other states, the tobacco industry donates more to Republicans than Democrats; Republican party committees received \$752,709 (75%) of the money between 1983-98, while Democrats received \$191,175 (19%).

The information we have on tobacco industry political activity is incomplete and underestimates the magnitude of tobacco industry activity. Between 1998 and 1999, the tobacco industry was found to have under-reported its lobbying expenses on several occasions. In 1998, the Tobacco Institute admitted to under-reporting by \$443,572 and in 1999, Philip Morris admitted to under-reporting lobbying expenses 15 times over the period 1993-96. These developments indicated that the lobbying law was ineffective at providing accurate information for public disclosure, and prompted a revision of the law in 1999. However, the revision is insufficient to prevent this kind of influence to be accumulated by an industry such as the tobacco industry.

These contributions are having an effect on policy making. On the average, for each \$1000 contributed to an individual legislator, that legislator scored 1.82 points more pro-tobacco on a 0 to 10 scale. At the same time, legislators who support the tobacco industry are rewarded; for each 1 point more pro-tobacco, contributions increase by an average of \$380. Republican legislators were more pro-tobacco than Democrats by an average of 1.39 points.

As in most states, in New York State, progress in tobacco control begins at the local level. New legislation is generally passed first on Long Island, which inspires New York City to do the same. Legislation passed in New York City sparks progress in the upstate area, and until the Pataki Administration, at the state level. The importance of localities passing restrictions to initiate the momentum to pass state legislation is why preemptive state legislation is a major threat to tobacco control in New York State.

The documents released through state litigation of the tobacco industry have played a critical role in the passage of tobacco control legislation in the face of an unsympathetic legislature and Governor. Advocates in other states should recognize that researching the documents can help them pressure political leaders and recognize industry front groups.

The Long Island counties of Suffolk and Nassau lead the tobacco control movement in the downstate

area, whereas Erie County sets the standard upstate. The ASSIST program has been successful in setting up local coalitions and galvanizing against industry tactics.

The industry organizes and finances “grassroots” coalitions, and “smokers' rights” groups such as the National Smokers Alliance, mobilizes its Tobacco Action Network, forms alliances with other organizations affected by anti-tobacco bills and finances groups such as the United Restaurant, Hotel, and Tavern Association to oppose clean indoor air legislation. It promotes “studies” claiming that tobacco control legislation will hurt the hospitality business, even though objective studies have consistently shown no effect or a positive effect on the hospitality industry.

At the state level the industry has sought to preempt local tobacco control activity; at the local level, the industry tries to pass weak laws promoting “accommodation” to prevent the passage of effective tobacco control policies. New York tobacco control advocates have vigorously – and generally successfully – opposed these efforts.

Since 1986, New York City has distinguished itself as a national leader in tobacco control legislation. While its clean indoor air laws have not been the strongest in the country, they are remarkable in light of the city’s size and the fact that Philip Morris' corporate headquarters are located in New York City. The city was also one of the first localities to sue the tobacco industry.

Both Nassau County and Niagara County Boards of Health enacted regulations (in 1994 and 1998, respectively) to eliminate smoking in restaurants. However, both were overturned in lawsuits sponsored by the tobacco industry. Both rulings determined that the Boards of Health were in violation of the state constitution because they considered economics in their decisions. These decisions have discouraged counties from using Boards of Health to pass clean indoor air regulations

When Republican George Pataki succeeded Democrat Mario Cuomo as governor in 1994, state tobacco control legislation abruptly ceased. Pataki ignored the Health Department’s tobacco advisory panel, the Commission for a Healthy New York, and only formulated tobacco control programs when he feared criticism from the media. Between 1990 and 1998 Pataki accepted \$8050 from the tobacco industry.

In November 1998, forty-six states agreed to a \$206 billion dollar settlement with the tobacco industry. The agreement settled the states’ claims for smoking-related Medicaid costs. New York State received \$25 billion to be paid over 25 years as a result of the settlement agreement.

In December 1999, health advocates, working the other interests, were able to increase the tobacco tax by 55 cents and dedicate part of the tobacco settlement funds to fund health care in New York State. New York’s cigarette tax of \$1.11 per pack is the highest in the nation.

Of the approximately \$1.5 billion generated annually by the settlement and additional tobacco tax, only \$37 million annually is dedicated to the state tobacco control program.

During the 1999 legislative session, the New York Medical Society supported the Civil Justice Reform Act which would provide the tobacco industry protection against product liability litigation.

The tobacco industry has probably used every strategy they have developed in fighting tobacco control policies in New York State. Despite these daunting challenges, advocates have achieved many notable successes and recognized and avoided counterproductive compromises. They have done so by exposing tobacco industry front groups and affiliations and holding politicians and organizations accountable for their actions.

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CHAPTER ONE

INTRODUCTION

New York is the third most populous state in the United States and New York City is the largest city, home to 7 million people. New York City is not only a major center of commerce and media, it is also the world headquarters of Philip Morris, the largest tobacco company in the world, and home to Loews Corporation, the parent company of the Lorillard tobacco company. As a result of New York's size and significance to tobacco companies, and its strong group of tobacco control advocates, the history of tobacco control in New York illustrates the full range of strategies used by both public health and pro-tobacco forces. As a result, the events that have taken place in New York tobacco control have national and international implications, and analysis of these events will produce conclusions applicable to a wide variety of local and state situations.

Since the mid-1980s, public health advocates have succeeded in enacting both local and state tobacco control legislation, including clean indoor air, taxation, and advertising restrictions as well as laws eliminating self-service tobacco displays, and local licensing for the sale of

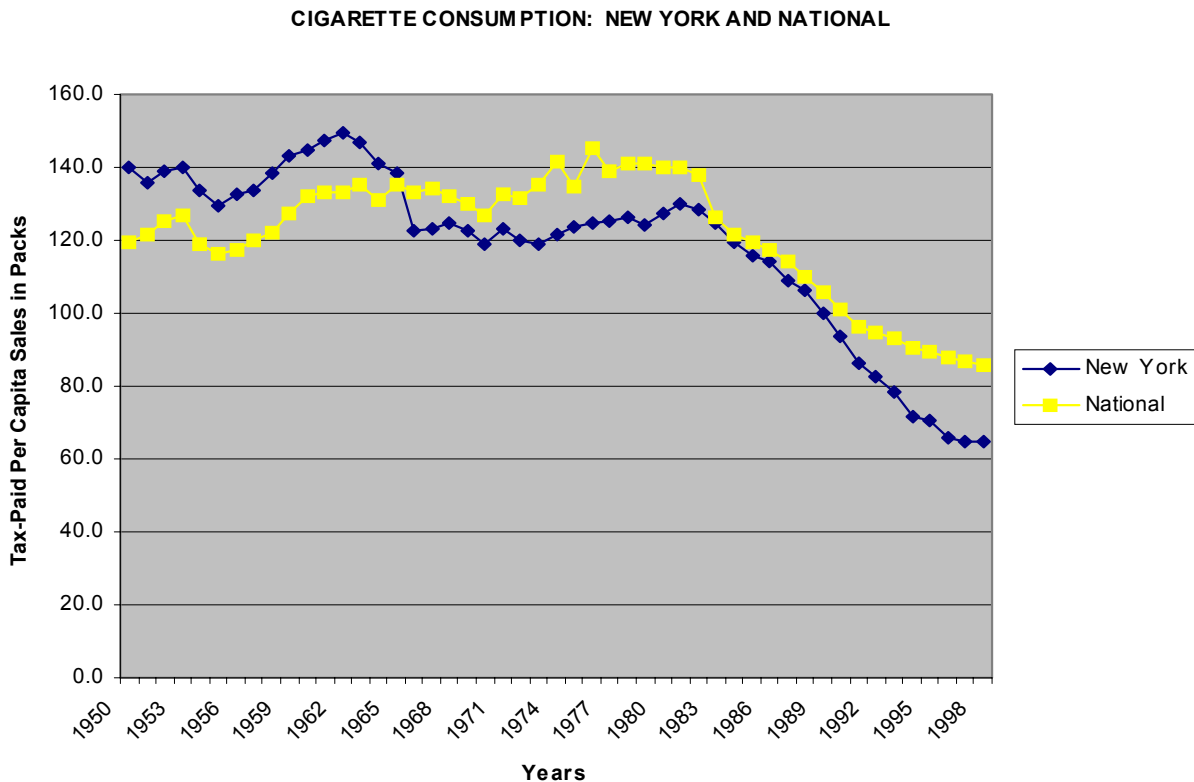


Figure 1. *The consumption of cigarettes in New York State has decreased at a faster rate than national consumption since the early 1980s.*

tobacco products. These successes may have contributed to the fact that per capita cigarette consumption in New York is below the national average (Figure 1).

Under the Cuomo Administration, tobacco control advocates were able to pass many tobacco control proposals at the state level. The state passed a Clean Indoor Air Act in 1989, restricting smoking in most public places, and in 1992 ended free sampling, restricted cigarette vending machines, and strengthened enforcement and penalties for youth access laws in a piece of legislation called the Adolescent Tobacco Use Prevention Act. The following year, advocates persuaded Cuomo to increase the cigarette tax to the highest rate in the nation. The year afterward, the legislature passed the PROKIDS (PProtect Our Kids from Inhaling Deadly Smoke) Act, which ended smoking on schoolgrounds.

However, when Republican George Pataki defeated Cuomo in the 1994 gubernatorial race, tobacco control policy languished. Pataki dismantled the Department of Health tobacco control program and supported legislation preempting local restrictions on smoking. He also supported the Civil Justice Reform Act, legislation that would protect the tobacco industry from individual lawsuits, and has resisted implementation of an effective state tobacco control program.

The state Medicaid lawsuits instigated an unpredicted course of events and brought \$25 billion to New York State. In addition, the litigation from other states released millions of previously confidential industry documents. The *New York Times* and other newspapers began investigating the contents of these documents and consequently published articles on hundreds of receipts submitted by the Philip Morris New York lobbyist, naming those legislators and public officials whose names appeared on the receipts. This created a scandal which forced Pataki and the legislative leaders to finally allow a tobacco tax increase, a small dedication of settlement funds to tobacco control, and a lobbying reform bill.

This report examines campaign contribution data to determine whether tobacco industry contributions to candidates and party committees may affect policy. The contribution data indicates that the industry spends significantly more money on legislative leaders than on other legislators, and in each house of the legislature, it spends more on members of the majority party. While the industry does not spend more on one party's candidates than on another's, it contributes vastly more to the Republican party committees. Because soft money contributions to party committees began only in 1994, it is difficult to determine whether the preference to contribute to Republicans is temporary trend which occurred because a Republican was elected Governor in 1994. Our analysis also indicates that the more money a policymaker receives from the tobacco industry, the more pro-tobacco their position will be.

Although the Long Island Counties are typically first to pass smoking restrictions or tobacco control laws, New York City quickly follows their lead. Once New York City passes a tobacco control measure, it is only a matter of time before the remaining New York localities consider the issue. Erie, Monroe and Chattaqua Counties generally lead the upstate localities in passing tobacco control legislation.

Erie and New York City surpassed State efforts to file suit against the tobacco industry to

recover Medicaid funds spent on smoking-related illnesses. Both localities had filed lawsuits before January 1997, when the State Attorney General finally filed suit. When New York State joined 45 other states in agreeing to a settlement (the Master Settlement Agreement), New York City and Erie received money from a special payment intended only for those states and localities which paved the way for state tobacco litigation. In addition, they receive a portion of the \$25 million payment designated for New York State, as do all localities in the state. Localities are free to spend their share of the \$25 billion in any manner they wish; few have decided to appropriate the money to tobacco control.

Tobacco control has enjoyed much success in New York City largely because of a supportive City Council Speaker and a strong grassroots movement. In 1988, New York City passed a Clean Indoor Air Act prior to the state, and in 1990 prohibited free samples and became the first major city to ban cigarette vending machines from most public places. In 1992, the City passed the Tobacco Product Regulation Act, which prohibited the sale of out-of-package cigarettes. The Act also required one public health message for every four tobacco advertisements on municipal property. The advertising restrictions were challenged in a lawsuit and overturned in court.

In 1994, the City Council passed the Smoke Free Air Act, which ended smoking in restaurant dining areas but exempted small restaurants. The industry, aware that New York City's reaction to smoke-free dining would have national implications, released numerous studies which indicated the Act was detrimental to the City's economy. However, advocates retorted by referring to non-industry sponsored research to contradict these claims.

In 1997, the City passed the Youth Protection Against Tobacco Act (YPAT), which prohibited billboards and restricted storefront advertisements within a 500-foot radius of child-oriented locations such as schools and day care centers. YPAT was challenged in court under the same grounds as the Tobacco Product Regulation Act was challenged, but unlike the TPRA, has been upheld by a 2nd Circuit Appeals Court. However, the tobacco industry is expected to appeal this decision.

Many localities have succeeded in passing tobacco control as comprehensive as New York City's. Suffolk County, for example, passed restrictions in 1994 which made them the first municipality to end smoking in restaurant bars. In 1998, it also became the first county in the state to pass marketing restrictions. Erie County passed smoke-free restaurant legislation in 1996, and became the first municipality outside the New York City/Long Island area to adopt such a law. Erie also passed a self-service display ban and was first in New York to file a Medicaid recovery lawsuit against the tobacco industry. Livingston County also passed stringent smoke-free dining legislation which included a phase-in for restaurant bars.

Local efforts to pass smoking restrictions through Board of Health actions were less successful. Nassau County was first to attempt this, and its regulations were overturned in a tobacco industry-sponsored lawsuit and replaced with weak legislation. Niagara County's Board of Health attempted to work with the legislature to negotiate a compromise bill, but after two years of negotiations, the Niagara legislature chose to pass another proposal which was not reviewed by the health advocates. The Niagara Board of Health passed stringent smoking

restrictions in spite of the weak legislation already passed, but the restrictions were overturned in court by another lawsuit sponsored by the tobacco industry. Dutchess County's Board of Health also passed smoking regulations, and these were also challenged by the tobacco industry. As of this writing, the decision is still pending.

The tobacco industry's strategy of overturning Board of Health smoking restrictions eliminated one promising avenue for both state and local tobacco control activity. In addition, the industry has been utilizing proactive strategies to prevent strong tobacco control measures from passage. In several counties, the industry has proposed an "accommodation" bill, also known as the "red light/green light program," which only requires signage to notify customers whether or not an establishment allows smoking. The tobacco industry also appears to have "captured" several local legislatures, prompting public health advocates to turn to the local Board of Health for recourse.

Now that this venue has been effectively sealed off by the industry litigation, tobacco control advocates will be required to redouble efforts to beat the tobacco industry in the more frankly political venue of local legislatures. Given the past strength that tobacco control advocates in New York have demonstrated, continued success at the local level is likely, as long as tobacco control advocates can continue to expose industry efforts and hold politicians accountable.

CHAPTER TWO

THE STATE CLEAN INDOOR AIR ACT

In 1989, New York became the eleventh state to pass a clean indoor air act [1]. The legislation ended smoking in public places such as auditoriums, gymnasiums, elevators, public transportation, and indoor swimming pools, and restricted smoking in areas including schools, hospitals, public buildings, retail stores, and waiting areas. It mandated that all employers adopt and implement a written smoking policy to provide nonsmoking employees a smoke-free work area and prohibited smoking in meeting and conference rooms unless all present unanimously agreed on allowing the behavior. Restaurants maintaining a capacity of fifty seats or more were required to establish a contiguous nonsmoking section sufficient to meet customer demand [2]. The generally accepted guideline for “meeting customer demand” was to designate 70% of the restaurant seats as nonsmoking and 30% as smoking. Prior to the Act, smoking was restricted only in libraries, museums, theaters, subways and buses [3]. While weak by 2000 standards, the bill was strong in comparison to other legislation at the time it passed.

Assemblymember Alexander “Pete” Grannis (D-Manhattan), the creator and sponsor of this bill, first introduced the legislation in 1978. Until the mid-1980's, Grannis received little support from health groups, but as localities began to succeed in passing legislation similar to Grannis’ restrictions, advocacy groups began offering more support [4]. The tri-agency coalition of the American Cancer Society (ACS), American Heart Association (AHA) and American Lung Association (ALA) and a small grassroots organization called People for a Smoke Free Indoors were the earliest supporters of the cause. The New York Public Interest Research Group joined the tri-agency coalition in 1988, and in late 1989, these groups banded with 50 others to form the state level executive Commission on Smoking or Health.

The battle to enact the bill continued for 13 years because of the tobacco industry’s influence on the legislature and its leadership. The legislature offered tobacco control advocates an opportunity to enact a weak statewide bill that included preemption of local tobacco control ordinances but the advocates wisely refused to accept such a compromise because it would prevent localities from passing stricter laws and would only remove the issue from the agenda.

Early Years

Alexander “Pete” Grannis, a Democrat, was elected to the Assembly to represent the district of Manhattan in 1975. He spent his first two years on the Health Committee, where he was asked by the Chairman to carry a bill regarding smoking restrictions. He introduced the bill in 1978 and reintroduced it each year thereafter. Although the bill repeatedly passed the Democratic Assembly, it never survived the Senate Health Committee, chaired by Republican Tarky Lombardi (R-Syracuse).

Lombardi, bitterly opposed to the bill, was rumored to have owned a cigarette vending machine business. Lombardi was supported by Senate Majority Leader Warren Anderson (R-Binghamton), who exerted firm control over Senate party members. In New York, the Senate

Majority Leader is given a great deal of authority: he or she appoints committee members, names the chairpersons, controls the legislative staff payroll and administers the staff allowances, determines his party's legislative agenda, and refers bills to committees [5]. Anderson's period of Senate rule was called a "staff dictatorship" because the leader and his staff exercised these powers to the greatest extent possible, micro-managing the committee chairmen and determining which bills stayed bottled up in committees [6].

Anderson and Lombardi kept Grannis' bill from reaching the Senate calendar. According to data from the now-defunct Commission on Government Integrity, Anderson received \$1900 from the tobacco industry between 1983 and 1987, and Lombardi received \$2950 between 1983 and 1986 (Table A-7). During the first few years of the debate, the Senate was able to use the opposition of the politically powerful teachers' union to justify their actions, but in later years, the union changed its position as members voiced preferences for smoke-free schools. In fact, the Senate's reluctance was due to fear of offending one of the state Republican party's primary financiers. Between the years 1983 and 1987, the party received almost \$71,790 from the industry (Table 1).

	1983-84	1985-86	1987	1990	1991-92	1993-94	1995-96	1997-98	Total 1983-98
Democrat	\$9,600	\$30,175	\$15,325	\$25,455	\$44,300	\$37,469	\$94,861	\$80,160	\$337,345
Republican	\$23,500	\$32,365	\$15,925	\$39,385	\$54,490	\$35,828	\$299,411	\$422,192	\$923,096
TOTAL	\$33,100	\$62,540	\$31,250	\$64,840	\$98,790	\$73,297	\$394,272	\$502,352	\$1,260,441

Tobacco Industry Opposition

The tobacco industry argued that the Clean Indoor Air Act would negatively impact private industry, infringe on personal freedoms, and alienate businesses and the smoking population. In addition, tobacco interests claimed the law would be unenforceable and could be used to discriminate against minorities. The arguments were presented to legislators and officials through lobbyists of the industry and other opponents of the law, such as the restaurant industry. The industry also hired former politicians to lobby on its behalf and asked its own employees to generate letter and telephone campaigns.

By concentrating a large amount of finances on lobbying expenditures, the industry could gain more access to legislators through the quantity as well as quality of their lobbyists. Some of these well-connected professionals were once New York politicians themselves; for the early battle over the Grannis bill the Tobacco Institute utilized the services of former State Senator Bill Adams [7]. Lobbying efforts focused primarily on legislative leaders; a 1980 Philip Morris memo details such efforts as meeting with the Chairman of the Senate Health Committee, the Senate Leaders, and the Chairman of the Assembly Codes Committee [8]. The latter reviews bills relating to criminal procedure, civil rights and penal law, as well as civil practice law and rules. Documents confirm that tobacco companies also concentrated on lobbying those

legislators who had received contributions from them, implying that they expected a higher degree of support from recipients [9].

Not included in the lobbying reports required by the State's Lobbying Commission was the use of the industry's Tobacco Action Network, the Tobacco Institute's nation-wide program designed to simulate grassroots response to legislative action. TAN uses industry employees to contact legislators or assist in various public outreach efforts such as phone banks. Each major tobacco company appoints a special Company Representative for each state, to serve on that state's TAN Advisory Committee. According to the Tobacco Institute's counsel, New York laws considered this representative a lobbyist: "A legal analysis has been completed by counsel of the New York State lobbying laws' grassroots requirements. It is counsel's judgment that the special designated volunteer from the companies will be required to register to lobby in New York State and file all appropriate reports" [10]. It remains unclear whether these TAN Company representatives registered with New York's lobbying commission.

A 1980 Philip Morris memo details how TAN was supposed to augment the success of the campaign by providing an artificial grassroots component to complement the industry's direct lobbying efforts:

Jack Kelly [then Senior Vice President of the Tobacco Institute] has requested the following TAN activities to reinforce the direct lobbying:

1. A letter writing campaign from volunteers to their Assemblyman (Jack specifically asked us to *seek volunteers at Miller Brewing*).
2. Company approval to organize a one-day visit to Albany for TAN volunteers to meet personally with their Assemblyman
3. Company approval to organize phone banks to generate additional letters to the Assembly -- i.e. Philip Morris volunteers would only be asked to call Philip Morris employees.
4. Company approval to conduct TAN training sessions for the letter writing, Albany visit and phone bank efforts -- i.e. training sessions scheduled at 100 Park [Philip Morris Corporate Headquarters] and New York USA sales offices to which employees would be invited for a briefing session on the "Grannis bill" and the campaign to oppose it. [emphasis added][7]

This document demonstrates the willingness of the tobacco companies to use volunteers in their subsidiaries - in this case, Miller Brewing - in political opposition of tobacco control legislation, even though these units would not be directly affected by the outcome.

The Tobacco Institute's eagerness to use any and all resources available to the industry, whether self-volunteered or not, sparked a dispute between the Institute and Philip Morris during the early battles over the Grannis Bill. TAN enrollment was voluntary, but the Institute wanted a list of all Philip Morris employees - not just volunteers - to assist with TAN efforts. Philip Morris responded to the Tobacco Institute's Jack Kelly:

In your January 29, 1980 letter to Mr. Goldsmith [Clifford Goldsmith, then President of Philip Morris, Inc.], you reiterate once again a request for a list of Philip Morris employees. Jack, we have explained repeatedly that this list will not be provided. We have and will continue to supply TAN with lists of our employees who voluntarily enroll in TAP -- our internal legislative support system. [11]

TAP, the Tobacco Action Program, was the Philip Morris company equivalent of the industry-wide Tobacco Action Network administered by the Tobacco Institute. In 1985, Philip Morris employees' participation in TAP activities dropped significantly. The company attributed this to "burnout" because the annual reintroduction of the Grannis bill forced them to frequently request activity from their workforce. In response, Philip Morris developed "lobby letters," "multiple text letters directed to the individual's legislator...designed to appear as if they were written by individuals" [12]. Philip Morris produced such letters with varied type face, margins, paper size, paper type and paper color and provided a pre-addressed, stamped envelope. Everything but the employee's signature was produced by the company. This advancement increased participation in TAP, since the effort individual employees actually had to make was so drastically reduced.

The tobacco industry strategies of contributing to political campaigns, direct lobbying, and TAN efforts limited the success of the Grannis Clean Indoor Act during the early 1980's. While the bill regularly passed the Assembly Health Committee and Codes Committee, and occasionally the full body, it was continually blocked in the Senate Health Committee. Once the industry realized the Assembly supported the bill, they focused their energy on the Senate and its leadership and devised strategies to exert more pressure on them.

A 1986 Tobacco Institute document acknowledges the importance of the Senate GOP Leadership and Senate Health Committee Chair by defining their districts as "primary targets" for a "comprehensive media plan". Secondary targets included the Senate Health Committee members' districts and tertiary targets consisted of the remaining GOP Senate Districts. The document lists tactics such as:

- Coordinate with labor and business organizations in primary/secondary districts
- Utilize companies' vendor relationships as conduit in primary/secondary districts.
- Set up meetings with Senators from primary/secondary districts in Albany with industry operatives and political allies.
- Inundate the primary/secondary Senate districts with TAP/TAN [Tobacco Action Program/Tobacco Action Network] letter writing program [13]

The Public Health Council Intervenes

The industry seemed to have an iron grip on the Senate leadership, but its usual strategies became obsolete when the executive branch intervened and tried to implement the provisions of the Grannis bill as part of the state health code. The State Public Health Council is much more isolated from special interests than the legislature, as members are appointed rather than elected and therefore are not vulnerable to the influences of campaign finance. In addition, the Public Health Council is mandated by the state Constitution to consider only the public health when making policy decisions. Therefore it is less sympathetic to claims of economic harm, which is the main argument used by the tobacco industry to defeat clean indoor air laws.

In response to the dramatic change of playing field, the tobacco industry unsuccessfully lobbied Governor Cuomo to intervene. When the Public Health Council's regulations passed, the industry resorted to delaying implementation through the regulatory review process conducted by the Office of Business Permits. In addition, the industry attempted to turn public

opinion against the regulations by forecasting economic hardship. The industry also tried to foster resentment in the legislature for the Public Health Council's bold behavior, which the industry termed a "usurpation of the legislative process" [14].

Prompted by the U.S. Surgeon General's 1986 report on secondhand smoke, the Public Health Council's Committee on Codes began holding meetings regarding the effects of passive smoking and the success of local legislation aimed at restricting smoking in public places. Led by State Health Commissioner David Axelrod, the committee scheduled meetings on June 30 and July 25, 1986 to gather medical evidence on the issue. The industry regarded these meetings as the preliminary stage of a process to institute statewide regulations equivalent to the Grannis bill. An executive from the Tobacco Institute's lobbying firm Shea & Gould wrote, "My impression is that this [July 25 Public Health Council meeting] is step-one in a process that will result in statewide regulations similar to those in Nassau County and New York City. ...The Council has not been hesitant to take on controversial matters (i.e., the AIDS epidemic and the closing of massage parlors) and the regulatory method is a proven way of taking the legislature off the hook on the tobacco issue" [15].

The industry's first reaction was to direct lobbying efforts at Democratic Governor Mario Cuomo in hopes he would prevent his Health Commissioner from pursuing the issue. Philip Morris USA's Director of Government Affairs, Michael Irish, wrote to Philip Morris Chairman of the Board George Weissman:

Recommendation: Proceed to schedule an appointment with Governor Cuomo as soon as possible to discuss the anti-smoking proposals. Likewise, we should schedule similar appointments with key gubernatorial assistants to alert these advisors to the proposals in question. Traditional lobbying techniques are not available to the tobacco industry in this instance and, therefore, we must proceed directly to the Chief Executive. [16]

The tobacco interests posed the same arguments against the regulations as they did against the legislation, with two major additions: the regulatory action was unauthorized and usurped the power of the legislature, and it would offend voters in the Southeast (tobacco-growing) region of the United States, which would effect Cuomo's chances of a presidential bid [16]. Philip Morris played heavily on this last theme, and in October tried to use its connections in the South to influence Cuomo's stance on the Council's actions:

We've talked with a number of the Democratic leadership in North Carolina: Lieutenant Governor Robert Jordan, Part Chairman James Van Hecke, House Speaker Liston Ramsey and former U.S. Senator Robert Morgan. They've expressed an interest and think the Public Health Council concept is ludicrous. However, they prefer not to call or even write to Governor Cuomo for (1) it might be misconstrued as support -- even left-handedly -- for Cuomo's presidential bid and (2) they do not want to be indebted to Cuomo for any reason.So, in short, no go. [17]

Philip Morris was more successful with Virginia leaders; they were able to convince Governor Gerald Baliles (D) and Speaker of the House of Delegates A.L. Philpott to write letters to Cuomo stating their opposition to the smoking regulations [3].

By the beginning of October, the Council finished draft regulations ending smoking in indoor public places, workplaces (unless employees unanimously consented to smoking), taxis,

limousines, and restrooms and mandating bars and restaurants (with more than 50 seats) to reserve 70% of seating capacity for nonsmokers. On November 3, 1986, the Public Health Council's Committee on Codes and Legislation held its first open hearing on the proposed smoking restrictions.

In addition to industry groups, the New York State Restaurant Association (NYSRA) testified in opposition, stating that patron demand for nonsmoking sections had not been evident. The Association also complained the regulations were too strict in not allowing the exemption of restaurants meeting a ventilation standard. Fred Sampson, president of NYSRA, predicted that approval of the measure would trigger a \$50 million-a-year "economic holocaust" [18]. Although there is no evidence NYSRA ever accepted financial support from tobacco companies, NYSRA has lent their member mailing list and emblem stamp to Philip Morris so that the tobacco company could mail letters (which appeared to be authored by NYSRA) introducing and praising the Philip Morris Accommodation Program to restaurants [19].

Senator Thomas J. Bartosiewicz, a Brooklyn Democrat and a member of the Senate Health Committee, spoke against the regulations and accused the Public Health Council of "usurping" the Legislature's authority. He threatened to vote against any council members supporting the restrictions when their six-year terms expired, and entertained the idea of sponsoring legislation to abolish the Council [20]. Bartosiewicz received \$250 from Philip Morris between 1985-86. (Table A-7)

Despite these threats, the Council approved the draft regulations for consideration on November 21, 1986 and scheduled a series of hearings to gather public feedback before formal adoption of the rules. In response, industry tried to delay the implementation of the regulations by targeting the State Office of Business Permits, which

oversees the regulatory and permitting processes, analyzing the impact of new and existing regulations and assisting businesses and other regulated entities to secure necessary State approvals. The Office of Business Permits regulatory review process, which we will seek to engage, can effectively delay implementation of regulations. [14]

However, the industry knew this was a limited strategy that would only delay what seemed inevitable:

...Although the Office of Business Permits can effectively delay implementation of regulation, it cannot prevent a determined agency from eventually succeeding unless other parties (i.e., the Governor, the State Legislature) intervene. We are hoping to delay the proposed implementation of the anti-smoking regulations for up to 30 to 60 days. [14]

In the meantime, the industry focused on rallying enough opposition in the legislature to secure a resolution: "...we will seek a joint resolution of the State Senate and Assembly which will express the sense that the proposed regulations before the Public Health Council represent a usurpation of the legislative process" [14]. In case the legislature failed to stop the regulations, the industry planned a last resort: "...if the regulations are adopted, we should be prepared to seek a legal remedy through action before the State Court of Appeals on the grounds that the action is an usurpation of the legislative process. Ideally, a state legislator should be the plaintiff in the

lawsuit” [14].

The industry’s shift of effort away from the executive branch toward the legislative branch was most evident when a number of their business representatives failed to appear at a Public Health Council hearing in January, despite their earlier commitment to testify. “Based on that, we believe the Tobacco Institute is now focusing its efforts in the Legislature,” a Health Department spokesperson stated [21]. At the same time, the industry strategy to delay implementation achieved success when the Office of Business Permits and Regulatory Assistance ordered a public comment period to be extended at the request of the tobacco industry lobbyists [14]. In another memo, a tobacco industry executive writes, “This time delay will permit the impact of the PM-USA/RJR letter writing campaign to be felt by the State Legislature” [22].

The delay also allowed the industry to further develop their court challenge strategy and consider the possibility of using an organization outside the industry to act as plaintiff. A January memo from Philip Morris’ Michael Irish to Guy L. Smith and John Kochevar states, “RJR Corporate Attorney Steven Heard (McGarrahan & Heard) feels that a lawsuit by aggrieved parties such as the State Legislature, Restaurant Association, etc., would ‘be a winner’” [22]. The industry fully intended to bring the case to court if they could find another organization to act as the litigant, yet publically denied they were attempting to overturn the regulations [23].

By this time, the industry strategy had evolved to include the possible ramifications of the Public Health Council’s actions. If these restrictions withstood legal challenge, they would set a precedent for the Council to further regulate smoking issues. A letter from Philip Morris USA’s Michael Irish, Director of Government Affairs, to the two Vice Presidents of Corporate Affairs, reveals that the company not only planned to obstruct implementation through a court challenge, but also worked to: “Strip or redefine the Public Health Council powers to prevent unilateral action such as these regulations in the future,” and “Through a grassroots letter-writing campaign combined with a direct lobbying effort, prevent the state legislature from passing a smoking restriction law as a compromise to the Public Health Council proposal” [22].

The tobacco interests’ attempt to garner legislative opposition to the Public Health Council’s actions met little success. A spokesperson for the Senate Republicans stated that they “had no plans to discuss the issue nor any plans to try to overturn the council’s action” [23]. Legislators knew that any attempt to overturn the regulations would be vetoed by Governor Cuomo, but Senate Republicans and Democrats, in separate party conferences, voted to condemn and oppose the proposed Public Health Council regulations as well to endorse resolutions designed to prevent future attempts by the Council to “violate” the legislative process. They also refused to allocate the \$300,000 necessary for the Health Department to implement the regulations [24], continuing to refuse to pursue the matter in court as a legislative body.

On February 6, 1987, the Public Health Council unanimously approved and filed the smoking regulations, to be effective May 7. The final version was essentially the same as the draft, with one exception. New York City’s Mayor Ed Koch requested that a waiver be made available to any businesses that could prove the restrictions would cause “undue financial harm,” therefore, the regulations were amended to include this provision. Enforcement consisted of

periodic state and city health inspections as well as individuals' complaints and penalties ranged from a fine of up to \$250 to 15 days in jail.

The Administrative Regulations Review Commission (ARRC)

Although the state legislature was unwilling to overturn the Public Health Council's new regulations, Senate co-chairman of the Administrative Regulations Review Commission (ARRC) Sen. Jess Present (R-Jamestown) tried to persuade them into more active opposition by passing an ARRC resolution against the regulations. ARRC could not affect the implementation of the restrictions, but such a resolution could spur the legislature to legally challenge the Public Health Council's regulations. Present admitted to smoking a pack and a half of cigarettes each day [23], but according to our data, Present did not accept any contributions from the tobacco industry between 1983-87. It is unclear whether the tobacco industry was involved with Present's actions, but after his unsuccessful attempt at prompting the legislature to challenge the Health Council's regulations, Present became involved in a lawsuit sponsored by the tobacco industry.

Present's efforts to deliver an ARRC resolution were frustrated by the fact that his co-chairman, Assemblyman Gary Proud (D-Rochester), supported the Public Health Council restrictions. The Monday following the approval of the regulations, Present held a meeting of ARRC with the purpose of passing a resolution against the Council's actions. The meeting was held against the wishes of Co-chairman Proud. Present defended his actions by stating that four of the six members wanted the meeting, but Proud called his conduct "unprecedented and contrary to the way the commission is supposed to operate" [25]. By a vote of 4-0, with Proud and one other member absent, ARRC passed the resolution which declared, "...that the New York State Department of Health does not have the statutory authority to promulgate restrictions on smoking in public places of employment..." [26] The commission hoped that these findings would be used in any legal challenges to the regulations.

While the ARRC resolution failed to inspire the legislature to challenge the Public Health Council regulations, it may have also influenced the Senate Republican and Democratic conferences to deliver their own resolutions stating opposition to the restrictions and the legislature's refusal to appropriate the \$300,000 necessary for the Department of Health to implement the measures. When the Democratic Conference of the New York State Senate issued its own resolution condemning the regulations, Deputy Minority Leader and lone Senate Democrat on ARRC Emanuel R. Gold (D-Forest Hills) stated, "Being considered are proposals to give the Administrative Regulations Review Commission power over the issuance of regulations, or to have that Commission make direct references to the Legislature where questions arise as to whether or not an agency is overstepping its authority" [27]. As illustrated throughout this report, Senate Democrats - while a powerless minority - rarely contend with the Republicans over tobacco issues, making it easy for the industry's agenda to be supported in the Senate.

After exhausting possibilities to prevent or overturn the Public Health Council restrictions in both the executive and legislative branches of government, the tobacco industry finally turned to the judicial system.

Lawsuit against the Public Health Council

The legislature's refusal to challenge the Health Council's regulations in court forced the industry to look elsewhere for potential plaintiffs. On February 24, 1987, Michael Irish of Philip Morris USA recorded the search for litigants for Vice President of Corporate Affairs Guy Smith and listed as possibilities:

New York City Chamber of Commerce and Industry
Staten Island Chamber of Commerce
Saratoga Chamber of Commerce
Restaurant Association of New York State
Yonkers Raceway
State Senator Thomas Bartosiewicz (D-Brooklyn)
State Assemblyman Robert Wertz (R-Smithtown)
Albany Tobacco/Candy/Magazine Store Owner
Smoker in a workplace [28]

On March 13, a group of individuals and organizations filed a motion with the state Supreme Court contesting the Public Health Council regulations on the grounds that the Council acceded its powers as directed by the state constitution. This group of plaintiffs consisted of: State Senator Thomas Bartosiewicz, State Assemblyman Robert Wertz, the Brooklyn Chamber of Commerce, the United Restaurant, Hotel, and Tavern Association, Dennis Paperman as President of the Brighton Beach Board of Trade, and Fred Boreali of Boreali's Restaurant, Inc. Although no tobacco companies were named as plaintiffs, their law firm (Hinman, Straub, Pigors & Manning, P.C.) represented the named plaintiffs, who reflected the industry's potential plaintiff list above. The defendants included State Health Commissioner David Axelrod as well as the State Public Health Council.

On April 23, Justice Harold Hughes of the State Supreme Court in Schoharie County found in favor of the plaintiffs, and decided that the rules set forth by the Council should be declared null and void because the Council had usurped the law-making authority of the Legislature (*Boreali v. Axelrod*, 130 AD2d 107) [29][30]. His eight-page opinion stated that the council's regulations conflicted "with the way major social and health policy changes should occur in a representative democracy" [30].

The State appealed, and Appellate Division Justice T. Paul Kane issued an order which prevented the State from taking any steps to implement the restrictions. After hearing the arguments, Kane upheld Hughes' decision, leaving the matter to the full five-member Appellate Division [31]. On November 25, 1987, the Appellate Division of the Supreme Court in the Third Judicial Department also affirmed Hughes' ruling by four to one, and declared the Public Health Council rules null and void. The opinion read:

...the scope of the Council's authority under its enabling statute must be deemed limited by its role as an administrative, rather than a legislative, body. In this instance, the Council usurped the latter role and thereby exceeded its legislative mandate, when, following the Legislature's inability to reach an acceptable balance, the Council weighted the concerns of nonsmokers, smokers, affected businesses and the general public, and, without any legislative guidance, reached its own conclusions about the proper accommodation among those competing interests (*Boreali v. Axelrod*, 71 NY 2d 1).

The court found four indicators that the Public Health Council overstepped its authority. First, the Council regulations exempted certain establishments (such as bars and small restaurants) because of economic concerns. The court ruled that “Striking the proper balance among health concerns, cost and privacy interests, however, is a uniquely legislative function” (*Boreali v. Axelrod*, 71 NY 2d 1). Second, the court also found that the Council used its power to create a set of rules without legislative guidance rather than supplementing broad legislation with the details of implementation. Third, the Public Health Council took action on an issue that had already been debated by the legislature. The court found that “Here, the repeated failures by the Legislature to arrive at such an agreement do not automatically entitle an administrative agency to take it upon itself to fill the vacuum and impose a solution of its own” (*Boreali v. Axelrod*, 71 NY 2d 1). Finally, the court concluded that the Council did not have the authority to enact such rules because no public health expertise was needed to address this issue.

Passage of the Clean Indoor Air Bill

After the controversy over the Public Health Council regulations, there emerged a public expectation that the legislature would address the problem of clean indoor air. This expectation, coupled with the successes of local clean indoor air laws, prompted the introduction of similar proposals in the state legislature. However, clean indoor air legislation died in 1988 when the Senate introduced a preemption clause, which Health Commissioner David Axelrod adamantly opposed. In 1989, the Senate leadership changed, and the Chair of the Senate Health Committee surprised health advocates by producing a comprehensive clean indoor air bill without preemption. The health advocates worked with Assemblyman Grannis and Governor Cuomo to swiftly push the bill through the legislature before the tobacco industry could react appropriately.

The controversy over the Public Health Council’s regulations revolved around the authority (or lack thereof) of the Council rather than the appropriateness of the regulations themselves. The final decision made by the Appellate Division of the Supreme Court described the situation regarding secondhand smoke and smoking restrictions as one that still needed to be addressed by the State Legislature: “in this case it is appropriate for us to consider the significance of legislative inaction as evidence that the Legislature has so far been unable to reach agreement on the goals and methods that should govern in resolving a society-wide health problem” (*Boreali v. Axelrod*, 71 NY 2d 1).

Phrases such as these in the Court’s decision fueled public expectations of the Legislature redressing the issue it had fought so bitterly to control. In addition, localities such as Suffolk County had passed ordinances similar to Grannis’ proposal, dispelling the industry’s claim that the legislation would cause a negative economic impact. The pressure of public expectation and the success of the local laws prompted Governor Cuomo to put forth his own legislative proposal mirroring the Public Health Regulations in 1988. Even the Senate felt compelled to introduce its own legislation regarding clean indoor air that same year.

Mirroring the tobacco industry’s preferences, the Senate proposal was extremely weak and included a preemption clause. The bill was proposed by Senator John Dunne (R-Garden City) and granted businesses more latitude in determining where smoking was allowed.

Although our data do not indicated that Dunne received money from the tobacco companies, it indicates that between 1985 and 1986 Dunne received \$150 from the United Restaurant, Hotel and Tavern Association, an organization later found to be financially supported by the tobacco industry. His bill gave smokers the same negotiating rights as nonsmokers, who had priority under existing law. Most importantly, it contained language which would replace local laws with its weaker provisions, rendering such ordinances null and void [32]. Localities such as Nassau County protested the preemptive language and urged the state legislature to defeat the Senate bill.

Although the Senate bill was eventually strengthened in other respects, the preemptive clause remained an issue that year. By that point, advocates for the bill included citizens groups (such as People for a Smoke Free Indoors) and the health organizations involved in fighting for the Public Health Council regulations, which were split on whether or not to accept preemption in exchange for unexpectedly strong anti-smoking provisions. While organizations representing local interests were strongly opposed to the idea, the state divisions of all the voluntary health

**Table 2. NEW YORK STATE COALITION ON SMOKING OR HEALTH
(and Ad Hoc Members)**

- American Lung Association of New York State +
- American Lung Association of Brooklyn +
- American Lung Association of Queens +
- New York Lung Association +
- American Cancer Society, State Division +
- American Cancer Society, Westchester Division +
- American Cancer Society, Queens Division +
- American Cancer Society, New York City Division +
- American Heart Association, State and City Affiliates +
- New York Public Interest Research Group +
- Environmental Planning Lobby +
- American Red Cross, New York State Division +
- New York State Federation of Professional Health Educators +
- American Cancer Society, Long Island Division *
- The City of New York *
- American Lung Association of Nassau/Suffolk *
- Public Health Association of New York *
- New York State Association of Counties *
- League of Women Voters of New York *
- Association of County Health Officers *
- Hospital Association of New York State (1)
- Medical Society of the State of New York (1)
- Doctors Ought to Care (1)
- Bar Association of the City of New York (1)
- New York State Catholic Conference (1)
- Americans for Nonsmokers Rights (1)
- United Auto Workers (1)
- American College of Obstetrician/Gynecology (1)
- American College of Emergency Room Physicians (1)

adopted from Turning the Tables: How to Beat the Tobacco Industry at Its Own Game [33]

+ = wavering on preemption

1 = preemption not an issue

* = opposed to preemption

For the discussion of events during 1989, "Coalition" refers to these groups

agencies (American Heart Association, American Cancer Society, and American Lung Association) wavered on the issue [33] (Table 2).

Health Commissioner Axelrod was instrumental in pressuring the health groups to reject preemption; he correctly understood that preemption of local ordinances was the crucial issue for the tobacco industry because it would prevent localities from continually reviving the anti-smoking debate and passing stricter local ordinances. In addition to removing authority from localities, the preemption strategy also establishes a weak standard, eliminates the informative process of public debate, and often divides tobacco control coalitions, which argue about the acceptability of such a clause [34].

Because of Axelrod's leadership, the New York tobacco control advocates uniformly rejected preemption. The New York State Association of County Health Officers also played a key role in lobbying against preemption. It was active in the coalition of health advocates and led anti-smoking campaigns in localities. The County Health Officers' experience with local smoking ordinances allowed them to refute industry claims of economic devastation, civil rights violations and fights between smokers and nonsmokers. Russ Hinz, who was on the Coalition on Smoking or Health (which then consisted of the three voluntary organizations and the New York Public Interest Research Group) stated, "The bottom line for Senator Anderson, Majority Leader and Senator Lombardi as Health Committee Chair, was that they needed preemption to accept this bill and ultimately it was killed last year [1988]" [35]. By including a preemption clause, which the advocates for the bill found unacceptable, the Senate helped the tobacco industry kill the bill.

1989 began with a change in Senate leadership; Ralph Marino (R-Oyster Bay) was elected as the State Senate Majority Leader, and Mike Tully (R-Roslyn Heights) replaced Tarky Lombardi as Chair of the Senate Health Committee. According to our data, Marino did not receive any contributions from the tobacco industry between 1983 and 1987, but did receive \$11,900 from tobacco interests between the years 1990 and 1996. Tully received \$250 from the industry between 1983 and 1986, and \$1600 between 1990 and 1998 (Table A-1).

Ralph Marino's rise to Senate leadership changed the mode of legislative lobbying in Albany. Under previous Majority Leader Warren Anderson, the biggest lobbying firms (including the tobacco industry's) had easy access to the Majority leader's top staff, but under Marino they were forced to communicate with other Senate members as well. In contrast to their experience with Anderson's staff, frustrated lobbyists were unable to obtain straightforward, yes-or-no answers from their new contacts. One lobbyist complained, "It's not one-stop shopping anymore. You have to cover the committees" [6].

Indeed, Marino acquired his position by pledging to allow committee chairs more freedom and initiative, a significant divergence from Anderson's "staff dictatorship". The *Albany Times Union* reported the changes due to Marino's new style of leadership: "While many bills once remained bottled up in committees, they are now clearing those committees, making it onto the Senate calendar where they stand a chance to be voted on" [6]. But Blair Horner, lobbyist for the New York Public Interest Research Group contended, "while committee chairmen seem to have more control than before, it doesn't guarantee the legislation will come to

a floor vote, which the Senate leadership still ultimately decides” [6]. Nevertheless, the leadership’s preferences were no longer the only proposals coming out of committee, giving less senior leaders the opportunity to pursue their own priorities a little further.

As if in testament to the new order, Health Committee Chair Michael Tully (R-Roslyn Heights) proposed a clean indoor air bill on June 5, 1989. Previous to this, such a bill would be blocked by the Health Committee Chairman rather than authored by him. Tully’s predecessor, Lombardi, would not even place the Grannis bill on a committee agenda. The bill was also similar to Grannis’ Clean Indoor Air Act, making the event all the more extraordinary. Russ Hinz received the call from Tully’s staff indicating the bill was about to be introduced. He gathered the other groups involved (such as ACS, AHA, ALA, NYPIRG, the New York Medical Society, the Association of Counties) to meet and review the bill. Once they discovered how similar it was to the Grannis Bill, Grannis immediately amended his version to make it identical to Tully’s.

At that point, there was one week left before the Senate majority’s caucus meeting, at which Senate Republicans would determine which bills would be introduced to the floor of the Senate and voted on by the entire body. After the 1988 debacle over the preemptive legislation, the tri-agency Coalition on Smoking or Health added new groups such as the New York Public Interest Research Group (NYPIRG) to its membership and became more focused on the campaign to pass the Grannis Bill [36]. In anticipation of the majority caucus, this recently expanded network of advocates bombarded Republican members with phone calls in support of the bill.

Part of this effort included prompting corporate executives whose companies instituted smoking policies to call Senators and describe their experience. Tully’s office requested this strategy, and the advocates succeeded in persuading executives from companies such as Citibank, Chase Manhattan, Bausch & Lomb, and Ford Motor Company to communicate their support of the bill. The consultant which worked on Ford’s smoking policy called to state, “Out of all the corporations I worked with including Federal Express, Ford, etc., I have never gotten any negative feedback, six months, a year, two years down the line.” Paul Beyer emphasized the significance of these contacts: “... one of their [corporate executives’] phone calls was probably worth...ten or twenty phone calls from people just saying, ‘I want smoking restrictions’” [35].

Meanwhile, the Coalition embarked on a concerted effort to contact editorial board writers at major newspapers and prepare them for an editorial on the Clean Indoor Air bill. They focused on Senate Majority Leader Marino and Senate Health Chair Tully’s districts on Long Island, and communicated with its regional newspaper *Newsday*.

The advocates persuaded *Newsday* to call Tully’s office and ask whether the bill was going to be considered at the Senate majority caucus, hoping the media pressure would thereby compel the Republican leaders to introduce the matter during the caucus. The strategy was designed to make Tully feel that the public and the press already believed the bill was going to be considered. Tully, in turn, placed pressure on Republican leaders by informing the Associated Press that he had the support of the Senate Democrats.

On Saturday, June 11, the lobbyists for the Coalition (Arthur Malkin, Blair Horner, and Russ Hinz) met to determine which Senate members to approach before the Republican caucus, the event which would determine whether the bill would be submitted to the floor of the Senate. There were 61 Senators, of which 34 were Republican. The lobbyists categorized each Senator in terms of their support for the bill and calculated that 20 had not yet taken a position. They also discussed how to target the grassroots activity for the following Monday and Tuesday (during the majority caucus). Russ Hinz explained in an interview with Donald Ross of the lobbying firm Malkin & Ross Strategic Services, “So not only were we targeting individuals in Albany to meet with the members, but we were also, over the weekend, laying calls and laying groundwork and getting people fired up for Monday morning to hit them from the district. Hit them with telegrams, mailgrams, and phone calls” [35].

The same week, the anti-tobacco forces received a boost from the scientific community. Dr. K. Michael Cummings at the Roswell Park Cancer Institute in Buffalo had been conducting studies which compared levels of the nicotine metabolite cotinine in the urine of nonsmokers exposed to second hand smoke with those of nonsmokers who experienced no exposure. The study found that while only 76% of subjects reported exposure to secondhand smoke, cotinine was detected in 91% of subject urine samples. Cotinine values rose substantially with the number of exposures to secondhand smoke, and the workplace was the most common source of exposure [37][38]. These results demonstrated that exposure to secondhand smoke was very prevalent, even among people not living with smokers. The results also implied that eliminating smoking in the workplace would dramatically reduce exposure to secondhand smoke.

Hearing the results from the Cummings study, Health Commissioner David Axelrod insisted that the researcher hold a press conference on his findings. The material had just been accepted for publication in a scientific journal. Cummings issued a press release and the Associated Press wrote a story on the study on June 12, just before the Republican caucus met [39]. By this time, the study was undergoing the processes of peer review and revision, but the journal did not consider Cummings’ press release grounds for revocation of the article. The study was eventually published in the Archives of Environmental Health [37].

Despite the journal’s approval of his activities, the tobacco industry criticized Cummings for using his study to support the clean indoor air legislation. He defended his unconventional actions by asserting that taxpayers paid for the study and therefore deserved the information at that crucial time. His co-author James R. Marshall, associate professor at the University of Buffalo’s Department of Social and Preventive Medicine argued, “Allowing a debate or important health policy to be uninformed for the sake of scientific purity is not right. We had evidence we thought was pertinent to the debate, even if the peer review process was not complete” [40]. According to Cummings, a number of Senators cited his study during the caucus [38].

The team of tobacco control lobbyists decided to call an emergency meeting the following Monday, with almost every member of the Coalition attending, including the American Red Cross, the Association of Counties, Pete Grannis’ office, and the environmental planning lobby, the state’s largest full-time environmental presence. They distributed a list of every Republican Senator and decided on who would visit whom.

The bill was considered at the Republican caucus late on Tuesday, resulting in an agreement in favor of the bill, with a few minor exceptions with respect to the restaurant provision and enforcement. Rather than waiting until the following day to amend the bill, Paul Beyer of Grannis' office cooperated with staff members from Tully's office to add the amendments and negotiate a single bill, for submission to both houses of the legislature. This decision was a significant move because if Tully and Grannis had shown any sign of difficulty agreeing on the bill, it would have provided opponents with an opportunity to break the advocates' momentum.

The amendments were ready to be filed by Wednesday. In New York it takes three days (during which the legislature is in session) to "age" a bill; therefore, the earliest the bill could be voted on by the full Senate was the Monday of the following week. However, the advocates hoped to sidestep the process by persuading Governor Cuomo to issue a message of necessity, which would allow the bill to be voted on immediately.

During another meeting on Wednesday, the advocates went through each of the 150 members of the Assembly and categorized them by their probable vote on the bill, determining that they had the votes to pass the bill if it were voted on immediately. During a meeting with the legislative leaders and representatives from the offices of the Governor and the Health Commissioner, the message of necessity issue was discussed and Marino agreed to vote on the bill that Thursday if the Governor gave the Assembly the message to do it on Wednesday.

Frantic to use this fleeting window of opportunity, the advocates searched for Axelrod and Cuomo and pressured them for the message of necessity, as Russ Hinz of the Coalition for Smoking or Health describes:

We actually went down to the second floor of the Capitol where the Governor's office is and went to his Chief Health Counsel and sent a very clear message that we, as the advocates, are telling you that if you don't get us this message and this bill hangs out over the weekend, we could lose this bill on the floor. If we lose the bill on the floor, "We're blaming you, Governor Cuomo and you, Commissioner Axelrod for letting it hang out long enough for the industry to mobilize." [35]

As they waited for the message of necessity, one of the health lobbyists was approached by a tobacco industry lobbyist curious to know why they were waiting around in the Capitol. According to Arthur Malkin, lobbyist for the American Cancer Society,

This guy was pale beyond belief when he realized that what we were waiting for was a message of necessity from the Governor. At that point he ran back to the other lobbyists and you could see pandemonium break free among the tobacco lobbyists as they realized that the vote was going to come immediately, not after they spent a weekend at their country homes in the Berkshires. [35]

Cuomo delivered his message of necessity to the Assembly, which passed the bill 111-26 that Wednesday afternoon, June 14. The bill then went to the Senate to be considered on Thursday.

The advocates again divided responsibility for communicating with each Senator and also

with the press to put more public pressure on Marino so he would keep the agreement and consider the bill on Thursday. To ensure this would happen, they also convinced the leaders involved in the meeting where the agreement had been struck to pressure Marino's office. Before long, the Speaker of the Assembly's office, the Governor's Counsel and the Health Commissioner's office had contacted Marino's staff with reminders of his pledge.

The bill was presented to the floor that day. Knowing that the Senate despised Commissioner Axelrod because of his attempt to revise the health code and thereby usurp their authority and for other unrelated reasons, industry lobbyists focused the Senate's attention on one provision in the bill giving the Health Commissioner more authority than the Senate would like. Despite these attempts, the bill passed the Senate by a vote of 49 to 4. However, the Senate's animosity toward Axelrod resulted in the implementation of the bill being delegated to local county health departments, rather than the state Department of Health [41]. The State Department of Health assumes responsibility only for those counties without a local health department.

Cuomo signed the bill into law on July 5, 1989 [42]. The former three-pack-a-day smoker stated, "We don't want to ostracize smokers, we want to embrace them. We want to help them quit" [42]. Most provisions of the law took effect January 1, but workplace provisions became effective April 1, 1990. By the time the law passed, 10 local communities within New York State, comprising 67% of the population, had already enacted strong anti-smoking restrictions [36].

Local governments consider the Clean Indoor Air Act an unfunded mandate, and therefore, little is done in the way of enforcement [41]. For example, the state does not audit local restaurant inspection programs for CIAA compliance inspections, nor requires some form of tobacco control enforcement in local health departments' work plan for state aid applications. This situation has not harmed the implementation of the law; the Act has generally been self-enforcing [41].

Conclusion

Many circumstances converged to create the opportunity for the Grannis Clean Indoor Air Act to pass in 1989.

Localities such as Suffolk and Nassau Counties and New York City had set precedents by passing their own clean indoor air laws and demonstrated that economic disaster, civil rights infringements and other industry predictions were not a byproduct of such legislation. The successful implementation of smoking restrictions in New York City businesses effectively dispelled fears of a negative economic impact from these laws.

The accumulation of local smoking restrictions indicated that local lawmakers felt the state was remiss in dealing with the problem of secondhand smoke. These local laws also gave rise to the argument that all New York citizens should enjoy equal protection from health dangers of secondhand smoke. By the time the Clean Indoor Air was enacted, 10 localities, covering 67% of the state's population, had enacted local clean indoor air ordinances. In addition, a significant amount of evidence had emerged from the scientific community indicating passive

smoking damages health, fortifying the public health argument for the bill. The passage of local laws prior to the adoption of a state law would become a familiar pattern in years to come.

When the State Public Health Council assumed the responsibility of passing smoking restrictions, the tobacco industry was caught unprepared. The strategies the industry had perfected were only useful in persuading legislators and elected officials; they soon recognized they had no direct avenue to influence the Public Health Council. The industry turned to its allies in the legislature to intervene, and attempted to frame the situation as a usurpation of legislative authority. The industry eventually succeeded in defeating the Public Health Council regulations through litigation which charged that the Council had improperly considered factors other than health in making its decision. The tobacco industry's victory over the Public Health Council would reverberate throughout the state, frustrating the attempts of local Health Councils (otherwise known as Boards of Health) to pass tobacco control regulations.

The battle over the Public Health Council's regulations engendered expectations of legislative action on clean indoor air, and took the idea of regulating smoking to a new level of public perception. Russ Hinz and Coalition leaders began strengthening their network of advocates during the health code controversy, developing an organized, better-informed group prepared for a more focused legislative campaign. Furthermore, the advocates were not afraid to hold government officials, even Governor Cuomo, accountable for the success or demise of the bill. Tobacco control advocates used media advocacy at the state level for the first time, and found it very effective to publicly embarrass lawmakers responsible for blocking tobacco legislation. In the following years, advocates would rely heavily on this tool, especially when confronted with an antagonistic Administration.

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CHAPTER THREE

OTHER TOBACCO CONTROL LEGISLATION DURING THE CUOMO ADMINISTRATION

Following the success of the Clean Indoor Air Act, the tobacco control advocates were able to obtain either a tobacco tax increase or passage of tobacco control legislation almost every year until the end of the Cuomo administration. After the Clean Indoor Air Act passed, the network of tobacco control advocates developed during the campaign was formalized into an advisory commission, which came to be known as the Commission for a Healthy New York. The Commission decided that the issue of youth access to tobacco would be their next legislative priority, and drafted a proposal called the Adolescent Tobacco Use Prevention Act (ATUPA), which ultimately prohibited free samples of tobacco products, eliminated cigarette vending machines, and strengthened the enforcement of youth access laws.

Earlier versions of ATUPA were blocked by Senate Majority Leader Ralph Marino and the New York State United Teachers Union, but the bill resurfaced and passed in 1992 because advocates brought these maneuvers into the public view. The advocates succeeded in increasing the tobacco tax in 1993, making the New York tobacco tax the highest in the nation. The following year, they passed the PROKIDS Act (PROtect Our Kids from Inhaling Deadly Smoke Act), which prohibited smoking on schoolgrounds and ended the sale of single cigarettes. By the end of the Cuomo Administration, New York was well-respected nation-wide for its significant advances in tobacco control.

Commission for a Healthy New York

Shortly after the state Clean Indoor Air Act passed, tobacco control advocates Russ Sciandra and Michael Cummings approached Health Commissioner David Axelrod to form a Commission on tobacco control. Cummings researched smoking and tobacco policy; he released information about his study on nonsmokers' absorption of second hand smoke which promoted the passage of the Clean Indoor Air Act. He and Sciandra were both working at Buffalo's Roswell Park Cancer Institute on the National Cancer Institute's (NCI) COMMIT program for the State Department of Health. The COMMIT program was aimed at reducing adult smoking prevalence and funded certain localities across the country to test community-based smoking cessation strategies to determine which were most effective.

COMMIT was the predecessor to the ASSIST program, a 17-state trial of the effectiveness of policy-based tobacco control interventions. When ASSIST first began its Request For Proposals process, the program description explained that ASSIST required the combined efforts of the NCI, ACS, state health departments, and other public and private organizations. The description also stated that state participation in ASSIST required the presence of a state commission or coalition focused on tobacco control.

Sciandra told Axelrod that he and Cummings wanted to submit an application for ASSIST and create the state's first tobacco control program. Axelrod asked, "How much money

is this going to be worth?” to which the advocates replied approximately 7 or 8 million dollars over the course of the 7-year contract. Axelrod decided that the State Department of Health should submit the proposal and appointed his Deputy Health Commissioner, Lloyd Novick, to be the principal investigator of the project. The State Health Department ultimately hired Sciandra away from Roswell Park to become the ASSIST Project Manager. Axelrod also agreed to appoint a state level executive committee, as mandated by the application, and decided to make the committee an advisory commission.

Cummings believed Axelrod’s decision was politically savvy in that it created an advisory commission consisting of over 60 organizations, adding much greater political force behind the state tobacco control effort: “He was very astute politically. I think he realized that it would be helpful and he wouldn’t have the battle that he’d had with clean indoor air if he had 60 organizations like the medical society and the others that were involved” [1]. Sciandra, the other co-author of the ASSIST proposal was subsequently hired by the state health department to direct the project in 1992 [2].

In July, 1989, Governor Cuomo appointed the advisory commission Axelrod wanted as the required state level executive committee. Its function was to analyze and present public officials with approaches to limiting tobacco addiction. The Commission on Smoking or Health (now known as the Commission for a Healthy New York) represented the State Education and Health Departments, Project ASSIST, and various other health groups, teachers and nurses associations and medical organizations.

Operating in tandem with the formal advisory commission was the coalition formed during the 1988 battle over the state clean indoor air bill. During this struggle, the anti-tobacco community expanded the informal tri-agency coalition of the three voluntary health agencies (the American Heart Association, the American Lung Association, and the American Cancer Society) called the New York State Coalition on Smoking or Health (“the Coalition”). The Coalition eventually incorporated allies such as the New York Public Interest Research Group, the New York Medical Society, and the New York Chapter of the League of Women Voters (Table 2). By 1990, it included the same groups on the executive Commission on Smoking or Health and became known as the Coalition for a Healthy New York.

When the ASSIST-mandated advisory commission formed, many health groups found themselves members of two very similar organizations. The Coalition maintained its independence by meeting separately, but ultimately operated as an unofficial subcommittee of the Commission. The Coalition would draft and submit their legislative plan before the Commission, which could then discuss and vote on it. The Commission always accepted the Coalition’s legislative recommendations.

The Adolescent Tobacco Use Prevention Act (ATUPA)

Blair Horner, the Chair of the Commission’s Steering Committee and lobbyist for member organization NYPIRG, led an effort to draft a bill regarding youth smoking and access to tobacco shortly after the Commission formed in 1989. At that time, selling cigarettes or chewing tobacco to persons under age 18 was already illegal and businesses selling tobacco were

required to post a sign stating, “SALE OF CIGARETTES OR OTHER TOBACCO PRODUCTS TO PERSONS UNDER EIGHTEEN YEARS OF AGE IS PROHIBITED BY LAW” (General Business Law, Section 399-e) [3]. However, advocates felt that minors continued to enjoy ready access to cigarettes through vending machines and free sampling. At a 1991 press conference, Paul Beyer of the American Cancer Society asserted, “Right now there is a desperate need for these kinds of laws in New York State. The average age at which children begin to smoke is 13, and 90% of all smokers begin by age 19” [4]. A 1991 press release by the Coalition for a Healthy New York stated, “Children under the age of 18 purchase cigarettes from vending machines 450,000 times each day, and 74% of retailers illegally sell cigarettes to children” [4].

Advocates also attributed high youth smoking rates to lack of enforcement of the current law. At that time, selling tobacco to minors was a criminal misdemeanor that was the responsibility of local law enforcement officers. Anti-tobacco advocates believed the law would be better enforced if violation was considered a civil offense under the jurisdiction of the county Department of Health. A 1988 study by Cummings and Marshall examining awareness of the youth access law in Buffalo, NY revealed that forty percent of the businesses surveyed did not know of the law or did not know the legal age for purchasing tobacco products and only 29.1% reported having the restrictions posted on the premises as dictated by law [5]. The study concluded that local law enforcement agents preferred to allocate their sparse resources to other issues and stated, “Unless community concern is raised about the issue of selling tobacco products to minors, it is not likely that law enforcement officials will expend resources for enforcement efforts” [5].

The Commission eventually proposed ATUPA, the Adolescent Tobacco Use Prevention Act, which included five major components. The bill outlawed cigarette vending machines in areas accessible to children, ended the free sampling of tobacco products, ended smoking on school grounds during school hours, revoked vendor licenses for repeatedly selling tobacco to minors, and restricted tobacco advertising on public property [6]. The first draft was completed in February, 1990, just one month after the state’s Clean Indoor Air Act went into effect. Cuomo proposed the first version of ATUPA on February 22, 1990. At that point, it only included the provisions regarding free samples and cigarette vending machines. Assemblyman Alexander Grannis agreed to sponsor the bill in the legislature [7] and in conjunction with the anti-tobacco advocates, added the other provisions.

The Senate’s version was sponsored by Michael Tully (R-Roslyn Heights), Chairman of the Health Committee and author of the state’s Clean Indoor Air Act. Tully’s proposal was similar to the Assembly’s but less restrictive in regards to cigarette vending machines and advertising. In 1991, another youth anti-smoking bill appeared in the Senate. Senator Joseph Bruno (R-Brunswick), then an Assistant Majority Leader, sponsored the legislation, which consisted of extremely weak provisions. Health officials called it a “watered-down, tobacco industry-sponsored measure” [8] introduced to compete with the stricter ATUPA bill. Bruno certainly maintained industry connections: our data indicate that Bruno collected \$600 in the years between 1990 and 1992, when ATUPA was an issue. He received another \$100 between the years 1983-86 and a total of \$7,300 between 1990 and 1998. In addition, an *Albany Times Union* article reported that Bruno collected \$1200 from the Tobacco Institute between 1989 and 1990 [8]. Furthermore, Bruno’s son, Kenneth, lobbied for the measure as an employee of the

Tobacco Institute's lobbying firm, Roemer & Featherstonhaugh [8].

Neither ATUPA nor its weak tobacco industry counterpart survived the 1991 legislative session. ATUPA resurfaced alone the following year with an additional provision strengthening enforcement of the youth access law.

In 1992, the legislature held a special session to address Suffolk County's imminent bankruptcy. The Coalition for a Healthy New York wanted to use this opportunity to force Senate Majority Leader Joseph Marino into taking a position on ATUPA. Previously, Marino escaped disclosing his opposition to ATUPA by preventing the bill from appearing on the docket. The Coalition persuaded Governor Cuomo to suggest the ATUPA proposal be placed on the docket at a meeting with legislative leaders concerning the special session's agenda. Marino refused to deal with the issue, enabling the advocates to blame him for the bill's immobility. They informed the press of Marino's opposition, prompting editorial boards across the state to deride him until he acquiesced and put the bill on the docket.

This success was offset by a substantial weakening of the legislation. The week the bill was to be considered, Senate Majority Leader Ralph Marino's senior education staffer contacted Ray Skuse, who represented the New York State United Teachers union (NYSUT), to ascertain whether NYSUT had any objections. Skuse replied that NYSUT could not support the legislation if it did not allow teachers a smoking area. He added that NYSUT would compromise if the bill allowed smoking in teacher lounges [9]. The following day, the Senate removed the schoolground provision. Although Skuse asserted, "I neither asked for that nor negotiated it," Senate Health Committee Chairman Michael Tully (R-Roslyn Heights) stated that NYSUT voiced "vigorous opposition" to Marino's staff [9].

NYSUT's grievance surprised tobacco control advocates; they claimed that they had not received any complaints from the union during the previous two years. Over fifty school districts in the state already maintained school ground smoking restrictions similar to those proposed in the bill. NYSUT's Treasurer, Fred Nauman, sat on the state commission responsible for proposing the measure [9]. A 332,000 member union, and 1991's largest source of campaign contributions to New York State elected officials and lawmakers, NYSUT's approval was imperative to the bill's success. In the first half of 1992, the union contributed \$130,000 to Senate Republicans, \$50,000 of which was donated three weeks before the demise of the schoolground restrictions [9]. That same day, July 7, they also contributed \$50,000 to Assembly Democrats and \$25,000 to both the Assembly Republicans and Senate Democrats [9].

Another contentious provision was the counter-advertising requirement. This measure imposed a public service advertisement regarding the hazards of smoking adjacent to all pro-smoking billboards on state-owned land [10]. The tobacco industry insisted that restrictions violated the first amendment to the federal Constitution. Eventually, Marino deleted the advertising restriction, but harsh criticism from the media forced him to keep the rest of the bill alive.

Preemption

ATUPA was further diluted by a provision which preempted local laws on free sampling; as of 1999, it is the only state law containing a preemption clause [1]. In some localities, free sampling is legal when occurring in adult-only facilities or in public places cordoned off to minors. ATUPA banned free sampling everywhere, explicitly preempting local law and setting a maximum standard for free sampling across the state [11]. Section 1399-ff § 6 of the bill states:

The provisions of sections 1399-bb of article 13-F of the public health law [the free sampling restrictions] as added by section three of this act, shall govern and take precedence over the provisions of any local law, ordinance, rule, regulation, resolution, charter or administrative code hereafter enacted by any polical subdivision of the state. [12]

This measure was added at the Senate's request during negotiations over the bill and was not actively attacked by tobacco control advocates in Albany. Although philosophically opposed to the idea of preemption, the advocates considered the bill's free sampling provision sufficiently stringent for a statewide standard, and considered it a reasonable concession in exchange for other provisions of the bill, and therefore accepted the free sampling preemption clause [13]. Most significant among these was changing the classification of selling tobacco to minors from a misdemeanor to a misdemeanor and civil offense. By adding the civil offense classification, the County Board of Health would act as enforcement officer for the civil offense penalties. As a misdemeanor, violators of youth access laws face imprisonment and/or fine, but the law was never enforced as such. By adding the civil offense, ATUPA subjects store-owners to a civil fine and the possibility of losing their tobacco license. The revenue from fines is typically divided between the county general fund and either the county board or the local school district for tobacco education efforts.

ATUPA passed on July 30, 1992, and took effect September 6, 1992. The implementation of the cigarette vending machine provision was delayed until April 1, 1993. It ended free sampling, restricted cigarette vending machines to areas inaccessible to children, and strengthened penalties for illegal sales of tobacco to minors. At that point, the only other state with a comparable youth access law was Florida.

The ASSIST Program

In December, 1993, the newly-named Commission for a Healthy New York (previously the Commission on Smoking or Health) released their report, "Tobacco-Free New York: A Plan for Action" [14], which outlined the ASSIST program, a joint effort between the National Cancer Institute (NCI), the American Cancer Society, state health departments and other public and private groups aimed at cultivating tobacco control programs and reducing adult smoking prevalence in participating states to 15 percent or less [14]. The American Cancer Society and the NCI are the primary participants and are most responsible for overall planning and implementation of the program. The report explained how New York State should apply the new ASSIST funding:

The Tobacco Control Initiative will foster local, community-based, tobacco-control coalitions led by county health departments, American Cancer Society units, and other voluntary agencies and health-concerned organizations. Each coalition will define the local tobacco problem and develop a five-year, comprehensive plan to address it. Tobacco Control Program field staff funded by

ASSIST will provide technical assistance to localities in preparing their plans. [14]

In October, 1993, the state Health Department began a competitive application process to determine which local tobacco control programs would receive part of the \$750,000 ASSIST allotted to these campaigns. The local coalitions would play a large role in the passage of tobacco control laws at the county and municipal levels.

The report also included many goals for the state level such as strengthening the Clean Indoor Air Act, enforcing the youth access laws, prohibiting tobacco product advertising on all state and local government property, and adopting a one dollar per pack excise tax which would be committed to tobacco control activities [14].

PRotect Our Kids from Inhaling Deadly Smoke Act (PROKIDS) and the 1993 Tobacco Tax Increase

After the passage of ATUPA, the Commission focused on increasing the state cigarette excise tax and reviving the provisions deleted from ATUPA. Spurring them on was a January report by the U.S. Environmental Protection Agency which declared secondhand smoke a carcinogen and stated that the agent caused a higher incidence of respiratory problems in children, such as pneumonia and bronchitis [10]. A study by Cummings et. al. revealed that in New York State, approximately 135,700 teenagers collectively smoked an average of 1.3 million cigarettes per day [15]. The authors went on to suggest curtailing youth access to tobacco by doubling the 39 cent cigarette excise tax, and also recommended the state distribute the revenue from illegal tobacco sales (which was estimated at \$39.5 million in 1991) to finance tobacco control efforts and ATUPA enforcement. Tobacco control advocates incorporated these themes in the PROKIDS (PREvent Our Kids from Inhaling Deadly Smoke) proposal. PROKIDS (bill number A.7139) entailed doubling the cigarette tax and directing the extra money toward health care, cessation programs and preventive education.

The tax provision was removed from the proposal when the advocates and state Health Commissioner Mark Chassin convinced Governor Cuomo to propose a cigarette excise tax increase in his 1993 budget proposal. Advocates originally favored doubling the tax to 78 cents, but praised the Governor anyway when he proposed a 21-cent increase [16]. The increase was estimated to raise approximately \$180 million in new revenues and decrease the state's smoking population by about 75,000 [17]. Cuomo had previously increased the state's cigarette excise tax by 12 cents per pack in the 1989 budget, and by 6 cents in the 1990 budget to help relieve state deficits. Cuomo was also responsible for imposing a \$100 licensing fee on retail tobacco vendors and a \$25 fee for cigarette vending machine operators [18]. These measures generally escaped public attention, but the 1993 tax proposal encouraged much controversy because it would have made New York's cigarette tax the highest in the nation [19].

Tobacco companies presented an economic argument in opposition to the tax increase. Philip Morris' briefing notes from a 1993 meeting with Governor Cuomo state: "We estimate that the number of cigarette pack sales New York will lose to adjacent states through cross border purchases will total about more than 51 million packs in New York's 1994 fiscal year -- lost sales to New York retailers, lost tax revenues to the state, plus the additional losses in retail

sales and taxes on other products bought across the border when the cigarette purchases are made” [20]. The industry also produced econometric models predicting the loss of 12,000 jobs [17].

Philip Morris and other tobacco companies also argued that raising the tax would be regressive, encourage smuggling and that state excise taxes are generally unreliable and “never raise the amounts of money their proponents predict” [17]. They also cited Canada in their argument that governments actually lose money through the sale of contraband cigarettes and the additional law enforcement required to monitor smuggling activities.

Leading the opposition to the tax increase was an organization titled New York Citizens for a Sound Economy (NYCSE). The group is one of three state branches of Citizens for a Sound Economy, a conservative think tank based in Washington D.C. which advocates for lower taxes [21]. In 1991, Philip Morris USA contributed \$92,000 to this parent organization [21]. NYCSE produced a report questioning the economic repercussions of the tax increase and considered collaborating with the tobacco industry to form a coalition against the tax [21].

Despite the opposition, the cigarette tax passed as part of the state budget in April 1993 (Table 3), although the tax increase was reduced from 21 cents to 17 cents per pack [10]. Senate Republicans had originally dismissed the idea of a cigarette tax increase, but eventually relented after struggling to find funding for programs such as education [10]. Their capitulation was gradual, beginning with agreement to 8 cents per pack, then 11, and finally, 17. New York’s cigarette excise tax became the highest in the nation, at 56 cents per pack. However, none of this money went toward

Table 3. HISTORY OF NEW YORK STATE CIGARETTE TAX RATES, 1939-1998	
Effective Date(s)	Rate Per Pack (in cents per pack of 20 cigarettes)
1939-3/31/59	2
4/1/59 - 3/31/65	5
4/1/65 - 5/31/68	10
6/1/68 - 1/30/72	12
2/1/72 - 3/31/83	15
4/1/83 - 4/30/89	21
5/1/89 - 5/31/90	33
6/1/90 - 5/31/93	39
6/1/93 - Present	56
Source: NYS Department of Taxation and Finance, Office of Tax Policy Analysis [18]	

tobacco control or smoking prevention.

The remaining PROKIDS provisions included the smoke free schoolground provision struck from ATUPA as well as advertising restrictions. The bill prohibited tobacco

advertisements such as billboards, posters and “fixed advertising” such as window stickers [10]. Other provisions strengthened the 1989 Clean Indoor Air law, restricting smoking in day-care centers, group homes, restaurants without full liquor licenses, fast food chains, bowling alleys, bingo halls and the indoor facilities of zoos [10]. In addition, the bill prohibited the sale of “loosies”, or individual cigarettes. Authored by the Cuomo administration and sponsored by Assembly member Alexander Grannis, this version was introduced to the legislature in April of 1993.

The teachers’ lobby remain conspicuously silent as PROKIDS advanced through the legislature. Many of NYSUT’s members had been supportive of smoke-free schools and when the media publicized its role in blocking the provisions in ATUPA, the organization experienced much internal dissension in addition to public castigation from the media.

Advocates tried to focus public attention on the December 1992 Environmental Protection Agency (EPA) report “Respiratory Health Effect of Passive Smoking” [18] and its potential repercussions: “With the EPA designating secondhand smoke as a dangerous carcinogen, it leaves business and particularly schools liable to lawsuits if they don’t protect the children and workers from (tobacco smoke),” stated Blair Horner, lobbyist for the New York Public Interest Research Group [10]. To further bolster the argument for the clean indoor air provisions, the Cuomo administration paid for a biostatistician from the U.S. Environmental Protection Agency to visit Albany and meet with key lawmakers and their staff. State health commissioner Mark Chassin explained that the scientist’s consultations were part of an effort to offset the tobacco industry’s efforts to trivialize and mitigate the findings of the EPA report on the hazards of secondhand smoke [22].

Meanwhile, the tobacco industry focused on trivializing the dangers of smoking and persuading legislators that other issues were more pressing. They also recycled the free speech argument used against ATUPA: “The more you look at its provisions, the clearer it becomes that sponsors of this bill would cynically use our kids as hostages to shield their real intention –keeping cigarette manufacturers from exercising their right of free speech to reach adult consumers with a legitimate problem” [23].

The tobacco lobbyists tried to supplant PROKIDS with its own efforts to control youth access and tried to convince Governor Cuomo to accept the industry’s own youth access initiatives in place of a law and to adopt preemptive state clean indoor air legislation. Ellen Merlo, Philip Morris’ Senior Vice President of Corporate Affairs reported, “They [lobbyists] further feel that we must draw the line in the sand over the Grannis Bill and that our agenda should be to try to convince him [Governor Cuomo] that with a combination of youth initiative advertising throughout the state and legislation that will provide accommodation with preemption we could have a win/win situation” [24].

The “youth initiative advertising” Merlo referred to most likely meant the Tobacco Institute’s “It’s the Law” program, which promotes the adherence to youth access laws and provides information and materials such as “It’s the Law” program stickers and decals to retailers. The program was developed in December 1990 to counter the progression of youth access laws across the country. In a 1994 Philip Morris document, an anonymous employee

describes the current environment and how the company should respond:

Youth access to tobacco products has become the anti-smoking movement's principle argument in seeking to impose further restrictions on tobacco sales and marketing practices - primarily vending, self-service, brand promotions, and advertising. It also serves as yet another reason to increase the price of cigarettes through an excise tax so as to price the product beyond a minor's reach.

Re-introduce the It's the Law program as a means of encouraging retailer action in preventing underage purchases - demonstrate effectiveness to state and local legislators in order to prevent increased sales and marketing restrictions. [25]

Tobacco lobbyists also used the brief respite between the cigarette tax increase and the proposal of PROKIDS as fodder for arguing that their business was victim to excessive government regulation. One lobbyist proclaimed, "I didn't even get into the merits of the bill. Our position was, 'You already hit us with the tax. Go somewhere else'" [26]. The industry maintained an aggressive lobbying campaign against PROKIDS, with Philip Morris outspending all other New York lobbying clients in 1993 [27]. Sharon Portnoy, a Philip Morris lobbyist, was so aggressive in lobbying, she had to be removed from the Assembly floor by a guard [26]. The tobacco industry spent a total of approximately \$1,144,528 on lobbying during the 1993-94 election cycle (Table A-25).

Another Philip Morris lobbyist, Brian Meara, was observed huddled with Assembly member Sheldon Silver outside the Assembly chamber [26]. Silver, who chaired the Assembly's Ways and Means Committee, denied discussing the PROKIDS bill with Meara. "Assemblyman Meara," as his critics call him, collected \$110,000 from Philip Morris USA in 1993, and received \$2,200 each month from the Association of Tobacco and Candy Distributors [26]. Meara also had ties with Assembly Speaker Saul Weprin (D-Queens). Lobbyists and aides reported that the Philip Morris lobbyist drove the Speaker's wife between Albany and Queens, and he also employed Weprin's son as a lobbyist in the mid-1980s [26].

PROKIDS remained mired in the Assembly Codes Committee for two months. The bill's sponsor, Alexander Grannis, complained that Codes Committee Chairman Joseph Lentol (D-Kings), would not explain his objections to the bill. Soon afterward, Grannis amended the bill to include counter-advertising instead of a ban on fixed advertising, and inserted a blanket no-smoking policy for restaurants. When this failed to move the bill, Grannis weakened it by removing the provisions regarding restaurants and advertising.

Lentol asserted that he gave Grannis, the Assembly sponsor of the bill, a choice between PROKIDS and a consumer rights bill regarding the funeral industry. According to Lentol, Grannis decided to focus on the funeral legislation and wait until the following year to pursue PROKIDS [28]. When the funeral bill passed, Grannis began advocating for PROKIDS and Lentol voted against the smoking bill in protest to Grannis' maneuver: "We had reached an agreement. He decided not to live up to that agreement" [28]. Grannis protested that Lentol never voiced his opposition despite numerous meetings, and suggested the Chairman was abusing his power: "It's not his choice to make. His duty as codes committee chairman is to look at (a bill's) penalty provisions. ... He is in no position to offer me an either or option" [28].

Assembly Speaker Saul Weprin (D-Queens) made it clear that he wanted the bill to leave the Codes Committee when he appeared at a Codes meeting; Speakers of the Assembly rarely attend committee meetings unless they chair the committee. After Weprin's visit, the Codes Committee passed the measure 14-2 [28]. Weprin reportedly made this show of support to demonstrate he was not responsible for blocking the bill. Committee Chairman Lentol voted in opposition [28].

The bill passed in the Assembly but died in the Senate. The *Albany Times Union* reported, "Tobacco lobbyists said they had assurances from Senate Majority Leader Ralph Marino that the legislation would not make it onto the Senate floor..." [28]. A Marino spokesman denied such an agreement was negotiated. Advocates blamed the Assembly for the bill's death, positing that if the bill had not been delayed in the Codes Committee until the last few days of session, it would not have taken such low priority in the Senate [26].

PROKIDS was reintroduced the following year. To keep public pressure focused on Marino and the Assembly, advocates arranged for a news conference at a smoke-free school where students thanked those Assembly members who supported PROKIDS. Two weeks later, on February 28, the Assembly once again passed the bill, which at that time included an expansion of smoke-free public places and workplaces, an end to smoking on schoolgrounds and an end to the sale of "loosies" [29].

Adding to the advocates' argument was the release of several studies in early 1994 which reinforced the EPA's findings on secondhand smoke. Most notable was the U.S. Surgeon General report which warned of the health hazards associated with smoking and the detrimental effect of secondhand smoke on children [29][30].

In June 1994, the Coalition for a Healthy New York released a survey stating that 36 out of the 61 senators supported the PROKIDS bill [31]. Sixteen of those supporters were Republican. However, when the bill reached the Senate, lawmakers diluted it so badly that Assembly sponsor Alexander Grannis stated that the Assembly would rather not pass any anti-tobacco legislation than settle for the new Senate proposal [31]. The Senate eliminated the provision requiring separately enclosed smoking rooms for workplaces and the prohibition of "loosies." Furthermore, the amended bill included a preemption clause regarding smoke-free schoolgrounds. The text stated that faculty and staff "may smoke in designated smoking areas during non-school hours," which could be interpreted as forcing districts which currently impose complete smoking bans to offer smoking areas [32]. The Grannis version implicitly allowed schools to determine for themselves whether to designate smoking areas outside of school buildings after school hours [32].

Senate Health Committee Chairman Michael Tully, sponsor of the Senate version of PROKIDS, agreed to the amendments in an attempt to address Senate Majority Leader Marino's objections. Assemblyman Grannis accused the Senate of allowing a tobacco industry lobbyist draft the language, and denigrated Marino "as perhaps the only high-ranking elected official who has not gotten the message that the tobacco industry is on the skids" [32]. A Marino spokesman responded, "[Alexander] Pete Grannis is irrelevant, but those sorts of mealy-mouthed comments are what you would expect from someone with no impact on this issue" [32].

On June 30, 1994, the same day these remarks were publicized in the *Albany Times Union*, the Senate reversed its position. The health groups delayed an early afternoon press conference while Tully and Grannis, the bill's sponsors, discussed the situation outside the Senate chamber. Afterward, Tully met with Marino, who said he would agree to the bill if the teachers' union (New York State United Teachers) voiced no opposition.

In 1992, when NYSUT had made a last-minute objection to the schoolground smoking provision in ATUPA, the Senate removed it without negotiating. As a result, NYSUT received damaging press attention; the Long Island chapters of the American Lung Association, American Heart Association, and American Cancer Society publicly blamed NYSUT for removing the schoolgrounds provision [33]. To avoid a similar situation, the union announced they would remain uninvolved in the PROKIDS battle [32]. "We are not opposing the [bill], and that's what we told Marino's office. There's nothing else really to say, so they can't pin this on us," stated NYSUT spokeswoman Linda Rosenblatt [32]. Later that day, shortly after NYSUT's announcement, Grannis and Tully proclaimed that a compromise had been reached. The bill passed the legislature on July 2, 1994, and Cuomo signed it into law on July 26.

PROKIDS passed without a preemption clause or the workplace provision requiring separately enclosed rooms for smokers. It prohibited the use of tobacco products on school grounds and child facilities such as youth detention facilities, day care centers, group homes and public institutions for children, and residential mental health treatment facilities for minors [34]. The law did not impact day care centers if they were located at a private home. The law also forbid the out-of-package sale of cigarettes ("loosies"), and increased smoking restrictions in general hospitals and other health facilities for adults.

Conclusion

The newly formed, multi-member Commission for a Healthy New York and the Governor's support were essential elements for the passage of legislation during the Cuomo Administration. By creating the Commission, Axelrod ensured that a large and eclectic group of organizations could lend political clout to any campaign for anti-tobacco legislation. Bringing these groups together to interact led to an expansion of the small and politically independent Coalition for a Healthy New York. Each body had an asset: the Commission had the Governor's ear at the time, and the Coalition was able to formulate its goals without political interference. The latter could then transfer its plan to the Commission so that it could be considered by the Governor and then translated into political action. In future battles with a less sympathetic Governor, the situation would reverse; the Commission would be hamstrung for political reasons and the Coalition would be the organization to push the envelope.

The New York advocates compromised little when they accepted the clause in ATUPA which forced localities to adopt the state restriction on free sampling, and in return, they were able to ensure better enforcement of youth access provisions by delegating enforcement to local Departments of Health. Although advocates should maintain a standard policy against preemption, this bargain was more constructive than not, as the preemption issue was not very significant and stricter penalties on youth access would have been pointless if there continued to be no enforcement of the law.

As with the Clean Indoor Air Act, a large factor in the success of ATUPA and PROKIDS was the advocates' willingness to use media advocacy strategies to hold lawmakers and other groups accountable. The public castigation of NYSUT was the main reason the schoolground ban on smoking finally passed. After the loss of the schoolground provision in ATUPA, the tobacco control advocates publicly criticized the New York State United Teachers Union for siding against children's health and going against the will of their members. Heavily embarrassed by the castigation, the union refused to enter the fray when PROKIDS became an issue. By publicizing sources of opposition and questioning their motives, advocates were able to use public opinion to their advantage and attain the original goals they set with ATUPA.

Governor Cuomo also played a significant role in defensively keeping lawmakers from obstructing or weakening tobacco control legislation, but he also made a large impact by publicly encouraging legislators to pass these bills. The success of these proposals hinged on Cuomo's personality: he allowed the Commission to create the legislation, deferring to its expertise, supported their actions, and intervened when possible to advance the proposals. The beneficial impact of a friendly Governor became painfully apparent when Cuomo was defeated in the 1994 elections by Republican George Pataki.

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CHAPTER FOUR

TOBACCO CONTROL UNDER THE PATAKI ADMINISTRATION, 1994-1999

In 1994, Governor Cuomo's re-election defeat removed a crucial ally of the tobacco control effort. The new governor, Republican George Pataki, was considered an ally by the tobacco industry; a 1995 Philip Morris document describes Pataki as "pro business and openly solicitous of PM..." [1] The tobacco industry, particularly Philip Morris, provided substantial campaign contributions to Pataki and the Republican Party, which Pataki controls.

During the course of his first term as Governor, Pataki would secure a reputation as a tobacco-friendly politician by dismantling the State tobacco control program and supporting preemptive legislation authored by the tobacco industry. In 1996, after being criticized for his pro-tobacco actions, Pataki introduced a tobacco control package and implied that the state was dedicating \$13 million to the package. However, Pataki's claims were misleading; many aspects of the program did not materialize, only about \$8 million was dedicated to the program, and most of the funding came from the federal government. What little was done was only a token effort to combat smoking. This was highlighted by Pataki's anti-smoking advertisement campaign, which was aimed only at pregnant women and children and consisted of stale messages and boring content. It became obvious that Pataki was not serious about his commitment to tobacco control when he supported legislation that would protect tobacco companies from litigation.

Tobacco Industry Support for Pataki

Pataki was a protégé of U.S. Senator Alfonse D'Amato (R-NY), former Chairman of the Republican National Senatorial Committee, an organization which raises funds to help elect Republican senators. D'Amato is friendly to tobacco interests, which donated \$678,100 to his Republican National Senatorial Committee between January 1995 and April 1996 [2]. Press reports indicated that Philip Morris gave \$25,000 to Pataki's inaugural and transition funds after election 1994, and contributed at least \$20,000 to his gubernatorial campaign and to the state Republican party over 1994-1995 [3].

Our data indicate that Pataki received only \$8,050 (as a Governor and as an Assemblyman) between 1990 and 1998. Because New York's financial disclosure laws are so weak, this estimate should be considered the bare minimum he accepted from the industry (Table A-10); for example, one major weakness is that New York does not require individual contributors to disclose their employers, allowing corporation to use their employees as conduits for campaign contributions. In addition, Pataki controls the Republican party apparatus, and therefore the enormous amount of soft money contributions the party receives from the industry are disbursed as Pataki sees fit. By controlling the disbursements, Pataki generates loyalty from those whose campaigns receive a cut of the soft money.

Pataki Cripples the State Tobacco Control Program

The Administration's pro-tobacco stance grew apparent in 1995, when it retracted

federally-funded anti-smoking television advertisements because of opposition from tobacco companies and administration officials [4]. In January, 1996, the Administration canceled “Tobacco Free Awareness Week,” a statewide educational campaign, infuriating tobacco control advocates across New York. The Administration issued no statement regarding the cancellation at the time, and only later did Health Commissioner Barbara DeBuono’s press aide Claudia Hutton explain that the event was forgotten and “slipped through the cracks” [5]. Tobacco control advocates planned a press conference to protest this inaction, but canceled it after Pataki announced a new anti-smoking video advertisement campaign aimed at teenagers the same day. In an Albany *Times-Union* article, Sciandra asserted that his former supervisor, David Momrow, alerted the Administration to the advocates’ plans, prompting Pataki to announce his new campaign and undermine their criticisms [3].

In April, 1996, the Administration terminated the youth-focused anti-smoking videos Sciandra developed to recruit kids into a youth anti-tobacco program. The video, intended for such events as youth group and PTA meetings, asserted that tobacco companies market to children and that youth advocacy groups can help counter this influence. Although Sciandra’s supervisors (including David Momrow) had approved the video, Dr. Kenneth Spitalny, Director of the Center for Community Health, rejected it. He wrote in an internal memo: “The video rants against (demonizes) the tobacco companies and intimates that the ‘kids’ are victims without indicating the constructive approach they have taken to reduce access to tobacco” [5].

The next facet to be eliminated from the tobacco control program was Sciandra himself. Sciandra recalls that the following May, Momrow explained to him that the tobacco issue “is red-hot now” and told Sciandra he could either be fired or he could resign. Sciandra responded that the Health Department had no legal grounds to expel him. The next month, Momrow informed Sciandra he was being reassigned to the AIDS epidemiology unit to a position for which he had no training. Sciandra chose to resign. However, he did not leave quietly; he publicized his ordeal, forcing the Administration to react defensively. Some tobacco control advocates worried that the Governor would react by becoming more antagonistic.

The Administration’s Director of Public Affairs, John Signor, asserted that Sciandra was not forced out or reassigned to the AIDS division; he resigned to take another position [6]. However, Sciandra did not have any such job offer when he left the department. Dr. Marc Manley, chief of the Public Health Applications Branch of the NCI stated that one of Sciandra’s direct supervisors had confirmed that Sciandra was being forced out of his job by top level administration [5]. Sciandra was subsequently hired by the American Cancer Society to assume the position of Director of the Center for a Tobacco Free New York.

Sciandra’s experience was not unique; a similar incident occurred with the Deputy Health Commissioner Lloyd Novick, the original Principal Investigator on the State’s ASSIST contracts. Novick knew DeBuono and reportedly supported Pataki’s decision to appoint her as Health Commissioner. But Novick later disapproved of some of DeBuono’s actions and made it publicly known. The press caught his statement and broadcast it, and Novick was dismissed shortly thereafter.

These events, and others outside of the tobacco control issue, generated a highly

politicized environment at the Health Department. A health advocate explained, “There was a perception that to a large extent, the [former Pataki Administration] public relations guy [read: Robert Hinckley] was making policy for the Health Department, not the Health Commissioner. And I mean, he was making policy because he was being told by Pataki’s public relations people what to do. Zenia Mucha who’s his [Pataki’s] Communications Director, is one of the top policymakers in his Administration....So in other words, policy is made by PR people.”

The Commission for a Healthy New York, which had assisted former Governor Cuomo in proposing anti-smoking legislation since its existence, was unprepared for the dramatic shift in policy. Until Pataki’s inauguration, the Health Department introduced a tobacco control proposal every year for the previous decade. They responded to the Administration’s blows to the state tobacco control program by sending a letter to Pataki’s Health Commissioner Barbara DeBuono in November of 1996, asking for more initiative on legislation and complaining about the underfunding of the state’s anti-tobacco advertising program [7].

In response, Administration spokesman Robert Hinckley stated that the state spent \$600,000 on anti-smoking television commercials aimed at teenagers and DeBuono had begun an educational campaign to get doctors to discuss the health hazards of smoking with their patients more frequently [7]. The Administration stated that the Health Department spent more on tobacco control efforts in 1996 than ever before: \$3 million dollars.

Throughout his term as Governor, Pataki would defend his record on tobacco by pointing out that he allocated money to tobacco control efforts. However, the money he allocated generally originated from sources outside of state funds. For example, of the \$3 million dollar program the Administration touted in 1996, \$2 million of that sum came from the federally funded ASSIST program. When Pataki allocated \$600,000 for a television advertising campaign in response to criticism over his cancellation of the State’s previous campaign, the Commission for a Healthy New York retorted that \$600,000 “was simply not enough money to have an effect on youth smoking rates and therefore ... was a waste of money” [7].

Pataki’s Support of Preemptive Legislation

Through the first few months of his term, it became increasingly evident that Pataki’s policy was consistent with the desires the tobacco industry. In June, 1995, when Philip Morris gave the NY Republican Party \$25,000 [2], Senate Majority Leader Joseph Bruno (R-Brunswick) quietly introduced a preemption bill which would allow the tobacco and restaurant industries to overturn strong local restrictions on smoking in restaurants [8]. Although this bill was ultimately killed by Democratic Speaker of the Assembly Sheldon Silver after much unfavorable press coverage, Pataki remained conspicuously silent on the issue. Bruno, who received \$6,700 from the tobacco industry in the election cycle 1995-96, stated that the idea originated from the Pataki administration. The Governor’s office denied the charge [8].

Prior to appearing in the legislature, the bill originated from the Tobacco Institute and an industry front group, the New York Tavern and Restaurant Association (NYTRA). This organization has since changed its name to the Empire State Restaurant & Tavern Association, which is headed by the same Executive Director as the United Restaurant, Hotel, Tavern

Association [9]. All three names refer to the same organization, which received tobacco industry financing to pursue the preemptive legislation. In a 1995 document, the New York State Tavern and Restaurant Association requested \$307,400 to \$419,900 from the Tobacco Institute [9]. The proposal stated the organizations intent: “It is the desire of the New York Tavern and Restaurant Association to seek enactment of state legislation that establishes uniform standards for the regulation of smoking which preempts any local action in this area” [9]. This legislation was inspired by the 1995 enactment of New York City’s Smoke Free Air Act, which ended smoking in restaurants with more than 35 seats. When the tobacco industry lost this battle, they began a two-pronged attack to regain their lost ground; they tried to amend the Smoke Free Air Act itself and they also tried to pass legislation that would preempt the Act.

NYTRA proposed to build a statewide “grassroots” coalition of hospitality organizations which would “be activated to engage in lobbying efforts to state legislators including: letter writing, personal meetings, media activity, etc.” [9]. The campaign was scheduled to start April 24, 1995 and finish at the end of the 1995 legislative session, on July 14. A 1996 Tobacco Institute budget document confirmed that NYTRA received the money for their campaign; the Institute allocated \$279,700 to the “New York State Preemption Plan” [10]. However, the Tobacco Institute’s 1995 state lobbying records only acknowledged expenditures of \$110,000 for the services of two lobbyists [8]. New York’s financial disclosure requirements are so lax that when the transgression was discovered and reported by the *New York Times* in late 1998, the Tobacco Institute merely had to re-submit its forms with the necessary corrections without suffering any penalty for misrepresentation [11].

When Pataki’s Health Commissioner, Barbara DeBuono, first discovered a preemptive proposal (S. 5414-A) had materialized in the legislature, she immediately tried to issue a press release opposing the bill. She stated, “This measure threatens the progress New York has made in keeping cigarettes out of the hands of our children and protecting nonsmokers from second-hand smoke” [5].

According to Russ Sciandra, the former director of the State Health Department’s Tobacco Control Program, the Pataki Administration blocked the release and also prevented DeBuono’s less critical revision from becoming public [5]. Sciandra asserted that DeBuono told him that she became involved in a heated argument with the Governor’s Communications Director, Zenia Mucha, over the press releases. Mucha reportedly ordered DeBuono not to discuss the preemption bill with anyone unless directly asked about it. DeBuono defied Mucha by arranging for a reporter to contact her [12][13][3]. The resulting publicity effectively extinguished the legislation.

In March 1996, tobacco control advocates faced another preemption threat with another bill introduced by Senator Serphin Maltese (R-Middle Village) and Assemblyman Peter Abbate (D-Brooklyn). Abbate received \$800 in tobacco industry contributions in 1995 and 1996; Maltese received \$750. Consistent with a change in industry strategy, the bill (A.8433-A/S.5902) focused on restaurants, and served two functions: it could compete with any other state smoking restriction bill and, if passed, it could create a maximum standard for smoking restrictions in restaurants. An anonymously authored Philip Morris report titled “Draft Plan - Region II -960000 [1996]” stated:

...we will pursue uniformity at the state level however regardless we will utilize the proactive strategy of keeping that measure alive in order to assist in defeating any further restrictions on use at the state level. We will amend the uniformity legislation to apply only to restaurants. This concept has been well received in preliminary conversations with legislators. [1]

Pataki announced his support for this legislation, which preempted local clean indoor air ordinances and imposed weak statewide uniform restrictions on smoking in restaurants [14]. The uniform standard was essentially equivalent to the state's 1989 Clean Indoor Air Act (CIAA), which established nonsmoking areas in restaurants according to customer demand. The CIAA deemed 70% nonsmoking as the general guideline for compliance, and the 1996 bill would have raised the percent by only another 5% to 75% nonsmoking [14]. While the 70% nonsmoking requirement in the 1989 CIAA was strong for its time, by 1996 a 75% nonsmoking area was considered highly permissive of smoking. 100% smoke-free laws were becoming common.

In June, 1996, Sharon Portnoy (Philip Morris' New York lobbyist) sent the draft bill to Tina Walls, stating, "The leadership of both houses has signed off on the concept. We are now attempting to get them to speak to each other and sign off on the actual legislation" [15]. Unfortunately for the tobacco industry, neither legislative leader wanted to support the Abbate-Maltese draft bill. Senate Majority Leader Joseph Bruno (R-Brunswick) stated that he was in agreement with its general goal to create a statewide smoking restriction standard, but could not endorse the actual legislation. A spokeswoman for Assembly Speaker Sheldon Silver (D-Manhattan) predicted that the effort to pass the bill through the Assembly would be "an uphill battle" [14].

The New York City Council, which had just passed legislation at the end of 1994 limiting smoking in restaurants, passed a resolution 43-0 (with six abstaining) opposing the bill and stating that New Yorkers had a right to be protected from the hazards of second-hand smoke [16]. After a similar display from other localities, which felt the state legislature was infringing on local authority, the bill was amended to allow localities to keep smoking ordinances already in effect. However, it compelled the localities to adopt the state standard should their local restrictions be overturned [17]. This loophole would have encouraged the tobacco industry to legally challenge all local smoking restrictions in the hope of overturning smoking restrictions, forcing localities to adopt the weaker state measure instead of trying to amend their own stricter restrictions. The provision was publicized in the *New York Times*, and shortly afterwards, the bill died in the Assembly [18]. Abbate and Maltese reintroduced the same measure again in 1997, but the bill was again defeated.

Pataki's 1997-98 Tobacco Control Package

After the Administration's first two years, Pataki recognized that tobacco had become a national issue capable of determining the political fortunes of national political figures such as presidential candidate Bob Dole. Meanwhile, Pataki faced mounting criticism regarding his lack of a tobacco control policy and unwillingness to allow a tobacco tax increase. Tobacco control advocates berated the Pataki Administration for retracting federally-funded anti-smoking television advertisements in late 1995 and declared the 1996 advertising campaign a "waste of money" [7]. The only new tobacco control initiative presented by the Administration was a compact between the state and the New York Medical Society which promoted doctors

discussing the dangers of smoking with their patients [4].

To circumvent further criticism, in December 1996 Pataki issued a press release discussing his intention to create a tobacco control package focused solely on pregnant women and youth. It consisted of a ban on self-service displays, increased ATUPA enforcement efforts, a media campaign, and expansion of Youth Partnerships for Health, a program designed to encourage youth to participate in tobacco control policy-making. Pataki announced he would allocate \$1.7 million from the state health department budget to enforce ATUPA, and introduce legislation that would double the tobacco licensing fee for store-owners and direct an extra \$5 million to local authorities for enforcement of youth access laws [19]. Another \$6 million would fund the media campaign. Altogether, the campaign would have cost close to \$13 million.

Pataki never introduced a self-service display ban, but he did introduce licensing legislation as part of the executive budget. The licensing legislation, which would have doubled the fee for tobacco product licenses and provided the money to enforce ATUPA, was killed by the Senate [12]. Again, Pataki publicized his tobacco control campaign as a \$13 million dollar effort, but did not clarify that the \$13 million was conditional and consisted largely of federal funds specified for tobacco control. He failed to mention that the \$13 million was administered over two years, and that \$5 million depended on whether a youth access enforcement bill passed through the legislature.

Because the \$5 million for youth access enforcement failed to materialize, the Health Department dedicated only \$2 million to enforcement during 1997 and 1998 [20]. However, this action culminated in over seven times as many compliance checks during those two years than before 1997 and over the course of one year (October 1997 to October 1998) elicited over \$1 million in fines for selling cigarettes to minors [21]. The Health Department allocated only \$2.8 million toward a media campaign instead of the promised \$6 million [20].

In sum, the Health Department allocated only \$8,266,251 to tobacco control during 1997-1998, and much of that was not state money. Approximately \$4.2 million originated from the federal ASSIST program, \$1.2 million came from a federal Preventive Health Services Block Grant, and \$400,000 originated from a federal Maternal/Child Health Block Grant. Other sources included a federal heart disease prevention program, and the Cable Commission (which did not provide funds but actually donated free air time for public service announcements).

Because his anti-tobacco predecessor focused on passing tobacco control legislation and did not have as many federal funds available, Pataki was still able to boast that it was the most New York State had spent on such efforts and a 500 percent increase from current funding of the anti-tobacco advertising program [22]. The Administration spent only \$2 million on media the previous year, and cable TV stations matched it with \$1 million in air time. Although advocates suspected the funding would be channeled to ineffective programs, only four other states financed tobacco control advertising when Pataki announced his media campaign [23].

Pataki's "\$13 Million Dollar" Media Campaign

Pataki's announcement of the "\$13 million" ad campaign occurred on a Sunday, less than

24 hours before health advocates and parents groups were scheduled for a press conference at which they intended to criticize Pataki's lack of a tobacco control policy [19]. The Governor declined to approach these organizations for support of his new program; the only group Pataki chose to invite to the press conference was an association of convenience stores [22] The New York Association of Convenience Stores (NYACS) also defended the campaign from criticism expressed in January [4].

NYACS receives money from both Philip Morris and R.J. Reynolds. In 1996, R.J. Reynolds spent \$1500 to sponsor an event at the NYACS trade show [24]. The association has served as a paid promoter of the Philip Morris program titled, "Action Against Access"; in 1996 it agreed to receive at least \$30,000 to implement AAA initiatives [25][26]. The convenience store association received money for not only promoting the program and thereby bestowing more credibility to it, but for promoting tobacco companies' other programs and initiatives as well. A 1994 anonymously authored Philip Morris report regarding another youth access program called "It's the Law" suggested:

Receiving an agreement from NYACS (or another regional or national chapter [of NACS]) that their designated spokesperson will convey the PM [read: Philip Morris] message points during the presentation, as well as during any media interviews. Connie Barella [President & CEO of NYACS], for instance, should be trained to credit both Philip Morris and Miller Brewing Co. for their commitment to educating convenience store managers about crime prevention techniques, especially on sales of cigarettes and beer to minors. [27]

NYACS and Philip Morris have also cooperated in drafting a weak legislative proposal on sales of tobacco to minors [28][29] and the Tobacco Institute budgeted \$1000 to NYACS in 1993 [30], \$500 in 1992, \$1000 in 1995 [31]. The relationship between Philip Morris and NYACS was temporarily disrupted when Philip Morris supported legislation to impose a \$1500 annual licensing fee on merchants selling cigarettes, and harsh penalties on those caught selling tobacco products to minors. NYACS responded by returning a \$20,000 check from Philip Morris, removing them from the NYACS vendor associate board, and censuring them for one year [32].

Tobacco control advocates were unimpressed with the consequent television advertising campaign. The first spot featured Libby Pataki, the Governor's wife, telling parents to patronize only those stores that refuse minors attempting to purchase cigarettes. She also directed store owners to obey the youth access laws and tells the audience: "Tell store owners you support their efforts to stop tobacco sales to children." Health Department officials later asserted that using the Governor's wife as a spokeswoman was entirely appropriate because of her heavy involvement in children's issues [6]. Other advertisements were tagged with the Governor's name and the slogan, "Protecting our Children." One anti-tobacco advocate (who wished to remain anonymous) commented, "...it appears that the Governor will be using Federal and State resources to begin his re-election campaign, all in the name of tobacco control."

In March, the *Journal of the American Medical Association* published a study titled, "Evaluation of Antismoking Advertising Campaigns." Although it did not specifically address the Pataki advertising campaign, the study supplied empirical evidence supporting claims that the media approach Pataki's campaign used was ineffective. Authors Lisa Goldman and Stanton

Glantz from the University of California, San Francisco, observed:

Two strategies are effective in reaching all audiences: industry manipulation and secondhand smoke....Advertisers should refrain from spots that focus on youth access, short-term effects, long-term health effects of smoking (for youth), and romantic rejection. To compete with tobacco industry advertising, anti-tobacco advertisements need to be ambitious, hard-hitting, explicit, and in-your-face. [33]

The Department's advertisements ignored industry manipulation and second-hand smoke and instead featured the ineffective strategies romantic rejection, youth access and short-term health effects. In a letter to Health Commissioner DeBuono, the advocates cited the *JAMA* passage and remarked, "We find it very disturbing that in its anti-smoking campaign the Department [of Health] relies on message strategies least likely to be effective while not using those shown most effective" [34]. The advocates also requested DeBuono explain how the Department selected its messages, and identify the research it based its decisions on. The letter emphasized that state law mandates the Health Department ensure "the most current research findings regarding mechanisms to reduce and change attitudes towards tobacco use are used in tobacco education programs administered by the Department" [35]. The correspondence ended with a request to incorporate the messages of second-hand smoke and industry manipulation in the media campaign strategy.

Hinckley wrote back to the advocates, explaining that the Health Department's selections were based on the opinions of a panel of media experts and youth focus groups. The panel was developed by the Centers for Disease Control and the Columbia University School of Public Health, and reviewed the materials planned for the media campaign. According to Hinckley, these experts rated many of the campaign's advertisements highly [36]. An anonymous source revealed that this means only that of the ten advertisements rated highest by the panel, the two most innocuous advertisements were chosen for the state campaign. A *New York Daily News* article further illustrated the dissonance between the panel's opinion and the Pataki Administration choices. It featured the head of the panel, Columbia University Professor Donald Gemson, stating that the Pataki campaign's use of authority figures might make smoking more appealing to minors: "By raising the forbidden-fruit issue, there is a segment of the youth population for whom it makes it more exciting" [37]. Other sources also related that the Pataki Administration has generally ignored the panel's advice.

The youth focus groups, conducted in Fall 1997, concluded that the advertisements focusing on tobacco effects on athletic performance and romantic appeal would be effective in dissuading youth from using tobacco [36]. But when a panel of 11 seventh, eighth and ninth-graders evaluated 10 commercials from around the nation on their ability to persuade teens to stop smoking or never start, they rated New York commercials lowest [37]. California's ads, which attacked the tobacco industry for marketing to teenagers and featured graphic shots of cancer victims, scored highest. As these findings were published in New York newspapers, Hinckley finally conceded that the studies recommended by the tobacco control advocates in their letter to DeBuono would be considered as the Department developed the 1998-99 media campaign [36]. The Department did not follow through on this commitment.

Criticism of the advertisements diminished until mid-April, when a commercial appeared

featuring Dennis Vacco, the state's Republican Attorney General, standing beside a photograph of a young child and lecturing about the harmful effects of teen smoking. Advocates protested this ad for two reasons. First, it appeared to be free election-year advertising for Vacco, who planned to run for re-election. (For this reason, California specifically prohibited advertisements featuring politicians since the implementation of its anti-tobacco media campaign.) Second, the advertisement featured someone who advocates believed hindered tobacco control efforts in New York. Vacco maintained personal ties with the tobacco industry, blocked New York from joining the 1997 national lawsuit against the industry until heavily criticized, and publicly likened suing tobacco companies for damages from tobacco-related disease to suing dairy farmers for cholesterol-related disease. Vacco ultimately lost to Democrat Eliot Spitzer in the November 1998 race for Attorney General.

The advocates requested DeBuono suspend the media campaign until it was reviewed and evaluated by the Commission for a Healthy New York [38]. Hinckley dismissed the complaints: "Obviously, their goal is more to make political statements and to get their names in the media than it is to ensure the appropriate expenditure of state dollars" [39]. The Vacco ad cost \$150,000 to run over one month, but state health officials insisted Vacco's appearance was justified because the ad was aimed at adults and designed to support the enforcement effort against sales to minors [37]. They also noted that he is the state's top enforcement official and instigated the state lawsuit against the tobacco industry.

The Administration ignored the advocates' request to suspend the campaign, but agreed to their request for a presentation on the media campaign at the June meeting of the Commission for a Healthy New York. The advocates had requested certain materials be provided ahead of time, including a list of all current and future advertisements, scripts of each message, and fuller descriptions of the youth focus groups and Columbia Panel consultation [40]. None of this information was provided in advance of the scheduled meeting. According to John Signor, Hinckley's successor, Hinckley spent one and a half hours at the Commission meeting outlining the media plan and mentioned gearing it up again in the spring.

The controversy over the media campaign faded as state elections neared at the close of 1998; air time grew more precious and the advertisements disappeared from the airwaves. As of this writing, no Health Department anti-tobacco television advertisements have aired since. According to Signor, the Department plans to focus on radio because it allows better segmentation of the population, and the campaign will target youth and pregnant women [6]. As of this writing, the campaign has yet to be aired.

The Civil Justice Reform Act

In April 1999, controversy arose over the New York Medical Society's endorsement of a tort reform proposal which protects tobacco companies from litigation by consumers. The Civil Justice Reform Act (S.2277/A.4509) states that in such a court case, not only would the jury have to determine that the use of a product was a substantial contributing cause of the disease, but that using the product during the previous 12 years caused the illness. Section 7 of the proposal also protected all manufacturer misconduct which occurred more than 25 years ago. Professor Richard Daynard of the Tobacco Products Liability Project explains, "thus, in a case brought

today, the jury would not be able to consider anything about the first 20 years of the [tobacco] industry's devastatingly successful disinformation conspiracy, which began in 1953 and continues to this day" [41].

Daynard, who analyzed the bill for its relevance to the tobacco industry, also found that Section 15 would remove liability from the industry if they were up to 49% at fault. Section 21 requires that the plaintiff must prove that the defendants could have successfully marketed a safer cigarette, and that he or she would have chosen this hypothetical safer cigarette over the alternatives [41]. Daynard says that the proposal's 12-year "statute of repose" would require plaintiffs to prove their tobacco-related illnesses were caused by the cigarettes smoked in the past 12 years, and this would implicitly immunize the industry against litigation:

Since the "ordinary person" has known, at least for the past 12 years and possibly much longer, that tobacco use is "capable of causing harm," all plaintiffs lose. This result obtains even though the plaintiff might prove that the defendants lied about their products, deliberately addicted youngsters to them, and could have made safer products but conspired among themselves not to! [41]

The Medical Society denies that the bill protects the tobacco industry from product liability claims, and argues that its relevance to the industry is a matter of interpretation. NYSMS supports the bill because it deters frivolous litigation and would lower the state's medical malpractice premiums [42]. Since 1997, Blair Horner at the New York Public Interest Research Group (NYPIRG) has alerted the Medical Society that the proposal offered protection to tobacco companies [43].

The bill is sponsored by the majority party legislators of each house (Assembly Democrats and Senate Republicans) and is supported by a coalition consisting of 800 organizations. A coalition of health groups including the voluntary health organizations, NYPIRG, and the League of Women Voters wrote a letter to Governor Pataki asking him to oppose the tort reform proposal, but five days after the letter was drafted, on March 30, 1999, Pataki spoke at a luncheon sponsored by Philip Morris Management Corporation (Kraft Foods, Miller Brewing, Philip Morris U.S.A.) held to advance the issue. The luncheon was part of an event called "Small Business Day at the Capital," organized by the Business Council of New York State, which promotes the Civil Justice Reform Act, and the National Federation of Independent Business. The event's welcome letter stated, "We must also address the problem of lawsuit abuse which our civil justice system encourages. Every sector of New York State's economy is affected by the threat of virtually open-ended liability created by the state's current tort laws" [44].

One member of the coalition supporting the Civil Justice Reform Act is known to be a front group for Philip Morris [45]. In 1995, the New York Tavern and Restaurant Association was financed by the Tobacco Institute to campaign for a bill that would have preempted local clean indoor air laws. The organization received between \$307,400 and \$419,000 for a campaign executed from April 24 to July 14, 1995 [9]. The campaign included establishing a grassroots network to support the law, public relations activities, and lobbying legislators.

Despite these ties, representatives of Philip Morris claimed that the company had not

reviewed the Civil Justice Reform Act nor established a position on it [42]. Health advocates suspect that the campaign is heavily funded by the tobacco industry, and New York State law does not require coalitions such as the one supporting the Civil Justice Reform Act to disclose their funding sources [45].

The Civil Justice Reform Act failed to pass the legislature in 1999, but is expected to resurface in the 2000 legislative session.

Conclusion

In terms of tobacco control, Pataki was the opposite of Cuomo; instead of supporting tobacco control legislation, he supported pro-tobacco legislation. Instead of fostering an effective tobacco control program for the state, he dismantled it. Advocates were faced with an unfriendly Administration unwilling to accept their expertise and antagonistic to any effective tobacco control programs. Advocates tried to publicize the Administration's pro-tobacco stance, but were not especially critical until Russ Sciandra was forced to resign. Sciandra publicly revealed the nature of the public-relations-driven Administration and the ways in which it hampered tobacco control efforts. Although advocates were divided on their support of Sciandra's outburst, they should have recognized that refraining from public criticism would not have improved their relationship with the Administration. Sciandra's move did not harm the tobacco control effort, and it succeeded in confirming the Administration's pro-tobacco stance. This action put the Governor on the defensive, prompting him to form the insincere and ineffective tobacco control package.

The decision to run a weak anti-tobacco media campaign was similar to steps taken in California under Governor Pete Wilson (R) during the years 1991-1998 [46] and Arizona under Governor Fife Symington (R) in 1994 through 1997 [47]. However, Pataki's campaign produced advertisements even weaker than those from California and Arizona. Like Pataki, Arizona's Republican Governor Fife Symington limited the scope of their anti-tobacco media campaign to adolescents and pregnant women, and forbid any direct attacks on the tobacco industry [47].

Preemptive legislation surfaced because of the success of New York City's Smoke Free Air Act, which strengthened the city's previous smoking restrictions to include some restaurants. The tobacco industry feared that New York City's precedent would inspire similar laws in other localities, and therefore introduced preemptive legislation that would remove the localities' authority to pass smoking restrictions. Advocates used media advocacy effectively to publicize the implications of such legislation, and held accountable the legislators responsible for its introduction and consideration. The strategy was successful; opposition snowballed after this publicity, with local governments incensed at the infringement on their authority.

From his inauguration through most of 1999, the Pataki Administration acted in a pro-tobacco manner. However, this changed in 1999 because of a special set of circumstances: tobacco industry documents would offer evidence that Pataki's two trips to Hungary were indirectly financed by Philip Morris. It would take a major public embarrassment, emphasized by the advocates, to force Pataki to capitulate and allow to pass a tobacco tax increase, a lobbying reform bill, and a slight increase in the state's tobacco control program's funding. However, the

increase in funding was paltry; despite the state receiving close to \$1.5 million a year from the settlement and increased tobacco tax revenue, Pataki only agreed to spend \$37 million on tobacco control.

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CHAPTER FIVE

ATTORNEY GENERAL VACCO AND TOBACCO LITIGATION IN NEW YORK

Litigation played a surprisingly important role in tobacco control during the late 1990s, as states began filing lawsuits to recover the costs of treating sick smokers through Medicaid and to seek court orders regulating tobacco industry behavior. For this reason, the role of the Attorney General figured prominently in the New York tobacco scene. Republican Dennis Vacco, elected to the position in 1994, was responsible for filing the New York State Medicaid recovery lawsuit, negotiating the settlement terms, and determining how the settlement monies were disbursed across the state. Vacco also played a key role in negotiating the 46-state Master Settlement Agreement that resolved all the outstanding state lawsuits against the tobacco industry. It was then up to Governor Pataki and the state legislature how the state's share of the money would be spent.

Tobacco control advocates claimed that Attorney General Vacco possessed too many ties to the tobacco industry, and accused him of catering to its preferences. The industry was a major financial contributor to Vacco and his Republican colleagues, contributing \$4,750 to Vacco, \$3,500 to Pataki, and over \$256,000 to New York Republicans party organizations during 1995 and 1996 (Table A-11)(Table A-16). In addition, Vacco had hired Steven Portnoy, husband of Philip Morris top New York State lobbyist Sharon Portnoy (who was later penalized for illegal lobbying), for a position in the Attorney General's community affairs office in New York City [1]. As tobacco control advocates expected, Vacco resisted pressure to sue the industry, even as more and more states chose to do so. Meanwhile, local governments decided to sue on their own behalf rather than wait for Vacco. These actions increased pressure on Vacco, who finally filed suit in January, 1997, at which point he pursued the case vigorously.

The MSA settled the Medicaid recovery claims of all 46 states and five territories who had not yet settled, and distributed \$206 billion over 25 years to the states. New York was to receive \$25 billion over 25 years. There was an immediate feeding frenzy over the anticipated income, with the Governor and the legislative leaders at odds with how to spend the state share. Pataki originally did not plan to spend money on tobacco control, but after an embarrassing scandal linking Pataki's travel to Philip Morris, the Governor agreed to raise the tobacco tax and dedicate \$37 million of the tobacco settlement money and tax revenue to the state tobacco control program.

Individual States File Suit Against the Tobacco Industry

A Third Wave of litigation against tobacco companies began in 1994 [2]. On February 25, Commissioner of the Food and Drug Administration David Kessler announced that he believed nicotine should be classified as a drug because it was addictive, and he believed the industry may have known about the addictive nature of nicotine. Three days later, a story on the ABC television news magazine Day One reported that the industry manipulated nicotine levels in cigarettes to keep smokers addicted to its products. Kessler's announcement prompted Congressman Henry Waxman (D-CA) to hold Congressional hearings titled "The Regulation of

Tobacco Products.” On March 29, 1994, multimillionaire Wendell Gauthier and 25 plaintiff’s law firms filed the largest class action suit filed against the tobacco industry to date: *Castano v. American Tobacco Company* [2]. Two weeks later, the first class-action suit regarding secondhand smoke was approved in a Florida Court of Appeals. The following May, the *New York Times* began publishing articles featuring information from confidential industry documents made available by whistleblower Merrell Williams and later the University of California San Francisco made thousands of pages of previously secret industry documents available on the internet. The University of California researchers also published an extensive analysis of these papers in a series of articles in the *Journal of the American Medical Association* [3][4][5][6][7] and, later, the book *The Cigarette Papers* [8].

In addition to this litigation on behalf of private parties, several states filed suit against the tobacco industry to recover the costs of treating sick smokers through Medicaid, the joint federal-state program for paying for health care for poor people. On May 23, 1994, Mississippi became the first state to sue the tobacco industry. Minnesota pressed suit that August. By January 1997, 19 states filed suit against the tobacco industry. Only then did New York sue the tobacco industry [9]. Public health advocates were quick to attribute Vacco’s delinquency to his tobacco ties.

Vacco had been actively resisting filing suit against the tobacco industry. In 1995, while under pressure to sue the industry, Vacco likened suing the tobacco companies for tobacco-related disease to suing dairy farmers for the heart disease caused by cholesterol in their products [10]. A 1996 industry document authored by the Philip Morris lobbyist Sharon Portnoy to “Distribution” reiterated Vacco’s refusal to sue:

Third Party Liability - Attorney General Vacco has indicated that [he] is not interested in suing tobacco companies. He thinks that the suits brought to date are bad law and are an attempt to levy a tax without approval by the legislature. However, he is being subjected to growing pressure from AGs [Attorney Generals] in those states that have brought actions as well as the anti’s in New York. Recently two NYS Assembly members held a press conference calling on him to sue. He is most interested in any information we can provide on this issue. [11]

In March, 1996, a spokeswoman for the attorney general’s office stated that New York had no plans to sue and would not act without the state health department [12], which implied they would not act without Pataki’s approval.

Later that year in New York, a coalition of health groups presented a study done by the University of California at San Francisco, which demonstrated that the costs to treat tobacco-related illnesses for the state’s Medicaid program have been steadily increasing over the years. Armed with this evidence, a group consisting of the New York State Nurses Association, the three voluntary health organizations (ACS, ALA, AHA), the League of Women Voters of New York State and the New York Public Interest Research Group wrote a letter to Vacco stating that the new information “is startling in itself, but more importantly, we believe it should prompt further consideration by your office of suing the responsible members of the tobacco industry for recovery of medical expenses incurred by the taxpayers of New York State” [13]. The state health department reported that smoking-related health care expenditures, including public health programs, private insurers and out-of-pocket expenses, total approximately \$6 billion a year [13].

Such public pressure eventually forced Vacco to initiate his own negotiations with the industry in mid-1996. Vacco maintained that he preferred a quick settlement to the potentially protracted court battle. He publicly debated the merits of a different kind of proposal: “What if the other states, or even a concentrated mass of the others, come up with a proposal saying, ‘Here are our terms; if you don’t comply with these terms, we will all file suit.’ That is what I am trying to do. I am trying to craft a proposal that will not be as time-consuming and uncertain as a lawsuit” [9].

After six months of negotiations with Philip Morris, Vacco offered a \$656 million settlement, which the tobacco company refused [14][15]. This figure amounted to only one year of compensation for smoking-related damages according to Vacco’s calculations, which estimated smoking-related Medicaid expenses as costing the state \$650 million a year [15]. Furthermore, Vacco’s office mistakenly assumed Philip Morris was negotiating on behalf of the entire industry. Vacco stated, “We were assured, in speaking with them, they were speaking on behalf of the industry” [14]. However, a spokeswoman for R.J. Reynolds Tobacco Company denied that the company ever authorized such representation and never discussed a settlement with Vacco [15]. Philip Morris denied negotiating any kind of settlement at all [14].

At this point, no state had settled nor tried a Medicaid lawsuit, and the industry could still boast that they never had to pay for damages or settlement in any lawsuit against them. The industry’s undefeated record may have prompted them to refuse the relatively small sum solicited by Vacco. Later the Attorney General would announce his lawsuit and discuss the industry’s insulting counter-offer: “They came back with a counter-proposal of less than 1 percent of what we had put forward, less than \$5 million” [16]. The industry’s refusal of such a reasonable settlement and Philip Morris’ public denial of any such negotiations may have ultimately contributed to Vacco’s decision to file suit.

On January 27, 1997, after his hopes for a speedy settlement were dashed, Vacco finally sued the tobacco companies (*State of New York et al. V. Philip Morris, Incorporated et al.*, 686 N.Y.S.2d 564). Although he failed to name the amount sought for damages, Vacco stated that he expected to recover at least \$10 billion [16]. In April, after New Jersey announced it was seeking \$50 billion in its Medicaid lawsuit, Vacco would alter his estimate: “We have not articulated a dollar amount in our lawsuit yet, but... it would be, in the final analysis, more than the \$50 billion that New Jersey was looking for” [17].

Several local governments in New York, including Erie County and New York City, frustrated by Vacco’s delay, had already filed suit against the industry by that time. The New York City suit was filed in the State Supreme Court in Manhattan on October 17, 1996. The lawsuit sought to recover money spent on the city’s Medicaid expenses, health care for the uninsured and insurance for city employees [18]. The suit also requested a court order to compel tobacco companies to fund an anti-tobacco educational campaign and to cease targeting minors with advertising campaigns such as Joe Camel. Although the lawsuit did not request a specific amount in damages, New York City Mayor Rudolph Giuliani (R) asserted that the figure would be based on a Columbia University study which estimated the city’s annual cost of treating smoking-related disease at \$300 million [18]. Erie filed their suit on September 11, 1996, one

week after Vacco announced he was trying to work out a non-litigious agreement with the tobacco industry. Seeking to recoup \$500 million from the industry, Erie joined 14 states, Los Angeles County and the city of San Francisco. Erie County Attorney Kenneth Schoetz stated, “We’d be happy not to have this burden on us. But absent action by the attorney general, we’re going ahead” [19].

Adopting the same strategy as the states which had already filed suit, Vacco named as the defendants: Philip Morris, Inc.; R.J. Reynolds Tobacco Company, a division of RJR Nabisco Holdings Corporation; Brown and Williamson Tobacco Corporation, a subsidiary of BAT Industries; Lorillard Tobacco Company, a subsidiary of Loews Corporation, and Brooke Group Ltd.’s Liggett Group, Inc., American Tobacco Company, United States Tobacco Company and Hill and Knowlton Inc.(the Tobacco Institute’s public relations firm) [16]. At the January 1997 press conference announcing the lawsuit, Vacco stated:

We are alleging in this lawsuit that for decades the tobacco companies have engaged in a conspiracy to mislead, deceive and confuse New Yorkers about the harmful, debilitating health effects of their powerfully addictive products.

Their scheme, in our estimation, as we are alleging confidently in this lawsuit, knowingly targeted children and adolescents with slick marketing techniques, multimillion-dollar marketing investments and public relations campaigns to encourage children into smoking at earlier and earlier ages. [16]

Unlike previous state suits, Vacco’s was more aggressive in that it used the special relationship between the Tobacco Institute and the Council for Tobacco Research and New York State in an especially credible effort to shut them down. Although the Tobacco Institute’s offices were in Washington D.C., it was incorporated in New York State in 1958 and the Council for Tobacco Research was incorporated in New York in 1971 [20]. Vacco argued that the two organizations abused their nonprofit tax-exempt status under New York law by serving the tobacco industry as “propaganda arms” and distributing misleading or false information about the health hazards of smoking. Vacco maintained that lawyers rather than scientists controlled the CTR so they could accumulate information to utilize in defense of the tobacco industry in litigation, and that the Tobacco Institute was merely a mouthpiece for the industry to refute claims that smoking is hazardous [21]. At a January, 1997 press conference he stated, “They’ve used the not-for-profit law for some years now as a shield. We are now going to use that same law as a sword” [16]. Indeed, the Attorney General is normally responsible for supervising the state’s nonprofit organization, and was therefore able to credibly threaten to seize their assets (including their records) and halt their operations.

Public health and tobacco control advocates greeted the announcement with faint praise, but also criticized the Attorney General for not suing earlier. Kenneth Schoetz, the Erie County attorney pressing the county’s lawsuit against the industry, remarked that Vacco “has been dragged kicking and screaming into this lawsuit, and he’s basically had to be embarrassed to do his job. There was a tidal wave of support building up for this litigation across the state, and the big question is, Why wasn’t the attorney general doing his job?” [16] Assemblyman Alexander Grannis, the state’s tobacco control legislative pioneer, showed such little faith in Vacco’s performance, he asked Governor Pataki to hire private firms to handle the case in place of the

Attorney General. “This attorney general has shown a marked reluctance to take on big tobacco, and... his record on high-profile cases is not that stellar” [16].

The Health Department and Vacco’s office insisted that the Attorney General was anti-tobacco; they retorted that he had increased ATUPA enforcement through sting operations, called for a state-wide ban on vending machines and pointed to his aggressive targeting of the two industry nonprofit research groups.

Once Vacco filed the lawsuit against the industry, he devoted significant energy to advancing it. On March 18, 1998, the industry filed to get the New York State lawsuit thrown out on the grounds that it exceeded the statute of limitations; the state knew about the alleged “crimes” for decades and knew other states were pressing suit, but failed to act in a timely manner [22]. Although only a few of the 41 state lawsuits that have filed had any part of their case dismissed, on March 31, Vacco drafted a bill that would exempt the state from the statute of limitations.

Vacco’s bill explicitly allowed for the recovery of costs resulting from exposure to tobacco products and smoke and allowed the state to recover appropriate punitive damages arising from willful misconduct by the tobacco industry. It held manufacturers liable jointly and severally unless the state wanted to proceed with the suit under market-share theory for liability. If passed, Vacco would not have had to gather “tobacco victims” to present in court, nor demonstrate for each victim the relationship between smoking and their ailment. Instead, statistical analyses would be sufficient to establish the extent of damages precipitated by the tobacco industry [23]. According to Blair Horner, Philip Morris contributed \$25,000 to the State Republican Committee on the same day this bill was drafted. Vacco’s bill was not printed until June 15, during the last week of the legislative session. Republicans, who previously promised support for it, killed the bill within 24 hours [24].

The lawsuit progressed despite these tobacco industry maneuvers. In May 1998, New York State Judge Stephen Crane, who was overseeing the state’s lawsuit against the industry, placed the Council for Tobacco Research (CTR) and the Tobacco Institute in receivership pending a hearing on whether they should be closed altogether, thereby ensuring that documents from the two agencies would remain undisturbed [21]. In October, 1998, the CTR and Tobacco Institute would dissolve under the terms of the Minnesota state settlement, which was coincidentally negotiated at the same time the CTR and Tobacco Institute were placed under receivership in May 1998 [25]. Details of the organization’s termination were negotiated with Vacco and approved by state Supreme Court Justice Stephen Crane.

As of this writing, the Attorney General’s office is negotiating the release of documents from the defunct organizations to the New York State Archives. Records from the Council for Tobacco Research are already available at the Archives, but the date the Tobacco Institute documents will be made available for public viewing is not yet known.

The 1997 “Global Settlement” and the McCain Bill

By the time New York filed suit against the industry, on January 27, 1997, secret

negotiations between the tobacco industry and anti-tobacco lawyers over a national “global settlement” of all outstanding litigation against the tobacco industry, including the state Medicaid lawsuits, were already in progress.

On March 13, 1996, Brooke Group Ltd., which owns the fifth-largest cigarette maker Liggett & Myers, agreed to settle with five states which filed suit against the industry and the huge Castano class action group. Liggett agreed to pay 5 percent of its pretax profits over 25 years, which would be dedicated toward a smoking cessation fund, and another 7.5% annually to settle five state suits [26]. Shortly after this announcement, the head of RJR Nabisco Steven Goldstone stated he might consider settling in return for immunity from future lawsuits [27].

Upon hearing RJR’s tentative invitation, co-counsel for Mississippi, Richard “Dickie” Scruggs, approached his brother-in-law, Senator Trent Lott (R-MS) to ask, “Do you think it’s possible to pursue a resolution of the lawsuits through a national settlement sanctioned by Congress? And would you be interested?” [2] Lott put Scruggs in contact with John Sears, a Republican lobbyist, and Tommy Anderson, Lott’s former Chief of Staff, who agreed to act as intermediaries between the anti-tobacco and industry lawyers [2]. Meanwhile, Attorney General of Mississippi Mike Moore, who had recruited several of the state Attorneys General to file suit, joined the negotiations. Bob Butterworth of Florida, Scott Harshbarger of Massachusetts, and Grant Woods of Arizona also participated. Scruggs and Moore also conferred with FDA Commissioner David Kessler, who suggested the attorneys contact Matt Meyers of Campaign for Tobacco Free Kids to represent public health groups.

By August, 1996, the industry was secretly offering \$150 billion to be paid over 15 years to settle the state claims, and agreed to abide by rules similar to some aspects of the pending FDA regulation of tobacco products (although they refused to actual regulation by the FDA) in return for immunity from future litigation [2]. When the proposal was leaked to the press, the industry denied the negotiations.

By early 1997, Sears communicated that the industry was willing to pay \$250 billion over 25 years and accept FDA rules without regulation [2]. By May, that number had jumped to \$300 billion. The legal teams on both sides scrambled to reach agreement before a June 20 deadline, after which, Mississippi’s state suit would go to trial.

Filing New York’s Medicaid lawsuit allowed Vacco to participate in the global settlement negotiations. Other participants were eager for New York’s support, because it would constitute a large proportion of the population affected by the agreement and it leads the states in Medicaid expenditures. Vacco did not participate in the earliest round of talks, but attended several meetings near the end of the negotiations and appeared at the press conference announcing the agreement on June 20, 1997 [2]. The lead negotiator for the states, Mississippi’s Attorney General Mike Moore (D), called Vacco his “whip from the right” [28].

The result was an agreement delivered to the public on the afternoon of June 20, 1997. The settlement agreement promised \$368.5 billion over 25 years from the tobacco industry, plus commensurate amounts in perpetuity. In addition, the industry accepted a “lookback provision,” which financially penalized the industry according to the amount of sales to minors each year,

some FDA regulation, dissolution of the Tobacco Institute and the Council for Tobacco Research, and limited marketing and advertising restrictions. In return for these concessions, the agreement protected the industry by eliminating punitive damages and class action suits, and a \$5 billion annual cap on compensation for individual lawsuits [29]. Because implementing this agreement involved granting the industry immunity from further litigation, as well as other items, the June 20 agreement was not a “settlement” in the traditional legal sense (i.e., a binding agreement among the parties), but rather a proposal to be enacted by Congress.

The states’ attorneys were confident that Congress would act swiftly in approval, but instead the settlement faced widespread criticism because of its vague and ambiguous language, which derived from the hasty manner in which the agreement was crafted [29]. The two main criticisms were: 1) it protected the industry from true FDA regulation, and 2) it gave partial immunity against future lawsuits to the industry [2]. For these reasons, former commissioner of the FDA David Kessler and former Surgeon General Dr. C. Everett Koop together denounced the settlement as “deeply flawed” only hours after its announcement [30] and the agreement attracted widespread criticism from some, but not all, elements of the health community [29].

Furthermore, the manner in which the deal was presented to Congress angered legislators, who felt the lawyers were usurping their authority. Senator John McCain (R-AZ), Chairman of the Commerce Committee, explained: “There was institutional reluctance -- resentment, even -- that a handful of attorneys general and plaintiffs’ lawyers would come to us with such a detailed agreement, even divvying up the spoils. ...Who do these people think they are? That’s a legislative and executive branch prerogative” [30].

Despite such discouraging comments and criticism by the public health groups, Vacco hailed the agreement as a “public health victory” and estimated that New York would receive annual payments of \$400 million the first year and up to \$700 million by the fourth year [28][31]. Half of New York’s share was expected to go toward medical insurance for uninsured children and the other half was to be split between state and local government to pay for smoking-related Medicaid cases [28]. Although the settlement figures were a far cry from the \$50 billion Vacco previously announced he had expected from an independent state suit, the attorney general was one of the most passionate supporters of the settlement agreement. When President Bill Clinton and the U.S. Congress hesitated in passing implementing legislation, Vacco complained, “The feds have been asleep at the switch. I’m fearful of that. I’m not convinced our lobbying strategy at this point is sufficient enough” [32]. By this point in time, the only organizations providing unqualified support for the global settlement were tobacco companies.

The provisions which met the most contention were the ones protecting the industry from civil liability. The federal Attorney General’s office suggested to the House Judiciary Committee that instead of eliminating the opportunity for future plaintiffs to collect punitive damages, Congress could impose a cap on such payments [33]. By that point, the tobacco company Brown and Williamson lost one damage verdict in 1996 in the amount of \$750,000 [33] - which produced more than a \$10 billion drop in tobacco company market valuations.

In the Spring of 1998, efforts to implement the tobacco settlement focused on legislation introduced by Senator John McCain (R-AZ), chairman of the Commerce Committee. The bill

raised the settlement payment to \$516 billion and denied the industry the legal immunity they sought [34]. As a result of these unfavorable changes (from the tobacco industry's point of view) to the settlement proposal, the industry turned against the bill. The tobacco companies launched a \$50 million advertising campaign against the legislation, focusing on the \$1.10 increase in cigarette pack prices that the bill would generate. One of these ads asserted that "Washington has gone cuckoo again," while another berated the "politicians in Washington" for "voting to destroy our way of life" [35]. They also contested that the bill would raise the price of a pack of cigarettes to \$50 and would create a black market which would obviously allow minors access to cigarettes [36]. The campaign by the tobacco industry was successful. Senate Majority Leader Trent Lott killed the McCain bill on a procedural vote on June 17, 1998. Both New York Senators, Alfonse D'Amato (R) and Daniel P. Moynihan (D) voted in favor of the legislation [36].

Meanwhile, the state suits progressed, uninterrupted by the potential settlement. The Mississippi lawsuit was first to proceed, but instead of going to trial the state settled with the industry on July 3 1997 for \$4 billion [37]. Florida, Texas and Minnesota followed, respectively, but only Minnesota went to trial. Texas settled for \$15.3 billion on January 16 1998, Florida for \$11.3 billion on August 25, 1997 and Minnesota for \$6.16 billion on May 8, 1998 [38][39][40]. Most significantly, each of these state settlements included a "most favored nation" clause which stated that any more favorable terms that the industry agreed to would apply retroactively to the states that had already settled. Thus, as each state settled on progressively better terms (from a public health perspective), the terms were "ratcheted up" for the other states that had already settled. This situation was unfolding in a way favorable to the health groups and against the interests of the industry.

The 1998 Multi-State Master Settlement Agreement (MSA)

In June, 1998, when it became clear that Congress would transform the "global settlement" into a bill much less favorable to the tobacco industry, the lawyers for nine states and the tobacco companies began negotiating for another settlement which would not involve Congress [41]. The new talks originated with the Washington State lawsuit against the tobacco industry when a court ordered the two sides to attempt negotiations for an agreement. At these discussions, two industry lawyers, Arthur Golden and Meyer Koplow met with state Attorney General Christine Gregoire and Joe Rice, a private attorney who was representing 25 states in tobacco litigation [42]. Rice had previously met with outside counsel for Philip Morris and R.J. Reynolds in May to discuss a new settlement when it became obvious that the McCain bill would not survive [43]. The negotiations began with Gregoire because she considered her case weak after a state judge ruled out some of its central claims. The pretrial decisions reduced the amount of money she could recover and deprived her of the ability to collect punitive damages. At first, the industry told Gregoire they refused to settle. But according to a lawyer familiar with the situation, they later capitalized on Gregoire's legal vulnerability by stating that they would only consider settling Washington's case if other states were included in broader negotiations [44]. The industry would use Gregoire's perceived weakness of the Washington case as leverage to force a multi-state settlement.

Although newspapers would refer to Gregoire as the "lead negotiator" in the second

round of settlement talks, it became evident that Joe Rice was actually the driving force [45]. In fact, when Gregoire needed more money to continue the Washington State suit, Rice's firm advanced the state \$150,000 a month [45]. The industry also knew they were dealing with an attorney who would rather settle for a large sum than protect the legal rights of future clients. In 1997, the Supreme Court rejected a \$1.3 billion class-action settlement between asbestos manufacturers and asbestos victims (whom Rice helped represent) because it restricted the legal rights of future victims who had not yet sued. A New York Times article stated, "Opponents of the deal charged that lawyers like Mr. Rice effectively sold out the legal rights of future victims so they could reap hundreds of millions of dollars in fees by settling their cases" [45].

New York and California were the among the first states Rice brought in. Like Vacco, California Attorney General Dan Lungren had been reluctant to sue the tobacco industry and had longstanding ties with the industry. The *New York Times* on July 13 1998 implied that the industry insisted on the participation of these sympathetic attorneys general as part of a strategy to get a quick and relatively painless settlement:

In recent talks aimed at reaching a new tobacco settlement, the best clues as to strategy were probably found in the five state attorneys general with whom the tobacco industry chose to negotiate.

To cinch a new deal with the 37 state with remaining lawsuits, cigarette makers, at a minimum, need to get participation from the biggest states and from those most eager to settle, and bring in some political figures who had participated in last year's talks. [44]

Other strategically-included states were Colorado and North Carolina. By the end of the month, the group of participating state attorneys general consisted of:

- Dennis Vacco (R-New York)
- Michael Easley (D-North Carolina)
- Christine Gregoire (D-Washington)
- Gale Norton (R-Colorado)
- Michael Fisher (R-Pennsylvania)
- Heidi Heitkamp (D-North Dakota)
- Drew Edmondson (D-Oklahoma)
- Daniel Lungren (R-California)
- Scott Harshbarger (D-Massachusetts) [46]

Except for Gregoire and Harshbarger, the other participants in the negotiating team were viewed by tobacco control advocates as not strongly opposed to the tobacco industry. Colorado did not file suit until two weeks before the June 20 deal was announced, and the Attorney General of North Carolina, Michael Easley, was heavily involved in the 1997 settlement negotiations despite the fact that North Carolina did not file suit [44]. The negotiators also excluded the primary architects of the June 20 agreement, who were viewed as too adamant on the health issues.

Details of the proceedings were also relayed to the other states via conference call. Preliminary terms included \$176 billion paid over 25 years, billboard advertising restrictions, and youth access provisions [43]. Issues involving the federal government, such as FDA regulation, were avoided so as to bypass Congressional approval.

The states experienced a series of setbacks in the summer and fall of 1997 when several court decisions in the tobacco industry's favor were made [47]. Despite the fact that the states had actually achieved more successes than losses, supporters of the settlement option spun the situation as if the tide had turned against the states. As a result, the talks shifted to favor the industry's interest. The most influential decision was a U.S. Court of Appeals ruling denying the Food and Drug Administration jurisdiction over tobacco products. Shortly after this decision, R.J. Reynolds Tobacco Company and Brown and Williamson Tobacco Corporation announced they would stop participating in discussions, a bargaining stance which signified confidence in their position [48]. The companies returned to the table in October, but it was clear by that time that the state negotiators had lost the will to demand stiff terms from the tobacco industry.

As the 1998 elections threatened to replace some of the participating attorneys general, including New York's Dennis Vacco and California's Dan Lungren, they began accelerating the process to complete talks by the end of the year. (Both Vacco and Lungren lost their offices in the November, 1998 elections.) In anticipation of a settlement, New York anti-tobacco advocates sent a letter to Vacco outlining their expectations, and communicated their opinions to Vacco's potential Democratic opponents in the 1998 elections [49]. As they waited for the formal announcement, a coalition including the New York Medical Society, the New York Public Interest Research Group and the state American Cancer Society, American Lung Association and the League of Women Voters held a news conference where they requested \$2.4 billion for smoking cessation and youth smoking programs [50].

On November 17, after five months of negotiations, the participating attorneys general and tobacco industry representatives officially announced the new settlement agreement, known as the Master Settlement Agreement (MSA).

The terms included payments in perpetuity which included a \$206 payment to the states over 25 years, \$300 million a year for anti-smoking programs for five years, and some limited restrictions on tobacco advertising [51]. The payments amounted to about 30% of the costs that smoking generated for Medicaid. The proposed settlement released the industry from all claims brought by the states, but could not give the industry immunity from private suits or protect it from punitive damages. It was the largest civil settlement in U.S. history [52]. Tobacco companies were responsible for paying plaintiffs' lawyers fees, which were left generally unrestricted by the proposal. These terms were similar to those related to the states in the June 20 settlement [53][29]. The tobacco companies included in the settlement were: Philip Morris Companies, R.J. Reynolds Tobacco, Lorillard Tobacco, and Brown and Williamson Tobacco.

The tobacco industry had learned its lesson following the June 20 settlement, which was the subject of extensive public scrutiny and criticism over several months. They only allowed four days (until November 20, 1998) for the 38 states and five U.S. territories that were not represented by their attorneys general at the negotiating table to decide whether to join the agreement. Health groups widely criticised both the agreement and the process. Nevertheless, all 46 states and the five territories which had not yet settled with the industry accepted the terms by the deadline. Although the four states which settled had reaped a total of \$40 billion from the industry and secured progressive new public health measures, the other states reluctantly signed on for their relatively smaller share of the \$206 billion, preferring the certainty of the settlement

over the unpredictability of a more rewarding state suit. One of the Attorney Generals reticent in embracing the deal, Richard Blumenthal of Connecticut, stated, “There is no assurance we could have obtained these public health advances in our lawsuit. ...In any legal action, no one can know what the results will be or when they will be achieved. The advances in this settlement are certain and immediate” [54].

Local Lawsuits

Because Attorney General Dennis Vacco refused to sue the tobacco industry on behalf of New York State, New York localities began filing suit for themselves to recover smoking-related Medicaid costs. Erie County announced their filing of a \$500 million Medicaid recovery lawsuit against the industry on September 11, 1996, joining the ranks of 23 other states and localities [19][55].

The Coalition for a Smoke Free City had been prodding New York City Hall since April 1996 to file its own lawsuit against the tobacco industry for the restitution of Medicaid costs related to smoking. In early October 1996, the organization sent decision-makers a letter accompanying several studies on the costs of smoking and on the 17th of that month, Mayor Giuliani announced the filing of litigation. The state’s apparent reluctance to file suit was a significant factor in the city’s decision to file. Indeed, pressure to file suit increasingly mounted on Attorney General Vacco as two other localities, Westchester and Erie Counties, followed New York City’s lead in filing separate suits. Upon the filing of New York City’s lawsuit, Assembly member Richard Gottfried (D-Manhattan), chairman of the Assembly Health Committee, asked, “Where is New York State? Why are Governor Pataki and Attorney General Vacco holding back?” This situation also occurred in California, where eighteen localities sued the tobacco industry on September 5 1996, in *People of the State of California v. Philip Morris, Inc. et al.* (San Francisco Superior Court, Case No. 980864) because state Attorney General Dan Lungren refused to file suit until June 1997 [56].

New York City not only sought to recover its smoking-related Medicaid expenses, it sought to also obtain reimbursement for insuring city employees and providing care to the uninsured. The suit also requested a court order against industry targeting of minors and another court order mandating the industry finance a public education campaign regarding the hazards of smoking [18].

Reaction to the MSA in New York

The MSA allocated \$25 billion over 25 years to New York State. It was up to New York to decide how the state should divide the payments with counties and other localities. Vacco had publicly stated that the payments would be divided approximately 50/50 between the state and its localities. (In New York, the state and the counties each pay a quarter of Medicaid costs; the remaining 50% is covered by the Federal Government.) From this formula, New York City would gain over \$6 billion dollars [57]. Each state had to seek approval from their respective state courts in order to implement the terms of the agreement. Vacco also had to withdraw his previous lawsuit which represented the State of New York in order to accept the MSA. His efforts shifted to the court overseeing the case, the state Supreme Court in Manhattan, [58] which

had to approve New York's participation in the MSA and dropping the case.

When the issue came before the court, there was controversy. The first party to protest the settlement was Westchester County, which argued that Westchester and all other New York counties should be allowed to comment on the proposal before it was given final approval. Westchester County Attorney Alan D. Scheinkman filed the motion out of concern that Vacco would not fairly distribute the payments to the counties, although he considered Vacco's preliminary estimate of \$455 million to Westchester encouraging [59]. On November 12, Judge Stephen Crane sided with Westchester; Scheinkman explained that this meant, "The Attorney General has to notify the counties of the terms of the settlement, and we have the opportunity to object to the settlement with the judge," prior to the finalization of the settlement [59].

When the state's claims were settled as part of the Master Settlement Agreement, the localities' suits were to be settled in conjunction. However, when Vacco revealed his formula for distribution of the monies, New York City had complained that its allocation of \$6 billion over 25 years was insufficient. The city felt the formula did not adequately represent its smoking-related health costs. On December 11, a new formula which allocated more money to New York City was proposed by Attorney General Vacco [52].

Tobacco control advocates also rejected the new proposal. Carol McKenna, a lobbyist for the state American Cancer Society stated, "We don't endorse it, and if we were the attorney general we wouldn't sign it" [60]. The Cancer Society and a host of other health organizations and tobacco control advocates created the Ad-Hoc Coalition on the Proposed Tobacco Settlement, and asked Justice Stephen Crane to postpone the November 20 date by which they had to accept or reject the multi-state settlement. They submitted several reasons why they were concerned with the terms of the settlement:

Not only does the proposed settlement preempt subordinate governmental entities from pursuing legal claims against tobacco interests for past misconduct, it preempts them from pursuing legal claims against tobacco interests for all future acts, even those unrelated to Medicaid reimbursement, the subject of this action.

The proposed settlement protects the multi-national assets of tobacco companies.

The proposed settlement reduces the amount of payments, dollar for dollar, if the federal government raises its cigarette excise tax.

The proposed settlement will continue to allow the tobacco industry to market to children as long as it is not the "primary" purpose.

- I. The settlement fails to contain a proviso calling on Congress to prevent the Federal government from moving to recoup its Medicaid expenditures. [61]

The Coalition argued they needed extra time to address these concerns. The judge granted this group with *amicus curiae* status and allowed them to present their arguments at a December 9 hearing on the consent decree. The American Cancer Society financed the development of the Coalition's *amicus* brief.

On December 23, despite complaints of regional bias and the objections voiced in the amicus curiae briefs, Crane decided that the formula was “fair, reasonable and adequate” [62]. Under this formula, the state was to receive \$12.8 billion (51.2 % of the settlement funds), New York City received \$6.7 billion (26.6%), and the other 57 counties received \$5.5 billion in total (22.2%) [62]. Erie County would receive \$518 million, while the other seven Western New York counties would collectively acquire \$316 million [60]. Erie County and New York City received more money than other counties because they sued the industry prior to the settlement negotiations. However both parties and Westchester County still felt shortchanged by the proposed distribution of funds. They asked the judge to reject or modify the proposed formula, but Crane was not allowed to alter the formula - only accept or reject it - and he saw no reason to reject it [62].

Delayed Payment

On January 22, 1999, New York City, Erie County and Westchester County filed motions to appeal the proposed distribution of funds, claiming that it did not provide them with adequate restitution. New York City argued that the formula is based partly on population, which they felt underestimated their smoking-related health costs, and that it neglected to include the smoking-related expenses of health coverage for government workers, retirees and their families. (The MSA prohibits the City from suing separately to recover these costs.) The City also asserted that the formula used inaccurate figures for Medicaid expenditures [63][64].

Erie County, which would have received \$518 million under Vacco’s formula [60], and Westchester County did not contest the formula itself, but instead sought part of a special \$8.6 billion payment to states that led the way in suing the tobacco industry. New York City also wanted part of this payment, because both the City and Erie County began their own lawsuits before Vacco sued the industry [65].

Because these issues prevented New York from achieving approval from its state courts, New York helped prevent the settlement funds from being released to the rest of the states involved in the agreement in an expedient manner. Under the terms of the settlement agreement, no funds could be disbursed to a state until all its parties seeking reimbursement for smoking-related Medicaid costs consented to the terms. Furthermore, payments to the other states involved in the settlement could not be disbursed until either the date June 30, 2000 was reached, or until 80% of the states attain final court approval from their respective state courts and states representing 80% of the population received final approval. Final court approval, also called “state specific finality”, meant that the agreement had been approved and entered by a state court, all claims against the released parties had been dismissed with prejudice, and the time to appeal any claims against such parties had expired or the appeals had been decided or dismissed [51].

The first qualification, which required at least 39 states to attain court approval, was achieved in the summer of 1999. For the second requirement to be met, either New York or California had to achieve state specific finality, because these two states each constitute about 13% of the involved population [64]. Because both states were experiencing legal challenges to their settlement terms, the second qualification was not met until November [66].

The state supreme court sided with the state in July, upholding the Vacco formula [67]. The localities decided not to appeal the decision further, allowing New York to reach state specific finality when the deadline to appeal passed in August [68]. The second requirement for enough states to represent 80 percent of the population to achieve approval was finally met in November 1999, with Virginia bringing the states over the mark [66].

The MSA Billboard Provision

In addition to paying the states billions of dollars, the Master Settlement Agreement also included several public health provisions. One of these ended tobacco advertising on billboards nation-wide. According to the terms of the agreement, all such advertisements were to be removed by April 23, 1999. The remainder of the lease for the affected billboards was made available to the states, free of charge, to post anti-smoking advertisements, but in order to do so, the state had to have the new billboards ready to post by that date. There were approximately 750 such billboards in New York State (far more than any other state), and most had contracts lasting through the end of 1999. State officials estimated that the industry would pay at least \$2.5 million for the lost billboard time [69].

While newly-elected Democratic Attorney General Eliot L. Spitzer (who had defeated Vacco in the November, 1998 election) controlled the billboard counter-advertising campaign, he had to approach the Pataki Administration for the \$500,000 needed to create the counter-advertisements that would go on the billboards the state was to receive for free. (The settlement only forced tobacco companies to pay for advertising space, not production costs.) According to Spitzer's office, this situation allowed Pataki discretion to choose the ads. The Pataki Administration wanted to replace tobacco advertisements with ads created by the Health Department. Anti-tobacco advocates, mindful of the Health Department's 1998 television advertising campaign which used ineffective advertising strategies and included tag lines promoting the Governor, anticipated a similar, feeble program.

The tobacco control advocates formed a coalition and offered to pay \$90,000 of the required funds for the new billboards, but threatened to withdraw their support if Pataki's ads were chosen. Roberta Armstrong, representative of the health groups explained, "Ineffective ads are pointless" [69]. The U.S. Centers for Disease Control and Prevention's tobacco control program (which had taken over the ASSIST program previously directed by the National Cancer Institute), had offered at a discounted rate several aggressive and effective anti-tobacco advertisements from other states to place over the tobacco billboards. The health groups favored these advertisements, but Pataki refused to allow any advertisements which demonstrated the hazards of secondhand smoke or attacked the tobacco industry, two effective strategies [70][71].

Ultimately, the Administration acquiesced and agreed to contribute only 20% of the new ads. However, Pataki still exercised veto power over the rest of the ads, eliminating those which focused on industry manipulation and the health effects of second hand smoke, the two most effective messages [71]. Joseph Belluck, representative of Spitzer's office, claimed that these ASSIST advertisements favored by the health groups were rejected because the federal government would not reimburse the state for their use [69]. Belluck emphasized that the main goal of the Attorney General's office was to replace the tobacco advertisements as quickly as

possible so that New York could be one of the few states to replace all tobacco billboard posters with anti-tobacco ads [69]. In the final arrangement for the funding of the counter-advertisements, the tobacco control advocates provided \$90,000, the state Health Department provided \$250,000, and the federal government contributed \$140,000 [72].

When the newly appointed Health Commissioner Dr. Antonia C. Novello assumed office in June 1999, she immediately made known her opinion on the billboards: she disliked them, believed they were ineffective, and wanted to replace them with tobacco control advertisements developed by effective state tobacco control programs. The new billboards were gathered from Massachusetts, Minnesota, California and Arizona, and were posted on September 23, 1999. Unlike the original billboards, several of the new advertisements addressed the issue of secondhand smoke and its effects on nonsmokers' health.

Appropriation of the Master Settlement Funds

For over six months after the agreement, Pataki's plans for the MSA money did not include funding for tobacco control programs. In December 1998, Pataki downplayed the implications of the settlement, stating, "I don't see it as a massive financial boon for the state," and commented that the state would experience "a significant loss of excise taxes" if residents bought fewer cigarettes due to the price increase initiated by the industry to help finance their settlement payments [73]. Pataki did not see the associated reduction in smoking as a public health benefit.

In January 1999, Pataki's spokesman Michael McKeon stated that the Governor planned to recommend in his budget proposal that the money be allocated to providing health insurance to New York's 3.17 million uninsured [65][73]. At the time, both Senate Majority Leader Joseph Bruno (R-Brunswick) and Assembly Speaker Sheldon Silver (D-Manhattan) supported the idea of dedicating settlement money to the uninsured. Silver continued to promote the concept, but Bruno rated it third priority on a list of settlement-funded enterprises, after cutting taxes and reducing state debt. The issue of New York's uninsured was especially relevant in 1999 because the state's system for funding hospitals which care for the uninsured was due for renewal at the end of the year [73]. Kenneth Raske, president of the Greater New York Hospital Association and Daniel Sisto, president of the Health Care Association of New York State, wanted the entirety of the settlement monies to go toward covering the uninsured. Sisto stated, "Every penny should be dedicated to health care" [74]. In fact, dedicating all the settlement funds to covering the uninsured would have made only a small impact on the problem. The state will receive an average of \$425 million per year from the settlement, but providing insurance to all the state's uninsured would cost about \$3 billion a year [73].

The idea of funding a state tobacco control program appeared to have no priority in the leaders' decisions on how to divide the settlement monies. Both Bruno and Silver were among the top recipients of tobacco money; according to our data, Bruno received \$7,300 and Silver received \$10,425 between 1990 and 1998 (Table A-1).

The tobacco control advocates wanted the state to use one-third of the funds to create a private foundation to administer tobacco control programs, and pointed to Minnesota's use of its

settlement funds (acquired separately, before the multi-state settlement) as a model for New York. The advocates felt that any program overseen by the state Health Department was subject to political pressure and the industry's influence. Russ Sciandra, at the Center for a Tobacco Free New York, explained, "Basically, we want it insulated from politics. We've seen examples from around the country where state programs were influenced by the tobacco industry" [75]. Chris McKenna, the attorney general's spokesperson, stated that Vacco thought a significant amount of the funds should be appropriated to anti-smoking programs, but added that it was the governor and legislature's prerogative to decide how the money should be spent [75].

In his 1999 Executive Budget, Pataki assumed the settlement monies would not be received until 2000 or 2001. However, he planned to reduce the state debt with \$1.5 billion of the \$2 billion expected from the first five years of settlement payments. Even with this contribution, the debt would still increase \$1 billion to a total of \$37.5 billion over the next five years [74]. The remaining \$500 million of the settlement money would be dedicated to health care programs. This afterthought of allocating a relatively insignificant portion of the money to cover the uninsured conflicted ideologically with Pataki's proposal to cut Medicaid by \$511 million. Dennis Whalen, executive deputy commissioner of the Department of Health, stated that the goal of the governor's proposed health budget was to ensure good health care while controlling costs [74]. As it stood in early February of 1999, 75% of the monies were allocated to debt reduction and 25% to health care initiatives such as covering the uninsured, or as negotiated with the state legislature [76]. Nothing was included for tobacco control.

Tobacco control advocates asserted that Pataki's refusal to allocate any settlement money to tobacco control could only compound the \$1.9 billion of annual Medicaid costs related to smoking [74]. At a health budget hearing on February 2, 1999, the Coalition for a Healthy New York promoted a \$104 million allocation of state dollars to smoking prevention programs, to be increased to \$250 million by 2003. As the Commission for a Healthy New York recommended in 1998, the programs should be based on guidelines prepared by the Centers for Disease Control and Prevention [77].

John Signor, Health Department Director of Public Affairs, asserted that in the proposed 1999 budget, tobacco control funding was at the highest level in the state's history; \$8.3 million was proposed for a statewide media and education campaign. Whether these efforts will be as tepid as the 1998 television advertising campaign remains to be seen. When asked about the administration's lack of tobacco control legislative proposals, Signor claimed that the Governor had shown his commitment to the cause through funding and programs consistent with CDC recommendations (CDC will be taking over the ASSIST program)[76].

New York's anti-tobacco program spent less per capita (45 cents) than many other states [78]. In comparison, Mississippi devotes \$11.26; Oregon dedicates \$2.59. Furthermore, the state funds only \$6.5 million of the \$8.2 million in New York's 1999 budget, with the balance contributed by federal grants [79]. Meanwhile, California spent \$120.1 million during the 1999 fiscal year and Florida spends \$70.4 million [78]. Until a *New York Times* article published on May 30, 1999 [78] revealed these figures and the Governor's neglect to establish a respectable tobacco control program, Pataki refused to significantly increase the tobacco control program budget for the fiscal year 2000. Pataki reacted to his unflattering portrait in the *New York Times*

by announcing three days later that he would consider a major increase in funding anti-tobacco programs only if it was in the context of a sound budget [79].

Even after the MSA, legislative leaders refrained from actively pressuring the Governor to spend more money on the anti-tobacco advertising campaign. However after the embarrassing May *New York Times* article highlighted this fact, Assembly Speaker Sheldon Silver publicly advocated the allocation of ten percent of the New York settlement share toward anti-tobacco programs [79]. In April, 1999, Assembly Democrats urged that a total of \$80 million be budgeted towards these programs, prompting Silver to develop a \$90-million-a-year anti-tobacco package. In June he stated the concept would be incorporated into the budget negotiations. The package also included a five-cent cigarette tax increase, two cents of which would be dedicated to the anti-tobacco programs [79]. Senate Majority Leader Joseph L. Bruno (R-Brunswick) also expressed support for allocating settlement money toward “anything having to do with education on the pitfalls of smoking” [79].

Later in June, the Assembly passed a plan to update the Health Care Reform Act, the legislation which finances health care in New York State. The bill would have used 90% of the tobacco settlement funds to finance health care, amounting to \$437 million annually. In addition, it would have imposed a 50-cent hike in the tobacco tax and dedicate \$95 million to anti-smoking programs [80]. However, the bill was never considered by the Senate.

Advocates continued to apply pressure to the Senate and the Governor in September, anticipating that the Senate would address the allocation of the tobacco settlement monies in October. The Coalition for a Health New York advocated the Kids Health Initiative, which would dedicate 20% of the settlement funds toward anti-tobacco programs and the rest to health care. The Pataki administration responded that the Governor approved \$8.4 million for tobacco control programs in 2000, including \$3 million for an anti-tobacco advertising campaign. Spokesman John Signor asserted, “The bottom line is that New York state’s funding for its anti-smoking programs are at the highest level in state history” [81].

However, after a September *New York Times* article revealed that Pataki’s 1995 and 1996 trips to Hungary were financed by the Philip Morris, Pataki has spoken in favor of broadening the state’s tobacco control program [82]. Other *Times* articles exposed the extent of tobacco industry under-reporting of lobbying expenditures and sparked an investigation by the Temporary Lobbying Commission into Philip Morris’ lobbying expenditures. The investigation culminated in a \$75,000 fine and an admission by Philip Morris that they under-reported lobbying expenditures 15 times over three years. Senate Republicans afraid of losing their seats and their majority in the 2000 elections advised Bruno to appeal to more centrist voters by lending more support to a settlement-funded anti-tobacco program [82]. Some Senate Republicans supported up to \$100 million dedicated toward such a program. Silver continues to support a \$90 million tobacco control program. Both the leaders and the Governor have expressed support for using the rest of the money for health care.

The Health Care Reform Act and Tobacco Tax Increase

State lawmakers finally agreed on how to use the tobacco settlement funds during the

special legislative session held in December 1999. Because the leaders had already determined that a large portion would be dedicated the health care, the distribution of settlement funds was tied to negotiations over updating the Health Care Reform Act (HCRA), the legislation which finances health care in New York State. The special session focused on HCRA and lobbying reform, both set to expire at the end of the year.

In mid-November, the Assembly and the Governor began negotiating a tobacco tax increase of 50 cents a pack, which would raise approximately \$400 million, to help finance HCRA [83]. On December 17, lawmakers announced a consensus on HCRA. The final product dedicated \$9 billion dollars over 3.5 years to health care, imposed a 55 cent tobacco tax increase, dedicated \$37 million per year to a tobacco control program and increased the number of uninsured New Yorkers eligible for state-funded health benefits [84]. The deal was very similar to the HCRA bill passed by the Assembly in June.

Just before the Senate reconvened to pass HCRA, Brown & Williamson Tobacco Company, Lorillard Tobacco Company and the New York Association of Convenience Stores launched a radio and print advertising campaign against the bill. The tobacco companies and storeowners were concerned that the tobacco tax increase would prompt consumers to turn to neighboring states or Indian reservations to obtain tobacco products at a lower price. The advertisements provided a toll-free number to Lorillard, through which callers were given their senator's contact information and patched through to their senator's office to voice opposition. In addition, Brown & Williamson Tobacco Company contacted constituents directly and then connected interested individuals to their senator's office [85]. Some senators reported receiving several hundred calls each business day [85]. Many callers were uninformed or misinformed as to the content of the bill; Jim Clancy, an aide to Senator Michael Breslin (D-Albany), stated, "Some callers were unaware that it [the tobacco tax increase] was tied to health insurance" [86]. Art Levy, Chief of Staff for Senator John DeFrancisco, stated:

We were getting calls from people who didn't necessarily know who they were talking to. Some mentioned Brown & Williamson, some didn't know how they got a hold of us but were told to voice their opposition to us. Frankly, a lot of them seemed to be somewhat confused. [86]

Despite the industry's opposition campaign, the state Senate gave final legislative approval to the HCRA proposal on December 28, 1999. The measure passed with unanimous approval, a 52-0 vote [87]. Pataki signed the bill into law on December 30, one day before the 1996 HCRA was set to expire [88].

Participants in the negotiations over HCRA agreed that the most influential factor in crafting the bill was the involvement of Local 1199, or 1199/SEIU National Health and Human Service Employees Union [89]. The group represents over 250,000 health care workers across New York State. It entered negotiations in spring of 1999 when it helped design the Assembly's HCRA bill, which passed the Assembly in June. In October, after observing the impact of the Philip Morris scandal on the mood in Albany, SEIU and its allies, the Greater New York Hospital Association and various consumer and advocacy groups, began a \$10 million advertising campaign consisting of television and radio ads as well as a direct mail campaign to pressure lawmakers into increasing health care funding and passing HCRA before its expiration

[89]. As a result of this well-organized and potent campaign, Local 1199 won a spot at the negotiating table with representatives for the governor, Senate and Assembly. This is generally unheard of in Albany politics, where legislative deals are usually hammered out by the triumvirate of the Governor, the Speaker of the Assembly, and the Senate Majority Leader.

Local 1199's involvement helped attain the generous increases in health care financing, but the increased demand for funding was not the only reason the usually anti-tax Governor and Senate Majority Leader acquiesced to a tobacco tax increase. Since 1998, the Coalition for a Healthy New York had been lobbying for a 50-cent increase in the tobacco tax and dedication of 90% of the revenue to health care and the remaining 10% to tobacco control. In addition, a recent scandal regarding tobacco industry under-reporting of state lobbying expenditures focused the spotlight on tobacco companies and the recipient lawmakers who accepted gifts more than generally allowed under state ethics laws. If it were not for this scandal (discussed in further detail in Chapter 6) and the consequent need for lawmakers to distance themselves from the tobacco industry, policymakers probably would not have turned to the tobacco control advocates' proposal and increased the tobacco tax. As one *Albany Times Union* editorial stated, "It can be argued that recent disclosures about the influence of Philip Morris lobbying money in Albany shamed the Legislature into approving the 55-cent tax hike" [90].

The 55-cent tax increase brought New York's tobacco tax to a total of \$1.11, the highest in the country [84]. The tax increase was estimated to generate \$400 million annually for HCRA; another \$375 million per year was dedicated from the tobacco settlement funds. Although tobacco control advocates were largely satisfied with the tobacco-related provisions in HCRA, they pointed out that the annual \$37 million dedicated to a tobacco control program fell far short of the Centers for Disease Control and Prevention's recommendation of \$95 million.

Conclusion

When the issue of filing a Medicaid recovery suit for New York State first materialized, Vacco resisted filing suit. However, after being bombarded by media pressure and criticism from health advocates, Vacco finally tried to enter negotiations with the industry. The industry's offer was minuscule compared to what other states were asking for; this fact, in conjunction with the industry's denial of the negotiations, probably insulted Vacco and angered him enough to file suit in earnest.

One of the major factors in pressuring Vacco to file suit was the litigation initiated by New York State and Erie County. Just as with legislation, the action had to be taken at the local level to demonstrate the credibility and potential benefits of an idea before the state considered it. In addition, the idea that only these two localities would receive a sizeable amount of money from the tobacco industry made Vacco appear idle and remiss in his duty to the state.

Tobacco control advocates were shrewd in trying to insulate the settlement money from politics, and were very vocal in pressuring Pataki to dedicate a portion to tobacco control. However, their public criticisms were not enough to change his behavior. It was not until the media revealed that Philip Morris was funneling money to Pataki through a third party that Pataki's behavior changed and he was forced to consent to a tobacco tax increase and a relatively

measly dedication of money to tobacco control. The media story gave the advocates the ability to demonstrate that Pataki's policies were the result of tobacco industry manipulation, damaging his credibility and forcing him to capitulate and allow tobacco control measures to pass. However, the amount dedicated to the state tobacco control program was less than half of the CDC's recommendation despite the fact that a total of \$1.5 billion (some of which was dedicated to HCRA) would be generated each year by the settlement and additional tobacco tax.

The MSA billboard provision gave Pataki another opportunity to appear anti-tobacco without actually doing anything that would discourage smoking and thereby harm the industry's interests. The tobacco control advocates expected this action and reacted appropriately by offering an incentive to post effective advertisements. The press coverage made Pataki appear very protective of the industry when he refused to post certain ads even after the health advocates offered \$90,000. The move kept Pataki on the defensive in regards to his anti-tobacco reputation, but it was only when new Health Commissioner Dr. Antonia Novello intervened that effective billboards were posted.

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CHAPTER SIX

TOBACCO INDUSTRY CAMPAIGN CONTRIBUTIONS AND LOBBYING EXPENDITURES

The data from 1983 through 1998 indicates that the tobacco industry has been a potent political force in Albany since 1983, directing money towards campaign contributions, political party contributions, and lobbying efforts. Between the years 1983 and 1998 (not including 1988-89 for lack of data), the tobacco industry spent over \$6.7 million on campaign contributions and lobbying expenses (Figure 2 and Table 4). Lobbying expenses comprise \$5.4 million of the total, although this is an underestimate because lobbying data for the years 1983-1992 were unavailable. Almost \$1 million went toward political parties; most of this amount was contributed after 1995. Another \$277,905 went toward legislative candidates, and the remaining \$38,650 went to candidates for constitutional office (constitutional offices are those executive offices created by the New York State Constitution: Governor, Lieutenant Governor, Comptroller, and Attorney General). As in other states, the industry contributed most heavily to legislative leaders and the Republican Party. In the 1997-98 election cycle, 80% of total contributions went to Republican candidates and committees.

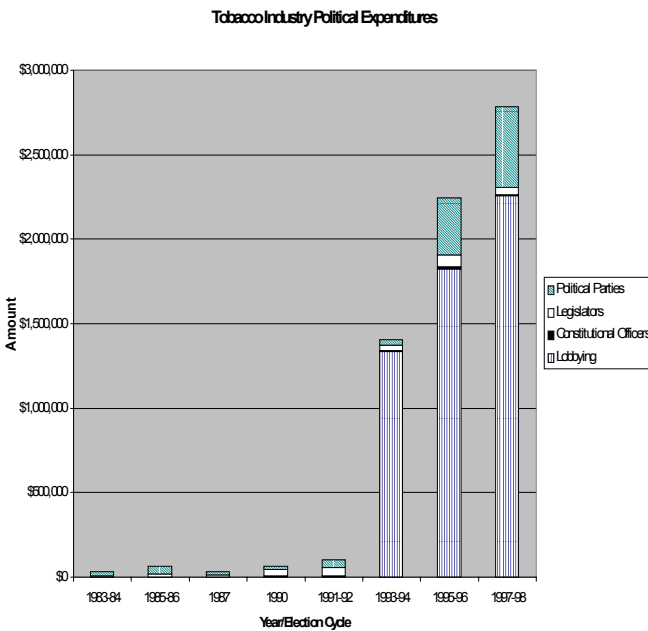


Figure 2. *Tobacco Industry Political Expenditures generally increased over time, especially in the late 1990's. Lobbying data was not available for years prior to 1992, therefore this graph indicates a major increase in lobbying starting in 1993. Lobbying increased dramatically with each election cycle after 1993, as did contributions to political parties.*

When considering our data on lobbying expenditures, it is important to keep in mind that the tobacco industry has under-reported lobbying expenditures several times. Both the Tobacco Institute and Philip Morris were investigated by the state Lobbying Commission and determined to have under-reported lobbying expenses. Both investigations were sparked by newspaper articles citing previously-confidential industry documents released through recent litigation. The Tobacco Institute was not penalized for their misrepresentation, but Philip Morris' case forced the Lobbying Commission to institute the highest penalty in its history. The Philip Morris case was also significant in that the documents cited in the news articles revealed the names of many lawmakers and public officials who accepted gifts from Philip Morris which exceeded the gift limit of \$75.

These scandals raised two major issues. First, they illustrated the weakness of the decades-old lobbying disclosure laws. The

Table 4. TOBACCO INDUSTRY TOTAL POLITICAL EXPENDITURES, 1983-1998 (not including 1988-89)

	1983-84	1985-86	1987	1990	1991-92	1993-94	1995-96	1997-98	Total 1983-98
Lobbying						\$1,331,728	\$1,825,945	\$2,256,796	\$5,414,469
Constitutional Officers				\$6,650	\$7,000	\$11,000	\$10,750	\$3,250	\$38,650
Legislators	\$8,850	\$20,990	\$9,950	\$35,790	\$50,596	\$32,347	\$70,844	\$48,540	\$277,907
Political Parties	\$24,250	\$41,550	\$21,300	\$22,400	\$41,944	\$31,600	\$338,528	\$477,312	\$998,884
TOTAL	\$33,100	\$62,540	\$31,250	\$64,840	\$99,540	\$1,406,675	\$2,246,067	\$2,785,898	\$6,729,910

penalties for under-reporting lobbying expenditures were too mild to deter lobbyists, and the law did not give the Lobbying Commission any enforcement power. Second, the scandals also illustrated the weakness of the state ethics laws, which govern the behavior of the recipients of the lobbying gifts. These laws are not enforced, mainly because the state ethics board (which supposedly monitors public officials) has little enforcement power, and the legislative ethics committee (which supposedly monitors legislators) hardly polices itself. Under state law, lawmakers and public officials should not accept gifts worth more than \$75, unless the gift was not intended to influence a decision. None of the lawmakers or public officials who were named in the Philip Morris documents has yet been penalized for accepting an illegal gift.

Of these two issues raised by the scandals, only one was addressed: the lobbying law. Embarrassed by their names appearing on tobacco documents, legislators were forced to revise the lobbying law, which was up for renewal at the time. In a strange turn of events for Albany, the Senate led the charge to change the law, and the Assembly and Pataki hampered the effort. The result was a new lobbying law which included stricter penalties for lobbyists who under-reported, but did not impose stricter limits on gifts nor penalize the behavior of the recipients of illegal gifts.

Campaign Contribution Data

Campaign contribution data came from disclosure reports filed with the State Board of Elections. We obtained data in different formats because of the way the Board of Elections collects and compiles the information. To determine contributions to individual legislators, constitutional officers and party organizations we used the Board of Elections' database of corporate contributions compiled from candidate disclosure reports. Because this database did not include contributions from Political Action Committees, we also obtained information from disclosure reports filed by the donor PACs. These reports declare contributions from PACs to individual legislators, constitutional officers, and party organizations.

We also included data from the Board of Elections' filings for party housekeeping accounts in addition to filings for the party committees themselves. The party housekeeping accounts receive money for the general expenses of the party rather than for the campaigns of specific candidates, but can be distributed by the housekeeping committee to individual

campaigns as seen fit. This money (also known as “soft money” is not restricted by a contribution limit, but party organizations did not take advantage of this fact until 1994, at which point they began soliciting contributions specifically directed to the housekeeping committees. Prior to 1995, only the Democratic Assembly Campaign Committee and Democratic Senate Campaign Committee operated separate housekeeping accounts. By 1995, all major political parties and subsidiaries had established housekeeping accounts: the Republican and Democratic State Committees, the Democratic Assembly Campaign Committee, the Democratic Senate Campaign Committee, the Republican Assembly Campaign Committee, and the Republican Senate Campaign Committee. All contributions to party organizations, whether directed to the party committee or its housekeeping account, are included in our data for political party contributions from 1983-98 (not including 1988 and 1989).

Data on lobbying expenses were obtained from the Temporary Lobbying Commission’s annual reports, which list names of lobbyists, the interests they represent, the amount they were paid and the amount spent on lobbying expenses. Annual reports were unavailable for the years prior to 1992. The lobbying data are paired into election cycles for all years except 1992 (because data for 1991 are not available).

Campaign contribution data for the years 1983-1987 were obtained from the databases kept by the Commission on Government Integrity, a commission formed in 1987 in response to a series of government corruption scandals in New York City. The Commission published reports detailing contributions received by state legislators, political party organizations, and local lawmakers [1]. The organization disbanded in 1990, but its database, stored in electronic format, was obtained from the former Deputy Counsel for the Commission. The information in the database originally came from disclosure forms filed with the New York State Board of Elections.

The following organizations were considered tobacco industry sources of funds: The American Tobacco Company, Brown and Williamson, the Liggett Group, Lorillard Tobacco Company, National Tobacco Company, Philip Morris, R.J. Reynolds, the Smokeless Tobacco Council, the Tobacco Institute, and the United State Tobacco Company. Also included under this term were two organizations known to possess financial ties with tobacco companies and known to have worked closely with them in the past: the New York Association of Tobacco and Candy Distributors, and the United Restaurant, Hotel and Tavern Association (also known as the “Empire State Restaurant and Tavern Association” and the “New York Tavern and Restaurant Association”). Smaller tobacco retailers were included in the category titled “Other” in our campaign contribution data, as well as Loews, the parent company of Lorillard Tobacco.¹ None

¹Companies categorized as “Other” in the contribution data included: Amsterdam Tobacco Company; Andy’s Tobacco & Candy; Bakery, Confectionery and Tobacco; Bellrose Tobacco; Booth Tobacco & Confectionary; Borinquen Candy & Tobacco Corp; Boro Park Tobacco Company; Borough Hall - Oxford Tobacco; Brighton Tobacco & Candy; Budd Tobacco and Candy Inc.; Buffalo Tobacco Prod. Inc.; City Line Tobacco, Inc.; Donohue Candy & Tobacco Co.; Donshree Candy & Tobacco; Elmira Tobacco Company; Empire Candy & Tobacco Co. Inc.; Globe Wholesale Tobacco Distributors Inc.; Helme Tobacco Company; Jack Gordon Tobacco Co.; Jones McIntosh Tobacco Co.; Kingston Candy & Tobacco Co.; LI Tobacco Co.;

of Loews' other subsidiaries (i.e. Loews Summit Hotel) were included.

Limitations of the Data

Data were not available in electronic format from either the Commission on Government Integrity or the Board of Elections for the years 1988 and 1989. A manual search through hard copy filings was determined to be an extraordinarily time-consuming process, therefore, we did not incorporate the data for 1988 and 1989.

Data are reported in two-year election cycles except for the years 1987 and 1990, which are reported separately for lack of data for accompanying years (1988 and 1989). This limitation should be kept in mind when viewing the graphs and figures of contribution data or when reading the analyses.

At the time we were compiling the data for this report, data for the year 1999 were not yet available. Therefore, reports on the campaign contributions and tobacco policy scores are based on the membership of the 1997-98 legislature.

Another major limitation of the data lies within New York's financial disclosure laws. The data available from the New York State Board of Elections and Temporary Lobbying Commission understates the actual amount the industry spends on political contributions and lobbying. Several times during the 1997-98 election cycle (discussed later in this report), information from previously confidential tobacco industry documents revealed that the industry was misrepresenting the amount it spent on lobbying and on gifts to lawmakers and public officials. For example, Philip Morris was found to have reported only about half of their actual lobbying expenditures. The industry is able to behave in this manner because of New York's weak financial disclosure laws. The laws require relatively little disclosure, penalties are not substantial enough to dissuade misrepresentation, and penalties are rarely enforced. Because these circumstances engender under-reporting of political expenses, the data we report are likely incomplete. However, they are helpful in demonstrating general trends in the way the tobacco industry distributes its contributions and lobbying expenditures.

Tobacco Policy Scores

We sought to relate campaign contributions to legislative behavior. To do so, we estimated a "tobacco policy score" for each member of the 1997-1998 Legislature. The score is obtained from polling 3 individuals knowledgeable about the Legislature and tobacco policy. Each legislator is evaluated on a scale of 0 to 10. A score of 0 represented an extremely pro-

Loews Clearing; Loews Corporation; Mandel Tobacco Company; New Castle Tobacco & Candy Inc.; North County Candy and Tobacco Inc.; NYS Tobacco Candy PAC; NYS Tobacco PAC; Pinkerton Tobacco; Queens Tobacco, Grocery & Candy Co.; Sanders & Langsam Tobacco Co.; Stanlou Tobacco Company; Stanton Tobacco Co.; Sunrise Candy & Tobacco Inc.; T & R Tobacco Sales Co. Inc.; Tiger Tobacco & Food Distribution; Tobacco Junction Inc.; Tobacco Pouch Ltd.; United Candy & Tobacco Co.; Universal Leaf Tobacco.

tobacco industry legislator and a score of 10 represented an extremely pro-tobacco control legislator. The average for each legislator is reported. Scores from 0.0 to 3.9 are considered pro-tobacco industry legislators, scores from 4.0 - 6.0 are considered neutral, and scores from 6.1 - 10.0 are considered pro tobacco control. Senators Thomas Liboux (R-Binghamton) and Serphin Maltese (R-Queens) tied for the lowest tobacco policy score in the Senate with 0.0, and Assembly Members Peter Abbate Jr. (D-Brooklyn), James Pretlow (D-Westchester), Roberto Ramirez (D-Bronx) and Darryl Towns (D-Brooklyn) also tied at 0.0 in the Assembly (Table A-1). In their respective chambers, Senator Richard Dollinger (D-Rochester) and Assembly Member Alexander Grannis (D-Manhattan) received the highest scores for their chambers, 8.6 and 10, respectively (Table A-1).

The tobacco policy scores in the Senate were significantly more pro-tobacco than in the Assembly (Assembly mean 4.6, standard deviation 1.9, n=150; Senate mean 4.0, standard deviation 1.8, n=61; p=.035), although the Assembly, on average, was mildly pro-tobacco (mean score below a neutral score of 5.0). Republicans had significantly lower tobacco policy scores (more pro-tobacco industry) than Democrats (Republicans mean 3.6, standard deviation 1.2, n=89; Democrats mean 5.12, standard deviation 2.1, n=122; p<.001).

Patterns in Campaign Contributions

Of the \$6.7 million spent during the period 1983-98 (not including 1988-89), the tobacco industry spent only \$1.3 million on contributions to individual campaigns and party organizations; the remainder was spent on lobbying (Table 4). During this period, Republicans received the majority of contributions, accepting \$923,096 of the \$1.3 million (Table 1). Democrats received the remaining \$337,345.

In the election cycle 1997-98, the industry spent a total of \$2,785,898 in campaign contributions and lobbying expenditures (Table 4). Lobbying expenses accounted for \$2.26 million (81%), contributions to party organizations accounted for \$477,312 (17%), legislative candidates received \$48,540 (almost 2%), and candidates for constitutional office received \$3,250 (less than 1%)(Table 4). A large fraction of the contributions to candidates and party committees was directed toward Republicans; Republican candidates and organizations received \$422,192 (80%), whereas Democrats only received \$80,160 (15%)(Figure 3 and Table 1). This significant difference between

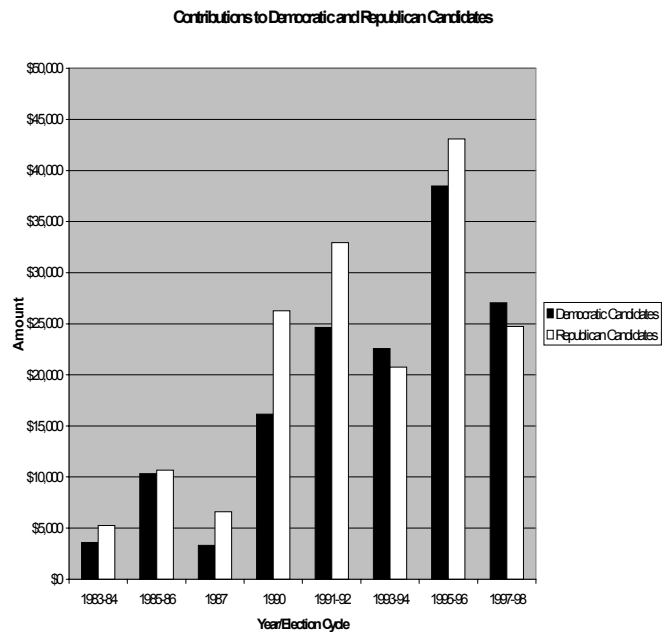


Figure 3. Tobacco industry contributions to individual candidates were essentially equal between the Democratic and Republican candidates except for the years 1990 through 1992, when the industry gave almost \$10,000 more to Republicans.

contributions to Republicans and Democrats stems from the disproportionate amount of contributions that Republican party committees receive from the tobacco industry, as compared to Democratic party committees.

Legislative Officeholders and Candidates

During the 1997-98 election cycle, the tobacco industry contributed a total of \$48,540 directly to legislative officeholders and candidates (Table A-1). Over the years 1983-98 (not including 1988 and 1989), the industry contributed a total of \$277,907 to legislative candidates (Table 4). During this period, the Republicans have maintained the majority in the Senate and the Democrats maintained the majority in the Assembly. While contributions to legislators of each party remained fairly balanced, for each legislative cycle, legislators of the majority party in each house received more money from the tobacco industry than did minority members.

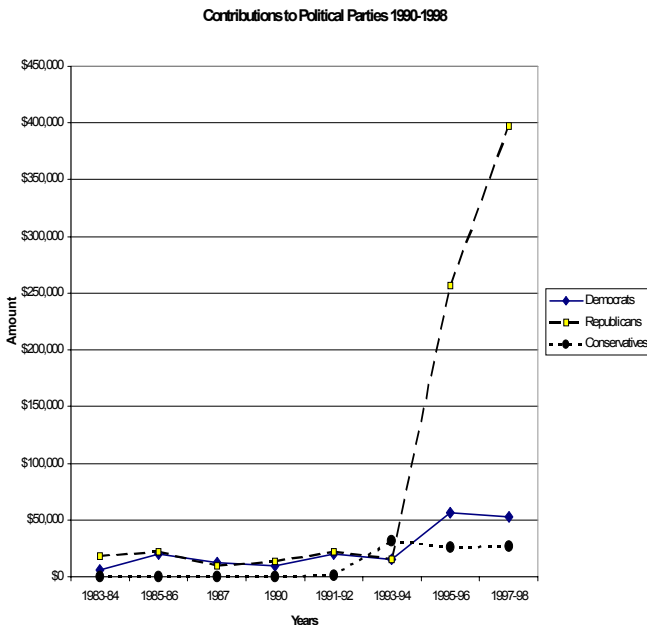


Figure 4. *Tobacco industry contributions to all political parties increased in the 1990's, but skyrocketed for Republican party committees.*

Over the same time period, Democrats received approximately 47% of the total amount contributed to legislators and Republicans received approximately 53%. Between 1983 and 1995, Republican legislators received more money, but in the election cycles 1993-94 and 1997-98, Democrats received slightly more money (Figure 4 and Table 5). In 1997, Democratic candidates received \$2,310 more than Republican candidates (Table 5); this shift may have been caused by the two Democratic party organizations renouncing tobacco contributions.

In 1996, the State Democratic Committee ceased the practice of accepting money from tobacco companies, and in April of 1997 the Democratic Assembly Campaign Committee announced that it would do the same [2]. Our data for the 1997-98 election cycle indicate that both

the State Democratic Committee and the Democratic Assembly Campaign Committee fulfilled their pledges. The Democratic Assembly Campaign Committee did not accept any money from tobacco companies, but did accept money from the New York State Association of Tobacco and Candy Distributors before its pledge and in November received a contribution from the United Restaurant, Hotel and Tavern Association, a group which has been financially supported by the tobacco industry to encourage preemption of local smoking restrictions [3]. Because the tobacco interests can no longer contribute to the Democratic Party through the party organizations (with the exception of the Democratic Senate Campaign Committee), it appears to be trying to win influence with the party by contributing more money directly to Democratic legislators.

	1983-84	1985-86	1987	1990	1991-92	1993-94	1995-96	1997-98	Total 1983-98
Democrat	\$3,600	\$10,325	\$3,325	\$16,155	\$24,651	\$22,569	\$38,495	\$27,050	\$146,170
Republican	\$5,250	\$10,665	\$6,625	\$26,285	\$32,945	\$20,778	\$43,099	\$24,740	\$170,387
TOTAL	\$8,850	\$20,990	\$9,950	\$42,440	\$57,596	\$43,347	\$81,594	\$51,790	\$316,557

Money was generally directed toward those members in the majority of the house in which they served. For example, Democrats in the Democrat-controlled Assembly received \$22,650, and Republicans in the Republican-controlled Senate received \$14,150, three-quarters of the total amount contributed to legislative candidates (Table A-1). The member receiving the most money during the 1997-98 election cycle was Assemblyman Jeffrey Klein (D-Bronx), who received \$6,800 from a variety of tobacco industry sources (Table 6). Klein was also the legislator which received the most money from tobacco interests over the period between 1990 and 1998, \$16,275 (Table A-1).

Rank	Legislator	Hs	Pty	Dis	1997-98	90-96	Grand Total	Tobacco Policy Score
1	Klein, Jeffrey	A	D	80	\$6,800	\$9,475	\$16,275	1.7
2	Silver, Sheldon	A	D	62	\$1,500	\$8,925	\$10,425	6.7
3	Bragman, Michael J.	A	D	118	\$3,425	\$4,995	\$8,420	1.3
4	Stafford, Ronald B.	S	R	45	\$500	\$7,000	\$7,500	3.3
5	Bruno, Joseph L.	S	R	43	\$0	\$7,300	\$7,300	0.7
6	Holland, Joseph R.	S	R	38	\$2,050	\$4,250	\$6,300	1.0
7	Libous, Thomas W.	S	R	51	\$300	\$4,700	\$5,000	0.0
8	Koon, David	A	D	135	\$2,425	\$2,425	\$4,850	5.0
9	Marchi, John	S	R	24	\$0	\$4,000	\$4,000	4.0
10	Velella, Guy J.	S	R	34	\$250	\$3,700	\$3,950	4.0
11	Spano, Nicholas A.	S	R	35	\$1,600	\$1,900	\$3,500	4.0
12	Straniere, Robert A.	A	R	61	\$500	\$2,775	\$3,275	3.7
13	Farley, Hugh T.	S	R	44	\$0	\$3,100	\$3,100	3.0
14	Oppenheimer, Suzi	S	D	36	\$1,000	\$1,850	\$2,850	6.0
15	Lack, James J.	S	R	2	\$1,100	\$1,650	\$2,750	1.0
16	Skelos, Dean G.	S	R	9	\$300	\$2,200	\$2,500	3.0
17	Straniere, Robert A.	A	R	61	\$0	\$2,375	\$2,375	3.7
18	Feldman, Daniel L.	A	D	45	\$150	\$2,200	\$2,350	5.0
19	Reynolds, Thomas M.	A	R	147	\$1,500	\$800	\$2,300	2.0
20	Schimminger, Robin	A	D	140	\$0	\$2,150	\$2,150	2.7
21	Larkin, William J.	S	R	39	\$700	\$1,400	\$2,100	4.0

Legislative leaders were the top legislative recipients of tobacco industry money (Table 7). Senator Ralph Marino (R-Oyster Bay), Senate Majority Leader during the battle for the Clean Indoor Act, rivaled Klein for receiving the largest sum of tobacco industry contributions in the period 1990-98: \$11,900 (Table 8). In third place was Sheldon Silver (D-Manhattan), Speaker of the Assembly since 1995. Silver received \$10,425 over the years 1990 through 1998. During the period between 1983 and 1987, the top recipients were Senators John Marchi (R-Staten Island) and Tarky Lombardi (R-Syracuse), and Assemblyman Daniel Walsh (D-Franklinville). Marchi was Chairman of the Senate Finance Committee during that period, and received \$6,725 (Table A-7). Lombardi, Chair of the Senate Health Committee, received \$2,950 between 1983 and 1986, and also received \$3,025 between 1990 and 1992 (Table A-4). Lombardi was chiefly responsible for bottling up the Clean Indoor Air Act in the Senate Health Committee; it was not until Senator Michael Tully (R-Roslyn Heights) replaced Lombardi as Chairman that the bill left the committee for a floor vote. Walsh, the Assembly Majority Leader between 1983 and 1986, received \$2,800 between those years.

Table 7. TOBACCO INDUSTRY CONTRIBUTIONS TO 1997-98 LEGISLATIVE LEADERS							
Legislator	Hs	Pty	Dis	Total 97-98	90-96	Grand Total 1990-98	Tobacco Policy Scores
Bruno, Joseph	S	R	43	\$0	\$7,300	\$7,300	0.7
Farley, Hugh T.	S	R	44	\$0	\$3,100	\$3,100	3.0
Connor, Martin	S	D	25	\$0	\$2,050	\$2,050	3.0
Paterson, David A.	S	D	29	\$0	\$50	\$50	6.0
Reynolds, Thomas M.	A	R	147	\$1,500	\$800	\$2,300	2.0
Wertz, Robert C.	A	R	6	\$200	\$350	\$550	2.7
Silver, Sheldon	A	D	62	\$1,500	\$8,925	\$10,425	6.7
Bragman, Michael J.	A	D	118	\$3,425	\$4,995	\$8,420	1.3

Table 9 lists all legislators serving on the 1997-98 legislature who did not receive campaign contributions between the years 1990 and 1998. This group consisted of four Senate Republicans, ten Senate Democrats, 21 Assembly Republicans, and 41 Assembly Democrats. One of these legislators is Alexander Grannis, who was responsible for sponsoring all successful tobacco control legislation in New York since 1989, including the Clean Indoor Air Act, the Adolescent Tobacco Use Prevention Act, and the PROKIDS bill.

Political Parties

Between 1983 and 1998 (not including 1988 and 1989), the tobacco industry contributed almost \$1 million (\$998,884) to the various political parties. During this period, the Republican party organizations received \$752,709 and the Democratic party organizations received \$191,175 (Figure 5 and Table 10). Of the money contributed to political parties during this period, \$815,840 was contributed between 1995 and 1998 (Table 4).

Beginning with the 1995-96 election cycle, we were able to document substantial tobacco industry campaign contributions to the party organizations through housekeeping committees, in addition to contributions made to the parties themselves. According to the Board of Elections, in 1994, special interests began taking advantage of the lack of restrictions on contributions

intended to fund basic overhead costs for political parties [4]. Such contributions were considered “housekeeping” contributions. Those party committees which did not already have separate housekeeping accounts established them to receive these unrestricted housekeeping donations and take advantage of this loophole. In addition, party organizations began asking donors to contribute directly to housekeeping accounts. Because parties began exploiting this loophole in 1994, total contributions to political parties increased dramatically in 1995 (Figure 2 and Table 4).

Previous to 1995, Republican and Democratic party committees received approximately the same amount from tobacco interests. Beginning in 1995, Republican party organizations received several times the amount received by Democratic organizations (Figure 5 and Table 10). During the 1995-96 election cycle, the Republican party organizations received \$256,312 while Democratic party committees received only \$56,366; Republican party committees received 4.5 times more than the Democratic committees.

Table 8. TOP 28 LEGISLATIVE RECIPIENTS OF TOBACCO INDUSTRY CONTRIBUTIONS 1990-98						
Rank	Legislator	Hs	Pty	Dis	Total 1990-98	Tobacco Policy Scores
1	Klein, Jeffrey	A	D	80	\$16,275	1.7
2	Marino, Ralph J.	S	R	5	\$11,900	-
3	Silver, Sheldon	A	D	62	\$10,425	6.7
4	Bragman, Michael J.	A	D	118	\$8,420	1.3
5	Stafford, Ronald B.	S	R	45	\$7,500	3.3
6	Bruno, Joseph L.	S	R	43	\$7,300	0.7
7	Holland, Joseph R.	S	R	38	\$6,300	1.0
8	Libous, Thomas W.	S	R	51	\$5,000	0.0
9	Koon, David	A	D	135	\$4,850	5.0
10	Marchi, John	S	R	24	\$4,000	4.0
11	Veella, Guy J.	S	R	34	\$3,950	4.0
12	Dugan, Eileen C.	A	D	52	\$3,850	-
13	Weprin, Saul	A	D	24	\$3,675	-
14	Spano, Nicholas A.	S	R	35	\$3,500	2.0
15	Yevoli, Lewis J.	A	D	13	\$3,301	-
16	Straniere, Robert A.	A	R	61	\$3,275	3.7
17	Farley, Hugh T.	S	R	44	\$3,100	3.0
18	Lombardi, Tarky Jr.	S	R	49	\$3,025	-
19	Oppenheimer, Suzi	S	D	36	\$2,850	6.0
20	Lack, James J.	S	R	2	\$2,750	1.0
21	Skelos, Dean G.	S	R	9	\$2,500	3.0
22	Robach, Roger J.	A	D	134	\$2,450	3.0
23	Feldman, Daniel L.	A	D	45	\$2,350	5.0
24	Reynolds, Thomas M.	A	R	147	\$2,300	2.0
25	Tallon, James R., Jr.	A	D	124	\$2,250	-
26	Schimminger, Robin	A	D	140	\$2,150	2.7
27	Larkin, William J.	S	R	39	\$2,100	4.0
28	Connor, Martin	S	D	\$25	\$2,050	3.0

Table 9. MEMBERS OF THE 1997-98 LEGISLATURE WHO HAVE NOT RECEIVED TOBACCO INDUSTRY CONTRIBUTIONS 1990-98

Legislator	Hs	Pty	Dist	Tobacco Policy Scores
Abate, Catherine	S	D	27	8.3
Dollinger, Richard	S	D	54	8.7
Gentile, Vincent	S	D	23	6.0
Kruger, Carl	S	D	21	5.0
Lachman, Seymour	S	D	22	5.0
Leichter, Franz	S	D	30	8.0
Montgomery, Velmanette	S	D	18	6.0
Paterson, David	S	D	29	6.0
Seabrook, Larry	S	D	33	3.0
Stavisky, Leonard	S	D	16	4.0
Fuschillo, Charles Jr.	S	R	8	5.0
Meier, Raymond	S	R	47	4.0
Padavan, Frank	S	R	11	6.0
Present, Jess	S	R	56	2.0
Arroyo, Carmen	A	D	74	5.0
Bea, Samuel Jr.	A	D	83	4.7
Brennan, James	A	D	44	8.0
Christensen, Joan	A	D	119	7.7
Clark, Barbara	A	D	33	6.0
Cohen, Adele	A	D	46	6.0
Colton, William	A	D	47	4.7
Cook, Vivian	A	D	32	5.0
Cummings, Pauline	A	D	31	5.0
Denis, Nelson Antonio	A	D	68	5.0
DiNapoli, Thomas	A	D	16	5.0
Dinowitz, Jeffrey	A	D	81	8.0
Englebright, Steven	A	D	4	8.0
Espailat, Adriano	A	D	72	5.0
Eve, Arthur	A	D	141	9.3
Galef, Sandra	A	D	90	7.3
Gantt, David	A	D	133	4.0
Genovesi, Anthony	A	D	39	5.0
Glick, Deborah	A	D	66	8.0
Grannis, Alexander	A	D	65	10.0
Green, Roger	A	D	57	7.0
Greene, Aurelia	A	D	77	5.0
Griffith, Edward	A	D	40	7.0
Harenberg, Paul	A	D	5	8.0
Hill, Earlene Hooper	A	D	18	5.0
Hochberg, Audrey	A	D	88	8.7

Table 9. MEMBERS OF THE 1997-98 LEGISLATURE WHO HAVE NOT RECEIVED TOBACCO INDUSTRY CONTRIBUTIONS 1990-98

Legislator	Hs	Pty	Dist	Tobacco Policy Scores
Hoyt, Sam	A	D	144	7.0
John, Susan	A	D	131	6.0
Katz, Melinda	A	D	28	6.0
Matusow, Naomi	A	D	89	6.0
McEneny, John	A	D	104	6.0
Millman, Joan	A	D	52	5.3
Ortiz, Felix	A	D	51	6.0
Parment, William	A	D	150	5.0
Perry, Nick	A	D	58	4.3
Pillittere, Joseph	A	D	138	3.0
Sanders, Steven	A	D	63	8.7
Scarborough, William	A	D	29	6.7
Sidikman, David	A	D	13	5.3
Smith, Richard	A	D	146	3.0
Sullivan, Edward	A	D	69	8.0
Alfano, Thomas	A	R	22	4.0
Bacalles, James	A	R	130	3.7
Barraga, Thomas	A	R	7	3.7
Conte, James	A	R	10	4.7
Crouch, Clifford	A	R	122	3.7
D'Andrea, Robert	A	R	100	4.0
Dinga, Jay	A	R	123	4.0
Doran, Craig	A	R	129	4.0
Guerin, John	A	R	101	3.7
Johnson, Jerry	A	R	136	4.7
Labriola, Steven	A	R	12	5.0
Little, Elizabeth	A	R	109	5.0
Mahoney, Bernard	A	R	120	3.7
Murray, Kathleen	A	R	19	5.0
Oaks, Robert	A	R	128	4.0
O'Connell, Maureen	A	R	17	5.0
Prentiss, Robert	A	R	107	3.7
Stephens, Willis Jr.	A	R	91	4.0
Thiele, Fred	A	R	2	4.0
Warner, Robert	A	R	124	3.0
Wirth, Sandra Lee	A	R	148	3.7

	1983-84	1985-86	1987	1990	1991-92	1993-94	1995-96	1997-98	TOTAL 1983-98
Democrat	\$6,000	\$19,850	\$12,000	\$9,300	\$19,649	\$14,900	\$56,366	\$53,110	\$191,175
Republican	\$18,250	\$21,700	\$9,300	\$13,100	\$21,545	\$15,050	\$256,312	\$397,452	\$752,709
Conservative	\$0	\$0	\$0	\$0	\$750	\$31,600	\$25,850	\$26,750	\$84,950
TOTAL	\$24,250	\$41,550	\$21,300	\$22,400	\$41,944	\$61,550	\$338,528	\$477,312	\$1,028,834

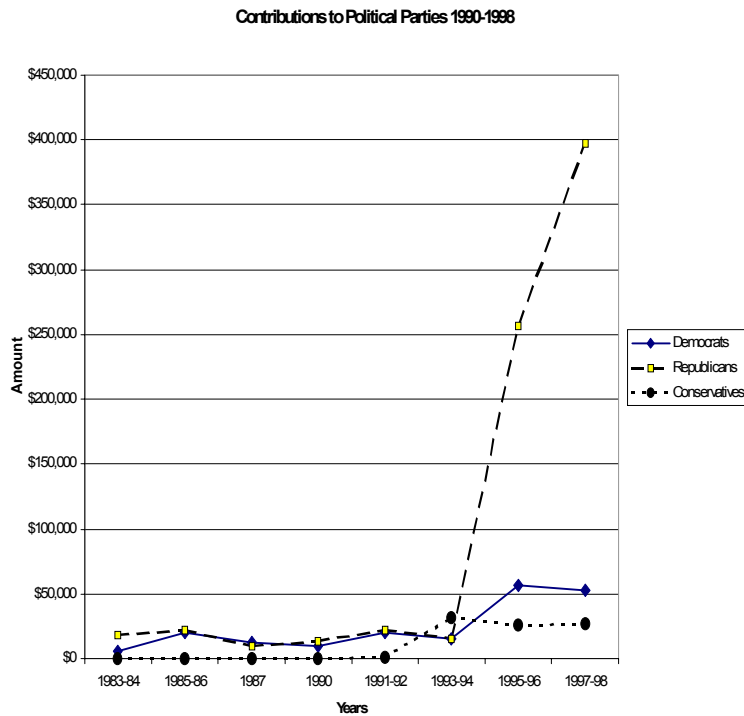


Figure 5. Tobacco industry contributions to all political parties increased in the 1990's, but skyrocketed for Republican party committees.

for constitutional office, only 3% of total tobacco industry political contributions (Table 4). Of this amount, Democratic candidates received \$16,150 (Table 11 and Figure 6) and Republican candidates received \$22,500 (Table 12 and Figure 7). Former State Comptroller Edward Regan (R) collected the most contributions, accepting \$9,000 over just three years: 1990-92 (Table A-13). Governors George Pataki (R) and Mario Cuomo (D) both received similarly high amounts of money from tobacco interests; Pataki accepted \$8,000 between 1993 and 1998 (Table A-10), and Cuomo received \$8,150 between 1990 and 1994 (Table A-12).

During the 1997-98 election cycle, the difference became even more extreme. Republican party committees received \$397,452 from tobacco interests, approximately 7.5 times the \$53,100 the Democratic party committees received (Figure 5 and Table 10). The increased divergence may be partially explained by the 1996 and 1997 respective announcements of the Democratic State Committee and the Democratic Assembly Campaign Committee to refuse money from tobacco companies.

State Constitutional Officers and Candidates

We obtained contribution data for constitutional officers and candidates for the years 1990-98. Over those years, the industry contributed \$38,650 to candidates

Table 11. TOBACCO INDUSTRY CONTRIBUTIONS TO DEMOCRATS 1983 - 1998 (not including 1988-89)									
	1983-84	1985-86	1987	1990	1991-92	1993-94	1995-96	1997-98	Total 1983-98
Democratic Legislators	\$3,600	\$10,325	\$3,325	\$14,005	\$22,151	\$14,569	\$35,995	\$26,050	\$130,020
Democratic Constitutional Officers	\$0	\$0	\$0	\$2,150	\$2,500	\$8,000	\$2,500	\$1,000	\$16,150
Democratic Party Committees	\$6,000	\$19,850	\$12,000	\$9,300	\$19,649	\$14,900	\$56,366	\$53,110	\$191,175
TOTAL DEMOCRAT	\$9,600	\$30,175	\$15,325	\$25,455	\$44,300	\$37,469	\$94,861	\$80,160	\$337,345

Table 12: TOBACCO INDUSTRY CONTRIBUTIONS TO REPUBLICANS 1983 - 1998 (not including 1988-89)									
	1983-84	1985-86	1987	1990	1991-92	1993-94	1995-96	1997-98	Total 1983-98
Legislators	\$5,250	\$10,665	\$6,625	\$21,785	\$28,445	\$17,778	\$34,849	\$22,490	\$147,887
Constitutional Officers	\$0	\$0	\$0	\$4,500	\$4,500	\$3,000	\$8,250	\$2,250	\$22,500
Party Committees	\$18,250	\$21,700	\$9,300	\$13,100	\$21,545	\$15,050	\$256,312	\$397,452	\$752,709
TOTAL REPUBLICAN	\$23,500	\$32,365	\$15,925	\$39,385	\$54,490	\$35,828	\$299,411	\$422,192	\$923,096

The Relationship Between Campaign Contributions and Legislative Behavior

A simultaneous equations regression analysis determined the existence of a relationship between tobacco policy scores and the amount of campaign contributions received by legislators in the 1997-98 legislature, with the tobacco policy scores and campaign contributions affecting each other. This implies

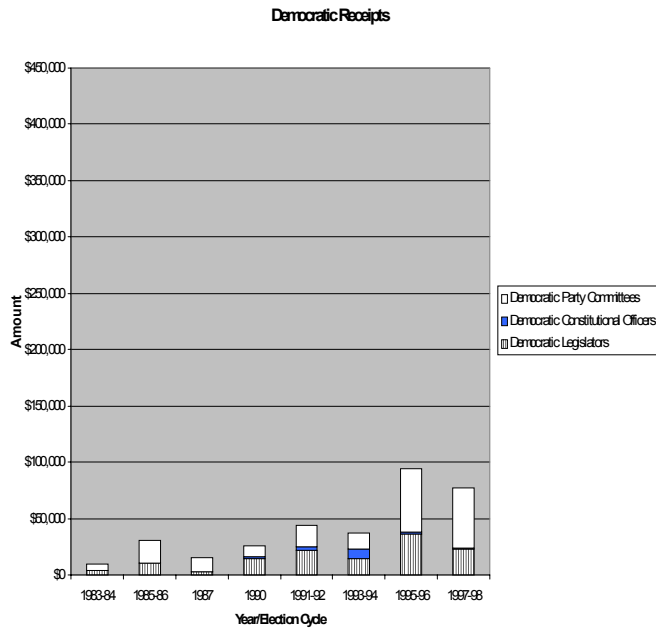


Figure 6. *The amount of tobacco industry contributions varied over the years we examined, but generally increased through the period between 1983 and 1998. Significantly more money was contributed to Democratic party committees in the 1995-96 and 1997-98 election cycles. It is unclear whether there was a decrease in contributions to Democrats in 1987-1990 because the data for 1988 and 1989 were not available.*

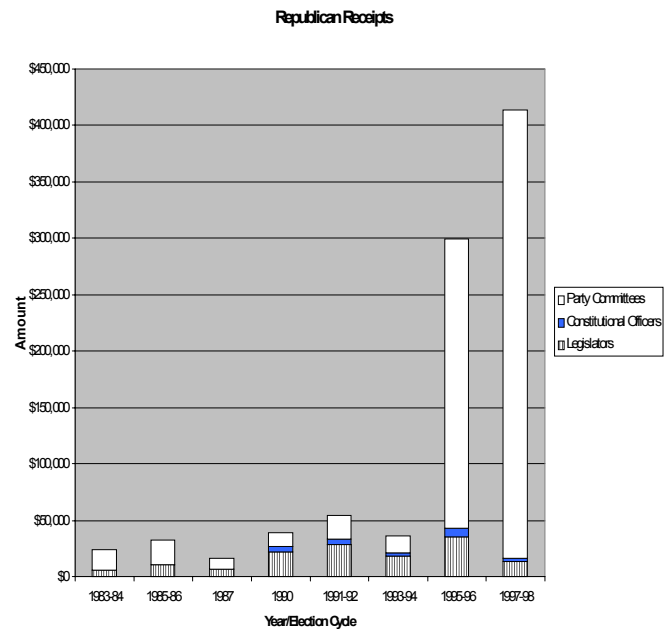


Figure 7. *Tobacco industry contributions to Republicans generally increased throughout the period between 1983-98. There was a dramatic increase in contributions to Republican party committees beginning in 1995 and increasing through 1998. It is unclear whether contributions to Republicans increased or decreased between 1987 and 1990 because data for 1988 and 1989 were unavailable.*

that the tobacco industry rewards legislators who support industry interests in their policymaking, and conversely, campaign contributions influence legislators to be more sympathetic to the industry. Simultaneous equations regression using two stage least squares was used to test the hypothesis that campaign contributions were affecting legislative behavior simultaneously with behavior affecting contributions [5][6][7][8].

The simultaneous equation regression model contains two equations. One equation predicts the 1997-98 tobacco policy score (dependent variable) from the amount of campaign contributions the legislator received in that election cycle (independent variable) and from the legislator's party affiliation (Republican or Democrat). The second equation predicts campaign contributions (dependent variable)

from the legislator's tobacco policy score (independent variable) and party affiliation. Dummy variables for Bragman and Klein were included in both equations because they received significantly more money than other candidates (\$6,800 and \$3,425 respectively).

Table 13. SIMULTANEOUS EQUATIONS RESULTS FOR TOBACCO POLICY SCORES AND 1997-98 CAMPAIGN CONTRIBUTIONS				
Dependent Variable = Tobacco Policy Score				
Variable	Coefficient	St. Error	t	p
Contributions (in thousands of dollars)	-1.82	.64	-2.86	.0047
Republican Party	-1.39	.26	-5.44	.0001
Klein	8.67	4.60	1.89	.06
Bragman	2.13	2.73	.78	.44
Constant	5.41			
Dependent Variable = Campaign Contributions (in thousands of dollars)				
Tobacco Policy Score	-.38	.11	-3.29	.0012
Republican Party	-.49	.21	-2.35	.0197
Klein	5.36	.80	6.72	.0001
Bragman	1.83	.82	2.23	.0269
Constant	2.09			
n=208. R ² = .22 for tobacco policy score; R ² = .38 for campaign contributions				

Table 13 presents the results of this analysis. For every \$1,000 a legislator received, his or her tobacco policy score decreased (i.e. became more pro-tobacco) by an average of 1.82 points. Republican legislators had tobacco policy scores that were 1.39 points lower than Democratic legislators for the same amount of tobacco industry campaign contributions received. For every one point reduction in a legislator's tobacco policy score, campaign contributions from the tobacco industry increased an average of \$380. These findings are consistent with earlier work, which indicated that legislators are rewarded with campaign contributions for pro-tobacco behavior and legislators who receive tobacco industry campaign contributions are generally more pro-tobacco in their [6][8].

This analysis was based only on direct contributions to legislators. It does not include contributions to political parties or party-controlled committees.

Lobbying Expenses

Tobacco industry lobbying expenditures increased significantly through 1992-98, totaling over \$6 million during those seven years. During the 1997-98 election cycle, the industry spent \$2,256,796 in lobbying expenditures (Table A-23). In 1997, R.J. Reynolds Tobacco Company held the 9th highest lobbying contract in the state, spending \$153,167 to retain Shulklapper & Vacek, P.C [9]. In 1998, Philip Morris Management Corporation became one of the top five lobbying clients in Albany by retaining a total of six different lobbyists [10].

Tobacco Industry Under-Reporting of Lobbying Expenses

Several developments occurred during the Pataki Administration which illustrated the weaknesses of New York's lobbying laws. These events eventually led to a revision of the lobbying law at the end of 1999. The original law expired every two years, gave very little power to the Lobbying Commission to enforce the law, required little in the way of disclosure, and its weak penalties failed to deter interest groups such as the tobacco industry from under-reporting its lobbying expenses.

In late 1998, the New York Public Interest Research Group, Common Cause New York, and the League of Women Voters of New York filed a complaint with the Temporary State Commission on Lobbying [11]. The complaint centered on previously confidential tobacco industry documents released through the discovery process of the State of Minnesota's lawsuit, which sought to recover Medicaid expenditures from the industry. These documents revealed that the Tobacco Institute spent much more on lobbying in 1995 than they reported to the Lobbying Commission. The secret 1996 Tobacco Institute budget included expenditures of \$279,700 for the "New York State Preemption Plan" and an additional \$165,000 for the "New York City Plan" in 1995 [12]. The Institute only reported spending \$110,000 to the State Lobbying Commission in 1995 [13].

The "New York State Preemption Plan" refers to lobbying efforts to persuade legislators to pass a bill preempting local clean indoor air laws with a weaker, statewide standard. In 1995, the industry's influence prompted Senate Majority Leader Joseph Bruno (R-Brunswick) to quietly introduce this legislation (SB 5414) in the Senate Rules Committee on June 12, 1995. At the time, Bruno claimed that the Pataki administration was responsible for the bill, but Pataki denied this charge [13]. The bill died when the legislative session ended on June 29, 1995 [14].

Additional documents revealed that the Tobacco Institute had funneled this unreported amount through the New York Tavern and Restaurant Association (also known as the Empire State Restaurant and Tavern Association and as the United Restaurant, Hotel, and Tavern Association) [3]. According to the Tobacco Institute, the restaurant association proposed the preemption plan, which consisted on several components:

- the establishment of a grassroots network which would promote uniform statewide smoking restrictions
- public relations and communications activities to publicize the idea of a statewide standard
- mobilization of legislators to support the preemptive legislation [3]

The Tobacco Institute denied responsibility for the Preemption Plan, asserting that the restaurant association "exercised complete control." James Portnoy, lawyer for the Tobacco Institute stated in a letter to the lobbying commission, "To the best of our knowledge, no TI [read: Tobacco Institute] employee discussed S.B. 5414 with a legislator or a staff member, exhorted the public to contact a

legislator or staff member” [14]. Portnoy also claimed, “TI did not retain, employ, or designate the Restaurant and Tavern Association to lobby on TI’s behalf.”

After the Temporary Commission on Lobbying began an investigation based on the complaint, the Tobacco Institute admitted to under-reporting its 1995 lobbying expenses by \$443,572 [14]. The Empire State Restaurant and Tavern Association admitted under-reporting by \$383,285, the amount of Tobacco Institute money the restaurant association spent on lobbying [11]. Scott Wexler, executive director of the Empire State Restaurant and Tavern Association, refused to admit that the association breached the lobbying law and asserted that the organization acknowledged the misrepresentation only to end the matter quickly.

Neither the Tobacco Institute nor the restaurant association suffered any penalty for their misrepresentation. At that point, New York law regarding lobbying expenditure disclosure required only that the organizations amend their previous statements. This statute, the 1977 Regulation of Lobbying Act, also established the New York Temporary state Commission on Regulation of Lobbying and empowered the organization to monitor lobbying activities and ensure public disclosure [10]. The Lobbying Act expired every two years, but had been kept alive since 1977 by the legislature’s periodic renewal.

Philip Morris Under-reports Lobbying Expenses

Further revelations of the tobacco industry’s lobbying tactics in late 1999 again elicited criticism of the Lobbying Act. On July 27 1999, *The New York Times* published an article summarizing the hundreds of internal Philip Morris documents which itemized lobbying expenses in Albany from 1993 through 1996 [15]. These documents were buried in the thousands of previously confidential documents recently made public through Medicaid recovery litigation against the tobacco industry. The documents indicated that at least 115 current and former members of the New York State Legislature accepted gifts from Philip Morris as well as public officials in the executive branch of the state government [15]. Such gifts included sporting event and concert tickets as well as expensive meals.

Under the state’s ethics law, legislators are unable to accept gifts valued at more than \$75 in one occasion if the gifts are intended to influence a decision, but it is difficult to prove such intent and therefore, the illegality of these gifts. In fact, no legislator has been penalized for receiving illegal gifts since the institution of the ethics laws in 1987 [15]. The Legislative Ethics Committee, which holds jurisdiction over such matters, consists of four members from each house of the State legislature. In 1999, these members are:

- Senator John J. Marchi (R-Staten Island)
- Senator James Lack (R-Long Island)
- Senator George Onorato (D-Queens)
- Senator William J. Stachowski (D-Buffalo)
- Assemblymember Deborah Glick (D-Manhattan)
- Assemblymember James Darcy (R-Long Island)
- Assemblymember H. Robert Nortz (R-Watertown)
- Assemblymember Helene E. Weinstein (D-Brooklyn)

One of these members, Senator James Lack, was recently tied to Philip Morris in a *Newsday* article which revealed that Lack has enjoyed a relationship with the tobacco company since 1993, and suggests that he collaborated with Philip Morris when, as President of the National Conference of State Legislators, he wrote on behalf of the NCSL to oppose FDA regulations preventing tobacco sales to minors. Lack was one of the legislators on Philip Morris' revised lobbying report which accepted gifts of over \$75 value on several occasions, receiving a total value of \$385.27 from the company [16][17][18][19]. According to our data on campaign contributions, Lack has received \$2,750 from the tobacco industry between 1998 and 1990 (Table A-9). All Senators on the Legislative Ethics Committee received contributions from the tobacco industry during the same period: Marchi (Co-Chairperson) received \$4,000, Onorato received \$1,100, and Stachowski received \$750 (Table A-9). Nortz was only Assemblymember on the committee to receive industry contributions; he accepted \$150 during the period between 1998 and 1990, and neither Glick (Co-Chairperson), Darcy, nor Weinstein received industry contributions.

The State Ethics Commission differs from the Legislative Ethics Commission in that it considers it unlawful for a public official to accept gifts from one source which, as an aggregate, amount to over \$75 *in one year*. The State Ethics Commission holds jurisdiction over the ethical conduct of public officials in the executive branch, and as a policy will not reveal whether they have initiated an investigation into the possibly unlawful conduct of the public officials listed in the amended Philip Morris lobbying report.

In addition to raising issues with the compliance of legislators to the state ethics law, the article also accused Philip Morris for not complying with state lobbying laws in disclosing the amount of money they used to lobby lawmakers. The article's author, Clifford Levy, writes:

In several instances, the Philip Morris records describe thousands of dollars in gifts to lawmakers that the company did not declare on its lobbying reports. In the first half of 1996, the company spent more than \$12,000 on meals for more than 60 lawmakers and their aides, as well as their relatives and friends, but little of that appears on its reports. [15]

The same day the article was published, the Temporary State Commission on Lobbying announced an investigation to determine whether Philip Morris had under-reported the amount its lobbyists spent on gifts to state policymakers. Philip Morris responded to news of the inquiry by stating that its lobbying activities were in compliance with the law and characterized the gifts as "participating in the democratic process" [20].

The *New York Times* not only challenged the accuracy of Philip Morris' reporting, but also condemned the legislature for facilitating such misrepresentation by continually renewing the 1977 Lobbying Act. Up until the article was published, legislators insisted that the lobbying law was sufficient and indicated that they would simply renew it. The Grannis-Hoffman bill had been considered dead. However, the day following the article's publication, Governor George Pataki admitted for the first time that the lobbying law was ineffective and should be strengthened [20]. A spokesperson for Assembly Speaker Sheldon Silver (D-Manhattan) indicated that he was willing to broaden the scope of the disclosure laws [20].

By August 4, both Silver and Senate Majority Leader Joseph Bruno (R-Brunswick) indicated they would support strengthening the lobbying laws, a marked contrast to earlier attempts by the Senate

and Assembly majorities to quietly renew the 1977 lobbying law. Up until then, both leaders believed the 1977 law would be renewed the final week of the regular legislative session, which ended on August 6. At the close of the legislative session, the lawmakers reported that they would consider the issue in a special session scheduled for later in the year. However, neither Assembly Speaker Silver nor Senate Majority Leader Joseph Bruno would specify which proposals they favored [21].

On August 16, 1999, Philip Morris announced, “We are in the process of reviewing our previous filings to determine whether any need to be amended in order to bring them into full compliance with the law” [22]. This statement contrasted with the company’s previous assertions that the gifts in question were legitimate. According to the Commission, even if they have already instigated an investigation against a company for misrepresentation of lobbying expenses, if the company amends its filings accurately, it will not be penalized for misrepresentation. This aspect of the law frustrates the Commission, which has itself argued for greater enforcement powers and stricter penalties.

On November 4, the *New York Times* reported that the Commission planned to issue a recommendation for civil penalties against Philip Morris, as investigators had determined that Philip Morris did not disclose in its lobbying reports their spending on the gifts detailed in the internal documents [23]. Under the lobbying disclosure guidelines, lobbyists must report all gifts as an aggregate sum and itemize any which exceed a value of over \$75. Furthermore, lobbying commission officials had stated that Philip Morris’ Albany lobbyist Sharon Portnoy appeared to have reported the presence of absent people at dinners with state officials and legislators so that when the check was split amongst this manufactured number, the total per official would be under the \$75 reporting cutoff [23]. As a result, Portnoy could claim she was not required to report such gifts.

On November 12, the Lobbying Commission announced that Philip Morris had agreed to a settlement which included a \$75,000 fine and a 3-year ban on lobbying imposed onto the company’s Albany lobbyist, Sharon Portnoy. Portnoy was fined an additional \$15,000 and Philip Morris agreed to be subject to unannounced audits over the next three years. The decision was landmark in that it was the largest fine levied by the Commission since its inception, the second highest being only \$5,000. However, the punishment was relatively feeble, in that it was such a small price to pay for the magnitude of their crime. In addition, such a small amount of money could not possibly deter a large corporation like Philip Morris. The inadequacy of this punishment was most likely due to the fact that the Lobbying Commission is a toothless agency, as ensured by the legislature’s failure to strengthen the state’s lobbying laws. It is unclear whether the agency would have been able to enforce the penalty, and therefore it had to negotiate with Philip Morris in order to impose any penalty at all.

Philip Morris admitted to violating the state lobbying disclosure laws 15 times over three years by under-reporting lobbying expenses. The \$75,000 fine imposed onto Philip Morris was calculated by multiplying the maximum fine for each violation - \$5,000 - by the 15 violations. In response to the findings of the investigation, Philip Morris released a statement which read, “We are very sorry that our reports were false and inaccurate, and we are examining our internal processes to ensure this will not happen again” [24].

New York State Attorney General Eliot Spitzer (D) called the Lobbying Commission’s settlement with Philip Morris “a sham” and “a farce” [25]. According to Spitzer, because the Temporary Lobbying Commission did not refer the case to Spitzer’s office, Philip Morris evaded state criminal

prosecution. The Attorney General wants to initiate such an investigation to determine whether Portnoy's superiors were aware of the intentional violations and whether such misrepresentation of lobbying expenses occurred during other years. Spitzer asserted, "There was a substantial message sent out today: That Philip Morris or any big company can outmaneuver the lobbying commission. Seventy-five thousand dollars and hanging one junior employee out to dry is a game they are playing" [26]. Lobbying Commission Executive Director David Grandeau was quoted as saying that he believed a referral was unnecessary for prosecutors to proceed with a criminal investigation but that such a referral might be issued anyway [27].

On January 11, 2000, the Temporary Lobbying Commission recommended that Albany County district attorney Sol Greenberg open an inquiry into the behavior of Philip Morris lobbyist Sharon Portnoy and decide whether to prosecute her on criminal charges. Portnoy, on leave from the company, could be charged with the felony charge of perjury and the misdemeanor charge of filing false documents [28]. Attorney General Spitzer's office accused the Commission of protecting Philip Morris; Greenberg's office previously expressed no interest in the Philip Morris case and generally does not focus on these types of white collar crimes [28].

After the settlement, Philip Morris submitted revised disclosure statements on September 10, 1999. The revised statements were not made available to the public until the Commission's inquiry was complete. According to the *New York Times*, Portnoy originally claimed spending \$190,188 on dinners and gifts for legislators during the years 1996 through 1998. When she submitted amended reports on November 11 in response to the inquiry, she reported spending \$522,817 on lobbying expenses - over two and a half times as much as she originally reported [29].

The lobbying commission's investigation only addressed Philip Morris' transgressions of the lobbying law; it did not address the violation of the ethics law which forbids lawmakers from receiving gifts over \$75 in value. Legislators exposed as recipients of Philip Morris' illegal gifts generally denied knowing that the gifts were worth more than \$75, and at least two (Democratic Assemblyman Ronald Canestrari and Republican Senator Hugh Farley) have publicly stated that they would refund any expenses incurred on their behalf which exceeded the \$75 limit [26]. Farley has received extensive campaign contributions from the tobacco industry, accepting \$3100 from tobacco interests between 1990 and 1996 (Table A-2). Canestrari has received \$500 between 1995 and 1998 (Table A-1). Assemblyman Edward C. Sullivan (D-Manhattan), who has no record of accepting campaign contributions from the tobacco industry according to our data, is opting to instead contribute the amount of his gift (\$25) to the anti-tobacco organization Smokefree Educational Services [30].

Meanwhile, three watchdog groups - Common Cause New York, the New York Public Interest Research Group, and the New York State chapter of the League of Women Voters - filed a complaint with the Legislative Ethics Committee, requesting that the committee investigate whether the recipient legislators violated the state ethics code by accepting Philip Morris' gifts [31]. However, as mentioned before, the four Senators on the committee (comprising half the group) have received substantial campaign contributions from the industry, and one member, Senator James Lack, appears in Philip Morris' revised report several times for accepting gifts over \$75 in value.

Philip Morris and Pataki Aide James Natoli

Two weeks after Philip Morris admitted it under-reported its spending to the Lobbying Commission and submitted amended reports, the Capital Region newspaper *The Daily Gazette* reported that a top aide to Governor Pataki violated the state ethics law by accepting free dinners from Philip Morris [32]. Like the *New York Times*, the *Daily Gazette* obtained this information through the internal documents released through state Medicaid recovery litigation. The article was based on several receipts found in the documents, indicating that Director of State Operations James Natoli and his family dined with Philip Morris lobbyist Sharon Portnoy on at least three separate occasions in 1995 and 1996. The total value of the Natoli family's share of the dinners equaled approximately \$477, well over the \$75 dollar-per-year limit imposed by the state ethics law on public officials in the executive branch.

This incident illustrates another loophole of the state ethics law. Natoli spokesman and Pataki press secretary Michael McKeon asserted that the official believed Portnoy, as a longtime friend, paid for the dinners herself, and was unaware that she intended to seek reimbursement from Philip Morris [32]. Guidelines for the state ethics law allow a state official to accept personal gifts from lobbyists "when the circumstances make it clear that it is that personal relationship, rather than the recipient's state position, that is the primary motivating factor" [32]. However, the guidelines also instruct that friendship can be discounted as the primary motivating factor when the contributor seeks reimbursement for the gift from his or her employer. McKeon explained, "He thought it was one of those friendship things,.. But because she expensed it to her company, that obviously takes it outside the realm of a friendship thing. So he's going to reimburse it as a result" [32].

Philip Morris and Senator James Lack

Two days after the *Daily Gazette's* expose, Long Island newspaper *Newsday* published an article also based on the internal tobacco industry documents [33]. The article focused on Philip Morris' contributions and relationship with Senator James Lack (R-East Northport. During the time Lack was president of the National Conference of State Legislatures (NCSL), between 1995 and 1996, the Food and Drug Administration was declaring its intent to prevent tobacco sales to minors. Philip Morris contributed to Lack's campaign, sponsored NCSL events, and treated Lack, his staff and family to meals apparently in an attempt to persuade Lack (and the NCSL) to oppose the FDA's new jurisdiction.

Lack elicited a relationship with Philip Morris even before becoming president, with Philip Morris eagerly pursuing the relationship thereafter [33]. In 1993, Lack's campaign finance chairman invited Philip Morris lobbyist Patricia McCrann to a fundraiser for Lack, and drew attention to the fact that in two years Lack would rise from his position of vice president of the NCSL to president [33]. In 1995 and 1996, Philip Morris lobbyist Sharon Portnoy paid for two meals with Lack and his wife and staff [33]. Between those years, Lack received \$1,150 in contributions from Philip Morris (Table A-2). The National Conference of State Legislators also received support from Philip Morris, which sponsored two major NCSL events in 1995.

On November 28, 1995, shortly after an October dinner with Portnoy, Lack wrote on behalf of the NCSL to oppose FDA regulations on preventing tobacco sales to children. In the letter, he repeated arguments developed by Philip Morris: 1) states have their own laws restricting sales to minors, and 2) the FDA's plan would be an intrusion on state rights [33]. Lack insisted he was representing the NCSL's position, and that he had merely signed a document produced by NCSL staff. He also asserted that he voted for every cigarette tax increase proposal since elected to the Senate, and could not recall

discussing the FDA matter with Philip Morris [33]. Lack claims that his relationship with Portnoy is also a result of his position as chairman of the Senate Committee on the Arts; Philip Morris contributes heavily to the arts.

Philip Morris, Pataki, and the Hungarian-American Chamber of Commerce

On September 28, 1999, the *New York Times* reported that Philip Morris may have used a non-profit organization to funnel money towards Governor Pataki's two trips to Hungary [34]. The State Ethics guidelines forbid state officials from receiving gifts valued over \$75 even if a third party is involved in the transaction. The two trips, taken in September 1995 and October 1996, allowed Pataki to promote trade with Hungary while tracing his roots to his family's homeland. At the time, Pataki publicized the fact that taxpayers were not financing the trip, because a nonprofit organization titled the Hungarian-American Chamber of Commerce of New York and New Jersey paid for the Governor and some of his family members and aides.

One week before the trip, Philip Morris joined the Hungarian American Chamber of Commerce and donated \$10,000 to the organization. Philip Morris had never contributed money to this organization before. The corporation gave another \$10,000 shortly before Pataki's second trip and another \$10,000 during the following year. The sum of Philip Morris' contributions made up almost 30% of the organization's total revenue during that period. Philip Morris denied contributing to the Chamber in order to underwrite Pataki's trips. Tax records analyzed by the *New York Times* determined that the Chamber spent almost all of Philip Morris' \$30,000 contribution on Pataki's trip. Furthermore, the Chamber lent its financial support for few other events during the years it received money from Philip Morris [34].

Pepsico and Pfizer also gave \$5000 each to the organization prior to the first trip, however, executives from these companies admitted their donations were intended to finance Pataki's trip; Philip Morris insists its donations were unrelated to the event [23]. Although the Administration denies having knowledge about the source of the Chamber's funds, Tina Walls, a senior Philip Morris executive who supervises lobbying efforts in several states, attended a Budapest dinner held for Pataki. Philip Morris asserts that Walls was invited by the Chamber [35].

Initially, the State Ethics Commission approved Pataki's Hungary trips because the Chamber had no business before the legislature, and therefore the Chamber's gesture was not considered an effort to influence Pataki. However, Philip Morris had a major issue before the legislature at the time it donated the money to the Chamber. As mentioned earlier, Senator Bruno had introduced a bill in June 1995 which would have preempted local clean indoor air ordinances and replaced them with a weaker statewide standard. Bruno asserted that the Pataki Administration was responsible for the bill, but Administration denied any involvement. In 1996, the same bill resurfaced, amended to preempt only clean indoor air restrictions in restaurants. Such a major issue would have been a significant motivation for Philip Morris to try to influence the Governor. Ultimately, the preemption measure enjoyed the support of both Pataki and the Republicans, but was obstructed by the Assembly Democrats.

The *New York Times*' intense coverage of the situation prompted the State Ethics Commission to take the unusual step of announcing its investigation of Pataki's trips. The inquiry was to determine whether the trips were illegal according to State Ethics guidelines. The State Ethics Commission

supported the Administration's claim that they were told only to determine whether the Hungarian-American Chamber of Commerce was a disqualified source; they were not required to determine whether any of the members of the Chamber were disqualified sources [36]. However, a *New York Times* editorial published on September 30 advised that "Now that it seems certain that some of these donations helped underwrite the Governor's travels, the only honorable course is for Mr. Pataki to return the chamber's money...." [37]

Despite the appearance that the Hungarian-American Chamber of Commerce was not profiting by donating money to Pataki's trips, the organization reaped benefits the years following. Its headquarters moved from its president's New Jersey residence to an office in the World Trade Center, where it pays no rent, due to its connection to the Pataki Administration [38]. The building's owner, the Port Authority of New York and New Jersey, is headed by Executive Director Robert E. Boyle. Boyle is a longtime personal friend of the Governor and was appointed to his position by Pataki. The Port Authority maintains that it would not rent out the space even if left unoccupied, and therefore felt justified in giving the office to the Chamber, which they felt accomplished valuable work [38]. The Pataki Administration's economic development arm, the Empire State Development Corporation, also helped sponsor a trade conference held by the Hungarian-American Chamber in 1997.

Attorney General Eliot Spitzer, who had hoped to obtain the Lobbying Commission's referral to instigate an investigation of Philip Morris' lobbying reports, stated that if he was permitted to investigate Philip Morris' under-reporting of lobbying expenses (exposed in July 1999), he would not initiate an investigation into the tobacco company's role in financing Pataki's trips to Hungary [39]. He also stated that unless he received a separate referral from the State's Ethics Commission, he would not initiate an inquiry into whether Pataki violated state ethics codes in accepting the gift.

Lobbying Reform

As the tobacco industry abuses of the state lobbying law and the inappropriate behavior of recipient lawmakers were revealed in the press, public pressure mounted in support of lobbying and ethics reform. As the state's lobbying law was up for renewal in 1999, public attention focused on strengthening these restrictions.

Assemblyman Alexander Grannis (D-Manhattan) and Senator Nancy Lorraine Hoffman (R-Syracuse) had been promoting an alternative to the lobbying law since 1997. This bill, the Integrity in Government Act, would prohibit lobbyists from contributing to legislators during the legislative session, limit lobbyists' contributions to legislators to \$250 for the entire election cycle, and prohibit gifts such as meals and sporting event tickets. The proposal would also expand the definition of lobbying, require more information regarding lobbyists' work on behalf of clients, and significantly increase penalties. Most importantly, the Grannis-Hoffman bill would give the State's Temporary Lobbying Commission a permanent status, which the Commission has repeatedly requested since the late 1980's. However, because permanent agencies fall under the jurisdiction of the executive branch and temporary commissions fall under the jurisdiction of the legislature, the legislature was unlikely to diminish its own powers by granting the Commission permanency [40]. As the bi-annual expiration of the State's lobbying law neared, anti-tobacco advocates and government watchdog groups promoted the Grannis-Hoffman bill as a better alternative to renewing the 1977 law. In May 1999, advocates for the bill held a public demonstration emphasizing the antiquity of the current law by touting props from the same era as

the law, such as a lava lamp and a “Saturday Night Fever” movie poster [40].

Originally, it appeared that legislative leaders would engineer simple renewal of the existing lobbying regulations before adjournment of the regular session. But the Philip Morris scandal made that politically impossible. The legislature had to address lobbying reform when it returned for a special session in December. The session was scheduled to either extend or reform the lobbying law and the Health Care Reform Act, which finances New York’s health care system.

The dynamics in Albany reversed as Senate Republicans took the initiative in proposing significant lobbying restrictions. Senate Majority Leader Joseph Bruno proposed a measure banning gifts from lobbyists which exceeded a \$25 value. Assembly Speaker Sheldon Silver criticized Bruno’s bill for being too weak; a spokesman for Silver stated, “This [proposal] is a sham, this is a disgrace” [41]. However, the Assembly offered no alternative as it condemned the Senate bill. The Grannis/Hoffman Integrity in Government Act was not offered as another option although it had been introduced annually in the Assembly since 1996.

The *Albany Times Union* continued to focus public attention on lobbying by closely following developments regarding lobbying reform and by running editorials and letters pressuring legislative leaders to come to a consensus on significant measures. One such editorial read:

Failure to enact meaningful regulations of the lobbying industry – and no, an extension of the current laws, due to expire Dec. 31 [1999], doesn’t count – removes whatever doubt that may have been lingering about whom this Legislature is in office to serve. It’s more out in the open than ever now, thanks to the New York Times’ disclosures about the Philip Morris cigarette company’s lavishing of free meals and other gifts on so many current and former legislators and other state officials as well. It’s clearer than ever that the state law allowing legislators to accept dinners and gifts worth less than \$75 each is entirely inadequate. It instead leads to rampant embarrassment, if not outright corruption. [42]

The Senate responded to Silver’s criticisms by publicly promising to stop accepting gifts from lobbyists regardless of whether lobbying reform was passed. The same day, the Senate passed Bruno’s proposal 60-0. The *Times Union* reported that opposition from Assembly Democrats, previously known as the champions of lobbying reform, precluded any chance of the bill becoming law [43]. Meanwhile, Senate Minority Leader Martin Conner (D-Brooklyn) challenged Bruno to codify the Senate’s voluntary ban on gifts from lobbyists as part of the Senate rules. Conner pointed out that unlike the lobbying bill, codification of the gift ban into law would not “need the Assembly’s approval or the governor’s approval” [44]. Bruno replied that if consensus on a lobbying bill could not be reached by the end of the year, he would examine the possibility of codifying the gift ban [43]. The Assembly Speaker Silver continued to press for an extension of the current lobbying law through the end of January to give the legislature time to pursue “meaningful reform” [44].

On December 21, Republican Governor Pataki and the Democratic majority in the Assembly formed an unusual alliance and agreed upon their own lobbying proposal. The bill’s provision regarding gifts was almost identical to the original law, which prohibited gifts worth more than \$75 if the gift was intended to influence a lawmaker’s decision. The provision in the bill maintains the \$75 restriction, but prohibits such gifts regardless of the intent behind them [45]. The bill also gave the Temporary Lobbying Commission more authority in ensuring full disclosure; it gave the commission power to conduct random audits of lobbyist records and increased the penalties for violating disclosure laws. The

most significant part of the proposal required lobbyists in any county or municipality with a population greater than 50,000 to abide by lobbying disclosure laws starting in 2001 [46][47][45].

The Assembly proposal focused almost entirely on the behavior of lobbyists rather than of recipient lawmakers. This continued to leave such matters in the hands of the State Ethics Commission and the Legislative Ethics Commission, which have been repeatedly criticized for failing to respond to lawmakers' violations of ethics laws. The penalty for lobbyists imparting gifts worth more than \$75 to lawmakers would be a civil penalty and the lobbyist would be charged with a Class A misdemeanor [47]. Fines would be raised from \$5,000 per violation to \$25,000. A repeat violation within five years would incur a Class E felony charge for the lobbyist. Submitting fraudulent disclosure filings would incur a \$50,000 fine. In addition, the Assembly proposal would have required lobbyists and their clients to file reports with the lobbying commission twice as often as the original lobbying law requires: twice a month for lobbyists and semi-annually for clients [47]. In addition, lobbyists would have to report the numbers of the bills they are acting on as well as any proposed rules or rate cases they are lobbying on [47].

Good government groups criticized the proposal's shortcomings, asserting that while it was indeed an improvement from the original lobbying law, it ultimately contained little to eliminate the influence lobbyists possess over Albany. Blair Horner of the New York Public Interest Research Group stated, "Some of the stuff in the proposal is quite good; the thing that's stunning is that it doesn't do anything about gifts and it doesn't include state agencies" [47]. Because of these shortcomings, NYPIRG, the League of Women Voters and Common Cause refused to endorse the Assembly bill [48]. Governor Pataki was responsible for the omission of a provision strengthening disclosure laws for state agencies [46], even though he was involved in a scandal in which Philip Morris appeared to be funneling money through the Hungarian-American Chamber of Commerce, an organization which has received support from state agencies.

Neither the Senate nor the Assembly proposal eliminated fundraising in Albany during the legislative session, a provision the good government groups believed would do much to decrease the influence of lobbyists. In addition, the proposal did not make the lobbying commission a permanent agency; it merely extended the commission's existence for another 8 years.

The Assembly passed their proposal on December 22 by a vote of 126-14. Just a few hours later, the State Lobbying Commission released amended lobbying disclosure reports from Philip Morris, which in November had admitted under-reporting lobbying expenses fifteen times over three years. These revised reports revealed that Philip Morris had under-reported its expenses between January 1996 and September 1999 by over \$65,000 [48]. The amended documents were withheld by the lobbying commission since Philip Morris submitted them on December 13, despite a Freedom of Information Law request filed by the *Albany Times Union* [48]. Not until Attorney General Eliot Spitzer threatened the commission with legal action were the amended reports were released.

Several days after the Assembly bill was introduced, Senate Majority Leader Joseph Bruno indicated that the Senate might pass the Assembly bill to establish a basis for lobbying reform before the original law expired, and then readdress issue in early 2000 in hopes of obtaining a stronger measure [49]. On December 29, the Senate passed the lobbying law designed by Governor Pataki and the Assembly Democrats by a 51-1 vote [50]. Pataki signed the bill into law on December 30, 1999, the day before the original lobbying law was set to expire. According to an article in the *Albany Times Union*,

under the Assembly bill, Philip Morris could have been required to pay up to \$1.125 million for the violations they committed, as opposed to the \$75,000 they were required to pay under the original lobbying law [48].

Conclusion

Our analysis of legislative behavior and campaign contributions is consistent with earlier research which found that the amount of tobacco money correlates with a legislator's policy position. The more money received from the tobacco industry, the more likely a legislator will support a pro-tobacco policy. Although this is a general rule, two major exceptions are former Senator Michael Tully and former Governor Mario Cuomo, who received substantial amounts from the tobacco industry, but championed tobacco control policy.

The lobbying scandals illustrated that our data are far from complete. While it appears that New York politicians do not receive as much money from the tobacco industry as other states, New York has very weak disclosure laws. For example the law does not require individuals who contribute money to disclose the names of their employers.

The data we do possess, however, indicates that the tobacco industry contributes most to legislative leaders and the Republican party committees. It has also contributed a significant amount to the Governors. This is a typical pattern repeated in many other states. The industry focuses on legislative leaders because they determine which proposals are let out of Committee, and whether they are ever voted on by the full house. The industry focuses on the Republican party committees because they are less limited in the amount they can contribute to party committees and Republicans are philosophically more sympathetic to business.

One of the most important revelations of the lobbying scandals was the discovery that the New York Tavern and Restaurant Association was acting as a front group for the tobacco industry, accepting money to lobby for bill that would preempt localities from adopting strict tobacco control laws. The investigation essentially confirmed what tobacco control advocates had already suspected. There have been many occasions in other states where the tobacco industry has organized and funded restaurant coalitions to push the industry's agenda. NYTRA also goes by the Empire State Restaurant and Tavern Association, which has been extremely active in challenging smoking restrictions in court. Other states should learn from the New York experience by exploring the documents released in litigation to determine whether any suspicious restaurant organizations are indeed funded or organized by the tobacco industry.

The lobbying scandals came at an auspicious time: the legislature and Governor were required to renew or revise the lobbying law, which was set to expire at the end of 1999. The scandals forced the policymakers to revise and strengthen the law. By increasing penalties and the enforcement power of the lobbying commission, they were able to appease their constituents. The most significant improvement in the law was the extension of lobbying disclosure requirements to localities, which was prompted by a series of articles revealing the extent of the tobacco industry's involvement in local politics. However, it is still unclear whether enough money will be appropriated to the State Lobbying Commission to exercise their new enforcement powers. Although the lobbying law was a substantial improvement over the old one, it only addressed the behavior of the lobbyists, and not the behavior of the recipients.

Legislators and public officials continue to be monitored by apathetic ethics committees which have yet to issue penalties for accepting inappropriate gifts. New York State needs further campaign finance and lobbying reform to prevent special interests such as the tobacco industry from capturing such influence in Albany again.

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CHAPTER SEVEN

NEW YORK CITY

Tobacco control advocacy in New York City grew out of a small group of committed tobacco control advocates, later joined by the voluntary health organizations. Even today, when approximately 120 organizations make up the Coalition for a Smoke Free City, grassroots efforts such as Smokefree Educational Services and the philanthropic work of Henry and Edith Everett play a major role in tobacco control in New York City and effectively set the agenda. In New York City, the tobacco control conflict exists not only in the policymaking arena but also in the philanthropic circle, where the tobacco industry gains credibility and loyalty by donating to cultural and minority organizations.

The first major tobacco control legislation for the city was passage of the Clean Indoor Air Act in 1988. The passage of this bill was a triumph for the grassroots organization People for a Smoke Free Indoors, which pressured Mayor Ed Koch and the city council with hard-hitting advertisements.

David Dinkins defeated Koch in the 1989 Mayoral race, removing a strong supporter of tobacco control legislation. During the Dinkins Administration, all initiative for tobacco control legislation originated with the City Council and tobacco control advocates, with support from the City Health Commissioner Woodrow Myers, and City Consumer Advocate Mark Green. The Council passed legislation ending the distribution of free tobacco products, and prohibited cigarette vending machines. The Tobacco Product Regulation Act, which passed in 1992, prohibited the sale of “loosies” (individual cigarettes) and required one public health advertisement for every four tobacco advertisements on municipally-owned property. However, the tobacco industry successfully challenged the advertising restrictions in court and they were overturned.

The next major piece of tobacco control legislation materialized during the Giuliani Administration in 1994. The Smoke Free Air Act strengthened the earlier Clean Indoor Air Act by requiring that restaurant dining areas become smoke-free. Exemptions included restaurants with a separately enclosed and ventilated “smoking room,” the bar area of restaurant bars, and restaurants with 35 seats or fewer. This legislation was initiated by the Coalition for a Smoke Free City and heavily supported by City Council Speaker Peter Vallone. During the debate over the legislation, the industry used its National Smokers’ Alliance (NSA) and a restaurant group called the New York Tavern and Restaurant Association to lobby against the bill. This organization is referred to by many names: the United Restaurant, Hotel and Tavern Association, the Empire State Restaurant and Tavern Association, and the Manhattan Tavern and Restaurant Association. The industry also released many studies claiming that the proposal would have a negative economic impact on the city. Advocates successfully discredited the NSA and the restaurant association and focused the debate on health issues. The Smoke Free Air Act passed at the end of 1994 and became law in 1995.

The Coalition and Speaker Vallone next focused on tobacco advertising. In 1997, Vallone introduced the Youth Protection Against Tobacco Act, which prohibited billboards and restricted storefront advertising in a 500 foot radius around child-oriented places such as schools and day care centers. It also ended tobacco product promotions to minors throughout the city. Advocates developed a well-organized campaign including radio advertisements, and the proposal passed in 1998. However,

the tobacco industry financed a lawsuit brought by a group of advertising companies, and although the law was recently upheld in a 2nd U.S. Circuit Court of Appeals, the industry is expected to appeal this decision.

Tobacco Control Advocates in New York City

New York City's tobacco control movement began with a small cluster of grassroots groups and grew into a giant coalition with great political power and diversity. People for a Smoke Free Indoors essentially began the clean indoor air movement in New York City; the organization was formed in 1986 with the sole purpose of passing clean indoor air legislation in the City. Members included founder and media expert Tony Schwartz; Edith Everett, a philanthropist and stockbroker at Gruntal and Co.; Dr. William Cahan, a lung cancer surgeon at Sloan Kettering Memorial Cancer Center; and publicist Chris Godeck. Cahan, who headed the organization, was known for the sign over the door to his operating room which read, "Marlboro Country." Cahan's wife, Grace Mirabella, is the founder of *Mirabella* magazine and was first among women's magazines to feature anti-tobacco columns in her publication despite industry threats of pulling advertisements [1]. People for a Smoke Free Indoors was successful in accomplishing its goal of passing clean indoor air legislation when the New York City Clean Indoor Air Act passed in 1988, largely due to its support.

The voluntary health organizations were at first too timid to play an active role in the initial campaign for clean indoor air; at the time, they had just begun to involve themselves in public policy and were still trying to determine what kind of role they should play in this new realm. Edith Everett, a former member of People for a Smoke Free Indoors commented, "They [the voluntary health organizations] would never sign anything that would criticize Philip Morris or you know, anything like that. They've come a long way in their willingness to step forward and you know, say it like it is, and that was helpful" [2]. These groups currently play a major role in New York City tobacco control.

Another organization which made a great impact on the tobacco control movement was Smokefree Educational Services, headed by Joseph Cherner, formerly a senior vice-president at the financial trading firm Kidder, Peabody, & Co. According to *Business Week*, Cherner formed the nonprofit organization in 1987 and since then has:

...photographed Newport employees distributing cigarettes to minors and shown the photos to members of the City Council, the State Legislature, and the governor; brought cancer victims to shareholders' meetings held by cigarette companies; sold stickers printed with anti-smoking slogans that supporters plastered over cigarette ads on subway cars, phone booths, and buses; and invited children to show up at City Hall hearings with illegally purchased cigarettes. [3]

This group also led 43 others Coalition members in counter-advertising campaigns. For example, a mock-Marlboro advertisement reading "Cancer Country" and displaying a skeleton in a cowboy hat ran on 250 city taxi-cabs for three months [4].

Tobacco and Philanthropy in New York City

In addition to battling the tobacco influence in policymaking, New York City tobacco control advocates also battle the influence of the industry on the philanthropic level. Henry and Edith Everett, previously associated with People for a Smokefree Indoors, have led the opposition on this front. The

Everetts fought many battles involving the tobacco companies' presence in New York's philanthropic circle and in the Jewish community, and provided much of the financing for People for a Smoke Free Indoors while it existed.

When People for a Smoke Free Indoors disbanded after New York City's Clean Indoor Air Act passed, the Everetts focused on dissuading cultural institutions from accepting or acknowledging money from tobacco companies. Feeling that contributing to these organizations (and publicizing these actions) gives tobacco companies an increase in legitimacy and power, the Everetts contribute their own money with the stipulation that the recipient refuse to acknowledge tobacco contributions. For example, several years ago, the Everetts requested that the New York Jewish Museum refuse to acknowledge tobacco contributions in exchange for their contribution of half a million dollars toward building a new room. The museum originally agreed to this condition, but later turned down the Everetts' offer [2]. Edith Everett believes the vacillation was attributable to the fact that George Weissman, former CEO of Philip Morris, sits on the board and personally contributes a generous amount to the museum [2]. A month or two after the Everetts' offer was refused, Philip Morris underwrote an exhibit there [2].

In 1989, CEO of Loews Corporation (which manufactures cigarettes through its subsidiary, Lorillard) Lawrence Tisch donated \$30 million dollars to New York University (NYU). The university named its hospital after him, although usually \$30 million would not precipitate such a great honor. Furthermore, the \$30 million was not paid as a lump sum, but rather in payments over an extended period of time [2]. These special accommodations may have been due to the fact that Tisch was Chairman of the Board at NYU, and conversely, NYU President John Brademas sat on the Loews Board. The Everetts and Dr. William Cahan were among the many who protested this, but as Cahan recalls, "They used to say my outrage is not the equivalent of \$30 million" [1].

The Tisches and Everetts were embroiled in another philanthropic controversy in 1997, when James Tisch, Lawrence's son, was nominated for the position of President of the United Jewish Appeal Federation of New York [5]. Edith Everett stated, "My husband and I believe that any person who is engaged in making his living in the tobacco industry - whose brother [Lorillard's chief executive Andrew Tisch] lied before the congressional committee.... How could such a person be an appropriate leader of a Jewish Community?" [2] Despite the Everetts' protests, Tisch became president of the Jewish social services organization. According to a *New York Times* article, "Several Jewish leaders who opposed Mr. Tisch's nomination asked not to be quoted, saying they were afraid that the Tisch family or the UJA-Federation might cut off support to their groups" [6].

In 1990, when Lester Pollack (a Board member of Loews Corporation, which owns the Lorillard tobacco company) was considered for the position of President of the Jewish Community Center Association, the Everetts launched a campaign in opposition which generated letters from over one hundred religious, health, and education leaders worldwide. Despite the protests, Pollack was designated president in 1991. The Everetts, feeling that he represented values inconsistent with the organization's, requested he either resign from the Loews board or resign from the presidency of the JCC. The anti-tobacco organization Stop Teenage Addiction to Tobacco assisted the Everetts in communicating Pollack's tobacco connection to other JCC leaders, and encouraged them to write letters to Pollack [7]. However, Pollack remained on the Loews board while serving as President of the Jewish Community Center Association and then went on to chair the Conference of Presidents of Major American Jewish Organizations [8].

At the time of this writing, the Everetts are protesting the selection of Andrew Tisch as chair of the National Jewish Center for Learning and Leadership's (CLAL) annual dinner. CLAL has published literature which includes a section titled "Ethical Leadership in a Time of Change," which reads:

The traditional Jewish sources assembled in this unit all agree: It is possible for money to be tainted. It does matter where donated money comes from. We should not honor persons whose substance is gained in an illegal or immoral way. [9]

Minority Communities and Tobacco Control

In recent years, the New York City black community involved itself more often in the issues of tobacco policy. The Reverend Calvin Butts of the Abyssinian Baptist Church has been the leader in this movement. In March 1990, Butts led the spray painting of cigarette billboard advertisements in Harlem. This action led to the Metropolitan Outdoor Advertising Company to announce that it would remove their tobacco and liquor billboards from areas within five blocks of schools, churches, and playgrounds. Furthermore, they offered to provide public health advertisements for areas in the city known to be at high risk for drug and alcohol abuse. They also cooperated with Reverend Butts in organizing a committee of health advocates, advertising professions and other community leaders to design the public health advertisements [10].

Tobacco control movements in minority communities are particularly significant because the tobacco industry targets minorities in two ways: it markets certain brands of cigarettes to this population, and it wins the support and loyalty of minority communities through donating money to its organizations and sponsoring community events. In New York City, the tobacco industry's influence is prominent in these communities. This is illustrated by the large amount of financial support that state legislators who represent these communities receive from the industry. A New York Times report indicated that State Senator Efrain Gonzalez Jr. of the Bronx opened a Washington office for a Hispanic legislators' association with \$40,000 from Philip Morris, Assemblywoman Gloria Davis (who also represents the Bronx, a predominantly black district) receives \$5,000 each year from Philip Morris, to sponsor a Thanksgiving meal for the poor in her community [11]. The tobacco company has also donated \$19,000 to the Bronx Democratic Committee, which received another \$10,000 from R.J. Reynolds [11].

New York Smoking Pollution Control Act

The New York City Council started considering city-wide smoking restrictions in 1982, when Councilmember Stanley Michaels introduced the first legislation, which focused on providing smoke-free areas in restaurants [12]. Mayor Ed Koch began supporting anti-smoking measures in New York City in June 1985, when he publicly requested that restaurants set aside at least one quarter of their seats for nonsmokers. A tobacco control advocate since his days in the U.S. Congress, Koch was a member of Action on Smoking and Health (a Washington-based anti-smoking advocacy group), and supported bills to funnel cigarette taxes into cancer research and end smoking in federal buildings [13].

In a memo to Koch, Special Assistant to the Mayor and Health Services Administrator Victor Botnick addressed the shortcomings of Koch's voluntary approach to smoking regulation:

Up to now, New York City has relied on public education and voluntary action to promote the right of nonsmokers to breathe smoke free air. These efforts, while helping many people to quit, did not ensure this

right. For example, last summer the New York City Department of Health offered to publish and distribute the names of those restaurants which voluntarily set aside 25% of their seating capacity as nonsmoking area. Of the 15,000 restaurants who were contacted by mail, only 405 restaurants responded positively. [14]

As a result, Koch's office drafted the Smoking Pollution Control Act (SPCA) of 1986. The proposed legislation prohibited smoking in most public places of New York City, including elevators, buses, taxicabs, restrooms, service lines, theatres, places of public assembly, and retail stores. Restaurants would be mandated to designate a smoking section consisting of up to 50% seating capacity. The Act also imposed smoking restrictions on workplaces, sports arenas, convention halls, and health facilities. Employers with 16 or more employees were required to adopt and maintain a written smoking policy. The Act named the Department of Health as the primary enforcing agent, but police officers and employees of the Departments of Buildings, Consumer Affairs, Environmental Protection, Sanitation and Fire were also allowed to enforce the SPCA's provisions [15]. Fines ranged from \$200 to \$1000, depending on the number of previous violations, and waivers were available "subject to appropriate conditions, where such waiver is in harmony with the general purpose and intent of this Title" [16].

Much of the impetus for Koch's new policy originated with a radio commercial produced by media expert Tony Schwartz. Schwartz won the World Health Organization's Tobacco or Health Medal in 1988 for his contribution to tobacco control [17]. The commercial featured Koch making a speech addressing the problem of AIDS in New York City and the closing of the gay bath houses as a response to the health threat. The advertisement states:

Mayor Koch, Mayor of New York, made a statement about New York City's bathhouses being closed down due to AIDS. He said, "This is a matter that involves a lot of money to these people. They are selling death. Places where death can be distributed. We don't want that to go on."

But I wonder, Mayor Koch, did you ever stop to think that you could make the same statement about cigarette companies?

[Koch's statement,] "*They are selling death*" [is repeated]

Why does the City allow cigarettes to be sold on public property?

"They are selling death."

And why does the City allow cigarettes to be advertised on subway trains, buses and city-licensed taxicabs?

"They are selling death."

Mayor Koch, cigarette companies are selling death.

"We don't want that to go on."

And like you, we don't want that to go on. [18]

According to Schwartz, Koch told him he would back a law to restrict smoking in New York City if Schwartz could support him with a committee and some media.

Schwartz formed the committee People for a Smoke Free Indoors, a tiny organization founded with the sole ambition of passing clean indoor air legislation. Stanton Glantz, one of the co-authors of this report, assisted in the creation of People for a Smoke Free Indoors.

The members of People for a Smoke Free Indoors also organized the Committee for a Healthy New York, another not-for-profit establishment which focused on educating the public about secondhand smoke, rather than lobbying for legislation. These organizations added to the small handful of groups such as GASP which constituted the tobacco control movement in New York State. The New York branches of the American Lung Association and American Cancer Society were also involved, although they were timid about criticizing the tobacco companies [2]. Because their IRS status precluded them from lobbying, they concentrated on educational efforts. It was not until Tony Schwartz began publicly criticizing their cautiousness that they began publicly supporting the legislative effort [19].

Part of this reluctance came from the voluntaries' inexperience in politics. Chris Godeck, publicist for People for a Smoke Free Indoors, explained, "...they were very afraid of it [the political arena] initially...it was so alien to them. They wouldn't do an anti-smoking ad!" [19]. The voluntaries supported the clean indoor air legislation chiefly by publicizing the cause to their constituents and encouraging them to join People for a Smoke Free Indoors, so that their members could lobby for the legislation on their own time. In some ways, the voluntaries' reluctance to actively participate in the campaign allowed People for a Smoke Free Indoors more freedom in their activities and decisions. Chris Godeck stated, "Because we didn't have to get the approval of the Lung Association, Cancer Society - which we would have never been able to do or would have taken forever because of their bureaucracy - we just moved ahead" [19].

People for a Smoke Free Indoors' primary activity was executing mail campaigns to educate citizens about the Smoking Pollution Control Act and providing them with the names and contact information of their local legislators. They also attended and testified at hearings, held press conferences and sponsored advertisements supporting the legislation. People for a Smoke Free Indoors was a prominent and unique organization at this time because of their connections with the Mayor's office. Koch often sent a representative, Herb Rickman to the group meetings [2].

The first draft of Koch's Smoking Pollution Control Act was released on March 21, 1986 with a 60-day public comment period following. In addition, Koch declared his intention to administratively implement the Act's provisions in city agencies by July 1 [20]. Koch appointed a Committee on Smoking and Health to review public comments, and named former U.S. Health, Education and Welfare Secretary Joseph Califano as its chairman. Other members included Deputy Mayor for Finance and Economic Development Alair Townsend, Health Services Administrator Victor Botnick, Commissioner of Health Dr. Stephen Joseph, and Charlie Hughes of Local 372 AFSCME (American Federation of State, County and Municipal Employees) district Council 37. The tobacco industry knew Califano supported tobacco control; Philip Morris Chief Executive Officer privately told employees "there is no way Califano can be impartial" [21].

The same day the draft was released, Philip Morris distributed a memo asking all employees to call City Hall between 2:30 and 3:30 p.m.. The memo provided employees with arguments against Koch's action and instructed them to avoid revealing their connection to Philip Morris: "Please identify

yourself only as a citizen who thinks such a law is unnecessary and unwise” [20]. Similar requests were distributed when the Califano Commission held its first public hearing, complete with instructions such as: “You can write either as a resident of New York City or as someone who works in New York City and pays City taxes. When you write, please write as an individual and if you wish, use the attached piece of stationery. Please make comments in your own language (i.e., don’t copy exact wording of the points suggested below” [22].

Newspapers portrayed the Koch anti-smoking proposal as an attempt to steer public attention away from the scandals which plagued the Koch administration [23]. Beth Fallon of the *New York Post* wrote:

What we are viewing, fellow citizens, smokers and nonsmokers alike, is the politics of diversion. Reeling from two months of scandal and scarring headlines, wounded by the departure of nearly two dozen top aides, sobered by the suicide of a former “friend,” Donald Manes, the mayor has cast about for something - anything - to seize the headlines and take people’s minds off the mess.
[24]

Other journalists added to this cynicism by asserting that Koch previously opposed similar legislation. Koch opposed the less restrictive bill advanced by Councilmember Michaels which died annually in committee the previous five years. He defended his prior lack of support by arguing that the bill would have harmed the city’s economic revival. With the introduction of his proposal in 1986, Koch claimed that the city’s economy had strengthened to the point of being invulnerable to the new restrictions [25].

Some of these newspaper articles appear to have been organized and orchestrated by the tobacco industry; Philip Morris executed a media plan to respond to the Koch announcement [26]. The company intended to bombard the media with their own information and opinion by delivering a statement within minutes of the announcement, blanketing the weeklies in all five city boroughs with the statement, targeting the minority press, and arranging one-on-one interviews for Guy Smith (a Philip Morris senior vice-president) and journalists. One segment of the plan states, “PM U.S.A. Corporate Affairs communications staff will nurture “friendly” columnists and feed them facts supporting the smokers’ side of the story” [26]. Another Philip Morris document states, “We will *again* contact Beth Fallon from the *New York Post* and other column writers to portray the Committee’s view on this issue” [emphasis added][27].

The City Council’s initial reaction to the announcement and Koch’s plan was also a negative one. Peter Vallone, City Council majority leader, complained that the Mayor failed to consult with the City Council before the announcement, a usual courtesy extended with mayoral initiatives. Stanley Michaels, in particular, felt that the Mayor was taking credit for legislation that was already pending in the Council. In an interview recorded in January, 1999, Michaels reflected,

It was not his [legislation], it was mine. The older they get, they rewrite history. He did sign it. He did acclaim it and enforce it. But the funniest part of it, when the bill went into effect and the first time they were putting up the signs, I was invited to be part of the press conference. And then I found out that they had called the press conference before - and had the press conference before I got there. [12]

The Mayor’s appointed Committee on Smoking and Health added to the Council’s frustrations by planning to conduct its own hearings. Chair of the Health Committee Fernando Ferrer described the

public hearings on the proposal “a perversion” of the normal legislative process in the Health Committee [25].

During the sixty-day comment period, Philip Morris planned “to defeat or severely gut the Koch anti-smoking proposal” [28] through Operation Sinon, a campaign of opposition which they named after the Greek who convinced the Trojans to bring the Trojan Horse inside the walls of Troy [28]. The campaign included the following strategies:

Temporary Cessation of Corporate Contributions - immediately (and temporarily) halt all corporate contributions to all New York City-based organizations for at least the duration of the Califano review period.

Labor Pressure - immediately, and quietly, build labor pressure against the Koch proposal using PM USA, Miller, and General Foods labor contacts

Shadow Commission - with a broad-based coalition immediately establish a shadow commission, chaired by a person of high credibility (e.g. , William F. Buckley) and high awareness, to engage in the same kind of activities as the Califano Committee.

Federal Activities - immediately inventory all New York City federal assistance activity in various Federal Agencies and Congressional Committees and begin work with friendly members of key Congressional Committees to slow down or scuttle such assistance until relief is given on the Koch proposal. [28]

By early April, Philip Morris created an internal “New York City Task Force” to work full time on Operation Sinon [29]. The company generated various arguments against the bill and publicized them through press releases. They asserted that the law would be unenforceable, addressed a relatively trivial concern, and would negatively impact the economy. In a publicly released position statement, Philip Morris claimed that the cost to New York citizens to implement the law would be over \$60 million [30]. In an internally circulated discussion of Koch’s announcement of the SPCA, the company also questioned the Mayor’s motives:

The manner in which the legislation was presented – the circus atmosphere of the press conference, the Mayor’s buoyancy (“This Act is going to be my platform in the next election”) – point to the real *raison d’être* of this proposal. It is the move of a mayor beleaguered by the corruption and scandal to deflect attention from these crises in his administration. The Mayor said he was just so busy putting the City back on a sound economic footing five years ago that took priority. Now that the City’s economy is sound...he says he can now turn his attention to this matter. As David Smith has pointed out, Califano said this Act would save the City billions of dollars. Either Califano is lying or the Mayor is lying. [31]

In another section of this Philip Morris report, which outlines objections to the Mayor’s proposal, the validity and objectivity of the appointed Commission is criticized: “By creating a Star Chamber committee and then, presumably ramming the resulting legislation down the throat of the City Council, the Mayor has taken a step toward autocratic rule....” [31]

The industry also argued that the law was likely to be selectively enforced against minorities. In a letter to Mayor Koch, Philip Morris executive Frank Resnik stated, “I would bring to your attention an editorial in the March 6 *Amsterdam News* where it was noted that in New York City, ‘A check of citations for 1979 showed that about 14,000 whites were given summonses for smoking on subways and buses while more than 40,000 Blacks, Hispanics and what officials termed “others” were cited for the

same violations” [32]. In April, Philip Morris executive Guy Smith published a letter-to-the-editor in the *Carib News*, stating: “It is a well-documented fact that more Blacks smoke than whites, so it is not very difficult to imagine a situation where an employer would overlook a Black worker in line for a promotion on the basis that the new job would require him or her to supervise employees in the non-smoking area” [33].

Koch responded to Smith’s letter-to-the-editor with animosity. He wrote a letter to Frank Resnik stating:

I hope that you would agree that protecting the non-smoker should never be portrayed by anyone as a racially bigoted position. If you do conclude that I am right, I would urge you to instruct Mr. Smith not to seek to fan racial animosities in securing support for his position.” [34]

Nonetheless, Philip Morris continued with this strategy, although in a less public manner. A subsequent memo from Smith implied that the company planned to secretly orchestrate discrimination claims against the smoking restrictions: “We will have to set the record straight and be able to take Philip Morris underground with respect to the discrimination issue” [35].

Meanwhile, the Tobacco Institute devised a set of strategies to defeat the bill. The range of activities included direct lobbying, public relations, media, “tobacco family” and Tobacco Institute resources, member company programs, and targeted communications programs [36]. The lobbying firm of Shea & Gould was retained for their political expertise and lobbying skills and member companies were expected to provide “CEO-level contact with Mayor Koch and others; utilization of company-retained counsel; memoranda in opposition and letter-writing campaigns by subsidiaries, suppliers and vendors; labor contacts; and, mailings to consumers” [37][38]. Memos from Philip Morris confirm that the companies utilized subsidiaries such as General Foods and Ronzoni to provide manpower for letter writing campaigns [39].

The Tobacco Institute also hired the public relations firm Skurnik & Simon to organize a “grassroots” contingent, eventually to be known as “the Committee for Common Courtesy”. Former City Council President Paul Screvane announced its formation on May 14, wearing boxing gloves to demonstrate how the proposed bill would pit City residents against each other [40]. Screvane stated, “Restrictive smoking legislation is unnecessary, unfair, unenforceable, and economically destructive” [40]. In 1998, Councilmember Stanley Michaels bumped into Screvane at Opening Day for the New York Mets baseball team:

I said to him, “I notice you are not smoking.” He said, “Yes, I don’t smoke anymore.” I said, “When did you stop?” He said, “After they took my lung out.” [12]

The other members of the Committee included former Governor Hugh L. Carey (D), whose gubernatorial campaigns were supported by George Weissman, former president of Philip Morris. Others included former Mayor John V. Lindsay, whose law firm represented tobacco company Liggett & Meyers in product liability cases, Koch’s former press secretary, Maureen R. Connelly, and his former political aide Claudia Wagner [41] [42].

Supporters for the bill included Action on Smoking and Health (ASH), Group Against Smoking Pollution, and the voluntary health associations (ACS, AHA, ALA), but the core of the effort was People

for a Smoke-Free Indoors.

On July 1, 1986, Califano held a press conference to release the Committee on Smoking and Health's report. The Committee announced recommendations to exempt restaurants with fewer than 40 seats, allow for waivers in case of financial hardship, and remove the police department as an enforcing agency. Koch supported the removal of police enforcement officers in stating, "The experience of other cities and states has demonstrated that enforcement by the police is unnecessary to achieve compliance. Instead it is the Committee's view that compliance can be achieved through self-enforcement and by agencies normally involved in health and safety issues" [43].

The Committee also rectified omissions in the first draft, clarified responsibilities, permitted more smoking areas and allowed a 30 day grace period for first offenses. Califano commented on possible ramifications of the proposal, and specifically warned that businesses and their employees needed protection against economic retaliation from the tobacco industry. He illustrated his point by accusing Philip Morris of removing smoking clinic signs from General Foods after their corporate takeover of the company [44].

The industry responded by immediately holding their own press conference, featuring Barry Feinstein, president of Teamsters Local 237 and the Co-Chairman of Committee for Common Courtesy, and Sonny Hall, president of Transport Workers Union Local 100. These speakers denounced Koch's administrative implementation of the proposal in city agencies and filed unfair labor practice charges with the City's Office of Collective Bargaining. They also announced they would pursue an injunction of the mayor's policy while seeking to overturn it [44]. The spokesmen asserted that the Mayor's action:

- interferes in the conditions in the workplace
- arbitrarily breaks existing contracts
- impedes the collective bargaining process
- causes disharmony among the workforce
- extends management's ability to unjustly punish workers [45]

The tobacco industry recruited many other labor organizations to join in opposition, such as the Public Employees Federation and the New York State AFL-CIO. Although cigarettes are the leading cause of fatal fires, the New York State Professional Fire Fighters Association and the International Association of Fire Fighters also joined the industry [45].

The City Council Health Committee held its first of three days of hearings on January 12, 1987. The hearing proceeded despite indications that the State Public Health Council intended to strengthen smoking restrictions in the state Health Code. Mayor Koch announced that the city should continue with its own efforts because there was no guarantee the state would act. Koch was the first of 35 witnesses at the hearing, followed by City Health Commissioner Stephen C. Joseph, another supporter of the proposal.

The survey firm Penn & Schoen Associates, hired by Philip Morris, spoke in opposition to the proposal, basing their argument on a survey they conducted for the tobacco company. They surveyed five localities with restaurant smoking ordinances: Dallas, Texas; the states of Florida, Connecticut and New Jersey; and Nassau County, New York. Two hundred restaurant owners and customers were

surveyed in each jurisdiction. Penn & Schoen asserted that 28% of all restaurant owners (from all five locations) and 44% of Nassau county restaurant owners reported problems with the distribution of customers at peak hours. Twenty percent of all restaurant owners and 35% of Nassau restaurant owners reported longer customer waits, and 9% of all owners and 14% of Nassau restaurant owners reported losing customers due to the restrictions [46].

On February 6, 1987, efforts to pass the Koch Smoking Pollution Control Act were suspended when the State Public Health Council unanimously approved smoking restrictions the equivalent of Assemblyman Pete Grannis' unsuccessful clean indoor air bill. The Council announced the regulations would go into effective on May 7. Koch addressed the possibility that the State regulations would be blocked or overturned before implementation: "Because the Public Health Council adopted its regulations, I have not pressed the City Council for action on our proposed local law. If court challenges or the Legislature obstruct implementation of these rules, I will return to the Council and urge it immediately to pass our bill" [47]. Koch followed the State developments closely, and berated the State Legislature for refusing to allocate the \$300,000 Governor Cuomo requested to enforce the new regulations. Litigation funded by the tobacco industry began in March of 1987, and ended with the annulment of the regulations in November.

New York City Clean Indoor Air Act

In October 1987, when it appeared the State's Public Health Council regulations were about to be overturned in court, New York City Council leaders resurrected the idea of smoking legislation. They proposed a new bill (Intro 915A) which limited smoking in large stores, restaurants and offices and ended smoking in most indoor public areas. The legislation differed in several aspects from Koch's proposal and Health Commissioner Stephen Joseph complained that the new bill was weaker.

On October 30, tobacco control advocates People for a Smoke Free Indoors held a day-long conference on anti-smoking issues. In a session titled, "Getting the Message Out", advertising expert Tony Schwartz played two radio advertisements regarding the newly proposed smoking restrictions. One advertisement praised a member of the City Council's Health Committee for representing the best interests of New York City residents by voting for the proposal and the other criticized the member for voting against the proposal. Schwartz sent both messages, specific to each member, to every nonsupportive Health Committee member with the question, "Which would you rather hear being broadcast around the city?" [48]

Stanley Michaels remembers another event which greatly contributed to the Health Committee's passage of the bill: the testimony of Dr. Harold Freeman, an African American surgeon at Harlem Hospital. At the time, there were a significant number of minority members on the Health Committee, which made the environment less favorable to passage of the Clean Indoor Air Act. The tobacco industry spends a large amount of money contributing to minority communities, sponsoring minority events and supporting minority candidates with campaign contributions. According to Stanley Michaels, when Freeman testified, he "looked the minority members square in the eye and said, 'We suffer more than any other group and if you do not support this legislation, you are guilty of genocide of our people'" [12].

Skurnik and Simon, Philip Morris' public relations firm, requested \$170,480 to conduct a

campaign against the bill which focused on influencing the members of the Health Committee:

Throughout the campaign, we will focus on the communities that are represented by the members of the Council Health Committee and the Council Leadership. These communities are in many cases prime target groups:

Councilman Fernando Ferrer (Health Committee Chairman) - South Bronx: low income, Hispanic.

Councilman Morton Povman - Forest Hills, Kew Gardens Hills: middle class, Jewish.

Councilwoman Carolyn Maloney - East Harlem, Upper East Side: low income, Hispanic, and upper income White respectively.

Councilman Joseph Lisa - Corona, Jackson Heights: low and middle class, Italian, Black, Jewish.

Councilwoman Priscilla Wooten - East New York: low income, Black.

Councilman Victor Robles - Bushwick, Williamsburg, low income, Hispanic

Councilman Hilton Clark - Harlem: low and middle class, Black.

Councilman Peter Vallone (Majority Leader) - Astoria, low and middle class, Italian and Greek. [49]

The tobacco industry also focused on criticizing the workplace restrictions, and attempted to recruit major employers and labor organizations to protest them. In a status report, Philip Morris Government Affairs Regional Manager John Boltz wrote to his department Director, Michael Irish:

We are continuing to identify major employers in these districts and will be making personal visits with the goal of requesting contact that communicates the need for workplace flexibility.Contact is also being made with the former New York Secretary of State Basil Patterson to attempt to retain his firm to coordinate labor efforts in this state. The reason for these attempts is the generally fragmented and non-participatory attitudes of the labor community with regard to smoking issues in this state. [50]

The Health Committee unanimously voted out the proposal on December 8, 1987, and the measure was scheduled for a floor vote on December 23. The bill mandated that restaurants allocate 50% of seating capacity to nonsmokers, but exempted smaller restaurants with fewer than 50 seats. It required the posting of the restaurant's smoking policy and dictated that patrons be asked which section (smoking or non-smoking) they would prefer. Employers were required to create a written policy allowing employees to designate their work areas as non-smoking and prohibiting smoking in most common areas of the workplace. Exempt institutions included bars, hotel and motel rooms, private rooms in restaurants, private, enclosed offices, pool halls, and tobacco-related businesses.

In the case of undue financial hardship, waivers were available from the Commissioner of Health. Employees under collective bargaining agreements prior to the law's effective date were subject to the terms of their contract before the terms of the law. The bill ended smoking in health care facilities, public mass transit, large retail stores, most indoor public areas, and all public school buildings providing instruction up to the 12th grade. Six departments (Health, Buildings, Consumer Affairs, Environmental Protection, Fire and Sanitation) had enforcement authority and penalties for individuals were \$50 per violation. Businesses were fined up to \$100 for their first violation, \$200 for the second, and up to \$500 for the third committed within twelve months [51].

On December 24, the City Council voted 30-1 to approve Intro 951-A. Mayor Koch signed the bill on January 7, 1988, and the New York City “Clean Indoor Air Act” went into effect April 6, 1988 [52]. Upon adoption of the law, the City Council sent a resolution to the state legislature stating the Council intended to reject any legislation that would in any way weaken the City’s new smoking restrictions. In 1999, reflecting back on the battle to pass the City’s Clean Indoor Air Act, Councilmember Stanley Michaels wryly contested routine tobacco industry statements that such laws are bad for business: “The craziest part of it is the biggest service we did to the public relations and lobby groups in New York City, because when we were going through this whole business trying to pass this legislation, every...I think the tobacco industry hired every lobbyist and every PR firm in the city of New York” [12].

Koch’s Role In Tobacco Control

Although Koch’s support of the New York City Clean Indoor Air Act helped propel the tobacco control movement in both New York State and the nation, his subsequent tobacco-related initiatives and relations bred a mixed record. In early 1989, the Koch administration began an advertising campaign promoting the cultural institutions and resources of New York City; the campaign was partially funded by Philip Morris. Over 15,000 posters were displayed around the city, and Koch himself appeared on some of the versions. Dr. Mary Schmidt Campbell, the city’s Commissioner of Cultural Affairs, approached the tobacco company for support shortly after she assumed her post in October of 1989. Linda Blumber, the Assistant Commissioner of Cultural Affairs and coordinator of the campaign, estimated its value at approximately \$500,000 [53]. In February 1989, Koch issued a mayoral order which directed the Department of General Services to stop tobacco advertising on city-owned billboards and announced his intention to end tobacco sales in public buildings [54][55]. His billboard ban affected 175 billboards in the five boroughs of New York City [56].

The Dinkins Administration

In 1989, David Dinkins defeated Koch in the New York City Mayoral race. Dinkins, a reformed 2-pack-a day smoker, was regarded with suspicion among the tobacco control community because of his personal and professional affiliations with the tobacco industry. He played tennis with tobacco lobbyist Sidney Davidoff [57][58]. In addition, Philip Morris had hosted a fundraiser for Dinkins in September 1985 for his campaign for borough president. Vice President of Public Affairs Stanley Scott wrote a memo to the top executives which stated: :

Frank Resnik and I have agreed to hold a fund raiser here at PM [read: Philip Morris] for David Dinkins on September 3rd. We have already raised \$5,000 and Would like to turn over a check for \$10,000 to Dinkins at that event. Dinkins, as most of you know, considers himself a PM goodwill ambassador and is the leading candidate in the race for Borough President. [59]

Although he faced serious budgetary difficulties as Mayor, Dinkins never called for an increase in the city’s cigarette excise tax, and in 1988, as Manhattan Borough President, he applauded Marlboro Country Music in New York City. A 1993 Philip Morris document profiling the Mayor stated that, “During his tenure as Manhattan Borough President, Dinkins had a close, cordial relationship with Philip Morris” [60].

Despite this assessment, Dinkins signed several initiatives which limited the availability of cigarettes to children. On June 18, 1990, Dinkins signed Intro 401, which banned the distribution of free or discounted cigarette samples in public places. Disbursement was prohibited from public events such as concerts and sporting events, as well as from parks, streets, and sidewalks. The law took effect on July 18, 1990, and violations were classified as misdemeanors and punishable by fines of \$500 to \$1000 [61][62]. This initiative was the first of a package of bills backed by the City's Health Commissioner, Woodrow A. Myers, and Consumer Affairs Commissioner Mark Green, who already held a reputation as a tobacco control advocate.

The industry argued that the legislation would violate the federal Cigarette Labeling and Advertising Act, which states, "no requirement of prohibition based on smoking and health shall be imposed under state law with respect to the advertising or promotion of any cigarettes" [63]. However, the numerous sampling bans upheld in other cities weakened this argument. The industry then attempted to amend the legislation by limiting distribution only to certain areas and requiring that sampling contractors attain a license. The amendment also suggested a schedule of penalties for distribution to children and other violations. However, neither the Council nor its staff demonstrated interest in the proposal, and the industry viewed the passage of Intro 401 as inevitable. Therefore, the tobacco companies did not expend much effort in fighting this legislation, as Jim Cherry, Vice President and Deputy General Counsel for Lorillard, observed in a memo to top executives at his company: "Others in the Industry are not exhibiting the usual concern and vigor in opposing Intro. #401, and one might guess that they see no great stake for them in City sampling" [64].

Once the law passed, the tobacco industry explored how far it could go without violating the letter of the law. A document from Jim Cherry to top executives stated:

The following operational questions...would seem to arise:

- What precisely is the lowest cost at which we could make promotional sales (from the van or otherwise) and remain beyond the prohibition?
- Is bar sampling within the prohibition and, if it is, would bars selling tobacco be exempt?
- Is coupon sampling permissible?
- What varieties of private functions sponsored by us would qualify as exceptions to the prohibition? [65]

The Lorillard Sales Promotion Department was particularly concerned with how the limitations affected their bar promotions, and debated whether they should continue sampling in bars despite the new law. A memo from Jim Cherry to Andrew Tisch, the CEO of Lorillard, and M. Alfred Peterson, Senior Vice President of Finance, explained the argument for continuing the practice:

It can be said that licensed premises, as they are restricted by age, are not locations available to the general public; and, as they usually retail tobacco, could enjoy the exemption afforded to stores. It could also be said that attempted enforcement of the statute in bars is not likely to be within the contemplation of the City because: it may not be among the City's objectives; it is not an exposed form of sampling which could raise public pressure for enforcement; and, it simply may never come to the notice of the City. [66]

The original proposal also included restrictions on cigarette vending machines, limiting them to areas inaccessible to children, but this provision was removed [67]. The cigarette vending machine restrictions resurfaced four months later as Intro 13.

On October 11, 1990, Dinkins announced an anti-tobacco campaign that included ten aspects: 1) cigarette vending machine ban (except in adult-only locations); 2) smoke-free schools; 3) proxy campaigns by city pension funds to influence behavior of tobacco firms; 4) end to tobacco advertising on city-owned billboards; 5) end to tobacco ads on city-owned buses and subways; 6) end tobacco advertising on taxi cabs; 7) replace tobacco billboards at Yankee and Shea stadiums; 8) post pro-health counter-advertising on city-owned billboards; 9) support federal legislation for stronger and larger warnings on billboards; 10) support the petition before the Federal Trade Commission for warnings on promotional materials and a ban on cartoon characters in tobacco advertisements. Although he never accomplished all of them, Dinkins made a serious attempt to implement each goal and many of these objectives were realized by legislation passed by the City Council.

Philip Morris Chairman and C.E.O. Hamish Maxwell responded to the announcement with a biting letter to Dinkins, stating, “The financial and other support which Philip Morris has given to public and other institutions in this city appears to me to be acknowledged by the city, if at all, as grudgingly and ungraciously as possible” [68]. Maxwell concluded with an implied threat to move Philip Morris headquarters from the city: “It could be reasonably concluded that your Administration has decided that Philip Morris’ continuing presence in New York City is one of the city’s dozens of embarrassments that it can do without” [68].

Intro 13, the cigarette vending machine legislation, was already progressing through the city council by the time Dinkins announced his 10-point plan, and passed on October 15, 1990. Intro 13 had been drafted independent of the Administration by Council Speaker Peter Vallone. Dinkins signed the bill on November 27, and the restrictions became effective on January 31, 1992 [69]. New York City became the first major city in the country to ban cigarette vending machines from most public places [69]. Cigarette vending machines were removed from apartment buildings, gas stations, coin-operated laundries, theaters and restaurants; exceptions included bars and hotel lobbies with defined areas for liquor sales. The bill also required that “a [cigarette] vending machine must be placed a minimum of 25 feet from any entrance to the premises and directly visible by the owner of the premises, or his or her employee or agent” [69]. Intro 13 was challenged in court by the tobacco industry, but in 1992 the State Supreme Court, Queens County ruled in favor of the city [70].

In 1991, Dinkins banned cigarette advertisements on 100 municipally-owned billboards. The tobacco companies considered the prohibition of tobacco advertising on city-owned billboards as “moot since former Mayor Koch had already directed the city to eliminate said advertising” [71]. Mayoral orders can be easily reversed by a subsequent mayor, and only passing these restrictions as legislation can ensure their permanence.

Dinkins also ordered Taxi and Limousine Commission (TLC) Chairman Jack Lusk to begin phasing out cigarette advertising from the roofs of taxis and post a “no smoking” sticker in taxi interiors [72]. In spring of 1991, the TLC issued a proposal to amend the Taxicab Owners Rules to include these provisions.

Stadium Billboards

Dinkins’ efforts to negotiate the removal of the tobacco advertisements in Yankee and Shea stadiums were weak gestures despite strong public pressure behind the policy. Both of these stadiums

displayed large Philip Morris Marlboro billboards, which were inevitably aired on television during Mets and Yankees games. Joe Cherner, founder of Smokefree Educational Services, called attention to the problem and lobbied Mayor Dinkins to order the billboards down. On opening day of the 1991 baseball season, Cherner brought 35 little leaguers and 50 adults to Shea stadium to hold a demonstration and press conference over the billboard. In spring of the same year, Cherner also offered to buy the billboard for \$240,000 (which matched Philip Morris' annual payment), but the Mets refused, asserting they had a contractual obligation to allow the Marlboro to continue [73]. In 1993, Dinkins wrote the owners of the New York Mets (Fred Wipon and Nelson Doubleday) to request they prohibit tobacco advertising on the billboard of Shea stadium. Dinkins also wrote the owner of the Yankees (George Steinbrenner) a similar request regarding Yankee stadium [74]. Neither party agreed to remove the advertisements voluntarily.

On April 27, 1993, Parks Commissioner Betsy Gotbaum stated on televised broadcast that she felt that tobacco advertising was not keeping with the character and dignity of Shea Stadium. According to a Smokefree Educational Services press release, "Then-Mayor David Dinkins and Parks Commissioner Betsy Gotbaum initially refused to take a position on the billboard, but when Mayor Dinkins later told the Sierra Club that the billboard was not in keeping with the 'character and dignity' of the stadium, those recorded remarks forced the Parks Commissioner to agree" [75]. Under section 23.2 of the Mets' lease of Shea Stadium, the City can remove any signs the Parks Commissioner believes are "not in keeping with the character and dignity of the stadium" [75][76].

Cherner sent a letter to Gotbaum asserting that she was neglecting her duties as Parks Commissioner and informed her that Smokefree Educational Services was prepared to take legal action to force the removal of the billboards. The letter states:

...unless you take appropriate action by July 1, 1993, to require the removal of the Marlboro billboards from Shea stadium, SES will thereupon promptly commence an Article 78 proceeding to seek a judicial determination: (i) that failure to so act is in violation of a duty enjoined upon you by law; (ii) that your failure to require the removal of such tobacco advertising is arbitrary and capricious or an abuse of discretion in light of your own determination that such advertising is not in keeping with the character and dignity of the stadium; and (iii) that you should be directed by the Court to require that such advertising be removed. [77]

Smokefree Educational Services followed through with their threat and commenced litigation in July, but it became unnecessary when Dinkins was defeated in the 1994 mayoral race and Rudolph Giuliani was elected. Even before his election, Giuliani wrote to Parks Commissioner Betsy Gotbaum and requested the removal of the signs [78]. Three months after his inauguration, the city's Parks Department ordered the Mets to remove the billboard before opening day on April 11. The Mets, who felt obligated to honor the Philip Morris contract through to its end date in 1997, immediately filed a petition in State Supreme Court in Queens for a declaratory judgment which would solve their dilemma [79].

However, the Marlboro Man was removed from Shea Stadium before opening day in 1997, after Philip Morris chose to refuse a contract option which would have kept the billboard in place for several more years [80]. Three months after this announcement, the Coalition for a Smoke Free City sent a letter pressuring Giuliani to order the removal of two Marlboro signs in Yankee Stadium [81]. By February 25, 1998, the Yankees had removed the Marlboro billboards and a spokesman stated there

would be no more tobacco billboards in Yankee Stadium [82].

Marlboro Grand Prix

In March 1992, the New York City Franchise and Concession Review Committee voted 4-2 to approve a 10-year deal with Philip Morris which allowed the company to hold its Marlboro Grand Prix event in Manhattan starting the weekend of June 26, 1993. Dinkins and three of his appointees voted in favor of the proposal after negotiating an agreement with Philip Morris, which required the company to hold a youth anti-smoking advertising campaign through the duration of the ten year contract. Under this accord, Philip Morris would devote 30% of the transit and signage promoting the race to the youth campaign. Ten percent of the signage was to be dedicated to the youth anti-smoking message year-round. Copies of the Tobacco Institute's brochure promoting its "Helping Youth Say 'No'" program were to be inserted in the official race program as well as distributed throughout the New York City public school system [83]. Like other tobacco industry "educational" campaigns, public health advocates viewed this program as one that, at best, was ineffective and, at worst, may actually have encouraged smoking [84]. The mayor's office estimated that the race would generate \$2.1 million each year in taxes and \$56 million in revenue for hotels, restaurants and stores [85].

Philip Morris considered its part of the agreement conditional on whether the Dinkins administration protected the tobacco industry from advertising restrictions. In 1993, after the Tobacco Product Regulation Act went into effect, the company threatened to end their youth anti-smoking advertising campaign if the city began "selectively banning advertising on city property, i.e., telephone kiosks." A briefing on Dinkins written by Philip Morris executive Ellen Merlo states, "Unless the provisions in the current (Tobacco Product Regulation Act) bill are upheld throughout the Administration, we do not feel that it is in our best interest to go forward with our [youth anti-smoking campaign] commitment" [60]. Because the youth-directed program was a tobacco industry effort, we were unable to attain the internal documents which would reveal whether Philip Morris made good on its threat.

Smokefree Educational Services and the New York Public Interest Research Group (NYPIRG) filed a lawsuit in the State Supreme Court in Manhattan requesting nullification of the agreement on the grounds that the city failed to adhere to the land-use procedures normally addressed in such events, nor assessed the potential effect the auto race would have on the environment [86]. Anti-smoking advocates previously attempted to persuade Philip Morris to run the race under a non-tobacco related name, but the company refused. NYPIRG attorney Chris Meyer commented, "It's ironic that Dinkins has made a big case out of being an anti-smoking advocate but he's willing to sell the city's soul for a car race" [86]. After the lawsuit was filed, the city agreed to withdraw from the race.

The Tobacco Product Regulation Act

In December, 1991, the City Council Health Committee held hearings to consider Intro 2-A, otherwise known as the Tobacco Product Regulation Act (TPRA). The legislation prohibited the sale of individual cigarettes and required store owners to post signs stating, "Sale of cigarettes, cigars, chewing tobacco, powdered tobacco, or other tobacco products to persons under eighteen years of age is prohibited by law" [87]. In addition, no retailer under the age of eighteen could sell tobacco products. The Act also banned the use of tobacco products on public and private schoolgrounds. A provision

banning self-service displays of tobacco products was in the original version of the proposal, but was removed from the final version. Enforcement of the TPRA was delegated to the Departments of Health and Consumer Affairs; the ability to suspend or revoke tobacco licenses lay with the Commissioner of Finance. Consumer Affairs Commissioner Mark Green was extremely supportive of the bill, actively pushing a total advertising ban on city property, and Health Commissioner Woodrow A. Myers was also a strong proponent [88].

The most significant provision in the Act, an addition to the 1991 version, required one public health message for every four tobacco advertisements in or on municipally-owned or leased property and transportation facilities under city jurisdiction. The facilities affected included stadiums, telephone booths, private bus lines, bus stop shelters, ferries, and taxis. Tobacco advertisements on city billboards were already phased out by the mayoral orders issued by Koch and Dinkins, although as mayoral orders they possessed little staying power as compared to legislation. The anti-smoking messages were to be comparable in size, location, and visibility to the tobacco advertisements, and one quarter of the public health ads were to be directed toward youth. These pro-health messages were to be submitted by individuals, groups, or other entities to the city, free of charge, but the advertising contractors were responsible for the cost of posting and maintaining the anti-smoking advertisements, including the revenue lost by the displacement of paid advertisements.

The tobacco industry responded to the Act by emphasizing their own youth access initiatives such as “It’s the Law” and “Tobacco: Helping Youth Say No” on the grounds that these were sufficient to battle underage smoking, and claimed that the law would be an ineffective addition to their efforts. They did not take issue with the ban on out-of-package cigarette sales because federal law already prohibited the industry from such activity. They charged that the provision prohibiting minors from selling tobacco would “create further burdens for the retail industry and the city’s working youth” [89]. They also claimed that the restrictions on smoking on schoolgrounds “goes well beyond discouraging youth to penalizing adults who using common sense and courtesy, may choose to smoke” [89].

The industry also claimed that the advertising restrictions would force leasing agents for the city to pass the cost of displaying a public health advertisement onto the cigarette companies, which they argued penalized one form of speech and was therefore a violation of the First Amendment. They also worried that the costs associated with displaying an anti-smoking ad would discourage leasing agents from accepting cigarette advertisements unless the manufacturer volunteered to absorb the additional costs [89].

The Tobacco Product Regulation Act passed the City Council on October 8, 1992. At that point, no other city or state had tried to require the private sector (in this case, the companies which lease advertising rights from the city) to providing free advertising space for tobacco counter-advertising [90]. (Although California was paying for such advertisements through its Proposition 99 anti-tobacco program, funded by a tobacco tax.) The tobacco industry feared that the counter-advertising provision in the TPRA would give significant impetus to states and localities nation-wide [72]. Joe Cherner predicted that the industry would remove their ads to prevent the posting of counter-advertisements: “The tobacco industry would rather have no advertising than to have both sides be told” [90].

The counter-advertising portion of the TPRA was rendered moot when the agencies responsible for the affected facilities banned tobacco advertising. In 1992, the Mayor ordered tobacco

advertisements discontinued on city bus shelters and private buses franchised by the city upon their contract expiration dates in 1995. Tobacco advertisements were also prohibited by the Metropolitan Transit Authority, which controls the city's subways, buses and commuter trains and stations.

Dinkins had originally written to the Chair of the Metropolitan Transportation Authority to request that their contracts include a provision which required that one anti-smoking ad would be displayed for every two tobacco advertisements, similar to the restriction in the TPRA, then still under consideration by the City Council. The counter-advertisements would be commissioned by the city's Department of Health, which would seek out private financial support for production costs [91]. In June, the real estate subcommittee of the MTA instead recommended that the outdoor advertising companies who won the contract with MTA should bear the costs of counter-advertising. The tobacco industry believed that Dinkins personally instructed the chair of the subcommittee to take this stricter approach [92].

On June 26, instead of accepting the real estate subcommittee's recommendation, the full MTA board voted 10 to 1 in favor of eliminating all cigarette advertising from New York City's subways, buses, commuter trains and stations [93]. Chairman Peter Stangl decided in favor of a total ban once he heard that a complete ban would cost the MTA \$4.5 million in revenue loss, only \$500,000 more than the cost of a partial ban. The restrictions were scheduled to take effect on buses and subways after December 31, 1992, and on the Metro-North Commuter Railroad, the Long Island Rail Road and MTA billboards until March 30, 1994, when the advertising contracts were due to expire. Tobacco Institute spokesman Tom Lauria commented, "They [the MTA] are discriminating against one form of legal speech and setting a precedent. Groups against alcohol can come in. Animal rights activists can try to ban ads for meat. Environmental groups now have a basis for trying to stop automobile advertising" [94].

The Act was eventually challenged in court by Vango Media, a company which displays advertising on the rooftops of New York City taxicabs. From 1975 through 1991, at least 75% of the signs they displayed were cigarette advertisements [95]. Vango had previously been recruited by Lorillard to lobby U.S. Senators to oppose a bill that would have ended federal preemption of state tobacco advertising restrictions, which was the argument they used against the Tobacco Product Regulation Act [96]. The defendants included the City of New York, the New York City Department of Health, and the New York City Taxi and Limousine Commission.

On June 1, 1993, Judge Lawrence M. McKenna of the U.S. District Court for the Southern District of New York found that the requirement to display public health messages by the counter-advertising provision of the TPRA was preempted by the Federal Cigarette Labeling and Advertising Act of 1965. Section 1331-1341 of the Act states,

(b) No requirement or prohibition based on smoking and health shall be imposed under State Law [or, as amended in 1970, any law of any political subdivision of the State] with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter. 15 U.S.C. Section 1334(b).

Vango's motion for declaratory and injunctive relief was granted. This ordeal discouraged the city council from including taxi cabs in other bills regarding tobacco advertising restrictions, such as the 1997 Youth Protection Against Tobacco Advertising and Promotion Act.

Other provisions of the TPRA remained intact, although a debate revolves around how well they were enforced. In a 1993 enforcement sweep in Harlem, the Department of Consumer Affairs found 48 out of 60 stores selling individual cigarettes or “loosies” to undercover teen-agers [97].

Frustrated with Vango’s court victory, the Coalition for a Smoke-Free City decided to try eliminating taxi rooftop advertising of tobacco products by attempting to ban taxis from advertising any product. The organization petitioned for an amendment to the Taxicab Owners Rules which would prohibit taxis licensed by the Taxi and Limousine Commission from carrying any advertising at all. The agency did not adopt their proposal.

Dinkins’ record on tobacco was a mixed one. Parts of his 10-point plan were implemented, and the City Council accomplished much of it for him by passing Intro 401, Intro 13 and the Tobacco Product Regulation Act. These laws banned free sampling and the sale of “loosies,” restricted cigarette vending machines, ended the use of tobacco products on schoolgrounds, and required signs regarding tobacco sales to minors to be posted in stores. Dinkins’ anti-tobacco stance was largely due to his activist Commissioners of Health and Consumer Affairs, Woodrow Myers and Mark Green. Green was instrumental in passing the Tobacco Product Regulation Act.

The Smoke Free Air Act

The impetus for stronger smoking restrictions in New York City began in January 1994, when the ASSIST-sponsored Coalition for a Smoke-Free City approached city leaders about amending the 1988 New York City Clean Indoor Air Act. Citing the findings in the recently released U.S. EPA report on the adverse health effects of environmental tobacco smoke, the Coalition persuaded Speaker of the City Council, Peter Vallone, to act as prime sponsor of the bill in conjunction with Council Members Enoch Williams (Chair of the Council Health Committee), Stanley Michaels (Chair of the Council Environmental Protection Committee) and Juanita Watkins. Vallone once smoked heavily, but stopped in 1990 when he watched his secretary, a cousin by marriage and a smoker, die of lung cancer [98]. Mayor Giuliani, a Republican joined the Democratic Speaker in supporting the proposed restrictions.

The Coalition, representing over 120 organizations, was the main proponent for the proposed Smoke Free Air Act. Because Coalition members rarely contribute their own money, the organization can often be limited in the scope of their activities unless they receive private donations. However they were able to raise enough money to hire a lobbyist, conduct an opinion poll, use paid media and recruit various medical experts, private citizens and prominent restaurant owners to testify in support of the bill.

From January through March 1994, the Coalition’s Policy Chair Joe Cherner met with Mayor Giuliani and Council Speaker Vallone to discuss drafting a proposed bill. On March 16, the Mayor announced the completion of the first draft of the bill, which Vallone introduced to the Council later in the month. It ended or restricted smoking in virtually all public places within the City, including restaurants, workplaces, sports arenas and schools. The most significant provisions restricted smoking in restaurants to separately enclosed rooms, and in other workplaces restricted smoking to only one separately ventilated smoking room on each floor of the workplace. Endorsed by Giuliani and supported by all five borough presidents, the bill (Int. No. 232-A) was considered almost certain to pass.

Meanwhile, the tobacco industry initiated opposition by hiring two veteran lobbyists with close ties to Vallone: Norman Adler, consultant and former political adviser to Speaker Vallone, and Martin J. McLaughlin, head of a public relations and lobbying firm and personal friend of the Speaker [99]. The lobbyists were also known to have close ties to other Democratic members of the Council, but because the organization of the City Council delegates a great deal of control to the Speaker, access to Vallone was the industry’s foremost goal. The Speaker appoints Chairs of the committees, who earn more money for their leadership role, and controls the Council Political Action Committee, which raises funds for the other members’ reelection campaigns.

Additional tobacco industry tactics included: hiring a public relations and telemarketing firm to mobilize smokers and restaurant owners to contact elected officials, commissioning research organizations to conduct economic impact studies, and utilizing extensive amounts of paid media. The industry also sponsored organizational meetings, conducted mass mailings, sent out press releases and provided spokespersons for interviews, lobbied members of the City Council, and ran phone banks.

Like the advocates, the tobacco industry also sent representatives to testify at public hearings. In addition, they enlisted their suppliers; a presentation to Philip Morris vendors states:

According to industry estimates, enactment of this bill would cause Philip Morris’ sales in New York to decline by 15 percent. A loss of this magnitude would make it difficult for us, or any business, to maintain its current levels of purchasing. And when a major company cuts purchasing, it creates a ripple effect that has an adverse impact on a large number of other businesses. [100]

The presentation concluded by requesting vendors to call their City Council representatives and the Mayor’s office, and to follow up with a letter. Included in a packet distributed to the vendors was list of talking points to discuss with their representatives.

The industry’s opposition campaign also included the National Smokers’ Alliance, a “smoker’s rights” organization funded by the tobacco industry. Its president, Thomas Humber, was a senior vice president at Burson Marsteller, the world’s largest public relations firm. At Burson Marsteller, Humber was in charge of the Philip Morris account. Previous to working there, he was actually employed by Philip Morris as the Director of Public Affairs for the company’s European headquarters [101]. While the NSA appears to be a “grassroots” organization, developed and cultivated by concerned citizens, it is actually organized and financed by the tobacco industry. The National Smokers Alliance was also heavily involved in opposition against smoking restrictions in Erie and Livingston Counties and financed lawsuits to overturn Board of Health smoking regulations in Niagara and Dutchess Counties.

The tobacco industry also extensively used a restaurant organization to promote their arguments against the proposed smoking restrictions. The restaurant association is known by four

Table 14. OTHER NAMES FOR THE NEW YORK TAVERN & RESTAURANT ASSOCIATION
Empire State Restaurant and Tavern Association United Restaurant, Hotel and Tavern Association Manhattan Tavern and Restaurant Association

different names (Table 14). According to Joe Cherner, this association originally had very little presence in New York until Philip Morris, looking for an organization to represent its interests, renamed it the New York State Tavern and Restaurant Association (NYSTRA or NYTRA) and backed it with funds

[58]. The New York State Restaurant Association (NYSRA), an organization not affiliated with the tobacco industry, threatened to sue NYTRA to change its name so that the two organizations would not be confused [58], but no suit was filed because NYTRA changed its name. In 1994, as the Smoke Free Air Act was considered in New York City, advocates found that NYTRA was calling itself the United Restaurant, Hotel and Tavern Association (URHTA) or the Manhattan Tavern and Restaurant Association (MTRA). Currently, the organization also uses the name Empire State Restaurant and Tavern Association (ESRTA).

During the campaign for the Smoke Free Air Act, Joe Cherner challenged the validity of the MTRA and URHTA and found that neither organization had offices in New York City. Cherner also discovered and testified at a public hearing that URHTA's chapters in Manhattan, Queens, Brooklyn, the Bronx, and Staten Island were all defunct. The organization has promoted statewide preemptive legislation since the passage of the Smoke Free Air Act in 1995 [102]. It continues to use more than one name.

The formation of a restaurant organization by the tobacco industry in response to local clean indoor air legislation is a pattern which began in California. Samuels and Glantz observed that in battles over local smoking regulations in California, groups with names implying they were independent business or restaurant organizations would emerge to argue against smoking restrictions [103]. Such groups included the Beverly Hills Restaurant Association, Restaurants for a Sensible and Voluntary Policy (RSVP), the Sacramento Restaurant and Merchant Association, and the California Business and Restaurant Alliance [103][104].

The only legitimate (non-tobacco-funded) restaurant association heavily involved in the debate over the New York City Smoke Free Air Act was the New York State Restaurant Association (NYSRA). NYSRA is not a front group founded and financed by tobacco interests, although restaurant smoking restrictions typically engender an alliance between them. Rick Sampson, President of NYSRA admits freely, "Oh, we have worked with Philip Morris, we have worked for Tobacco Institute. Obviously because it's the same issue. The one thing our argument has always been and we've always said this publicly, and we've been quoted: if the tobacco people walked away from this issue tomorrow, we'd still fight it" [105]. NYSRA also opposed the bill as it was written, but offered amendments such as a phase-in to ameliorate any possible negative economic impact the Act could have on the restaurant industry.

In April, NYSRA distributed a member survey to determine whether their membership supported or opposed the proposed Smoke Free Air Act. The Council's first draft allowed smoking in separately enclosed restaurant areas, but most NYSRA members believed this clause gave a competitive advantage to those restaurants with such rooms. This contentious issue caused a schism in the NYSRA membership, between those who owned such rooms and those who did not. Consequently, the responses indicated that about 75% of the member restaurants opposed the proposal, and as a result, the NYSRA Board of Directors voted 11-6 to oppose the bill.

After meeting with Speaker Vallone, who candidly informed him the city would definitely pass the Smoke Free Air Act in some form, the NYSRA local president attempted to modify the bill into a more acceptable proposition for the membership. To appease all members, the organization endeavored to change the provision allowing separately enclosed smoking rooms and instead proposed to incorporate a restaurant phase-in which phased smoking out of all restaurants over a period of six years.

The association believed that if New York City restaurants became smoke-free immediately, they would lose business to neighboring jurisdictions. Association representatives argued that a phase-in would allow neighboring jurisdictions time to “catch up” with their own smoking restrictions so that New York City would not lose business to them. It would also allow economic impact to be assessed before restaurant owners made dramatic changes. Rick Sampson, current President of NYSRA reflected:

...our approach was to do the phase-in the first year, you cut it from 70 [percent nonsmoking] to 80. See what the economic impact is on this, and if there is none, then you go to 90, and after 90 you go to 100%. To me it was a very practical approach to do. And we still believe that that’s the way to go if the state decides to really do it, to go totally smoke free, do a phase-in. And again if there’s no impact, then go ahead and do away with it. [105]

At the bill’s first public hearing held in June, 75 out of 87 speakers testified in support of the Smoke Free Air Act. The advocates promoted the law by arguing that exposure to secondhand tobacco smoke was a proven health hazard and that current City law was inadequate to protect the public and employees. The Coalition denied the Act would have negative economic consequences, and refuted the industry’s argument that smokers would leave the City to dine elsewhere by pointing out that neighboring areas such as Suffolk, Nassau and Westchester Counties were in the process of passing similar restrictions. The Coalition also presented documentation demonstrating that localities which already implemented legislation similar to the Smoke Free Air Act had not suffered a negative economic impact. In response to the industry’s claim that the Act would violate a person’s right to smoke, the Coalition asserted that the right to breathe clean air superseded the right to smoke. By keeping the public debate focused on the health risks of secondhand smoke exposure despite the industry focus on economic impact, the advocates controlled the issue instead of defensively responding to industry attacks and arguments.

Tobacco interests, hoping to shift the issue from public health to the alleged economic ramifications of the bill, protested that the public was not supportive, enforcement would be costly and difficult, and that the government was infringing on personal matters. They argued that the law would adversely impact restaurant sales and impinge on smokers rights, but refrained from challenging the health claims regarding secondhand tobacco smoke.

Advocates were able to secure enough support from other restaurants to undermine the industry’s attempt to establish that all restaurants opposed the regulations for fear of economic hardship. Smokefree Educational Services President Joe Cherner obtained the testimony of a Beverly Hills restaurateur, whose testimony at the hearing crippled the industry’s credibility as well as that of the New York Tavern and Restaurant Association. Barry Fogel, the owner of the Jacopo’s restaurant group, acted as president of the Beverly Hills Restaurant Association. His testimony, which was read on his behalf, explained that the association was organized by tobacco interests to oppose the 1987 proposal of a smoke-free restaurant ordinance in Beverly Hills:

There was no Beverly Hills Restaurant Association before the smokefree ordinance. We were organized by the tobacco industry. The industry helped pay our legal bills in a suit against Beverly Hills. The industry even flew some of our members by Lear Jet to testify before their City Council against a similar smokefree ordinance. Tobacco Institute representatives attended some of our meetings [106].

Fogel also disputed industry claims that Beverly Hills restaurants suffered a 30% decrease in revenues during the five months the subsequently repealed smoke free ordinance was in effect.

According to Fogel, sales tax data from the California State Board of Equalization demonstrated a slight increase in restaurant sales during this period [106]. Fogel's testimony was included in a large compilation of supportive letters and documents from elected officials across the nation, restaurant and business owners, scientists, journalists and various other organizations. This volume, assembled by Smokefree Educational Services, was presented to the Council in stages.

An incident between Philip Morris and Speaker Vallone prior to the hearing also contributed to the advocates' success at this event. Just before the hearing, Philip Morris' Chairman of the Board William Murray met with Speaker Vallone and shortly thereafter threatened to move the company out of the City [107]. But, instead of intimidating the Council members, Philip Morris only succeeded in aggravating them. The industry's expectation that this threat would outweigh any argument presented at the hearing explained their poor showing at the event. The opposition representatives consisted mostly of "out of town hired guns," [107] although local restaurant owners and smokers joined them in focusing the debate on economics and government infringement.

Later in the summer, Philip Morris' National Smokers Alliance (NSA) took out full-page advertisements in newspapers criticizing Speaker Vallone and Mayor Giuliani. The NSA also organized a signature campaign which paid collectors one dollar for every signature collected. The NSA flooded City Hall with its pre-printed messages; an estimated 300,000 letters of opposition were received, almost all of which were form letters. Meanwhile, the NYSRA President took Council Staff on tours of restaurants to illustrate the impact the bill would have on the restaurant industry. NYSRA also hired a public relations firm to promote the association's position and appeared on various television and radio talk shows.

When it discovered the nature of the NSA's signature campaign, the Coalition for a Smoke Free City issued a press release revealing the simulated grassroots campaign. The Coalition also ran advertisements supporting the bill throughout the summer.

Before the second public hearing for the Smoke Free Air Act, which took place on September 26, 1994, the Council sided with the advocates of the bill and strengthened the draft to include restaurants of all sizes. The morning of the second hearing, an article in the *New York Times* reported that Philip Morris again threatened to move out of New York City if the bill was passed: "It has been communicated to officials of the city that if the bill is passed, it would cause us to reconsider having our headquarters in NYC," said Steven C. Parrish, senior vice president and general counsel of Philip Morris, the world's largest cigarette maker. "Our employees are concerned that the city seems to be attacking our company and our industry. This bill is very, very important to us" [108]. The continued threats from Philip Morris again angered the Council members, prompting member Anthony Weiner (D-Brooklyn) to berate the company at the hearing: "What does not add to debate is a company standing up at a press conference or releasing a press release saying that, 'If we don't get our way we're going to take our ball and go home. My view is, go home now. Philip Morris has done nothing but take someone who was leaning against the bill to leaning for the bill" [109].

On the same morning, the United Restaurant, Hotel and Tavern Association publicly criticized the bill in full-page advertisements printed in New York City newspapers. URHTA previously mailed similar material to 10,000 restaurant owners in the City and had also created radio spots criticizing the Council. During the public hearing, URHTA was questioned as to how they financed the recent

advertisements. The organization admitted that the advertisements were financed by the Tobacco Institute. When Councilmember Michaels asked how much the advertisements cost, URHTA Executive Director Scott Wexler replied he had not seen the figures, since the advertisements were sponsored by the Tobacco Institute. When asked how much URHTA members contributed, Wexler replied, “Not a lot” [109]. Later it was revealed that the Tobacco Institute paid approximately \$200,000 for the advertisements [110]. Coalition speakers further discredited URHTA. Joe Cherner testified that according to a reporter he spoke with, URHTA’s radio advertisements were done by Young and Rubicam, Philip Morris’ ad agency [109].

These revelations echoed the disclosures generated by the Los Angeles debate over a smoke-free restaurant ordinance. During that episode, the industry front group Restaurants for a Sensible Voluntary Policy (RSVP) was forced to acknowledge that they received money from Philip Morris and the Tobacco Institute. They also used the same public relations and advertising firm used by the Tobacco Institute, Philip Morris, and R.J. Reynolds (Ogilvy and Mather) [103].

The same *New York Times* article which reported on Philip Morris’ second threat to leave New York City also exposed the industry’s attempt to encourage New York cultural organizations receiving financial support from Philip Morris to oppose the bill. Philip Morris contributes to arts establishments such as the Alvin Ailey Dance Theater, Lincoln Center, and the Museum of Folk Art: ““They wanted us to stress to Council members that, if the bill passes, it will directly reflect on their funding to us,’ said a senior executive of a leading arts organization, who asked not to be identified” [108]. Another *New York Times* article reported Philip Morris’ response to these accusations: “the company, for its part, maintains that it did not intend to drag arts groups into the political maelstrom, but only to contend, as Philip Morris has done repeatedly, that smoking restrictions might affect tourism and hence the revenue of cultural institutions” [111].

Speaking in favor of the Smoke Free Air Act at the public hearing were restaurateurs and restaurant employees testifying that they had instituted smoke-free policies and wished for uniformity. Their presence illustrated that the restaurant industry was divided on the issue.

After the hearing, the Coalition commissioned a Gallup public opinion poll which revealed that 25% of those surveyed said they would be more likely to eat in smoke-free restaurants compared to 12% who responded they would be less likely [107]. But the Council, presented with NYSRA’s counter proposal incorporating a six-year phase-in for all restaurants, decided to soften the restrictions. Instead of including a phase-in, they amended the bill to exempt restaurants with fewer than 35 seats. Rick Sampson asserted, “...I think it was really a political situation...that they were really going to have their hands full with a lot of the small bodegas and small restaurants that they didn’t really want to hammer those people” [105].

Meanwhile, Smokefree Educational Services ran a full page ad in the *New York Times* exposing the United Restaurant, Hotel, and Tavern Association as a puppet of the tobacco industry. The big, bold headline of the advertisement read, “PHILIP MORRIS Shame on you!” and revealed the tobacco company’s direction of the United Restaurant, Hotel, Tavern Association:

The United Restaurant, Hotel, Tavern Association of New York doesn’t have an office in New York City. It doesn’t have a telephone number in New York City. And its Manhattan, Queens, Brooklyn, Bronx, and

Staten Island chapters are all defunct! When you think about it, it isn't surprising to learn that the outfit behind the campaign attacking the City Council for protecting the health of New Yorkers is none other than - Philip Morris, the giant tobacco company, whose executives still deny that tobacco smoke causes cancer or any other disease. [112]

At the third public hearing in December, the industry continued to argue against the bill, despite the exemption they had obtained for small restaurants. The opposition presented studies indicating that the legislation would generate a negative economic impact. URHTA presented a study predicting the loss of \$410 million a year in restaurant sales and a loss of 9,200 jobs. The study, commissioned by URHTA and conducted by Price Waterhouse [113], merely surveyed restaurant owners and managers to ask their predictions regarding the effect of the new law on their businesses. Thirty-six percent of respondents predicted they would experience a decrease in sales, and on average, believed this loss would amount to an 8.1% decrease. Price Waterhouse calculated that such a loss would incur \$410.1 million in lost sales, \$117.3 million in lost payroll, \$16.4 million in lost city sales tax revenue, and 9,217 lost jobs [113]. The survey also found that 25.7% of the hotel/motel management interviewed predicted a decrease in sales due to the new restrictions, and the average of the respondents' predicted loss was a 5.8 % decrease. According to Price Waterhouse, this would amount to \$123.3 million in lost sales, \$40.3 million in lost payroll, \$10.6 in lost city tax revenue, and \$1,815 lost jobs in the industry [113].

Despite the dire forecast presented by URHTA, the Health Committee voted unanimously (8-0) to send the bill, with the amendment exempting restaurants with fewer than 35 seats, to the full Council for consideration. Immediately before the full Council vote, Philip Morris hired Campaign Tel, a telemarketing firm in Tampa, Florida to call and urge people on the National Smokers Alliance's New York City database to voice opposition to their Council member. The telemarketer greeted the listener and explained the bill, coached the person as to what to say, and then patched the call through to the Mayor's office or City Council representative, listening to the ensuing conversation and coaching as needed [114].

The phone campaign proved unsuccessful in dissuading the full Council from passing the legislation. On December 24, 1994, the Council voted 36-8 to pass the bill. Giuliani signed the Smoke Free Air Act into law on January 10, 1995, to go into effect four months later on April 10. The final version still contained the exemption for restaurants with fewer than 35 seats on the pretext that it would assist the smaller restaurants in the outer boroughs. The Council assured restaurateurs they would revisit the issue a year later if the industry could prove the restaurants had been negatively impacted. URHTA's Executive Director Scott Wexler continued to forecast dire economic consequences: "...we expect it to cost the city 11,000 jobs and the hospitality industry more than \$500 million" [115].

Effective April 10, 1995, smoking was ended or restricted in most public places, including restaurants, workplaces, sports arenas and schools. Whereas the 1988 Clean Indoor Air Act prohibited smoking in most common areas of workplaces and required restaurants seating over 50 customers to set up nonsmoking sections of at least 50% seating capacity, the new legislation prohibited smoking in restaurants seating over 35 guests, but continued to allow smoking in enclosed smoking lounges and restaurant bars meeting certain specifications.

Prior to the Smoke Free Air Act, the law only prohibited smoking in most common areas of workplaces (such as meeting rooms, hallways, and elevators). The Smoke Free Air Act extended the 1988 law to end smoking in all areas of the workplace except for one separately ventilated "smoking

room” permitted on each floor of a workplace (of up to 300 sq. feet). The Smoke Free Air Act also required that private offices be smoke-free unless there were three or fewer people present and consenting. The Smoke Free Air Act ended smoking in outdoor seating areas of sports or recreational facilities, but permitted (with restriction) separate smoking rooms in the indoor viewing area and in both enclosed and unenclosed concourse areas. Indoor and outdoor areas of daycare centers were mandated smoke free. Schools other than the smoke-free pre-primary, primary and secondary schools, such as community colleges and technical training institutes, had to restrict smoking to separately ventilated smoking lounges for employees and students. In addition, penalties for violating the law rose from \$50 to \$100 and fines for restaurant owners, building managers and others responsible for the use of public places were doubled to \$200, \$400 and \$1000 for the first, second and third violations, respectively (Table B-4).

Neither the advocates nor the restaurant industry appreciated the small restaurant exemption. Both sides felt it made little sense from a public health standpoint to exempt smaller establishments because secondhand smoke could be more concentrated than in larger restaurants. President of NYSRA, Rick Sampson, reflected, “...if you really think about it, exempting restaurants under 50 seats - that means the whole restaurant could be smoking, under 50 seats. And our thought was always...I mean, if they really were concerned about public health why would you exempt a whole restaurant?...that 50 people can be in a restaurant smoking!” [105] Furthermore, the restaurant industry was discontent with the competitive advantage the law’s exemptions gave to smaller establishments and those with restaurant bars. Sampson explained, “...it boils down to: ‘you can only smoke in the bar area’. For those restaurants without the liquor license, they again were put at an economic disadvantage” [105]. This issue repeatedly emerged in local smoking legislation debates across the state.

Despite mixed feelings over the final provisions, the Coalition felt they were successful in passing strong restrictions against secondhand tobacco smoke. The Coalition attributes this success to their ability to refute the opposition’s economic arguments while maintaining focus on the health aspect of the issue. Other advocates agreed with this assessment but added that the support of the City leadership and the division within the restaurant industry were also major factors. The most critical champion was the Council Speaker, but they also thought the Mayor played an important role [107].

Claims of Adverse Impacts in Business

Since 1987, the tobacco industry has been perpetuating the myth that a 30% drop in business will accompany the implementation of smoke-free restaurant legislation. This claim was first used successfully during the 1987 attempt to repeal a 100% smoke-free restaurant ordinance in Beverly Hills [116]. The 30% figure originated from a survey commissioned by the Beverly Hills Restaurant Association, a tobacco industry front group organized by tobacco industry consultant Rudy Cole. Despite the industry’s involvement in producing this information, the Beverly Hills City Council accepted the survey’s claims and agreed to repeal the first 100% smoke-free restaurant law in California.

The industry-supported Empire State Restaurant and Tavern Association (also known as the New York State Tavern and Restaurant Association) sponsored a study analyzing restaurant employment. The findings, presented in an April 1996 unpublished manuscript, claim that New York City experienced a 4.0% decrease in restaurant employment while neighboring areas experienced a 5.0% increase [117]. Dr. Michael Cummings, Director of the Smoking Control Program at the Roswell Park Cancer Institute,

analyzed this study for tobacco control advocates in Toronto who were striving to pass a similar law, and discovered that the analysis of restaurant job trends was done before the law went into effect and did not incorporate any of the data from after the implementation date. Therefore, none of the differences the study claimed can be attributed to implementation of the law. However, this study continues to be distributed by the Association [118].

As it does everywhere, the industry attempted to persuade the City Council to overturn the ordinance by sponsoring a series of studies claiming large negative economic impact, noncompliance and public rejection of the law (Table B-2). The New York Restaurant and Tavern Owners Association and the National Smokers Alliance each commissioned studies which entailed interviewing restaurant owners and managers to determine the economic impact of the Smoke Free Air Act on their businesses. NYTRA financed a study conducted by Penn + Schoen Associates which claimed that 63% of New York City restaurateurs reported the new law damaged their business [119]. The same study measured a reported increase in restaurant business in neighboring New Jersey counties during this same period [119]. The other study, completed by Fabrizio, McLaughlin & Associates, determined that 70 percent of restaurateurs reported a decrease in business since implementation of the law, and the mean reported decrease was 16 percent [120]. The first study was conducted two months after the Act's date of implementation and the second was done six months afterwards. Both of these studies measured perceptions of restaurateurs communicated by a telephone interview. Despite the fact they were based on speculation and perceptions rather than hard data, both studies were used to persuade restaurant owners that the law was detrimental to their livelihoods, and publicized in other localities to convince restaurateurs to oppose smoke-free legislation [121].

The Tobacco Institute budget plan for the URHTA post-ban survey indicated that Price Waterhouse would conduct the poll, selecting a sample of restaurants from New York City to participate in a monthly survey. The Institute budgeted \$45,000 to pay for the Price Waterhouse poll, which they expected would be a three-month survey [122]. However, the study ultimately examined only two weeks of the law's implementation; Price Waterhouse conducted its survey between April 28 and May 5, 1999, starting just 18 days after the law went into effect [123]. The firm randomly selected restaurants from the five boroughs of New York City, ultimately interviewing 209 restaurants. Press releases declined to mention whether the company sought out owners or managers or other staff qualified to answer questions about the impact of the law on their business. The study found that 55% of the respondents opposed the new law, while 33% favored it; 51% indicated that the law negatively affected their business, and 41% said their sales were lower than those for the same time last year [123].

The study sponsored by the National Smokers Alliance was conducted by Fabrizio, McLaughlin and Associates between May 3 and May 6, 1995. The company interviewed 1,000 full service restaurant managers or owners from geographically targeted restaurants distributed throughout the five boroughs. They found that since the new smoking restrictions were implemented, 68% of restaurateurs felt their business was disrupted by the new smoking restrictions, 56% stated their sales decreased since then, 81% believed the restrictions illustrated "government over-regulation of small business," and 84% would prefer to accommodate both smokers and nonsmokers.

To obtain an objective assessment of the law's actual impact, Hyland et al. [124] also assessed the economic impact of the Smoke Free Air Act by analyzing raw sales data and changes in restaurant employment. Evaluation of semiannual data obtained from the New York State Department of Taxation

and Finance for the period between March 1990 and February 1997 indicated that both restaurant and hotel sales tax revenue increased in New York City after the ordinance went into effect but decreased in the rest of the state [124]. Hyland and Cummings found that the growth in number of restaurants was comparable between New York City and the rest of the state between April 1993 and April 1997, but New York City's growth in restaurant employment (17.6%) more than tripled that of the state's (4.6%) [125]. This demonstrates that the growth in restaurant employment in New York City was not an outgrowth of a larger trend effecting the state. The researchers acknowledge the smoking restrictions may not have caused these positive outcomes, but emphasize that the findings negate the industry's predictions that New York City's restaurant business would decline after implementation of the law.

Implementation and Enforcement

Hyland and Cummings [126] investigated the veracity of another industry prediction: that the law would be unenforceable and that no one would comply. They evaluated compliance through three methods: a) a telephone survey of restaurateurs conducted between November and December of 1996, b) data from unannounced health inspections performed by the New York City Health Department between February and April 1997, and c) complaints registered with the New York City Health Department's Complaint and Information Unit between 1990 and 1997.

The telephone survey findings indicated that 2/3 of the population was compliant with the law, while the health inspections found that 77% were compliant [126]. The inspection results revealed that 93% of the incidents of noncompliance were due to restaurant configuration (too many seats in bar area, bar too close to dining area, etc.), and 75% of those restaurateurs in compliance reported that they did not have to spend any money to comply. The information from the Complaint and Information Unit indicated the typical routine experienced by cities after implementing a smoke-free restaurant ordinance. The Unit accumulated an average of 287 complaints for all businesses for each of the two months following implementation. Thirteen to 24 months after the law went into effect, complaints averaged 116 per month for all businesses. The large amount of complaints received immediately after the ordinance was implemented was most likely due to lack of awareness; as the City's Health Department educational efforts increased, the number of complaints decreased. Print and subway advertisements promoted the new law and identified where to file complaints.

Finally, Hyland and Cummings assessed consumer response to the law with ten-minute, random digit-dialed telephone interviews. Consumers were contacted between November and December 1996 and were asked questions regarding changes in their restaurant dining habits. The study found that only 15% of consumers were opposed to the law, and more smokers favored the law than opposed it [127]. In addition, 67% of consumers wished to expand the regulations to the presently exempt small (fewer than 35 seats) restaurants. These findings dispute the industry's claim that the law would be unpopular.

Another study which measured the economic impact of the Smoke Free Air Act on New York City was published by Stanton Glantz and Annemarie Charlesworth at the University of California, San Francisco [128]. The study focused on several localities and states where the tobacco industry claimed that smoke-free legislation would negatively impact tourism. In New York, the United Restaurant, Hotel and Tavern Association publicized these claims in the New York Times, stating:

On a larger scale, New York stands to lose millions of dollars as the meetings and conventions that bring

visitors from all over the world take their business and vacations elsewhere. New York today has over 25 million visitors every year. Tourism is a \$14 billion industry. This helps support our city. It means jobs. Other big cities that compete for this business will be very glad to see this smoking ban pass. [129]

Glantz and Charlesworth examined whether these claims were supported by hotel and sales tax data. The study found that the rate of New York's hotel revenues per year, which was decreasing until 1995, climbed by a rate of \$77.4 million (in current dollars) each year between the passage of the Smoke Free Air Act in 1995 and 1998 [128]. In other words, hotel revenues are increasing \$77.4 million a year faster than they were before the Smoke Free Air Act was passed. In addition, Glantz and Charlesworth used statistics from the New York City Convention & Visitor's Bureau and found that there was a significant increase in the rate of European tourists visiting the city [128].

Misrepresentation of Studies to Promote Repeal

The Cornell University Center for Hospitality sponsored a study on the effects of the New York City ordinance by researchers Cathy Enz, David Corsun, and Cheri Young [130]. The preliminary results appeared to support tobacco industry claims; the investigators found that 37.6% of smokers and 1.9% of nonsmokers dined out less, while only 5.3% of smokers and 16.5% of nonsmokers dined out more. They also found that 40.6% of smokers and 8.7% of nonsmokers spent less time dining, whereas only 9.8% of smokers and 5.6% of nonsmokers spent more time dining. Forty-seven percent of smokers avoided smoke-free restaurants more frequently, and 15.9% dined outside New York City more often. The study also revealed that smokers dined outside their homes more often than nonsmokers and spent more each week on their meals. However, the study pointed out that because nonsmokers composed 74% of the population, as a population they spent more than the smokers. Enz et. al. also found that 41% of smokers smoked in a smoke-free area in violation of the act, and only 36.5% of these were asked to stop. In their summary of findings, they warned, "If enforcement of the act increases, smokers who now violate (41%) may reduce their dining frequency even more" [130].

Dr. Stanton A. Glantz found fault with the Enz study for several reasons. First, it did not estimate the net effect of the ordinance on total sales using the percentage of smokers and nonsmokers and the percentages of each population they found were eating out less or eating out more [131]. Glantz calculated that according to their numbers, the ordinance had no net effect on restaurant sales. Second, the sample size was too small (389 individuals) to draw strong conclusions, and third, the sample did not seem randomly selected because it included 34.5% smokers when New York City's prevalence is about 25%. In addition, it was unclear how the researchers validated the respondents' estimates of actual expenditures, and it was also unclear whether they tested their questionnaire to ensure it was neutrally worded. In the original unpublished report, the investigators included a number of very critical responses disproportionate to the percent of people they found actually disliked the law.

The industry touted this study as supporting evidence of their claims: that restaurants would lose money and compliance would not be enforced. However, they failed to emphasize findings that were not consistent with their aims, such as the finding that 76.7% of nonsmokers favored the act, and 49.8% of nonsmokers favored extending the act to bars. Sixty-one percent of smokers believed secondhand smoke was hazardous. Only 21% of nonsmokers believed the act would harm the restaurant business, compared to 67.6% of smokers.

The published version of the Enz report addressed many of the points in the Glantz critique. It presented an estimated net effect: that the legislation had no ill effect on restaurant business [132]. They could not alter their sample size, but provided more information on the randomization of their sample selection. In addition, they provided more information as to how they calculated “average amount spent per meal” although they did not validate the respondents' expenditure estimates. They addressed most of the flaws found in their original report and clarified that the study demonstrates that the Smoke Free Air Act did not incur a negative economic impact on the restaurant industry [132]. Despite the fact that the final version of the Cornell study does not support its position, the tobacco industry continues to promote the earlier version as evidence that smoke free air laws produce adverse economic impact. It is included in the Philip Morris ETS (Environmental Tobacco Smoke) Communications Manual which consists of Philip Morris white papers on subjects such as ETS, risk assessment, epidemiology, and provides the reader with a variety of articles and studies from which to quote from when interviewed or addressing an audience [123].

At the same time it was promoting the preliminary version of the Cornell study, the industry criticized the later, published version. Enz noted that the critique was instigated only after public health groups such as the Advocacy Institute began using her published study to promote clean indoor air laws. The National Smokers Alliance commissioned a critique from consultant Michael Evans and distributed it to numerous restaurant associations [133]. The Evans Group maintained that the Enz study failed to acquire pre-ban and post-ban data necessary to assess the overall impact of the ban on restaurant sales. The Evans Group also calculated their own estimates of the economic impact of the ban, basing its calculations on the proportion of smokers in the Enz sample rather than the proportion of smokers in the overall population. In her rebuttal to the Evans Group critique, Enz astutely concludes,

What have been identified by the Evans Group critique as errors, flaws, unsubstantiated assumptions, and bias seem to be findings or data that do not support a particular position. It is easier to fault existing research when it conflicts with what you want to find than to conduct your own research. It is also possible that the aggressive critique is a reaction not to the study itself, but to the fact that the study is being used by contesting advocacy groups. [133]

The Enz study was also critiqued by Coopers & Lybrand, a consulting firm hired by the Empire State Restaurant and Tavern Association (a.k.a. NYTRA). This critique also found that the data presented was inadequate to draw the conclusion that the ban had an overall positive effect on total restaurant sales. Furthermore, it made the same mistake as the Evans critique in assuming the sample's proportion of smokers reflected the proportion of smokers in the overall dining population (Table B-3).

Despite the fact that numerous studies dispute tobacco industry claims, the Philip Morris ETS [Environmental Tobacco Smoke or secondhand smoke] Communications Manual contains a section on the economic impact of clean indoor air laws which cites the New York City Smoke Free Air Act as a case study. The preface to this sections reads: “The New York City [smoking ban], in effect since April 1995, is a convincing example of the negative economic impact of smoking bans in the HoReCa [hotel, restaurant and café] business” [123].

Youth Protection Against Tobacco Advertising and Promotion Act

In 1997, the Coalition for a Smoke Free City met with New York City Council Speaker Peter Vallone about a potential proposal restricting tobacco advertising targeted at children. Vallone followed

the developments in a similar Baltimore law as it faced a court challenge. On April 28, 1997, the U.S. Supreme Court let stand the Fourth Circuit U.S. Court of Appeals decision in *Penn Advertising of Baltimore v. Baltimore*, upholding an ordinance prohibiting advertising of cigarettes and alcohol in a publicly visible location. The plaintiff charged that the ordinance violated the First Amendment right to commercial speech and was preempted by the Federal Cigarette Labeling and Advertising Act, which prohibits localities from regulating the content of cigarette advertising. The Court sided with Baltimore because the ordinance “limits only the location of signs that advertise cigarettes, but it does not address the content of such advertisements” [134].

On April 30, 1997, Vallone held a press conference with the Coalition for a Smoke Free City to announce his submission of Intro. 951 to the Council as its chief sponsor. Twenty-eight of the 51 Councilmembers co-sponsored the bill, including all the members of the Health Committee. This initial draft prohibited all tobacco advertisements in publicly visible locations within 1000 feet of any school, playground or playground areas in a public park; it also prohibited them from locations within 1000 feet of any child day care center, children’s institution, youth center or amusement arcade, with the exception of a single black and white sign. For those stores outside the 1000 foot radius, tobacco advertisements in publicly visible locations had to be in black and white (“tombstone”) text only. The bill also restricted tobacco product promotions (i.e. t-shirts, caps, or other items bearing a name or logo of any tobacco product) within 1000 feet of any school premises, playground, child day care center, children’s institution, youth center or amusement arcade and banned promotions of imported tobacco products throughout the city. The Departments of Health, Consumer Affairs and Buildings were designated as the enforcement agencies. First-time violators were fined up to \$300, then up to \$500 for the second violation, and up to \$1000 for the third, which also entailed suspension of a retailer’s cigarette license.

The American Cancer Society took the lead in advocating Intro 951 and was primarily responsible for its introduction. The ACS helped recruit witnesses for the first two public hearings using a three tiered approach [135]. First, they contacted medical experts knowledgeable about cancer-related disease and legal experts specializing in preemption issues and First Amendment controversies, then sought advertising experts willing to explain how tobacco companies target youth and other groups through their advertising. Finally, they engaged community groups such as Youth Partnerships for Health, schools, teachers, volunteers and Coalition members [135].

The Coalition for a Smoke Free City wanted the Council to strengthen Intro. 951 by adding centers of family activity (churches, synagogues, sports arenas and stadiums) to the list of places within 1,000 feet of which tobacco products cannot be advertised, and by extending the restrictions to tobacco advertisements on taxi cabs [135]. They began a media advocacy campaign in support of the proposal which ultimately produced seventy 60-second radio ads, twenty-four advertisements in parents-based publications and two full-page ads in the *New York Times*. The coalition also provided a website and email campaign [135].

The advocates also utilized a direct marketing campaign called ADVOCASH which provided incentives for youth to write letters to local officials regarding the prevention of tobacco addiction among minors. ADVOCASH flyers were redesigned specifically for Intro. 951 so that in exchange for writing letters of support for the proposal, youth could earn ADVOCASH coupons which could be redeemed for several items: t-shirts, wallet calculators, brass keytags, and euro-style pens. These flyers were mailed to 50,000 junior high-aged students in New York City. Both the ADVOCASH campaign

and the media and communications campaign were paid for through the National Cancer Institute's ASSIST program (now run by the Centers for Disease Control and Prevention) [136]. Prior to October 1, 1998, localities could use ASSIST funds to lobby for local legislation, although not for state or federal legislation.

Norman Adler, legislative consultant to the Tobacco Institute, coordinated the industry's opposition [137]. In an April 1997 letter to Tobacco Institute State Activities Division executive Marty Carson, he outlined his plan to use the industry's natural allies to its advantage: "Unlike the restaurant campaign, there is a direct and verifiable economic impact on specific classes of businesses that would result from a point of sale advertising ban or restrictions that are tantamount to a ban. The campaign to oppose the impending Vallone bill will utilize the impacted business people as 'citizen lobbyists' and grassroots activists on behalf of their own interests" [138]. Adler wanted the opposition campaign to revolve around the theme that thousands of neighborhood retailers would lose a crucial source of irreplaceable income if the Vallone bill passed into law. He wanted to emphasize that many of these retailers were minorities and operated on small profit margins. Of those businesses affected by the ban, Adler explained,

All components will be provided with a message to convey to political decision makers that realistically represents their interests and their unique demographics. While messages will vary somewhat, all messages will be "on theme" so that politicians cannot play off one group against another. [138]

In contrast to the industry strategy during the Smoke Free Air Act campaign, where arguments were directed to Speaker Vallone, Adler wanted these messages conveyed to individual members of the Council because it was an election year.

Adler wanted each tobacco company to identify one corporate coordinator to "identify every business that receives anything of value from the company (fees, promotional materials, vendor contracts, etc.) and to identify the name, address, phone number and title of one individual in each business to be used as a contact" [138]. The Institute would arrange a political mail house to determine the City Council districts in which each of these businesses and business contacts were located. The coordinator was also responsible for designating campaign directors, who were responsible for the day-to-day efforts of the campaign. These directors were to report to the Tobacco Institute campaign director daily via fax. Adler also wanted the Institute to create a media campaign in conjunction with its third party contacts:

T.I. (In cooperation with affiliates) creates media campaign, utilizing third party groups as sources for stories, re: fight by small business and their allies to preserve their livelihood; additionally, first amendment materials are created and distributed as op-ed and, possibly, newspaper advertising. [138]

The first public hearing for Intro. 951 took place on June 26, 1997. The hearing was generally considered a victory for the bill's advocates, who recruited former Brown and Williamson Tobacco Company employee Russell Stewart to testify about tobacco industry research on advertising to children. Small business owners and representatives of retail businessmen testified in opposition. The *New York Times* reported that Philip Morris employees were also present, albeit disguised as small business owners with buttons reading "Save Our Stores" [139].

The second hearing occurred on October 6, 1997. Prior to the event, the Coalition for a Smoke

Free City photographed 20 tobacco billboards and tobacco retail outlets covered with tobacco advertising, all of which were located in lower Manhattan. These photographs were presented to the City Council. The Coalition also distribute stickers which read, "Stop Marketing Tobacco to Kids - Support Intro. 951" [135].

On December 2, the Health Committee held the third public hearing jointly with the Youth Services Committee. The bill remained intact and unchanged up until this hearing, whereupon it was substantially weakened. The ban on distribution of tobacco promotional merchandise within 1000 feet of schools was replaced by a prohibition on distribution of such merchandise to minors throughout the city. In addition, the provision limiting advertising outside the 1000 foot radius to tombstone layout was eliminated. Billboard companies argued that tobacco companies would no longer advertise once they were restricted to tombstone layout. Councilmembers justified the removal of this provision by indicating that similar restrictions were under legal challenge elsewhere in the country.

The Federal Cigarette Labeling and Advertising Act restricts the ability to regulate tobacco advertising to the Federal Government, if health reasons are the motivation for the regulations. However, the New York City Council regulations were directed toward reducing smoking by minors, rather than trying to improve the health of the overall population. The Council eliminated the tombstone provision because it would have affected the adult population, damaging the credibility of the City's argument that their action was not preempted by the Federal law because it focused on minors. This argument was used to successfully defend Baltimore's tobacco billboard ordinance; the appeals court panel determined that the law was not preempted by the Cigarette Labeling and Advertising Act because it only limited billboard exposure to minors and still allowed advertising in other parts of the city and on different media [140]. However, the city of Rochester in 1998 passed advertising restrictions which included tombstone provisions. As of this writing, the advertising restrictions have not been challenged.

Instead of a total ban on tobacco industry promotions to both adults and minors (including the distribution of free coupons, t-shirts and baseball caps) within 1000 feet of schools and child-oriented centers, the amended bill imposed a city-wide ban on the distribution of tobacco product promotions to minors, allowing such promotional activities to occur within the 1000 feet of schools if the materials are distributed to adults only [141][142]. Councilmembers believed they had strengthened the bill with this provision, but critics felt it weakened the proposal as distributors of samples were unlikely to check identification and it would continue to expose minors to a form of advertising within the 1000 feet around schools. In addition, penalties were softened; instead of automatically losing their tobacco licenses after 3 citations in 2 years, store owners were instead mandated to appear before the Finance Commissioner. The Commissioner then determines whether a license should be suspended [143].

During this hearing, the Coalition for a Smoke Free City endeavored to include restrictions on taxi-top advertisements. However, Councilmembers were reticent to regulate the taxi industry, remembering the industry's success at challenging the advertising restrictions in the Tobacco Product Regulation Act in 1993.

Shortly before the December 4 joint meeting of the Health and Youth Services Committees, the Giuliani Administration met with Speaker Vallone and sought to soften enforcement. However, the Administration's attempts had little effect on the Council's decision. Last minute changes to the bill re-instituted the original fines for illegal advertisements displayed by a store, but a different range, \$2500 to

\$10,000, was added for outdoor advertisements. The latter provision penalized the tobacco companies rather than the small business owners. Furthermore, if a store owner was cited three times in 18 months for advertising violations, his or her license would be automatically suspended. The final draft emerging from the December 4th Joint Health Committee and Youth Services Committee Meeting maintained the weaker provisions added at the third public hearing, but included a section prohibiting tobacco advertising associated with the sponsorship of a sporting or cultural event. This final draft was approved unanimously by both committees. On December 17, 1997, the full Council passed Intro 951 by a vote of 45-3. Voting in opposition because they considered the restrictions too broad were Sheldon Leffler (D), Walter McCaffrey (D), and Michael Abel (R), all from Queens.

The final draft prohibited tobacco advertisements on billboards within a 1,000 foot radius of schools, playgrounds, day care centers, and amusement arcades and also ended outside-facing tobacco advertisements from an area within five feet of store doors and windows. Each store selling tobacco products would have been allowed to post one generic black-and-white advertisement stating, "Tobacco Products Sold Here" [144]. The Department of Consumer Affairs and Department of Buildings were designated as the enforcement entities, fining retailers \$300 to \$1000 and outdoor advertisers \$2500 to \$10000 for each violation depending on the number of previous citations. A six-month phase-in was incorporated to give retailers and advertisers time to comply. The bill also banned the distribution of tobacco product promotional items, such as clothing or memorabilia, to minors throughout the city.

Once the bill passed City Council, the tobacco industry tried to lobby Mayor Giuliani to veto it. In particular, they requested the radius around youth-oriented locations be decreased from 1000 feet to 500. They argued that the 1000 foot radius would cover 90% of the city and therefore amount to a "de facto ban" on tobacco advertising.

The Mayor surprised the Council on January 5, 1998, by indicating for the first time that he might not sign the legislation. Giuliani asserted that he was concerned the bill would not withstand a legal challenge. He proposed to decrease the restrictive radius to 500 feet because the city had successfully defended a 1995 ordinance restricting adult businesses within 500 feet of homes, schools and churches. The change Giuliani proposed would have only codified the tobacco industry's existing voluntary code that prohibited such advertisements within 500 feet of churches, youth centers, schools and other youth-oriented places [145]. Giuliani also claimed that the bill was too onerous for businesses because it would go into effect in 60 to 90 days, whereas the Mayor preferred to allow a period of 6 to 8 months for implementation [146].

Council leaders insisted that Giuliani's concerns had been addressed with the Administration prior to the bill's passage. Deputy Mayor of Operations Randy M. Mastro retorted, "The Mayor is doing the responsible thing by carefully reviewing the constitutionality of the legislation" [146]. Mastro denied that Giuliani's second thoughts resulted from pressure from the tobacco industry.

After a bill's passage by the City Council, a mayor has 30 days to sign, veto, or do nothing to the bill, which effectively renders it into law. During this period, the Speaker of the Council and the Mayor can develop amendments, which then must be voted on by the entire Council. Eventually, Giuliani and Vallone bargained to leave the legislation intact but extend the phase-in time to six months. The mayor signed the newly amended bill into law on January 14, 1997, and it went into effect July 13, 1998 (Table 15)[147][148].

Table 15. DEVELOPMENT OF THE YOUTH PROTECTION AGAINST TOBACCO ADVERTISING AND PROMOTION ACT

Date/Event	Changes in legislation
April 30, 1997	<p>Initial draft:</p> <ul style="list-style-type: none"> • Prohibited all tobacco advertisements in publicly visible locations within 1,000 feet of any school, playground, playground areas in a public park, child day care center, children’s institution, youth center, or amusement arcade • Exception: stores can display a single black-and-white sign advertising tobacco products • Prohibited tobacco product promotions (t-shirts, caps, any items bearing a name or logo of any tobacco product) within same 1000 foot radius • Banned promotions of imported tobacco products throughout the city • Enforcement agencies: Departments of Health, Consumer Affairs, and Buildings • Penalty for violation: up to \$300 for first, \$500 for second, \$1000 and suspension of retailer’s cigarette license for third
December 2, 1997: Third public hearing regarding Intro 951	<p>Weakened:</p> <ul style="list-style-type: none"> • Removed ban on distribution of tobacco promotional merchandise within the 1000 foot radius • Instituted city-wide ban on distribution of tobacco promotional merchandise to minors • Removed provision which limited advertising outside of the 1000 foot radius to the single black-and-white (“tombstone”) ad • Instead of automatically losing their tobacco licenses after three citations in 18 months, store owners instead appeared before the Finance Commissioner after three violations, at which point the Commissioner would determine whether license should be suspended.
December 4, 1997: Joint meeting of Health and Youth Services Committees	<p>Strengthened:</p> <ul style="list-style-type: none"> • In addition to the original fines for illegal advertisements displayed by a store (ranging from \$300 to \$1000 depending on number of violations), added fines ranging from \$2,500 to \$10,000 for violations of the outdoor advertising provisions (i.e. billboards) • Reinstated automatic suspension of tobacco license if store owner cited three times in 18 months • Prohibited tobacco advertising associated with the sponsorship of a sporting or cultural event (city-wide)
January 6, 1998: Giuliani’s public hearing	<ul style="list-style-type: none"> • Added six-month phase-in for businesses to reach compliance

Table 15. DEVELOPMENT OF THE YOUTH PROTECTION AGAINST TOBACCO ADVERTISING AND PROMOTION ACT	
Date/Event	Changes in legislation
January 14, 1998: Giuliani signs Intro 951	Final draft: <ul style="list-style-type: none"> • Prohibits tobacco advertisements on billboards within a 1,000 foot radius of schools, playgrounds, or day care centers • Within the same radius, banned outside-facing tobacco advertisements from an area within five feet of store doors and windows, except for generic black-and-white advertisement reading, “Tobacco Products Sold Here” • Violators of storefront advertising provisions fined \$300 to \$1000 depending on number of previous citations • Violators of outdoor advertising provisions fined \$2500 to \$10000 • If retailer cited three times within 18 months, tobacco product license automatically suspended • Prohibits tobacco advertising associated with the sponsorship of a sporting or cultural event (city-wide) • Allows color advertising by store owners outside of 1,000 foot radius • Prohibits distribution of tobacco product merchandise to minors city-wide • Six month phase-in for businesses to comply

The same day Giuliani signed the bill, three groups filed a legal challenge against Intro. 951, charging that the law violated the First Amendment of free speech and was preempted by the Federal Cigarette Labeling and Advertising Act. The three groups consisted of the Advertising Freedom Coalition, the Greater Metropolitan Food Council, and the New York City Ad Club [148]. Howard Tisch, director of the Greater Metropolitan Food Council, admitted that the expensive lawsuit was partially financed by tobacco companies [149]. The group of plaintiffs argued that the law would deprive store owners of \$30 million they receive from the tobacco industry for advertising their products in their windows and storefronts [144]. The city decided to delay enforcement of the law until November 10, four months after the law was implemented, but the effective date was further delayed pending the outcome of the lawsuit when the plaintiffs succeeded in obtaining a court injunction [144]. During the debate over its passage the Small Business Congress of New York also threatened to challenge the law. Their lobbyist, Richard Lipsky, stated, “Under this bill, the contracts we have with tobacco manufacturers are effectively abrogated, and a great deal of income is going to be forfeited” [150].

On December 15 1998, Federal Judge Deborah Batts at the U.S. District Court in Manhattan ruled that Intro 951 was in violation of the Federal Cigarette Labeling and Advertising Act which states that only the federal government can address health concerns by regulating tobacco advertisements [149]. Batts based her ruling on a 1994 decision by the Second Circuit Court of Appeals, which overturned a provision of the New York City Tobacco Product Regulation Act. The provision under challenge required one public health message to be displayed for every four tobacco advertisements posted on publicly owned space. The Second Circuit court of Appeals found that this mandate violated the Federal Cigarette Labeling and Advertising Act [144].

The City appealed this decision, and on October 25, 1999, the 2nd U.S. Circuit Court of Appeals ruled in favor of the City [151]. The appeals court characterized the elimination of tobacco advertisements within a radius of child-oriented places as “akin to a run-of-the-mill zoning regulation”

[151]. This decision is expected to be appealed by the original plaintiffs.

Although Intro 951 may still remain under legal challenge, a provision of the 1998 Master Settlement Agreement banned tobacco advertising on billboards, rendering that issue moot. However, the Master Settlement Agreement did not address storefront or window advertising, which would be eliminated under Intro 951.

Conclusion

The major players in passing New York City tobacco control measures were grassroots groups, the City Council, and recently the voluntary health organizations and the Coalition for a Smoke Free City. The role played by Edith and Henry Everett is especially significant; by challenging the philanthropic behavior of the tobacco industry, they reduce the industry's credibility and influence in New York society. Reverend Calvin Butts also plays a significant role by resisting and calling attention to the tobacco industry targeting of the black community.

The success of the Clean Indoor Air Act demonstrated the effectiveness of media advocacy. The Koch bathhouse commercial basically forced Koch to react and take a position on smoking restrictions, and the radio advertisements holding the City Council members accountable for the Clean Indoor Air Act was instrumental in the proposal's passage. The way in which the campaigns were done was especially hard hitting; this was attributable to the talent of advertising expert Tony Schwartz.

The battle over the Tobacco Product and Regulation Act taught tobacco control advocates to be careful when drafting advertising restrictions, as they are susceptible to challenge because of the Federal Cigarette Labeling and Advertising Act. The tobacco industry uses this federal legislation to preempt states' and localities' abilities to restrict tobacco advertising. Because the tobacco companies used a taxi company to file suit against the restrictions, advocates were afraid to include taxis in future advertising restrictions. However, tobacco control advocates should realize that the industry will always find some group to represent their interests in a lawsuit. Advertising restrictions should be drafted with this in mind, rather than with concerns over a certain group of businesses who will be affected by the restrictions.

The Smoke Free Air Act has not been challenged in court because nothing preempts local legislatures from strengthening their smoking restrictions. However, the industry is intent on changing this by passing state legislation that preempts the ability of local governments to strengthen such restrictions. NYTRA, a restaurant association supported by the tobacco industry, not only campaigned against the City's Smoke Free Air Act, it accepted money from the industry to lobby for preemptive legislation at the state level. Local governments must be aware of legislation that will remove their authority to create smoking restrictions.

Advocates must be careful to distinguish between tobacco-supported restaurant groups and independent organizations such as the New York State Restaurant Association. NYSRA's main concerns with the Smoke Free Air Act were that restaurants in neighboring localities without smoking restrictions would gain customers at the expense of New York City, and that restaurants with bars or separately ventilated rooms were given a competitive advantage. NYSRA was much more flexible than NYTRA (the industry-supported organization), but was not pleased with the provision exempting small

restaurants. These complaints offer good arguments to remove these exemptions and thereby remove all competitive advantages that were created by the law.

During the debate over the Smoke Free Air Act, advocates did an excellent job of keeping the argument focused on health issues, and most importantly, discrediting the restaurant association and other opposition campaigns. Again, media advocacy was effective in revealing the nature of the opposition campaign and its connections to the tobacco industry. By doing this the opposition lost credibility.

Another lesson of the Smoke Free Air Act is that the fight continues even after the passage of smoke-free restaurant restrictions. As soon as the issue arose, the industry released studies demonstrating that New York would suffer a negative economic impact. Advocates had to counter these with examples from other states and localities which demonstrated that such claims were never realized. After implementation, the industry released more studies to support their claim that the restaurant industry suffered from the smoke-free regulations. Advocates used non-tobacco sponsored research to counter these claims, and tried to discredit the industry studies by revealing the sponsor of the research. This was especially important because the industry wanted to portray the legislation as detrimental to the economy so that they had an argument for amending the bill to contain weaker provisions, and could argue against similar bills in other localities considering smoke-free air laws. Even now, with many non-industry studies demonstrating that no negative economic impact occurred, the industry claims that the restaurant business was adversely affected.

The passage and implementation of the Youth Protection Against Tobacco Act again demonstrated the challenges with passing advertising restrictions. As with the Tobacco Product and Regulation Act, the law was challenged in court under the Federal Cigarette Labeling and Advertising Act. The decision reached in the case of the TPRA was used as a precedent to overturn YPAT in the first decision, but on appeal, YPAT was determined to be as legitimate as any other zoning restriction. The key was to focus on the industry's targeting of children, rather than focusing on the health reasons for restricting advertising.

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CHAPTER EIGHT

LOCAL ACTIVITY OUTSIDE NEW YORK CITY

Because the tobacco industry's influence over the state legislature has prevented stronger clean indoor air measures from passing, localities have been forced to pass their own measures to protect citizens from secondhand smoke. (Such local action is probably the best way to implement tobacco control legislation anyway.) The tobacco industry has poured millions of dollars into fighting the local campaigns for clean indoor air, proposing weak "accommodation" legislation to compete with stricter measures, proposing amendments to strong legislation already passed, and challenging local Board of Health regulations in court. The coalitions developed by ASSIST have been instrumental in pooling resources among advocates to fight industry tactics. Counties passed smoking restrictions either through their legislature or through their Boards of Health, regulatory authorities with limited jurisdiction over their county's sanitary code. The battles over local ordinances in New York has illustrated the full range of industry strategies and tactics in fighting local regulation of smoking and seeking to get them overturned after they are passed.

Suffolk County

Suffolk County has had a long history of passing progressive legislation regarding public health and the environment. For example, Suffolk has ordered the recycling of newspapers and restricted the use of specific plastics, and it has led the way in instituting smoking restrictions [1]. Neighboring Nassau County and New York City generally follow its lead in passing tobacco control measures. Unlike other areas of the state, where Republicans generally vote against tobacco control laws and Democrats support them, in Suffolk and Nassau Counties these laws are often a bipartisan effort. Indeed, without Republican support these laws would never be passed on Long Island, as Republicans hold the majority in both the Nassau and Suffolk legislatures. The bipartisan nature of these efforts contributes to the ambivalence the respective County Legislatures demonstrate towards these laws. Because no one party stakes a claim to the tobacco control issue, sponsors cannot rely on votes to follow party lines, although partisan skirmishes are not unusual.

The First Effort to Pass a Clean Indoor Air Law

Suffolk's efforts to restrict smoking began in 1975, when the Board of Health banned smoking in hospitals, classrooms, and supermarkets [2]. In August 1984, the Suffolk County legislature enacted "A Local Law to Limit Smoking in the County of Suffolk." This legislation prohibited smoking in many public places such as libraries, commercial establishments, elevators, public transportation, public areas of health care facilities, indoor areas used for recreation or entertainment, and enclosed workplaces [3]. However, it generally allowed for the exemption of separately ventilated smoking rooms [4].

A different smoking restriction had been introduced by Suffolk County Legislator Ira Hariton (D-West Islip), who submitted his original proposal to the 18-member legislature in April of 1983 and again in 1984. This proposal ended smoking in restaurants with 35 seats or more, theaters, conference rooms, places of public assembly, large offices and public buildings. Each citation cost \$25 [5].

The tobacco industry fought this regulation through direct lobbying of legislature members, addressing the print media, forming coalitions of related industries, and feigning grassroots opposition. Ric Scanlan from Lorillard Tobacco led the lobbying effort, finding little success with the Democratic members of the legislature. However, Scanlan targeted seven lawmakers who “could be favorably impacted prior to the September 27th vote” [6]. A letter from the Tobacco Institute’s Vice President of State Activities to the government affairs directors and head counsel of the Tobacco Institute, Philip Morris, Lorillard, Brown and Williamson and R.J. Reynolds demonstrates the vast network the industry used to find connections to key legislators:

Initial investigations reveal one of the “targetted” council members as a law school classmate of one of our Area Directors. Moreover, a firm frequently engaged in the sampling of our products alleges to have a close personal relationship with another of the “targetted” legislators. Therefore, this is to ask your review of the “targetted” legislators, as well as to inquire of your suppliers, subsidiaries and advertisers, or any others, who might have additional knowledge of those targetted. (underline in original) [6]

The industry also arranged for Howard J. Rubenstein, the Tobacco Institute’s public relations firm, to meet with the Long Island newspaper *Newsday* to discuss an advertising effort in the paper. An industry document describes the coalitions formed in response to the law: the restaurant association, tavern association, bowling proprietors, retail food merchants and Chamber of Commerce, among others. Fostering coalitions within industries affected by the bill to further their own interests is one of the industry’s most frequent strategies in opposing local ordinances. An industry document states, “Approximately 500 corporations having in excess of 100 employees and operating within Suffolk County have been targeted for a specialized mailing.... Telephone calls and/or personal visitations will follow the mailing in order to elicit opposition to Resolution #1423” [6]. Another familiar strategy is the use of the Tobacco Action Network to simulate a “grassroots” effort by calling and corresponding with legislators. According to Tobacco Institute executive Mike Kerrigan, “Approximately 300 TAN members...have been participating in letter writing efforts since the Spring” [6].

These efforts were successful in killing Hariton’s 1983 bill, but in March 1984, the proposal was re-introduced as Resolution No. 1158 and passed the legislature by a vote of 13-5. The industry reacted by focusing its efforts on obtaining a veto from Republican County Executive Peter Cohalan, and ensuring that the legislature would not be able to acquire the number of votes necessary to override the veto. Industry consultants and executives contacted state and local Republican county officials, executives at the Grumman Corporation (the largest employer in the county at the time), and hired two lobbyists (Robert Ryan of Ryan & Ryan Public Relations and Walter Conlon) to influence Cohalan [7].

Industry involvement in local campaigns opposing smoking restriction is often suspected because of the professionally-organized manner of the campaign and the appearance of industry public relations consultants. An industry report detailing efforts behind the orchestration of witnesses at the April 1984 public hearing confirms such suspicions in regards to Suffolk County:

- Develop and Coordinate coalition witnesses to attend 4/9/84 public hearing
- Fred Sampson of the New York State Restaurant Association will appear along with five other witnesses from the restaurant association.
 - Philip Morris has impacted the Grumman Corporation to urge LIA [the Long Island Association] to testify publicly.
 - Walter Oberstebrink if scheduled to testify for the LIA.
 - Mike Esposito of the Tavern Association has been contacted and will testify at the public

hearing

- The Bakery, Confectionary and Tobacco Union has formally expressed their opposition.
- The Huntington Chamber of Commerce will provide six witnesses for the public hearing
- Bowling proprietors will testify and meet with the County Executive [7]

In addition, Philip Morris, R.J. Reynolds, Lorillard, Brown & Williamson and Liggett & Myers were contacted to send employees to the public hearing [7]. Letters received from the Restaurant Association, Chambers of Commerce, Labor Unions, Grumman Corporation, Tavern and Liquor Dealers, the Long Island Association, Baker Confectionery and Tobacco Workers Union were the result of a coalition letter writing campaign initiated by the industry [7]. The tobacco companies also urged its own employees living in Suffolk County to write to Cohalan to urge a veto [8]. Phoenix Marketing was contracted to collect 20,000 signatures in opposition to the law prior to the public hearing [7].

These efforts were rewarded by Cohalan's April 26 veto of the no-smoking bill. Cohalan defended his decision by arguing that the exemption of bars and restaurants with fewer than 35 seats unfairly favored these establishments, and therefore violated the state and federal constitutions. He also cited that the law would have a negative economic impact on restaurants with 35 or more seats. Cohalan also found issue with the provision which exempted offices with fewer than 75 employees from prohibiting smoking, arguing that because of this provision, the bill failed to achieve its fundamental objective of protecting Suffolk workers. Finally, Cohalan stated that it would be difficult to enforce the law and that the law was a waste of taxpayer money [9].

To sustain Cohalan's veto and discourage the twelve votes needed for a veto override, the industry again asked its employees to contact County legislators and voice their support of Cohalan's decision [10][7]. The May 8 vote came out one vote short of the two-thirds needed.

In June 1984, Legislator Michael D'Andre and nine other sponsors introduced Resolution 1639-84, another clean indoor air law more restrictive than Hariton's. The proposal was unanimously voted out of the Health Committee, and a public hearing was scheduled before the full floor vote. Tobacco companies immediately requested their employees to again contact their County legislators [11]. One of the most contentious compromises was the exemption for restaurants which installed air-cleaning systems. Suffolk County Health Commissioner David Harris lobbied against the provision, but when the legislature adopted the law on June 26, 1984, the provision remained [12].

The legislature had made it clear they wanted smoking restrictions passed, with or without Cohalan's consent. Therefore, Cohalan capitulated and signed the bill into law, which went into effect August 13, 1984. The ordinance ended smoking in places of public assembly, public buildings, conference rooms, theaters, and arenas, and in offices employing 50 or more people. In these offices, smoking was ended in conference and meeting rooms, rest rooms, hallways, and elevators, and general work areas, except for areas specifically designated in writing as a smoking area [4]. Employers of more than 50 people had to designate half of their cafeteria or lounge space as nonsmoking. Restaurants with 50 or more seats were required to set aside 20% of their seating for nonsmokers unless they provided adequate ventilation. Violations were punishable by a \$25 fine and the County Department of Health was designated the enforcement agency.

In 1988, after conferring with Suffolk Health Commissioner Dr. David Harris, Suffolk County Executive Patrick Halpin proposed to strengthen Suffolk's smoking restrictions and bring them to the

same standard as those in Nassau County and New York City. His proposal mandated that restaurants and bingo halls designate 70% of their seating capacity as nonsmoking, and removed exemptions for restaurants with air-cleaning systems. Such restaurants would have seven years from the date of their cleaning system installation to comply with the new restrictions. Halpin explained that this provision was included because the Suffolk Health Department had determined that such systems were ineffective [13]. Health Commissioner Harris stated, “We’ve never been in favor of the air cleaners. They are not as effective as nonsmoking sections and smoking is the chief preventable cause of indoor pollution” [12]. The bill also ended smoking in limousines, taxis, and restricted the activity in bowling alleys and schools. Penalties for violations would increase from a fine of \$25 to a fine of \$500.

The proposal was rejected by the Legislature’s Health Committee, which decided that because the 1984 restrictions exempted restaurants with air-cleaning systems, and because many restaurateurs installed such systems to enjoy the exemption, it was unfair to repeal the exemption. In 1989, however, the exemption was nullified when the State Clean Indoor Air Act was implemented. The state law was also more stringent than Suffolk’s in that they extended smoking restrictions to all offices instead of exempting those with less than 50 employees. Furthermore, the Suffolk provisions required restaurants only set aside 20% of seats to nonsmokers, but the state law required restaurants to dedicate enough seats to meet “customer demand”, which was generally accepted as 70% of seating capacity.

In these circumstances, where a provision of the state law was stricter than the local law, the state provision superseded the locality’s. However, restaurateurs were relatively unconcerned, aware of the lax enforcement effort by the County, which would also be responsible for enforcing the state law. Between 1984 and mid-1989, 239 complaints were registered in Suffolk County, but no restaurants had been fined [14].

Vending Machines

In 1990, Health Commissioner Dr. David Harris requested that the Board of Health consider banning cigarette vending machines in places such as supermarkets and luncheonettes and keep them restricted to areas not accessible to children, such as bars and clubs. Harris’ proposal stemmed from an appeal by Dr. Louis Sullivan, U.S. Secretary of Health and Human Services, who called for states to attack the problem of youth smoking with policies such as vending machine bans [2]. At the time of Harris’s proposal, 59 local governments had implemented some form of restrictions on vending machines [2]. The Board agreed to allow Harris to draft a formal proposal to amend the public health code for the September meeting, maintaining that the issue lay within the Board’s authority rather than the county legislature’s.

Traditional opponents of such restrictions, such as the Tobacco Institute, argued that vending machines contribute a minute share to teenagers’ cigarette supply. They cited a 1989 industry-sponsored survey of 1,000 teenagers which concluded that only 9% of teen-agers used vending machines to access cigarettes [2]. However, Thomas Lauria, spokesman for the Tobacco Institute, told reporters his organization would not oppose the proposal because it was not a total ban [15]. Vending machine officials claimed that only 3% of youngsters get their cigarettes from vending machines [15] and the president of the New York State Automatic Vending Association argued that youth do not use vending machines to obtain cigarettes because the price per pack is 10 to 20 cents higher than at convenience stores [2]. Vending industry representative also estimated that Harris’ restrictions would cost the county

and state \$5.2 million in sales and excise taxes [2]. However, a few industry officials supported the legislation to demonstrate concern for the health of minors.

On September 5, 1990, Legislator and member of the Board of Health Allan Binder (R-Dix Hills) announced his proposal to ban cigarette vending machines from supermarkets and laundromats, and mandate locking devices for the machines in places like restaurants. At the time, the strictest New York vending machine restrictions were in Erie County, where vending machines were mandated to be placed in supervised areas [15]. Binder's measure had 10 co-sponsors, and also banned the distribution of sample cigarettes to minors.

At first, public health groups such as the American Heart Association and the American Cancer Society, publicly displayed support for the bill, even appearing with Legislator Binder at a press conference. However, two weeks after the introduction of the bill, both groups determined that the bill was not stringent enough and called for stricter measures [16]. They asserted that they were given little information and short notice before appearing at the press conference, and after researching the measure, determined it was an insufficient attempt to address the problem of youth access to tobacco. They pointed to the ineffectiveness of similar laws in Utah and Washington state. Frank Sala, representative for the Long Island Chapter of the American Cancer Society, explained, "We're not interested in creating new legislation based on unproven or ineffective methods. We want to stop the sale of cigarettes to minors, period" [16].

The American Lung Association, which had also endorsed Binder's proposal at the press conference, did not immediately withdraw support for the bill but suggested a six-month trial period to determine the efficacy of lock-out devices [16]. A week later, they withdrew their support because Binder did not extend to the rest of the population the provision banning free samples to minors, an amendment all three voluntary health agencies insisted on. Health Commissioner Harris, despite his original proposal to ban all vending machines in youth-accessible areas, continued to demonstrate support for Binder's proposal.

In response to the demand for a stricter measure, Democratic Legislator Sondra Bachety (D-Babylon) proposed a total ban on vending machines and free sampling on October 3, 1990. Binder expressed opposition to Bachety's bill because he believed it would be successfully challenged in court and because he considered Bachety's proposal an attempt "to help her floundering campaign for county clerk" [17]. Bachety countered, "The fact of the matter is that we can't enforce Mr. Binder's law with nine public health sanitarians. If we ban the machines we won't have anything to enforce" [17].

On October 10 1990, the Legislature voted 15-3 in favor of Binder's proposal. The same night, Bachety's bill was formally submitted. The American Cancer Society and American Heart Association announced they would lobby Democratic County Executive Patrick Halpin to veto Binder's measure [18]. The Executive Director of Suffolk's regional chapter of the American Heart Association, Terri Kivelow, pointed out that Suffolk's legislation would set a standard for state regulation. Kivelow asserted that "weak legislation locally will make it much harder on the state level to get a strong bill through" [18].

The extensive lobbying of the voluntary health organizations and other health groups, and their domination at an October 22 hearing convinced Halpin to issue a veto on Binder's bill on November 8

despite the likelihood of a veto override. Halpin concluded that the legislation was “poorly drawn” and “does not address the problem and will be impossible to enforce” [19]. Binder retorted that Halpin’s veto was “nothing but a photo opportunity” [19].

Despite heavy lobbying from the voluntary health agencies and local high school students, on November 13, the Republican-dominated County Legislature voted 13-4 (with one absentee) to override Halpin’s veto. The vote followed party lines except for three Democrats who voted against their party comrade. They asserted that they supported Binder’s bill because they were sure Bachety’s bill would not pass, and they preferred some vending machine restriction as opposed to none [20]. Indeed, Bachety’s bill eventually failed in the legislature, although she vowed to reintroduce it once it became evident that Binder’s measure failed to prevent youth from obtaining cigarettes from vending machines [21]. Binder’s measure went into effect on July 1 1991.

When the state’s Adolescent Tobacco Use Prevention Act went into effect on September 6, 1992, all vending machines were restricted to places inaccessible to children. Again, because the state law was stricter than local law, it superseded Binder’s measure and did not allow for locking devices on machines. ATUPA also made the sale of tobacco products to minors a civil offense, and placed County health officials in charge of enforcement, a role formerly played by local law enforcement officers. Instead of facing imprisonment and/or fine, ATUPA subjects store-owners to a civil fine and the possibility of losing their tobacco license. In 1993, recently elected Republican County Executive Robert Gaffney, announced he would make ATUPA enforcement a priority. Gaffney’s enforcement effort consisted of teenagers approaching clerks to buy cigarettes in undercover operations monitored by health officials. His disclosure of these intentions coincided with his personal attempt to stop smoking. Until that point, County police had not initiated an enforcement sting since 1990.

The Smoke Free Air Act

In March 1994, County Legislators Nora Bredes (D-Stony Brook) and Paul Tonna (R-Huntington) sponsored a bill ending smoking in all restaurants (with the exception of separately ventilated smoking rooms) and in public places such as day care centers, schools, bowling alleys and sports and recreational facilities. The bill, known as the “Smoke Free Air Act” also restricted tobacco products in stores to areas accessible only to store owners, and required stores selling such products to post an 11-by-17 inch sign warning about the hazards of smoking [1]. County Health Commissioner Dr. Mary Hibberd stated, “I could not write a better prescription for public health than has been written in this proposed law” [22].

Opponents included Patricia McCrann, head of Philip Morris’ public relations firm, McCrann Public Affairs, and the Long Island Hospitality and Tourism Association (also called the Long Island Hospitality Board [1][23]). McCrann Public Affairs appeared to orchestrate the efforts of the Long Island Hospitality and Tourism Coalition [23]. The industry remained discreet during the hearings for the bill, preferring to allow restaurant owners to voice their arguments for them. Claire Millman of the Nassau-Suffolk Tobacco Control Task Force recalls seeing industry lobbyists listen to testimony during the public hearings and furiously writing notes to restaurateurs or business people who were going to testify and prompting them to “Say this” [24].

On June 7, the Suffolk Legislature voted 12-4 in favor of the law, with one abstention and one

member absent [25]. Similar to events during the 1984 battle over clean indoor air, opponents of the bill focused their efforts on obtaining a veto from County Executive Gaffney. In addition to attending the public hearing on June 20, opponents requested a personal meeting with Gaffney. Legislator Nora Bredes maintained that the opposition stemmed from tobacco industry orchestrations.

Indeed, Philip Morris' New York lobbyist kept a team of industry executives briefed on the events in Suffolk and stated in her emails, "We need to continue the smoker calls and generate as many restaurant calls into the County Execs office as possible during the time between now and then [Gaffney's deadline to veto the bill]," and "The legislature will be holding a hearing on the pos [point-of-sale] restrictions tomorrow JS [Joshua Slavitt, Manager of Issues Planning at Philip Morris] and our local lobbyists are working with pop [point-of-purchase] witnesses" [26] [27]. Meanwhile some supporters of the measure wanted to strengthen the bill further, by extending the smoking restrictions to bars and removing a provision which allowed bowling alleys to permit smoking during all-adult league nights [22].

Despite pressure from the industry and restaurants, Gaffney signed the measure into law on June 23, 1994. The restrictions were not strengthened to include stand-alone bars or adult-league bowling nights, and opponents were successful in removing the provisions restricting access to tobacco products to store employees only [28]. The law made restaurants 100% smoke-free except for separately ventilated smoking rooms, ended smoking in public and private schools, as well as indoor recreation and sports facilities. Violations were punishable by a \$500 fine.

Even after the bill passed by a two-thirds majority and was signed into law by Gaffney, opponents continued to protest the measure, hoping to persuade the legislature to amend the bill before its scheduled implementation date of January 1, 1995 [29]. Philip Morris conducted a misinformation campaign, telling people that the bill was "being negotiated" when in fact, it was not [28][30]. After obtaining individuals' opinions on the smoking restrictions during a marketing survey, Philip Morris telemarketers would patch disgruntled smokers into legislators' offices [28]. Nora Bredes wrote a letter to William R. Murray, President of Philip Morris, Inc., complaining about the misinformation propagated via their legislation hotline. She charged, "Your 'Political Issues Hotline' organizers have been telling tobacco partisans to call against '1343-94' (the resolution number) and informing them that the bill is 'being negotiated.'" Bredes continued, "Not only did callers seem purposely misinformed, they were verbally abusive and threatening" [30].

It seems the Philip Morris strategy had two effects: it spread disinformation and therefore made it more difficult to implement the law, and it created controversy over an issue that had already been resolved by the legislature. Thus, the industry was successful in turning the issue back into a debate, and thereby making the legislation more pliable. The industry also began broadcasting disinformation about the negative economic impact similar laws had on other localities.

For example, local restaurateur Paul Greenberg published a letter to the editor in *Newsday* citing the industry claim that Beverly Hills suffered a 12-30% decline in business after enacting 100% smoke-free restaurant legislation [31]. Marguerite Gebhardt, on the board of directors for the American Cancer Society, wrote a letter in response, which was also published in *Newsday*. It criticized the survey which established the 30% myth, and countered it with information from another study which showed only a temporary decline of 6.7%. In addition, she pointed out that the same claim was made about Bellflower,

CA, which also passed smokefree legislation. In this case, the 30% statistic came from a survey prepared by a Philip Morris public relations firm. Again, the figure was disputed by a study of sales receipts, which demonstrated that restaurant revenues rose 2.4% [32].

On September 20 1994, Legislator Thomas Finlay (R-East Islip) formally submitted an amendment to the clean indoor air law which would allow smoking in 40 percent of restaurant seats as well as the bar area. Bredes demonstrated contempt for his proposal: “His so-called amendments are genuflecting to the industry and giving them everything they want” [28].

In an October 1994 public hearing which lasted 3 ½ hours, restaurateurs continued to cite the thirty percent claim and complained that installing smoking rooms could cost \$30,000 to \$80,000. Approximately 22 witnesses spoke against the Bredes/Tonna legislation, and expressed their preference of Finlay’s measure. These witnesses were goaded on by 60 audience members wearing stickers reading “It’s my business,” the same stickers Nassau County restaurant owners would don a year later to protest the Nassau Board of Health smoking restrictions [33][34].

In October, a *Newsday* article revealed that the filings in the Suffolk County Ethics Commission indicated that Philip Morris would pay \$30,000 to McCrann Public Affairs and Statewide Corporate Strategies, another lobbying firm [35]. The New York State Temporary Lobbying Commission filings indicated that Philip Morris Management Corporation/Kraft Foods paid McCrann \$98,956 for 1994. Legislators would agree to meet with a group of disgruntled restaurateurs, and find that the meeting included Patricia McCrann, who opened and closed the meeting and appeared to orchestrate the issues raised by the restaurant owners [36]. McCrann denied working for Philip Morris on the smoke free restaurant legislation and insisted she was only working for the Long Island Hospitality and Tourism Coalition and the United Restaurant, Hotel and Tavern Association (formerly the New York Tavern and Restaurant Association). However, both of these organizations are financially supported by the tobacco industry [23][37].

The United Restaurant, Hotel and Tavern Association was a major opponent of the New York City Smoke Free Air Act, and posted several advertisements opposing the legislation in the New York Times. Later it was determined that the Tobacco Institute paid \$200,000 for the ads, which only listed URHTA as their sponsor [38][36]. The organization was further discredited when Joe Cherner revealed that they did not have an office or a telephone number in New York City and that its Manhattan, Queens, Brooklyn, Bronx, and Staten Island chapters were all defunct. Nora Bredes cited a letter that was also submitted before the New York City hearings, which revealed that a restaurant group in Beverly Hills had been entirely financed and organized by the tobacco industry [36].

Bredes and Tonna, and the voluntary health agencies tried to undermine the opposition campaign by exposing the tobacco industry’s intimate involvement with these groups and their deceptive tactics (such as the 30% claim). These efforts were rewarded in December, when the Legislature’s Health and Human Services Committee decided not to consider Finlay’s amendment and thereby left the ban free of amendments [39]. However, Legislator Angie Carpenter (R-West Islip) had introduced a moratorium bill in October that was still under consideration. This bill would delay implementation of the law for a year to allow restaurants to change their configuration or add a smoking room to conform to the smoke free restaurant ordinance [40].

Suffolk's smoke free restaurant legislation went into effect on January 1, 1995, but a hearing for the moratorium bill was scheduled for January 24. Because the bill included a six-month phase-in for restaurants, Suffolk health officials instructed restaurants and bars to decide by February whether they would be smoke-free or begin modifying their buildings to conform to the law. Establishments choosing to alter their configuration were required to submit plans for renovation to the county.

Efforts to Amend the Smoke Free Air Act

The following March, ten legislators signed and filed a petition to exempt restaurant bar areas from the already-implemented clean indoor air act. This amendment, sponsored by Thomas Finlay (R-East Islip, would only require that bars supply separate ventilation systems and allowed the smoking area to be a minimum of four feet from the dining area or separated from it by a floor-to-ceiling partition. In response, Tonna and Bredes offered a compromise which temporarily exempted bars for three years [41]. The compromise proposal passed the health committee by a 5-2 vote.

On April 4, the County legislature killed the Tonna/Bredes proposal, leaving only the Finlay amendment to be considered. Both measures got 9-9 votes, but Finlay's stayed alive because of parliamentary maneuvering: the bill received a certificate of necessity from the County Executive and therefore went back to committee when it failed to garner the 12 votes necessary for passage [42]. Tonna and Bredes were unable to secure a certificate, and when they motioned to table the bill, the motion failed by another vote of 9-9. On May 3, the legislature voted 10-8 to approve Finlay's amendment which allowed smoking in bars until June 30, 1998 [43]. Until then, bars can include 20% of a restaurants seats, and must maintain a separate exhaust system and remain at least six feet from the dining area or be separated by a ceiling-to-floor partition. The vote put to rest a rancorous debate which plagued the legislature for over a year. Donald Blydenburgh (R-Smithtown), the legislature's Presiding Officer and the co-sponsor of the Finlay amendment, stated, "I've never seen an issue that has been so divisive to the [Republican-Conservative] caucus...or as distracting" [43].

That same day, a *Newsday* article reported that over 80 percent of Suffolk County restaurants were complying with the new smoking restrictions. Health officials issued only 130 violation notices. The health department gave restaurants until April 3rd to complete construction on a separately ventilated smoking room, which only 150 did out of the 200 who originally reported this as their intention [44]. Compliance was determined mostly by routine inspections by the county sanitarians, but also through customer complaints.

Tonna and Bredes did not challenge the new amendment, but in December, Tonna proposed a bill which amended Suffolk's ethics laws so that lobbyists were prohibited from giving elected officials meals, campaign donations, loans, and other contributions. The legislation passed on December 18 1995 [45]. The legislation exempted unions and companies doing business with the county. Many perceived this bill as retaliation of the heavy lobbying McCrann Public Affairs engaged in over smoke-free restaurants and bars [45].

In 1998, as the bar exemption neared sunset, a relatively new legislator named Fred Towle (R-Mastic) sponsored a bill which would have extended the exemption indefinitely. He argued that the current smoking restrictions were more reasonable and equitable for restaurants: "I really think the law currently in place is fair to all sides. It not only protects people's health but Long Island's economy"

[46]. The measure passed 11-7, but anti-tobacco groups such as the Alliance for Smoke-Free Air, Smokefree Educational Services and the Nassau-Suffolk Tobacco Control Task Force and the American Cancer Society staff and volunteers successfully lobbied Suffolk County Executive Robert Gaffney to veto the measure in late May. Gaffney's veto came as a surprise, because when he signed the original smoking restrictions passed in 1994, he asked for an exemption for restaurant bars [46]. Joe Cherner, President of Smokefree Educational Services, believed that Gaffney's decision was resolved after advocates arranged a meeting with a former bartender-waitress, Suzanne Hyams, who at 32 was suffering from emphysema because of her years working in smoke-filled restaurants [46].

Restaurant owners were unable to gather the 12 votes necessary to override Gaffney's veto; over 200 of them appeared at the meeting, wearing yellow "SAVE OUR BUSINESS" stickers and brandishing signs reading, "OVERRIDE THE VETO!" Anti-smoking advocates also appeared, wearing their own hot-pink lapel stickers which read, "Just for the Health of it" [47]. The override attempt failed by only one vote [48]. The following week, the Nassau-Suffolk Tobacco Control Task Force, a local ASSIST coalition, printed a full-page, color advertisement in the New York Times thanking the legislators who voted against Towle and Gaffney himself for vetoing the proposal [24].

On July 1, the same day the restaurant bar phase-in was implemented, a group of eight restaurants filed suit against the ordinance in U.S. District Court in Uniondale. The group claimed the legislation was a violation of the 14th Amendment because it made an irrational distinction between taverns and restaurant bars. They complained that because the law exempted bar owners, restaurant owners were being held to a higher standard. This was the first time such a claim had been made in a federal court, although similar claims have been argued in state courts. Kenneth A. Novikoff, the Uniondale attorney representing the restaurants stated, "We feel the law enacted by the Suffolk County legislature is unconstitutional. Moreover, it will cause immediate economic harm to the proprietors of these restaurants and their employees" [48]. Novikoff was a partner at Rivkin, Radler & Kremer, a law firm with tobacco industry ties [49]. Partner Arthur J. Kremer operated Statewide Corporate Strategies Inc., a lobbying firm which listed Philip Morris as its only client [50].

On July 6, federal court Judge Jacob Mishler issued a temporary restraining order against the phase-in for restaurant bars. The restraining order lasted until Mishler's hearing the following week, at which he refused to extend the implementation date further by granting a preliminary injunction [51]. The restaurants appealed, and were able to obtain another temporary restraining order from the Second Circuit Court of Appeals in Brooklyn, extending the implementation date to September 1st.

However, the restaurateurs were again unsuccessful in convincing the three-judge panel to delay implementation further while they considered the appeal [52]. This would have given the tobacco industry the possibility to attain the one vote needed to override an Executive veto if a pro-tobacco legislator was elected to Bredes' vacant seat. The industry wanted to delay implementation of the law until Bredes was replaced with a sympathetic legislator, at which point they could reintroduce the Towle Amendment and pass it without fear of a successful veto from Gaffney. Once the legislation actually went into effect, it would be much more difficult to overturn. But the court decided against further delay of implementation and the restaurant phase-in went into effect immediately after the appeals court threw out the lawsuit on September 2. Towle promptly reintroduced his amendment after the court's announcement.

Since the September 2, 1998 decision, Suffolk's law has been fully implemented and the county became the first municipality in New York State to ban smoking in restaurant bars which are not enclosed and separately ventilated [53]. The Suffolk County Health Department enforces the Smoke Free Air Act mainly through the routine inspections of restaurant and tavern establishments conducted by the county's nine sanitarians, but also through customer complaints. Violations result in citation; if the responsible party fails to correct the problem, they are fined up to \$500 per day of noncompliance [54].

Legislator Nora Bredes commented, "What I learned clearly from this effort is the organization and perseverance that a well-funded lobbyist can buy. While there were restaurants that were genuinely concerned, the push, the organizational effort, the effort to get mailings out, were the result of having McCrann Public Affairs [Philip Morris' public relations firm] behind the effort" [55].

Advertising Restrictions

In March 1998, Nora Bredes and Paul Tonna sponsored another tobacco control bill restricting point of sale advertising which mandated store owners to remove cigarette ads within two feet of candy racks and to keep tobacco products in areas accessible only to store employees (i.e. locked cases). The stores affected were gas stations, pharmacies, stationery stores and convenience stores. This measure threatened the annual \$3000 to \$6000 payments the tobacco companies paid stores to place their products in a self-service display on the counter [56].

The legislature approved the bill on November 2, and Gaffney signed it on November 20. It was the first such marketing restriction to be passed in New York State [57]. Gaffney's decision was influenced by a recent enforcement effort of the minor access laws. In October, the Suffolk Health Department executed a series of stings funded by a \$2 million state allocation to ATUPA enforcement. Richard Myer, head of the county's enforcement program stated, "We have found in doing our stings that the likelihood of an illegal cigarette sale to a minor increases by approximately 50 percent when the youth simply picks the package of cigarettes off of a display and hands over the money" [58].

The same day the legislature approved her bill, legislator Nora Bredes announced she was moving from Suffolk and consequently resigning her position on the legislature [59]. Her resignation had been expected since March when she disclosed that her family would be moving upstate. In January, Democrat Vivian Fisher won Bredes' former seat in a special election.

Tobacco Settlement

Suffolk County expects a 25-year total of \$669 million dollars from the multi-state settlement agreement. A spokesman for County Executive Robert Gaffney stated that Gaffney would like to use the money for property tax stabilization, although he also believed some of the money should be dedicated to health care and smoking-related diseases [60].

Nassau County

Nassau and Suffolk Counties together encompass all of the Long Island area, the middle class suburbs of New York City. Both counties have been very progressive in passing tobacco control laws,

with Nassau generally following Suffolk's lead. Until 1996, Nassau County policy was produced by a Board of Supervisors. In 1993, when the constitutionality of the Board's weighted voting system was challenged, the U.S. District Court in Uniondale ordered the county to create a more equitable form of government [61]. Observing this mandate, the County implemented its first legislature on January 1, 1996 .

Until that date, the Board of Supervisors had left clean indoor air issues to the County Board of Health. On January 31, 1986, the Board of Health ended smoking in most public places and restricted it in workplaces. Employees could still smoke in enclosed offices and designated smoking areas. The ordinance exempted bars, private functions, and areas of bowling alleys. The provisions required restaurants to designate at least 50% of the seating capacity as smoke-free unless the area was adequately ventilated, in which case only 25% of seating capacity had to be smoke-free [62]. The Board of Health originally proposed a total ban on restaurant smoking, but after encountering heavy opposition from the tobacco industry, adopted the milder restrictions. Nonetheless, this regulation was a fairly stringent for its time, and New York City, which was considering restrictions of its own, paid close attention.

The first month of implementation, health officials received approximately 15 complaints a day regarding the workplace provisions, but by June the same year, the complaints dropped to six per day. Other complaints numbered approximately ten a day at the onset, but by June decreased to four daily [63]. Most complaints came from beauty parlors, where customers were confined for extended periods of time and could not leave to smoke outside.

Board of Health Actions

The Board of Health decided to strengthen the regulations and pursue their original proposal of 100% smoke free restaurants in 1987. At the time, only Beverly Hills, California and Aspen Colorado had such stringent regulations [64]. The Board of Health began reconsidering the 100% smoke free restaurant bill when the Nassau-Suffolk Diner Restaurant Owners Association asked them to reexamine the issue. The Association complained that the current law, which required 50% of the restaurant be set aside for nonsmokers, was onerous to enforce. Jim Green, a lawyer for the group added, "It's very expensive to maintain a 50/50 split" [64]. These complaints stand in stark contrast to industry claims that 100% smokefree policies were more difficult and costly to enforce than some type of accommodation policy where both smokers and nonsmokers dine together. Health Commissioner John Dowling decided to assess the support from the rest of the restaurant industry before making a formal proposal.

The resulting compromise between the Board of Health and the restaurateurs was adopted on July 14, 1987. Instead of requiring 100% smoke-free dining areas in restaurants, the law required only that restaurants expand their nonsmoking sections to 75% of their seating capacity. However, the new law possessed other stringent provisions. It removed exemptions for restaurants with air-cleaning devices and ended smoking in bowling, scoring, and spectator areas of bowling establishments [65]. The bowling center provisions were also a compromise; the Board had originally considered banning smoking in the lobby and concourse areas of bowling establishments as well [66]. The regulations went into effect January 4, 1988.

In June 1994, the Long Island Planning Council, a nonprofit organization, began circulating

petitions directed at strengthening smoking restrictions in public places such as restaurants, hospitals and schools [67]. The Council submitted over one hundred fifty signatures to the Board of Supervisors as well as a copy of the recently proposed Suffolk smoking restrictions. In turn, County Executive Thomas Gulotta passed the information to the County Board of Health, the authority on smoking regulation. The Planning Council's measure mandated the end to smoking in restaurants, but in contrast to Suffolk's proposal, did not allow the option of allowing smoking in separately ventilated rooms. The Council's Executive Director Joan Kern explained that the option would engender uneven competition between restaurants which owned the equipment, and restaurants which did not. She stated, "I spoke to a couple of restaurant owners who said they'd rather not have smoking at all, and it made more sense" [67].

Once again, the tobacco industry permeated the local debate. At a meeting of the Nassau Board of Health during January 1995, Freeport Mayor Arthur Thompson argued against the stricter smoking regulations, explaining that he feared an adverse economic impact on the restaurant industry. In addition, he argued that the regulations violated the villages' home rule, imposing a law on communities without their consent. It was later revealed that Mayor Thompson worked for Statewide Corporate Strategies, a lobbying firm whose sole client was Philip Morris. Documents designated Thompson as the regional coordinator of the firm's Philip Morris account. The other two regional coordinators were Patricia McCrann of McCrann Public Affairs Inc. and Elizabeth Lasky of Capital Public Affairs. Both confirmed that Thompson was taken part in their efforts [50].

After a March 1995 hearing, the Board of Health decided to include the option of separately ventilated smoking rooms for restaurants. Several restaurant associations at the hearing, including the industry-financed New York Tavern and Restaurant Association, complained about the stringency of the proposed smoking restrictions, and claimed that they would put many restaurants out of business [68]. In a hearing held the following month, President of the Alliance for Smoke Free Air and media chair for the Nassau-Suffolk Tobacco Control Task Force Claire Millman noted that the omnipresent tobacco industry was playing on these fears to mobilize restaurateurs against the restrictions: "They stir up fears of loss of business among the restaurateurs...They're here right now. They're in this room, taking notes" [69].

The industry supported another organization called the Long Island Hospitality and Tourism Coalition (or Association [23]), which also testified that the regulations would cripple the hospitality business [55]. The Coalition was formed only the previous August, the same time Patricia McCrann was hired as its lobbyist [55]. Its representative, Frank Petruccelli, argued that the restrictions would give an advantage to the big chain restaurants, who he believed were the only establishments which could afford to implement a separately ventilated smoking room. Petruccelli was accompanied by two members of Philip Morris' public relations firm, McCrann Public Affairs. McCrann representatives also signed in several restaurant owners at the public hearings, demonstrating that the apparent grassroots efforts by restaurant owners were actually coordinated by sophisticated tobacco lobbyists [23]. At the same time, McCrann Public Affairs was also attempting to persuade Suffolk legislators to roll back its ordinance [69].

These groups focused on the economic impact arguments, claiming that the regulations would drive away twenty to thirty percent of business [23]. This is an unsubstantiated claim, and in fact, many studies have indicated that smoking restrictions made no impact on restaurant business. The industry also made arguments that the law would infringe on individual freedom, impair the productivity of

smoking employees, and enforcement of the law would waste valuable police resources [70]. The issue of personal freedom was illustrated when restaurant owners wore stickers stating “It’s MY business” [34], which Suffolk County restaurateurs had worn the previous year in protest of smokefree restaurant legislation [33]. Philip Morris also used employees enrolled in the company’s Tobacco Action Program to voice these arguments and prompted them to “please consult Chapters 1-5 and 1-6 of your TAP manual” for additional arguments [70]. The company also asked these employees to use their own personal stationery to write to the Nassau Board of Health and oppose the regulation [70].

In May, the Board of Health informally approved the draft regulations for further consideration and public hearings. Restaurants and other businesses such as bingo halls and bowling alleys were given the option of implementing separately ventilated smoking rooms, but otherwise smoking was generally prohibited in public places. Outdoor restaurants could allow 25% of seats for smokers, and outdoor arenas allowed smoking only in the area outside the main seating. Hotels were required to designate half of their rooms as nonsmoking accommodations [71]. This draft was more stringent than Suffolk County’s in that it allowed smoking in private offices only if the office was separately ventilated and regulated smoking in outdoor restaurants and sports arenas [55].

On January 22, 1996, the same day County Executive Tom Gulotta gave his State of the County speech to the new 19-member County Legislature, the Board of Health passed its smoking regulations. The law mandated that all restaurants, regardless of size, and all bowling alleys, adopt a 100% smoke free policy. However, both could allow smoking in a separately enclosed, separately ventilated rooms. For restaurants, these separate rooms could only include 25% of the restaurant’s seating capacity or less, and smoking was also prohibited in 75% of any outdoor dining areas. For bowling alleys, the smoking area could include at most 25% of the concourse area [72]. Bingo halls were under similar restrictions.

The regulation also restricted smoking in schools, hotel lobbies, auditoriums, food stores, offices, arenas, and hospitals; the only exemptions were bars and taverns [73]. Smoking was prohibited in workplaces except in separately enclosed, separately ventilated rooms which could not be the sole location of vending machines, waiting areas or areas for payment of services. Companies with four or more vehicles were required to designate 75% of them as nonsmoking vehicles. Hotels and motels were required to design fifty percent of their rooms as nonsmoking rooms. Outdoor public places furnishing permanent seating for outdoor sports, recreation and entertainment were required to prohibit smoking in the seating area and aisles [72]. The Board scheduled the implementation of these provisions for July 1, 1996.

The Legislature Intervenes

Both County Executive Gulotta and Presiding Officer of the legislature, Bruce Blakeman (R-Woodmere) were stunned by the action. “It was my understanding it was on the status calendar and would not be acted on,” said Gulotta [74]. Blakeman reacted indignantly: “This was an act of arrogance. Many legislators are upset that the board, which has not been elected, are engaging in legislative activity. There is no immediate crisis and we had asked for a delay” [74]. Chairman of the Board of Health Bruce Lister maintained that he had given legislators notice that the Board would take action.

Restaurateurs and bowling alley owners turned to the legislature to overturn the regulations. The local bowling industry was especially concerned because the Nassau restrictions were harsher than those

in Suffolk and New York City. They were afraid this would cause smoking customers to take their business across county lines. Again, the thirty percent claim resurfaced: “I’ll have to close by the end of the year, because 35 to 40 percent of my people will walk out,” said Sal Celauro Jr., the owner of a local bowling establishment [75].

Nassau County was about to adopt its first legislature when the new smoking restrictions passed. Knowing that the new body would not pass stronger restrictions than the Board of Health, the tobacco industry attempted to overturn the Board’s regulations. The state constitution expressly forbids any Boards of Health from considering any matters other than health in the process of creating regulations. The Nassau County Bowling Proprietors Association filed a lawsuit charging that because the Board considered economic effects in deciding the law, illustrated by the exemption of certain businesses such as bars, the Board acted out of its jurisdiction and the regulation was invalid. According to Claire Millman, attorneys for the bowling association included a former paid tobacco lobbyist [24]. On June 2, 1997, U.S. District Court Judge Dennis Hurley ruled that the Board usurped the legislature’s jurisdiction when it passed the smoking ordinance [76]. Hurley stated that the Board breached its authority by considering issues other than health.

The new legislature addressed the smoking issue with a very weak proposal which included provisions weaker or equal to state law. For example, it would have allowed vending machines in areas where state regulations already prohibited them; because state law supersedes a weaker local law, this was basically a moot provision. The bill would also allow automatic 24-month waivers to restaurateurs who promised to install a new smoking room but said they needed more time. Democratic legislators pushed to at least have these restaurateurs demonstrate evidence of their good faith by providing a copy of the building permit [77]. The proposal debated at a December public hearing only allowed smoking in restaurants in a separately ventilated room, but exempted those with 35 or more seats. These establishments were only required to designate 75% of the area as nonsmoking. In addition, the proposal drew from Suffolk’s bowling alley restrictions, allowing smoking in these establishments after 6 p.m [77]. A week later, the legislature added an amendment to extend the restaurant exemption to those with 50 seats or fewer [78]. The 24-month waiver was still allowed for restaurants, although the bill was amended to give the County Health Commissioner the discretion to add conditions to the waiver. Smoking was left unrestricted in restaurant bars and taverns. Each violation cost \$250, but enforcement was to be complaint-driven. While Health Department officials would check for compliance during routine health inspections, there would not be any inspections just to check for compliance with the smoking restrictions [79].

These were the provisions of the bill as it was passed on December 15, 1997. The regulation also prohibited smoking in the seating sections and aisles of outdoor public places providing seating for entertainment, workplaces, public mass transit, health care facilities, school grounds, and areas of indoor facilities frequented by the public such as banks, courthouses, and lobbies [80]. However, many of these places were permitted a separate smoking room.

Neither side was content with the result. Throughout the debate, tobacco control advocates publicly called for stricter measures. Claire Millman stated, “you have come up with a law that falls far short of its stated intent” [81]. Patricia Bishop-Kelly of the local chapter of the American Cancer Society congratulated the legislators although she had protested the extension of the restaurant exemption from 35 seats to 50. Bishop-Kelly also criticized the fact that the smoking restrictions

effectively relegated waiters, waitresses and bartenders to the status of secondhand citizens by not mandating the protection of these workers from the health hazards of secondhand smoke while protecting workers in virtually all other types of businesses [82]. A group of diners still unsatisfied with the restaurant provisions stated they were considering a legal challenge of the ordinance [81].

Legislator Bruce Nyman (D-Long Beach), the minority leader of the legislature, tried to convince tobacco control advocates that the legislation would ultimately fulfill their goal of smokefree dining areas: “I guarantee you that most restaurants in Nassau County are not going to be able to comply with this extra smoking room. So we are actually doing through the back door what you want us to do through the front door. I know it’s hard but you’ve got to trust us” [81].

The law went into effect on July 1. The Health Department received 134 waiver requests by this date, and granted each one.

Nassau County’s experience demonstrates the tobacco industry’s preference for dealing with legislatures rather than Boards of Health. Their battle mirrors that which occurred between the state Public Health Council and the tobacco industry during 1987. Because Boards of Health cannot consider factors other than health in passing regulations, smoking restrictions passed by any Board are stricter than what a legislature would generate. Standard tobacco industry arguments regarding economic impact cannot be considered by Boards of Health, and the members do not need to worry about campaign finances. Because it holds such little influence over these bodies, the industry seeks to overturn Board regulations on the grounds that such smoking restrictions are outside their jurisdiction, and return the matter to the legislatures, with which they can exert more influence. Even in Westchester County, which possesses the only Board of Health smoking restrictions still standing, experienced a lawsuit pressed by tobacco interests, although the premises for the suit differed from those filed against Nassau, Niagara, and Dutchess Counties [83].

Advertising Restrictions

Since 1998, Nassau Democrats introduced a proposal which restricted the positioning of cigarette displays in a manner which hinders shoplifting and prevents their exposure to children. It required gas stations, convenience stores, pharmacies and stationery stores to place tobacco products behind the counter or in locked display cases. The 1999 version also stipulated that cigarette advertising must be placed at least two feet from gum, candy, and other items generally purchased by children. Violations would result in a \$250 fine. The proposal was originally inspired by similar legislation proposed in Suffolk County.

Convenience stores and other retailers opposed the legislation because it would prevent them from receiving “slotting fees” from tobacco companies, which are earned by placing tobacco products in certain places. Tobacco control advocates believe these fees are paid to encourage shoplifting by minors. Patricia Bishop-Kelly explained, “If you know there is going to be a certain amount of pilfering going on and you pay a shopkeeper for the displays then it stands to reason that there is some intent by the tobacco industry to encourage the theft of tobacco products” [84].

The Democrats had introduced the self-service display/advertising restrictions twice before asking Republican Presiding Officer Bruce Blakeman to sponsor it in May 1999. This bipartisan gesture

had been made only once before, in 1996. However, Blakeman ignored the proposal until the following month, when the Republicans sent vulnerable incumbent Darlene Harris (R-Uniondale) to announce an almost identical bill to the media [85]. The Republican version differed only in that it did not contain a provision restricting tobacco advertising and it also contained anti-pornography provisions.

This partisan insult ignited a bitter quarrel between the two parties, with the Democrats frustrated at the disrespect demonstrated by the Republicans, and Republicans flaunting their majority rule and citing partisanship as integral to County policy. Blakeman stated that if Democrats did not understand the terms of majority rule, “they should go up to Albany and get a lesson in how bills get passed” [85]. Blakeman insisted that the Democrats made the issue partisan by issuing two press releases and submitting the bill without any Republican co-sponsors [85]. Advocates expressed support for the Republicans’ involvement with the issue, but voiced concern over the lack of advertising restrictions.

The American Cancer Society Long Island Chapter took the lead in lobbying for self-service and advertising restrictions. Advocates also highlighted the tobacco issue when they criticized Nassau’s use of the state settlement money. In a stinging *Newsday* opinion letter focused on criticizing the use of settlement funds, regional director of advocacy for the American Cancer Society Pat Bishop Kelly stated:

Meanwhile the legislature hasn’t even considered a bill by some of the Republican members that would place tobacco products out of the reach of kids. And legislation that would limit children’s access to tobacco and restrict advertising, introduced twice by Democrats, has been languishing in the legislative broom closet for the past nine months. A bill almost identical in scope was adopted by Suffolk a year ago and has been used with great effectiveness to decrease the illegal sale of tobacco products to minors. [86]

Pressure to act on a tobacco-related issue increased even more when Mark Loggerquist, a Channel 12 television news reporter, aired an expose of tobacco industry lobbying in Nassau and Suffolk Counties. This public pressure eventually forced the two parties to reach an agreement, tacking on the tobacco advertising restrictions to the Republican bill [87]. The legislation was unanimously passed on December 13, 1999.

The final legislation requires all tobacco products to be placed behind the counter or in locked cabinets accessible only to store personnel. It prohibits the placement of tobacco advertising within two feet of toys, candy, and trading cards; the counsel for the Democrats was careful to amend the legislation so that it did not specify “sports trading cards”, because of the recent overwhelming popularity of “Pokemon” (cartoon) trading cards among children. The change was jokingly named the “Pokemon Amendment”.

Nassau’s Use of Tobacco Settlement Funds

In November, 1998, even before the multi-state Master Settlement Agreement had been reached by 46 states and five tobacco companies, Nassau politicians began debating how to use their share of New York’s expected settlement funds. The Republicans expressed intent to use the money to fix budget holes, and the Democrats called for a task force to determine the best use of the funds. The Democrats formally submitted this recommendation in a letter to the Legislature’s Presiding Officer, Bruce Blakeman (R-Woodmere). Minority Leader Bruce Nyman (D-Long Beach) explained, “We wanted to put it on the table before it was served up,” and expressed his concern that Republican would

dedicated the money to budget problems before the Democrats had a chance to respond [88]. Patricia Bishop-Kelly of the American Cancer Society commented, “This settlement is not about plugging up budget holes. Our priorities should be to spend as much as possible to educate children about tobacco and into develop programs for those who want to quit” [88].

Nassau County accumulated a \$200 million deficit in 1998 and by June 1999, accumulated another \$125 million imbalance [89]. County Executive Thomas Gulotta developed a plan to address the County’s fiscal concerns which included selling the County’s rights to \$170 million of the tobacco windfall, asking the state to allow the County to impose a 1% real estate transfer tax, and selling Nassau’s medical facilities to a public benefit corporation [90]. Selling the rights to the settlement money will prove to be difficult and costly as two major Wall Street firms have reduced Nassau County’s credit rating to a near-junk level.

Erie County

Erie County is an industrial and commercial center located on the Western border of New York, neighboring Lake Erie to the west and Niagara County and Canada to the north. The county is one of the only Democratically controlled counties in the state outside of the New York City area and contains the City of Buffalo, the second largest city in the state. For the last decade, Erie has been a leader in tobacco control, passing progressive smoking and advertising restrictions before the state and other localities, with the exception of bellwethers Long Island and New York City.

In 1991, one year after New York City passed a sampling ban, Erie County did the same. This law prohibited the distribution of tobacco products for less than the basic cost at public events and public places [91]. In 1993, Erie again followed New York City’s lead and passed vending machine restrictions, which limited vending machines to establishments with liquor licenses [92].

In 1994, Erie County passed a law which prohibited tobacco advertising on county-owned property such as space available in the airport, trains, the subway, Rich Stadium, or the War Memorial Auditorium. Most of the controversy centered around restricting the ads in stadiums. The law passed in 1994 and included a provision grandfathering in the existing leases.

Clean Indoor Air

On November 19, 1996, Erie County became the first county outside the New York City area to adopt smoke free dining restrictions [93]. The Act prohibits smoking in all public places including restaurants, elevators, public transportation, public restrooms, service lines, retail stores, areas available to and customarily used by the general public in all businesses and not-for-profit entities (banks, offices, etc.), aquariums, galleries, libraries, museums, facilities used for showing motion pictures, stage drama, lecture, etc., areas of public assembly, government buildings, polling places, and places of worship. In addition, employers must provide a smoke free workplace, although they are not required to incur any expense to do so, and must adopt and implement a written smoking policy.

This legislation was implemented on January 1, 1997, with the implementation of the restaurant restrictions delayed until January 1, 1998. After this date, smoking in the dining areas of restaurants was no longer permitted, although the law continued to permit smoking in restaurant bars. However, if the

bar area allowed smoking and was the only means to exit or enter the restaurant or its restrooms, the law mandated a separate means had to be installed for nonsmokers. The restrictions also ended smoking in indoor areas of outdoor facilities and parks along with all sports arenas indoor and outdoor. Bowling centers and bingo parlors were also restricted after January 1, 1998. Beginning that day, smoking in bowling concourses was prohibited if minors were present, and regardless of the activities, at least 25% of the center were required to be smoke free. Bingo halls were mandated to provide separate rooms for smoking patrons. The legislation allowed for separately ventilated smoking rooms in all facilities and also permitted waivers; in addition, an appointed Review Committee was required to evaluate the law after its first year of implementation and report back in six months.

The struggle to get the law enacted began in 1995 when the Erie County Tobacco Control Coalition approached County Health Commissioner Dr. Arnold Lubin about drafting legislation to end smoking in virtually all public places. The Coalition, which consisted of the local chapters of the American Cancer Society and American Lung Association, Roswell Park Cancer Institute, the Wellness Institute of Buffalo and Erie County, and the Parent Teacher Association, remained the main advocates of the clean indoor air legislation throughout the debate. After obtaining Lubin's support, the Coalition drafted a restrictive proposal which included a ban on smoking in bars, and presented it to the Board of Health. Once the Board of Health reviewed the proposal, they sent it to the Legislature along with a formal resolution authored by Dr. Lubin which advised the legislature to give the matter serious attention [94].

The Chair of the Health Committee, Charles Swanick (D-Kenmore) was reluctant to support such a controversial bill, but agreed that secondhand smoke needed to be restricted. He sent a memo to the sixteen other legislators asking whether they were interested in holding a public hearing on the bill in their district. Eleven legislators expressed interest. Swanick decided to meet all eleven requests, which some tobacco control advocates perceived as a stalling tactic, although others believed Swanick was sincerely trying to involve all the legislators and obtain as much information as possible from the community.

Holding eleven public hearings generated a year of heated debate, during which the advocates outnumbered the opponents in 10 of the 11 hearings [93]. According to Hillary Clarke, formerly the head of the local Tobacco Control Program at Roswell Park Institute in Buffalo, the tobacco industry was very visible in Erie County, probably because it was their first battle in Western New York. Dr. Michael Cummings reported that Philip Morris' National Smokers' Alliance operated an office in Buffalo during the debate. Cummings visited the NSA's temporary headquarters on Delaware Avenue and verified that the organization was hiring representatives to go to local bars and recruit new members [95]. Recruiters were paid for the number of completed and signed applications they returned [96].

The NSA testified at the public hearings, and its director, Thomas Humber (former Vice-President of Philip Morris' public relations firm Burson-Marsteller) participated in radio shows debating the clean indoor air legislation with Dr. Michael Cummings. Clarke asserts that Humber also met with several of the Erie County legislators and the County Executive but did not receive a warm reception [97]. In fact, Humber met with Gorski days after the funeral of Gorski's brother-in-law, who died of lung cancer [93]. After the Erie experience, the industry increased their utilization of front groups including taxpayer groups, business groups, and restaurant owners.

One such restaurant group, heavily supported by the tobacco industry, was the Empire State Restaurant and Tavern Association. This group, previously named the New York Tavern and Restaurant Association (NYTRA) and the United Restaurant, Hotel and Tavern Association (URHTA), attended the public hearings and expressed adamant opposition to the restaurant smoking restrictions. They were similarly involved in hearings for the New York City Smoke Free Air Act, where it was discovered they had no chapters in the vicinity of the City and that the tobacco industry was paying for its media campaign.

Although these organizations expressed opposition, the advocates had already nurtured an alliance with Erie restaurant owners. They had been advised by the former chairman of the legislature, Len Lenihan (D-Tonawanda), that the support of the Western New York chapter of the state restaurant association (NYSRA) was central to the success of a clean indoor air act. He directed them to speak with its president, Dennis DiPaolo. The advocates met with DiPaolo every several months for almost two years. By the time DiPaolo was appointed to the Ad Hoc committee he realized that secondhand smoke was a veritable health threat and that the passage of smoking restrictions was an unavoidable trend. He therefore decided to help shape the legislation he believed was inevitable [93]. This was a deviation from the general attitude of the New York State Restaurant Association, which believes clean indoor air legislation restricting smoking in restaurants incurs a negative economic impact on the restaurant industry. DiPaolo's cooperation made it much easier for tobacco control advocates to maintain smoke free dining area restrictions.

In addition to the support of local restaurateurs, the advocates also enjoyed the support of Erie County Executive Dennis Gorski. Gorski lost his brother-in-law to lung cancer during the middle of the clean indoor air battle and had communicated that he would sign the strictest legislation the committee could produce.

Despite tobacco industry efforts, the overwhelming support for the proposal prompted Swanick to appoint a committee to incorporate the input from the hearings into a final draft. After Swanick made it clear that this proposal would pass, steadfast opponents such as the bowling alley owners agreed to negotiate with the advocates. The committee consisted of bowling alleys, taverns, the Western New York Restaurant Association chapter of NYSRA, Roswell Park Cancer Institute, and also included Health Commissioner Lubin, and Charles Swanick [94].

The proposal that emerged from the Ad Hoc committee was weaker than the original draft, exempting taverns and bar areas and allowing restaurants, and bingo and bowling businesses extra time to comply with the bill. Health Commissioner Lubin remarked of the revision, "It's more watered down than I would have liked, but this is a definite step towards promoting a healthier community" [98]. Restaurant owners were also satisfied with the bill; Dennis DiPaolo commented that the 11 months of public discussion made for a more "realistic" and flexible bill [98].

Anti-smoking advocates were less enthusiastic, having hoped for 100% smoke free restrictions in bars, bingo halls, and bowling alleys, but they considered the bill a preliminary step towards what they considered sufficient protection from second hand smoke. Dr. Michael Cummings at the Roswell Park Institute expressed dismay at the exemption of bars and taverns. "A hundred other communities have banned smoking in bars," he commented to the Buffalo News [99]. However, in a letter-to-the-editor in the newspaper, Cummings recognized the legislature's admirable efforts:

Legislator Chuck Swanick and the other members of the Erie County Legislature deserve an ‘A+’ for their efforts to avoid partisan politics and for allowing the public to express their views on the issues. The final compromise proposal, which evolved from nearly a dozen public hearings, is not perfect. But it fairly represents the views expressed during the period of time that the law was debated. [100]

The Clean Indoor Air Act went into effect on January 1, 1997, and restaurant restrictions were phased in January 1, 1998. Within the first three months of the restaurant phase-in, owners began complaining that the law was driving customers elsewhere. Restaurant owners in the City of Tonawanda asserted that their customers were migrating across Tonawanda Creek to North Tonawanda in Niagara County, which had no restaurant smoking restrictions. Erie’s Legislature Chairman Charles M. Swanick (D-Kenmore) responded to these grievances by stating, “We are not going to be changing our local law. The first 90 days is always more difficult. And at the end of the year there’s a review process” [101].

Self Service Displays

Since the Clean Indoor Air Act, Erie has passed legislation ending self-service displays of tobacco products. This legislation, which passed in 1997, was sponsored by Democrat Randi Cohen Kennedy, and received the support of County Executive Dennis Gorski. Only one public hearing was held regarding the bill, which occurred after the legislature already passed it but before Gorski signed it. At the hearing, the sole source of opposition came from the New York Association of Convenience Stores. NYACS testified that the restrictions would create a negative economic impact for convenience stores, which received substantial payments from tobacco companies to place these products in a visible and accessible manner [94].

The final draft stated that, “No retailer shall display or store tobacco in any manner which permits direct customer access or customer self service...” which basically prohibited shelf and counter displays, kiosks, and vending machines. The only exceptions were vending machines located in a bar or a tobacco business [102].

Filing the First Suit Against the Tobacco Industry in New York

Erie was also the first locality in New York State to sue the tobacco industry for recovery of its smoking-related Medicaid expenditures. The county’s budget includes a mandated payment to cover a portion of Medicaid costs. As Medicaid expenditures have been soaring, Erie found itself with less discretionary money to spend, forcing them to increase taxes. Thus, it made sense from a fiscal point of view to try to recoup some of the Medicaid costs. County Executive Dennis Gorski championed the cause. At the time, Gorski’s brother-in-law was dying of lung cancer. Gorski held a press conference announcing the lawsuit in front of the hospital treating his brother-in-law for lung cancer and explicitly mentioned his brother-in-law’s smoking-related disease [94].

Localities in the upstate region of New York State use Erie’s legislation as a model, rather than any of the downstate restrictions. Since Erie’s restrictions passed in 1996, the Western localities of Niagara County, Monroe County, Livingston County, and Genesee County have passed Clean Indoor Air Acts [103]. Erie set a stringent example to follow, and the subsequent upstate clean indoor air acts were as comprehensive as Erie’s or stricter.

Niagara County

Niagara County is located in Western New York, bordering Canada to the west and Lake Ontario to the north. There exists a strong anti-government sentiment in Niagara.

Board of Health Actions on Clean Indoor Air

On April 25, 1996, the Niagara County Board of Health discussed the possibility of strengthening their county smoking restrictions, as Erie County was in the process of doing. The Board decided to invite Dr. Arnold Lubin, Erie County's Health Commissioner, to make a presentation before them regarding the Erie experience. On July 25, Lubin made his presentation, explaining that in Erie, the Board of Health originally wanted to pass smoking restrictions as a regulation, but the Erie County Legislature wanted to address the issue [104].

After hearing Dr. Lubin's account, Board of Health President Barbara Brewer decided to form a committee which consisted of Board of Health members and members of the Coalition for a Smoke Free Niagara. She appointed five members of the Board to work with the Ad-Hoc committee which would draft proposed amendments to the sanitary code [105]. The resulting proposal, completed in September, was based on the recently adopted Clean Indoor Air Act passed by the Erie County legislature, but included stricter regulations. It restricted smoking in most public places, including public restrooms, retail stores, restaurants, bars, libraries, museums, sports arenas, convention halls, bingo halls, bowling alleys, health facilities, lobbies and hallways of apartment buildings, elevators, nursing homes, and places of worship. The draft also mandated that employers provide their employees with smoke free work spaces, and prohibited smoking in all enclosed areas of a workplace with the exception of a "separate smoking room" [106].

The Board of Health prepared the restrictions as regulations - amendments to the County sanitary code - but presented the draft regulations to the Legislature's Health Services Committee to receive their input. A follow-up meeting was also held with the Chairman of the Health Services Committee the following month, and the draft proposal was also sent to the Chairman of the Legislature. On December 5, 1996, the Board of Health dissolved its Ad Hoc Committee, after voting to accept and endorse the proposal and to begin public hearings on the proposal. The public hearings took place in February 1997, and the Board of Health sent a summary of the comments to the Legislature's Health Services Committee. It also formed a Board of Health Smoking Policy Committee. The committee consisted of two legislators, two pro-smoking advocates, two smoking opponents, a member of the Board of Health and a medical professional from the nearby Roswell Park Cancer Institute [107].

On April 3, 1997, when a Board of Health representative attended the Health Services Committee meeting to present the information from the public hearing, the legislature expressed their opinion that it was inappropriate for the Board of Health to draft smoking restrictions [93]. They began discussion on the possibility of the Board working with the Legislature to pass legislation that both bodies could agree on. The following month, the Legislature passed a resolution creating an "Ad-Hoc Committee to Develop Proposed Smoke Free Regulations for Niagara County". This committee met every two weeks from August through November, until they settled on a final draft proposal. This proposal was also modeled after Erie County's recently passed smoking restrictions and banned smoking outright in government-owned buildings, public transportation, stores, theaters, churches, elevators and public restrooms, lobbies, hallways, and other common areas in multiple dwellings/business buildings. It

restricted smoking in bowling areas to the concourse and only when adults were the only bowlers [108]. It allowed smoking in restaurant bars and in up to 30% of a restaurant's seating area until July 1, 1999, at which point dining areas, restrooms and waiting areas must prohibit smoking completely [108].

The business representatives appointed to the committee later charged that the committee's final recommendation (submitted to the Legislature at the end of 1997) was rushed through without their acceptance. Indeed, at the committee's last meeting, only seven of the twelve members were present when the proposal was formally endorsed [109]. Critics of the proposal also complained that restaurant owners bordering Erie County said they detected an increase in business since the Erie smoking ordinance took effect January 1, 1997 [110].

On December 4, 1997, three days after the legislative Ad Hoc Committee's meeting, the Board of Health passed a motion to support the compromise legislation and in January, they sent a letter to the Legislature requesting that they pass it into law. The legislature scheduled a public hearing for the bill, after which Legislator Lee Simonson (R-Lewiston) announced that a new committee would replace the 1997 ad-hoc committee to review the comments from the hearing and to change the proposal as they saw fit. The legislature dissolved the original Ad-Hoc Committee because they took issue with the presence of two nonresidents of Niagara County (Dr. K. Michael Cummings from Roswell Park Cancer Institute and Terry Dobins representing the bowling establishments), even though they appointed these individuals to the committee [111][112]. Advocates for the smoke-free legislation saw this as another attempt to delay passage of the proposal. The replacement committee was called the "Health Services Committee Special Committee", and consisted of representatives from the County Board of Health, the County Legislature, the County Health Department, local restaurants and a bowling establishment. Simonson, Chair of the Health and Education Committee, chose the appointees [113]. The committee met four times between February and March; the subcommittee made minor revisions and on May 5, 1998, the legislature held a public hearing on the revised proposal [109].

The Legislature Enacts a Pro-Tobacco Policy

On the same date, the Legislature also considered a proposal called "Red-Yellow-Green Light Alternative Policy to Proposed Smoking Law", sponsored by Renae Kimble (D-Niagara Falls). None of the committees formed to consider the smoking law reviewed this proposal. The Red Light/Green Light policy was actually taken from a Philip Morris program which provides red stickers to indicate a smoking establishment, yellow stickers to indicate both smoking and non-smoking areas are available, and green stickers for smoke-free establishments [114]. Hillary Clarke, formerly head of Roswell Park Institute's Tobacco Control Program commented, "The restaurant owners group acts as if they came up with the red/yellow/green on their own, but actually it is a concept that the NSA [National Smokers' Alliance] has been promoting all over the country as a way of making sure that nothing is done about second hand smoke" [95]. In West Virginia, an attorney affiliated with the National Smokers Alliance proposed the red light/green light program as an alternative to the 100% smokefree policy being considered by the Monongalia County Board of Health. The attorney had previously threatened the Board with a legal challenge against the proposed regulations [115].

Niagara County Citizens for Choice President Judi Justiana, who introduced the idea to the Legislature, admitted that the NSA furnished the concept of the red light/green light program and also acknowledged that the NSA would likely finance any legal challenge her group posed [95]. Despite the

obvious link to the tobacco lobby, the Niagara Legislature scheduled a public hearing for the “Red-Yellow-Green Light” proposal for May 19.

Despite the legislatively appointed committee’s efforts and Board of Health’s threat to implement stricter laws if the committee’s proposal was not adopted, the Legislature ultimately passed smoking restrictions completely different from the committee’s proposal. Legislators stripped the compromise legislation of the most significant provisions while the bill was on the floor, just before it was voted on. On May 19, 1998, the legislature passed a bill titled, “Local Law in Relation to the Regulation of Smoking in Niagara County.” It allowed smoking in taverns, bar areas of restaurants, and in a designated area of a restaurant so long as this area did not exceed 30% of seating capacity. The bill displeased tobacco control advocates because not only did it remove the smoke-free restaurant phase-in which would have been complete in July 1999, it exempted dining areas seating 45 people or less. State law already exempted restaurants with fewer than 50 seats from setting aside nonsmoking sections; without local restrictions, employees at these smaller establishments would have no protection from secondhand smoke. The bill also ended smoking in enclosed workplaces and prohibited smoking in bowling centers whenever a minor is present before 6 p.m., after which one-third of the concourse must be smoke-free [116].

On the same day, the legislature also passed the Red Light/Green Light bill proposed by Renae Kimble, who voted against the Local Law in Relation to the Regulation of Smoking in Niagara County. The Red Light/Green Light program is just another extension of the tobacco industry’s accommodation program which began in 1987. During that year, Pittsburgh, Pennsylvania passed its Smoking Control Ordinance, ending smoking in public places and providing a minimum nonsmoking section for restaurants. Philip Morris attempted to co-opt the law’s implementation with a campaign preaching the accommodation and tolerance of smokers. Instead of a traffic light logo which identified whether or not an establishment permitted smoking, this program’s logo resembled the Chinese yin/yang symbol for harmony. The company provided free advertising in local newspapers to restaurants which agreed to promote the accommodation program. The advertisements would announce that the featured restaurant accommodated smokers and nonsmokers and display the program’s logo. These restaurants were also required to display the logo in their storefront window. Local advocates exposed the role of Philip Morris, discrediting the campaign, and once Philip Morris stopped providing financial incentives to promote the program, restaurants lost interest [117].

Although the program was unsuccessful in affecting the implementation of Pittsburgh’s clean indoor air ordinance, Philip Morris resurrected it in 1993, to counter the barrage of smoking restrictions following the U.S. Environmental Protection Agency’s report, “Respiratory Effects of Passive Smoking” [118]. Philip Morris uses the accommodation program to accomplish three goals:

- 1) pass and preserve accommodation/uniformity [i.e. preemption] legislation in all 50 states;
- 2) defeat all severely restrictive legislation/regulation; and
- 3) overturn existing legislation that severely restricts smoking. [118][119]

Previously confidential industry documents reveal that Philip Morris did not believe the program itself would accomplish these goals but rather, the resources, contacts, research, and the network built in the process would bring success.

In addition to the Red Light/Green Light bill, the Legislature passed a resolution sponsored by Majority Leader Shirley Urtel (R-Cambria), who also voted against the smoking restrictions. The resolution was titled “Proposed Smoking Policy Authority of the Board of Health,” and called for state and local governments to maintain sole authority of regulating smoking, thereby removing any such authority from state and local Boards of Health [114]. This type of resolution, championed by tobacco interests in other localities, removes authority from government bodies with which the tobacco industry holds little influence, and gives it to those with which the industry wields substantial power. However, Urtel’s resolution was not binding on any of the parties.

Every one of the legislature meetings regarding the smoking restriction was attended by former Democratic Assemblyman Matthew Murphy, an attorney whose presence was paid for by the Philip Morris public relations firm Upstate Corporate Strategies [95]. As a state legislator, Murphy represented Lockport, the Niagara County Seat. It was a Democratic legislator who pushed the red light/green light program into the bill. Once the Democrats started defecting, the negotiating process favored the industry position [120].

Murphy never publicly commented during these meetings, but during the final vote over the restrictions, when legislators were amending the bill by stripping out significant provisions, the lawmakers brought copies of their amendments to Murphy [93]. Murphy was also employed by Statewide Corporate Strategies, the Philip Morris Public Relations firm involved in lobbying against the Long Island smoking restrictions [121].

Tobacco control advocates felt the legislature’s adoption of such a weak measure amounted to an attempt to silence the issue without actually impacting it. When asked if the Board of Health would instigate further negotiations with the legislature, Board of Health President Linda Flessel said, “Absolutely not. We’ve negotiated for two years. We’re done” [122]. Legislator Lee Simonson (R-Lewiston) who headed the ad-hoc committee which proposed the compromise law stated, “The board negotiated in good faith. It was the Legislature that did not accept the compromise, not the Board of Health” [122].

The Board of Health Responds

The Board of Health, inflamed at the legislature’s disregard for their input, previously threatened to pass its own, stricter proposal if the legislature did not enact the ad hoc committee’s compromise bill. The legislature knew before the vote that if the Board passed its own regulations, they would be much stronger because State law prohibits them from considering economic factors when devising a ban. State law and a federal court decision in a Nassau County smoking restriction (later overturned for considering economics in forming the law) dispute supported the notion that a Board of Health can amend the Sanitary Code without legislative approval if the Board’s jurisdiction is a noncharter county such as Niagara. Despite the potentially harsher restrictions and the legal precedent supporting the Board’s threat, the legislature continued to ignore their protests.

The Board of Health Smoking Policy Committee met and drafted another proposal which ended smoking in virtually all public places except bars, restaurant bar areas, bowling establishments, tobacco businesses, facilities used for private functions, hotel/motel rooms, and separate smoking rooms. On July 23 1998, the Niagara Board of Health voted 7-1 to pass these regulations. The lone “no” vote came from

new board member Gerald R. DeFlippo (R-Lockport), a county legislator and prominent restaurant owner who had to undergo open-heart surgery due to his smoking habit [123]. The scheduled implementation date was March 1, 1999.

According to these restrictions, smoking would be ended in restaurant dining areas as of the March 1st date, but allowed in restaurant bars. Restaurants would be allowed to accommodate smokers in fully enclosed, separately ventilated smoking areas, but the maximum size of such an area is 30 percent of total seating capacity [95]. Public Health Director David E. Wertman addressed the enforcement issue by stating that smoking compliance would be added to the restaurant inspection checklist. Furthermore, employers would be required to ban smoking in all enclosed places in their business facilities and were required to adopt a smoking policy within 90 days of March 1st. Smoking was restricted to separate smoking rooms in convention halls, bowling centers, bingo halls, sports arenas, and, as mentioned before, restaurants. Enforcement of the restrictions would be based on citizen complaints, and violators would be charged a \$1000 civil penalty [95]. Exempt from the regulations were private residences and vehicles, tobacco businesses and hotel and motel rooms.

State law forbids the Board from considering economic factors in designing their regulation; this requirement led to the repeal of the Nassau County Board of Health regulations. A federal court found that Nassau's Board of Health usurped the authority of the County Legislature when it passed its smoking regulations because the Board considered issues other than health. For example, the Nassau Board of Health restrictions exempted bars because they believed bar owners would suffer severe financial losses. However, in making this concession, the Nassau Board of Health overstepped its powers.

To prevent a similar legal challenge, Niagara's Board asserted that economic concerns did not influence their designation of exempted areas. They carefully crafted the regulation to exclude mention of economics and instead reason that because the smoking restrictions were primarily to protect children from the effects of second hand smoke, the exemption of bars was consistent with the objective of the regulations, as children are prohibited from such establishments. The state Health Department declared the regulations consistent with state law and confirmed the effective date.

The Tobacco Industry Challenge

Members of the county health department supported the Board of Health action, prompting the legislature to threaten repeatedly since then to substantially reduce the size of the department; in the 1999 budgeting process, the legislature tried to slash thirty jobs from the Health Department [93]. The threats emanated from newly elected legislators, including the aforementioned Gerald R. DeFlippo (R-Lockport), ex-smoker and restaurant owner [120][123]. In addition, the Board of Health appointments last only for two years, and as the members' terms are coming due, the legislature replaces them with people who, according to tobacco control advocates, have much less interest in public health. Therefore, if the Judge decides the restrictions need fairly subtle changes to conform to law, and gives the Board of Health a chance to amend them, the new membership might prevent the Board from obtaining the votes necessary to pass the revised restrictions.

On December 7, 1998, a group of eight restaurant owners under the name Niagara County Citizens for Choice sued the Board of Health claiming that the imminent smoking restrictions were

unconstitutional. The group's attorney, John M. Curran, filed the suit in the court of U.S. District Judge Richard J. Arcara in Buffalo. Curran admitted that part of his fee came from the National Smokers Alliance [124]. This strategy of readily admitting tobacco industry affiliation is relatively new, and probably intended to preserve what little credibility the tobacco-funded group still maintains. The restaurants pointed to the exemption of facilities rented for private functions as an indication that the real motive behind exemptions was economics, not concern for children's health, as children often attend such private functions [93].

Curran asserted that the Board's July 23, 1998 action was unlawful because it exceeded its authority by basing a decision on matters other than health when it exempted bars from the restrictions and allowed separate smoking areas in bowling centers, bingo halls, convention halls, sports arenas, and restaurants. Hillary Clarke at Roswell Park Cancer Institute advised the Board that exempting adults-only businesses such as bars would be legally defensible. "The effects of secondhand smoke are particularly harmful for children," she stated, in an interview with the Buffalo News [124].

Curran pointed to a memo from the Assistant County Attorney Michael Fitzgerald to the Board of Health which supports the pro-tobacco forces' claim that the Board of Health was acting outside of its jurisdiction: "It is my position that the determination of the board to totally ban smoking without the opportunity for separate smoking rooms is an attempt to make public policy determination to legislate a ban on smoking, which is uniquely a legislative function and is beyond the scope of authority of the Niagara County Board of Health" [125]. Curran also implied that the Board was using the children's health issue as a guise for economic considerations, and cited a letter from Hillary Clarke to the Board of Health. "In the letter, Clarke advises the Board of 'the need to be careful' and explicitly 'cautions' the board against making 'any further public comments on the issue of economics' because any such remarks could be used in the anticipated lawsuit against the board to show that the board exceeded its authority by balancing economic concerns," said Curran [125].

Of the four Clean Indoor Air Acts implemented in upstate New York at that time, Niagara's was the only one implemented through a Board of Health. In other counties, the industry encountered more resistance in the legislature and instead worked mainly through restaurants. Their success in coopting Niagara's legislature stems from the fact that the county is strongly anti-government, and therefore more receptive to the industry's "big government" strategy. In addition, the coalition of health advocates failed to educate the community about the dispute and the industry infiltration.

U.S. District Judge Richard J. Arcara overturned the Board of Health regulations on April 2, 1999. Arcara stated that the Board of Health had exceeded its authority in passing regulations stricter than a law recently passed by the County Legislature. The court referred to the 1987 New York State Court of Appeals decision *Boreali v. Axelrod* and a four-pronged test used in this case to determine whether the Niagara County Board of Health overstepped its authority.

The court found that all four stipulations of the *Boreali* test were true. Both the plaintiffs and defendants agreed that the first count was true, but the Board of Health argued that the economic considerations were only an issue because they initially were trying to assist the Legislature in forming legislation. However, the plaintiff claimed that the Board intended to pass its own regulations since the beginning of the debate. The court sided with the plaintiffs, citing the bar exemption as illustrative of the violation. Tobacco control advocates should be concerned that this judgment effectively states that it

is impossible to pass smoking regulations without considering economics, which means no board of health would ever be able to pass smoking regulations. Second, the court found that the board created a set of rules without legislative guidance, rather than providing expertise to augment or finesse existing legislation. Third, the court found that the Board formed regulations which had the same provisions the legislature had reviewed and declined to adopt as law. Finally, Arcara decided that the regulations did not require medical or scientific expertise [126].

Before Niagara County, no New York State Board of Health has passed regulations contradicting its local legislature's actions [95]. Niagara's experience is significant in this respect and because it may determine whether other local Boards of Health will attempt to pass their own regulations when they feel their legislature is beholden to special interests. As of now, the only Board of Health regulation in effect is in Westchester. This regulation was passed in 1994, and was challenged on different grounds than those charged against the Niagara and Nassau Boards of Health. Future Board of Health actions seemed highly unlikely, as Hillary Clarke noted in a memo regarding the Niagara decision: "...the Court's findings that by banning smoking a Board could have to, by necessity, consider economics, and that the drafting of the regulations do not require medical or scientific expertise will doom the effort of any Board of Health [126]. As predicted, when Dutchess County tried to pass smoking restrictions through their Board of Health, the restrictions were overturned on the same basis as Niagara's Board of Health restrictions.

Rockland County

Rockland County is known as the gateway to the Hudson River Valley, and is located only 16 miles north of New York City. Most residents commute from this wealthy suburb to both blue and white collar jobs in the City.

In 1977, the Rockland County Board of Health amended the County sanitary code to end smoking from certain public places, such as the workplace and restaurants. In 1988, Rockland wanted to pass stricter amendments to the code, but the lawsuit against the State Public Health Council which eventually overturned the Council's amendments to the State sanitary code, discouraged the Board of Health from tackling smoking restrictions [127]. Instead, health advocates passed a clean indoor air act through the Rockland County Legislature, ending smoking from most public places. This local law closely resembled the Public Health Council restrictions.

The Tobacco Industry's "Smoke Free Air Act"

In 1997, the Legislature amended this ordinance to restrict smoking in restaurants. The bill was called the Smoke Free Air Act, and according to anti-tobacco advocates, it was created by the industry as part of an "accommodation program". According to Scott Wexler of the Empire State Restaurant and Tavern Association, a tobacco industry front group, there were several attempts to pass ordinances that would have ended smoking completely in restaurant dining areas and restricted it heavily in bar areas [76]. The industry apparently decided to support this weak bill so that it could take the smoking issue off the table and pass an ineffective law. The Communities for a Tobacco-Free New York actively opposed the bill, collecting signatures, and distributing fliers calling for 100% smoke free restaurants.

The industry sent their "top guns" at the hearings for the Smoke Free Air Act, including John

Gillespie, a tobacco lobbyist representing the Hotel Association in Rockland. Gillespie worked for Philip Morris for several years prior to 1996; in 1994, he organized restaurant owners to rally against attempts by the Board of Health to pass strict smoking restrictions. His success in preventing passage of these measures was noted by New York State lobbyist Sharon Portnoy, who sent an email with the subject heading “Rockland!!!!!!!!” to several individuals in Government Affairs and Vice President Ellen Merlo. It read, “...the smoking ban was defeated in Rockland county. This was a big success for our local lobbyist John Gillespie who arranged the army of restaurant and diner owners and patrons that flooded the room” [128].

Another communication from Philip Morris Government Affairs executive Chris Smiley recounts events in 1995:

On Dec. 19th the proposed bill by the B.O.H. (Board of Health) [the legislature actually proposed the bill, but sponsor Sandy Rubenstein was on the Board of Health] to ban smoking in all restaurants was voted down. The bill that John [Gillespie, Philip Morris lobbyist] introduced that required restaurant owners to post a sign [whether] or not their establishment was smoking, letting the society decide, was also dropped. At this time Rockland County Board of Health has been defeated. Although this has been the third straight year that this bill and others like it has come to defeat this will be a constant fight. Sandy Rubenstein (the head of the B.O.H. [and a legislator]) has already expressed that he will impose a stricter ban in the latter part of 96. [129]

Thus, Gillespie had acquired substantial experience in orchestrating restaurant and other hospitality groups in campaigns to fight strict regulations and also support weak measures. The presentations at the 1996 hearings were very professional; even their representative “consumer” and “beverage person” was polished and well-rehearsed [130].

The bill required restaurants with 35 or more seats to set aside at least 75% of their dining area for nonsmokers. The smoking and nonsmoking sections were required to be separated by a partition at least 72 inches high, and the restaurant had to follow certain other ventilation restrictions. Air from the smoking area must be exhausted to the outside of the building unless filtered before recirculation. Bars and bar areas of restaurants were exempt from the restrictions. The bill also restricted smoking to separate areas of bowling alleys and workplaces, and ended smoking in taxicabs, limousines, and all schools or vocational institutions [131].

The bill presented two major problems: the ventilation requirements and the 72-inch partition would be difficult to install in existing establishments, and devising a way to exhaust smoky air would be costly. Restaurant owners were required to submit their plans for compliance to the Health Department’s Environmental Health Section.

In contrast to previous health-related bills, the Rockland County Health Department was not consulted for advice on the Smoke Free Air Act proposal [132]. Nor was the local ASSIST coalition, the Communities for a Tobacco Free New York (CTFNY), which serves Westchester, Putnam, Orange, and Rockland Counties. The American Lung Association serves as CTFNY’s fiscal agent and the American Cancer Society, the American Heart Association and the Rockland, Westchester, Putnam, and Orange County Departments of Health are included in its membership. The legislature’s disregard for the advice of these public health experts indicates that the passage of the Smoke Free Air Act was a political deal, already fashioned and sealed before the proposal’s introduction.

When CTFNY heard about the Smoke Free Air Act, they immediately realized the bill was too weak to significantly protect public health. They began contacting legislators to voice their opposition. Health Commissioner Marvin Thalenberg contacted County Executive C. Scott Vanderhoef to voice his concern about the proposed bill [130]. However, the campaign was not well-organized, as health advocates largely believed the legislature would pass the bill regardless of their input. Health advocates were also discouraged by the previous year's failure to pass Sandy Rubenstein's smoke free restaurant bill.

The legislature passed the Smoke Free Air Act in July 1997, and scheduled its implementation date for January 1, 1998. Despite health advocates' attempts to sway County Executive Vanderhoef, he refused to veto the bill. The resulting restrictions were so popular with the tobacco industry, they were highlighted in a Philip Morris newsletter regarding the smokers "accommodation" program, the "Sign of the Times"[76].

The Jaffee Amendment

Implementation of the Smoke Free Air Act was interrupted and slowed because legislator Ellen Jaffee (D-Ramapo) proposed to amend the Smoke Free Air Act by ending smoking in dining areas of all restaurants and in bar areas unless they were separately enclosed. Jaffee considered the Smoke Free Air Act to have several shortcomings. She felt the effectiveness of the restaurant ventilation requirements was negated by the lack of smoking restriction in bar areas. The ventilation requirements and the 72-inch partition seemed burdensome, and the requirement that air be exhausted seemed costly and wasteful to owners because air would have to be conditioned or heated only to be discharged. Furthermore, restrictions on smoking in workplace cafeterias were inadequate [133].

Jaffee consulted with Communities for a Tobacco-Free New York, which recommended she wait a couple of years before introducing the proposal. However, Jaffee decided to press ahead, and CTFNY began distributing fliers and gathering signatures to demonstrate support for Jaffee's stronger legislation. Fliers read:

IS THE ROCKLAND COUNTY LEGISLATURE PROTECTING OUR HEALTH?

There is no safe level of exposure to second-hand smoke. Rockland County voters should let their legislators know that:

- We want totally smoke-free restaurants.
- The legislature should stop dragging its feet. Our family's health is at risk. Pass a **strong** second-hand smoke bill **immediately**. [134]

A representative from CTFNY dressed as the Grim Reaper when attending the final hearing regarding the Jaffee amendment, and another representative dressed as "Joe Chemo" a withered Joe Camel toting chemotherapy gear [130].

Gillespie and the tobacco industry maintained their presence during the public debate over the Jaffee amendment, organizing the restaurateur opposition [132]. This was evidenced by the restaurant owners' circulation of a study by the World Health Organization's International Agency for Research on Cancer, one of the leading world authorities on cancer. The lobbyists for the opposition presented the

IARC study as finding no correlation between secondhand smoke and lung cancer in nonsmokers and touted it as proof that smoking restrictions such as the Jaffee amendment were not necessary to protect health [135]. Work by Ong and Glantz reveals that this study was the center of a tobacco industry public relations ploy. The study actually found an increase in risk of lung cancer in nonsmokers exposed to secondhand smoke, similar to other major reports, but the industry misrepresented the statistical significance of the findings to dilute the impact of another significant testament to the harmfulness of their product. This misrepresentation was perpetuated in a Rockland Journal-News article during the Jaffee debate [135].

The Jaffee amendment was defeated on May 5, 1998 by a vote of 11-10. According to an anti-tobacco advocate, Jaffee was unable to garner the support to pass the amendment because three Democrats on the Democratic legislature refused to clearly state their position until the last minute. Peter Branti (D-Haverstraw), Christopher St. Lawrence (D-Ramapo), and Howard Philips (D-Haverstraw) eventually voted against the amendment, and were the only Democrats to do so [136].

The nature of the Smoke Free Air Act makes implementation and enforcement difficult. In a March letter addressed to Jaffee, Health Commissioner Marvin Thalenberg details the problems with enforcement of the Smoke Free Air Act. He writes, "The current law is difficult to enforce in certain areas specifically having to do with ventilation rates, degree of filtration, the issues of operation and maintenance of air cleaning systems and the fact that bar areas under the current law are exempt" [137]. However, the Rockland County Health Department hired a full-time engineer to perform inspections separate from regular restaurant health inspections to enforce the Smoke Free Air Act. Restaurants which insisted on maintaining a smoking section were told to draw up a plan for their heating and ventilation systems so the health department could determine whether they were compliant with the new law. According to Carl Dornbush, Senior Environmental Health Specialist at the Rockland Health Department, as of September 1999, only 35 restaurants submitted plans; the vast majority of county restaurants chose to eliminate smoking from their dining areas [127]. To date, only one restaurant has been fined for failing to meet these specifications.

At the time of this report's publication, Rockland is considering tobacco advertising restrictions, a media/education campaign to encourage pharmacies to not sell tobacco, and improving the tobacco licensing of retail stores. Given the influence of the tobacco industry over the legislature, it remains to be seen whether the county will continue to pass weak laws to remove the tobacco control issue from the agenda, or whether it is capable of passing significant tobacco control legislation instead.

Livingston County

Livingston County is a fairly conservative region located in the Western Finger Lakes region of New York State. The rural suburban county contains approximately 63,000 residents [138].

On August 19, 1998, the Livingston County Board of Supervisors approved a bill ending smoking in all public places, including restaurants. The bill applied to areas such as restaurants, elevators, public transit, restrooms, service lines, retail stores, libraries, museums, sports arenas, and Livingston County Jail. Smoking was prohibited in all businesses and nonprofit entities patronized by the public, such as banks and salons. In addition, the bill restricted smoking in health facilities, multiple unit residences, and commercial facilities, bowling alleys, and bingo parlors. Implementation was

scheduled for August 19, 1999, but while restaurants must go smoke-free as of this date, restaurant bars do not have to comply until 2005. At that point, smoking will only be allowed if the bar area is serviced by a separate ventilation system and negatively pressurized so that smoke does not escape from its boundaries. Violations are punishable by a civil penalty of up to one thousand dollars.

Tobacco Industry Proactive Efforts on Clean Indoor Air

The tobacco industry was particularly active in Livingston County, exercising two well-known strategies they had used in local smoking restriction battles nationwide: the Accommodation Program and accusing ASSIST coalitions of illegal lobbying.

In the hearings for the draft restrictions, Conesus Supervisor Donna Avery proposed a signage law as an alternative to the clean indoor air bill. The idea emulated a program sponsored by Philip Morris, the Red Light/Green Light plan. Stickers, similar in size to the credit card stickers placed on the windows of restaurants, indicate with traffic lights whether an establishment allows or restricts smoking. Red indicates smoking is permitted without restriction, green indicates a non-smoking establishment, and yellow denotes smoking is restricted to certain areas [139]. The National Smokers' Alliance (NSA), a smokers' rights group financed and organized by Philip Morris, promoted this program in localities such as Spokane, WA, Arlington Heights, IL, and Fayette County, GA, and Monongalia County, WV [139]. They also succeeded in persuading the Niagara County Legislature to adopt the measure in 1998 [95].

Charges of Illegal Lobbying

In addition to promoting the Red Light/Green Light program, the National Smokers Alliance also accused the Livingston County Tobacco Control Coalition (an ASSIST coalition) of using taxpayer money to lobby the Board of Supervisors. ASSIST is funded in part by the federal government and the county acts as the fiscal agent. Because the money consists of federal funds, the state program contract states that no funding should be used to lobby government officials.

The tobacco industry is threatened by the component of ASSIST which calls for the selected sites to "substantially increase and strengthen public support for policies which a) mandate clean indoor air; b) restrict tobacco use by minors; c) increase economic incentives and taxation to discourage the use of tobacco products; and d) restrict the advertising and promotion of tobacco" [140]. The industry determined that the best approach to impede the program's success was to challenge the ASSIST coalition's policymaking activity as illegal lobbying. In a 1992 Tobacco Institute Executive Committee transcript, an employee states, "...we think that catching the ASSIST coalitions in lobbying activities offers our best shot at working through Congress, or in the states to redirect the anti-smokers' activity" [141]. According to the Institute of Medicine (IOM), policy development should be one of public health's primary functions. In 1988, IOM stressed that public health professionals needed to become more politically involved in forming policies to improve public health [142]. Thus, the role of the Health Departments in designing and promoting health policy is not only approved, but encouraged. Although Health Departments are restricted from lobbying government officials, their staff must interact with public officials to fulfill this role. The tobacco industry works to promote the misperception that this routine interaction is equivalent to lobbying, and is therefore illegal.

In Colorado, Washington, Minnesota and Maine, the industry filed formal complaints accusing that taxpayer money was being used in lobbying efforts by the ASSIST coalitions [142]. All four state health departments received numerous requests for ASSIST documents (under the Freedom of Information Act) In Colorado, the industry filed lawsuits questioning the legality of the Colorado Health Department's activities in planning the state tobacco tax initiative and participating in the petition process. In Washington, the industry filed a complaint with the Washington Public Disclosure Commission in November 1995, charging Project ASSIST with misusing taxpayer funds for lobbying efforts. In October 1995, industry ally Minnesota Grocers Association filed a complaint with the Minnesota Ethical Practices Board and with the state auditor, also accusing Project ASSIST of misusing taxpayer funds. In Maine, the Attorney General received a letter from an industry lobbyist with similar allegations, and the ASSIST files the industry obtained by a seemingly independent lawyer through FOIA requests were incorporated into a document title "Survey of DHS [Department of Health] ASSIST Files" which was distributed by tobacco lobbyists to Maine state legislators. In all four cases, these formal complaints were negated after investigation or dismissed because officials found the claims baseless.

In their examination of the effects of these attacks on ASSIST coalitions, Bialous et. al. concluded that although such allegations were ultimately disproved or dismissed, they still influenced the activity of public health professionals in the four states and the 13 other states with ASSIST contracts. Bialous et. al. state, "...the tobacco industry's allegations led public health professionals to self-censor their activities to some degree in 11 of the 17 [ASSIST] states (65%)" [142].

Thus, the National Smokers' Alliance accusations of illegal lobbying on the part of the Livingston coalition was not just an attempt to determine whether the coalition was using funds appropriately, but it was an attempt to intimidate Livingston tobacco control professionals into diminishing their policymaking efforts. In a letter to Chairman of the Board of Supervisors Dennis House, attorney for the NSA Renee Giachino asserted it was "unusual" and "possibly illegal" that the Livingston County Tobacco Coalition used county money to lobby county health officials [143]. At hearings, industry lobbyists would ask, "Who pays your salaries?" causing the coalition to recoil and distance themselves from the health department.

NSA lawyer Giachino stated, "We do have precedent at the Supreme Court level that says that taking someone's money and using it against them for lobbying is wrong" [143]. However, Public Health Director Joan Ellison pointed out that the Tobacco Coalition's funding came from a grant, and no county tax dollars were distributed to them. "It's a separate grant and it's managed separately. It's not part of any other program. The money is funneled through the county to the Department of Health as a method of paying for things. We are the intermediary" [143].

Tobacco control advocates, aware of these intimidation tactics used against other ASSIST coalitions, focused public attention on the credibility of the National Smokers Alliance. On August 19, 1998, the *Livingston County News* published a letter-to-the-editor from the Western New York Field Director of the ASSIST Program, Hillary Clarke. The headline read, "Smokers alliance is nothing more than a big tobacco company front," and the letter explained that the National Smokers Alliance was financed by Philip Morris and run by PM's public relations firm, Burson-Marsteller [96]. The letter was prompted by the NSA's extensive attempts to recruit members during the debate over the smoke-free restaurant ordinance. The organization distributed opposition postcards in area restaurants and urged

customers to complete the postcards and send them to their town supervisors [144]. Clarke wrote about a similar campaign against an Erie County proposal, during which the NSA opened an office in Buffalo and hired recruiters to find new members for the organization. Recruiters were paid according to the number of signed applications they obtained.

The National Smokers Alliance responded in an intimidating fashion to dissuade public challenge to their organization. However, their legal threats did not coerce Hillary Clarke to withdraw her statements from the *Livingston County News*. NSA attorney Renee Giachino responded to Clarke with a letter which read, “Your letter demonstrates your malice toward NSA and reckless disregard for the truth in your effort to discredit our organizations, for which we intend to hold you fully and completely liable. The net result of your erroneous and unfounded statements is to defame, and we seek an immediate retraction and apology, to be submitted to the editor of *Livingston County News*” [145]. Clarke chose instead to write another letter to the *County News*, saying she stood by her original statements and provided support for each of her charges.

Apart from this episode, the industry experienced limited success with their intimidation tactics. Although the Livingston County Tobacco Control Coalition provided a great amount of support for the restaurant smoking restrictions and financed several billboards and print advertisements which promoted the measure, the Coalition also tried to diminish the lobbying controversy by distancing itself from the county health department. However, the Coalition was still successful in passing the smoking restrictions. The Board of Supervisors ultimately chose the fairly stringent clean indoor air bill over the signage law, passing the bill by a vote of 12-5 (Table B-5). The law was implemented August 19, 1999.

Dutchess County

Dutchess County is located in the middle of the Hudson River Valley, bordered by Connecticut to the East and the Hudson River to the West. It is midway between New York City and Albany and is mostly suburban and rural.

In early 1999, health officials in Dutchess County announced plans to strengthen smoking restrictions, including an end to smoking in restaurants. The Board of Health considered whether to pass the restrictions as an amendment to the County Sanitary Code. As the restrictions were discussed, tobacco industry lobbyist John Gillespie began attending the public meetings. Gillespie claimed he was a lobbyist for the Empire State Restaurant and Tavern Association, an organization known to have accepted tobacco industry funds to campaign against smoking restrictions. Gillespie’s primary client is Philip Morris [146]. Gillespie was also involved in preventing the Rockland County Board of Health from passing restaurant smoking restrictions in 1994, and he also helped pass an extremely weak “Smoke Free Air Act” in 1997 as part of the tobacco industry’s “accommodation program,” which succeeded in its effort to take the passive smoking issue off of the table by passing an ineffective law.

The Dutchess County legislature, which had been opposed to the restrictions proposed by the Board of Health, passed legislation on August 9 which severely limited the Board of Health’s power. This legislation, which passed by a vote of 22-11, subjected most regulatory actions by County agencies to the approval of the County legislature. The legislation read, “The County Legislature has determined that regulatory actions by County agencies which have an ‘economic’ impact upon small businesses located in Dutchess County shall not take effect until such proposed actions have been submitted and

approved by the County Legislature” [147]. Legislative Majority leader Mark Sheedy, who introduced the measure, stated that it was based on a draft provided by tobacco lobbyist John Gillespie [148].

The voluntary health organizations (the American Lung Association of Northeastern New York, the American Cancer Society and the American Heart Association) lobbied against the law, submitting to the Chairman of the Legislature a legal analysis of the legislation and concluding that “the actions of the county legislature are contrary to the state legislature’s intent and to state environmental law” [149]. The health groups argued that under the State Environmental Quality Review Act (SEQRA), the County legislature was required to prepare an environmental impact statement, as the legislation they were about to pass would affect human health by impeding the Board of Health and thereby create an environmental impact [149].

Although the legislation had passed the legislature, it still needed approval from the County Executive to become law. One legislator, Hamilton Meserve (R-Stanford), wrote an opinion in the Poughkeepsie Journal urging County Executive William Steinhaus to veto the measure. Besides arguing the obvious point that the bill removed the separation of powers between executive and legislative branches of government, Meserve argued that the law would tie up every executive department and agency, not just the Board of Health, and turn the legislature into a bureaucratic nightmare by flooding it with approval requests for various regulations [150].

On August 19, 1999, while the bill still awaited approval from Steinhaus, the Dutchess County Board of Health passed an amendment to the County’s sanitary code that ended smoking in all public indoor places except bars, tobacco shops, and at private social events. Smoking was also prohibited in all enclosed facilities in a place of employment, including restaurants (without bars), the indoor facilities of sports arenas, bingo halls, and bowling centers [151][152][153]. The Board passed the new smoking restrictions despite the advice of County Attorney Ian McDonald, who cited the defeat of the Niagara County Board of Health smoking restrictions as an indication that the Dutchess restrictions would be overturned if challenged in court [154].

Shortly afterward, on September 7, County Executive William Steinhaus vetoed the legislation which would have required executive agencies to seek approval from the legislature when creating regulations. Steinhaus had lost his mother to smoking-related emphysema, but did not basis his veto on this issue, but rather on the long-term implications of the legislation on the structure of county government. He felt that the legislation was an overzealous attempt to prevent the Board of Health from passing its smoking restrictions and stated, “I would veto this law at any time, in any year during my tenure as county executive because it undermines the separation of powers, duties and responsibilities between the Legislature and executive and is contrary to the county constitution” [155].

After this failed attempt to block the Board of Health restrictions, the County Legislature worked to forge a compromise between the health advocates who supported the restrictions and the business owners who feared the restrictions would incur a negative financial impact. By the end of the year, four proposals regarding smoking restrictions were ready for the 2000 legislative session [151].

In December 1999, a group consisting of seven restaurants, two individuals, the Empire State Restaurant and Tavern Association and the National Smokers’ Alliance filed suit against the Dutchess County Board of Health. The plaintiffs are represented by John M. Curran and William Keefer, part of

the firm Albrecht, Maguire, Heffern & Gregg, which represented the plaintiffs who challenged the Niagara County Board of Health smoking restrictions. The firm's fee is paid by the National Smokers' Alliance, the tobacco industry front group [151]. The suit, filed in federal court, alleges that the Board of Health does not possess the constitutional authority to adopt smoking restrictions and that only the County or State legislature has the authority to do so [156]. The suit also claims that the restrictions violate the plaintiffs' civil rights by forcing them to expend a large amount of money to comply with the regulation and they violate the plaintiffs' First Amendment rights by forcing them to post signs by smoking areas which read, "Due to recognized health risks to children from second-hand smoke and current Health Department regulations, we cannot allow minors under the age of 18 into this room" [156].

As of this writing, the lawsuit has not yet been resolved. However, the outcomes of similar cases such as those regarding Board of Health regulations in Niagara County, Nassau County and the State Board of Health indicate that the Dutchess County Board of Health regulations will probably be overturned.

Conclusion

When legislatures considered strong smoke-free restaurant measures the industry had a host of strategies to prevent their passage and to weaken the measures. In Suffolk, the industry misinformed constituents about the status of the new law, prompting many citizens to believe the law had not yet been passed and that it would have a major negative economic impact on the County. Eventually, the public pressure generated by the industry's misinformation campaign prompted legislators to amend the legislation to incorporate a phase-in for restaurants. Suffolk's experience also demonstrates that the battle continues even after a bill is passed.

Another favorite industry strategy was the introduction of "Accommodation" legislation under the guise of protecting nonsmokers when the actual purpose of the bill is to protect the tobacco industry. This occurred in Niagara, Rockland and Livingston Counties. Passing Accommodation legislation allows the industry to remove the smoking issue from the agenda without really addressing the problem. Advocates need to recognize this, and continue to publicize that the industry has sponsored such legislation all across the country. However, Rockland County's experience demonstrated that even a relatively weak piece of legislation can have strong effect if the Department of Health extends resources toward enforcing the ventilation requirements. Doing so made most restaurants recognize that it was easier to simply go smoke-free.

The industry also directs its lobbyists to form coalitions which are designed to appear to be genuine grassroots opposition groups. In Nassau and Suffolk County, Patricia McCrann orchestrated the Long Island Hospitality and Tourism Coalition, and in Rockland and Dutchess Counties, John Gillespie lobbies for the Empire State Restaurant and Tavern Association (a.k.a. NYTRA), a coalition of restaurants organized and financially supported by the tobacco industry. Advocates need to recognize these names and be suspicious of any "grassroots" opposition groups that suddenly appear with unusually strong organization and unlimited resources.

These industry strategies are ineffective against a regulatory body, such as a Board of Health. The industry cannot apply pressure from constituents in the same fashion as they can with a legislature,

which is why it continues to challenge Board of Health regulations in court, to keep the matter under the legislatures' jurisdiction.

The defeat of the State Public Health Council clean indoor air regulations was a major blow to tobacco control. At the time, it was not yet apparent how significant this event was in determining local policies. The lessons the tobacco industry learned in this battle were applied to battles over local Board of Health regulations in the mid-1990s. Largely because of the precedent set in the State Public Health Council case (*Boreali vs. Axelrod*), the tobacco industry has been successful in overturning the Nassau and Niagara regulations; Dutchess County's lawsuit is still unresolved. The only local Board of Health smoking restrictions left unchallenged are Westchester County's, which were revised after a successful court challenge based on a different argument.

Local Boards of Health may be able to withstand a lawsuit brought under the state *Boreali vs. Axelrod* decision by refusing exemptions to any business, thereby not considering economic issues in the policymaking process. Niagara's unsuccessful attempt to draft regulations around the *Boreali* decision indicates that exemptions for any location will always be interpreted as the result of economic considerations. In addition, Boards of Health are more likely to withstand court challenge if they act before the legislature tries to. With three precedents upholding the *Boreali* decision, Boards of Health must consider changing their strategy if they wish to retain authority on this matter.

Despite this vigorous opposition by the tobacco industry, local tobacco control in New York has been a major success. Fifteen counties in addition to New York City have enacted strong clean indoor air measures or other tobacco control policies. Because the counties included are the most populous in the state, roughly 85% of the state's population is covered by these restrictions (Table 16)[157].

Table 16. TYPES OF ORDINANCES PASSED BY NEW YORK LOCALITIES	
Source: NY Tobacco Laws [157]	
Type	Locality
Requiring 100% Smokefree Dining	Dutchess County Erie County Genesee County Livingston County Monroe County Suffolk County Westchester County
Restricting Restaurant Smoking	Nassau County (exempts restaurants with 50 or fewer seats) New York City (exempts restaurants with 35 or fewer seats) Rockland County (exempts restaurants with 35 or fewer seats)
Requiring 100% Smokefree Worksites	Dutchess County Erie County Genesee County Livingston County Monroe County Niagara County Suffolk County
Restricting Worksite Smoking	Nassau County New York City Rockland County Westchester County
Licensing Tobacco Retailers	Dutchess County New York City Schenectady County
Banning Self Service Tobacco Displays	Cattaraugus County Chautauqua County Cortland County Erie County Genesee County (exempts cigars and pipe tobacco) Livingston County Nassau County
Restricting Billboards and Other Outdoor Tobacco Advertising	City of Albany City of Buffalo Erie County (county-owned property only) City of New Rochelle New York City Rensselaer County City of Rochester Rockland County (county-owned property only) Town of Long Beach City of Yonkers

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CHAPTER NINE

CONCLUSION

As in most other states, progress in New York tobacco control has come primarily at the local level, and local successes inspired state action. In New York, Suffolk and Nassau Counties have traditionally been first to address tobacco control issues; their successes motivated New York City to follow suit, and until the Pataki Administration, the state followed New York City.

The State will not adopt legislation that has not been experienced at the local level because a lack of local legislation indicates a lack of interest and because the state legislature needs to determine from a local experience whether the legislation has had a positive or negative impact. Furthermore, the tobacco industry wields much more power at the state level than at the local level of government, so if a policy cannot pass at the local level, it is almost impossible to pass at the state level. This situation indicates that the most important issue in tobacco control is the preemption of local smoking restrictions. If advocates wish to continue their progress in New York, they must protect the localities' authority to pass tobacco control legislation.

The industry has responded to these local threats mainly by trying to pass preemptive bills at the state level, and using restaurant front groups to represent their interests. Although preemption is not likely in New York because of the strength of the counties (especially New York City) and the vigilance of tobacco control advocates, advocates should be wary of tobacco control bills they have not been consulted on and continue to publicize any industry involvement with legislation.

The difficulties New York's tobacco control advocates faced at the state level with an unsympathetic Governor impressed upon them how much progress revolved around the political priorities of former Governor Mario Cuomo and former State Health Commissioner David Axelrod. Axelrod's death removed a politically astute champion from New York's tobacco control effort. Health Commissioner Antonia Novello, appointed in 1999, appears to be upholding the anti-tobacco reputation she gained as the U.S. Surgeon General. She not only replaced the weak billboards posted by the State Department of Health with informative and effective advertisements, she also extended State Medicaid coverage to include smoking cessation therapies.

Tobacco control advocates have had to rely on a champion from inside the political structure because they do not possess many options in terms of influencing policymakers. In tobacco control, public opinion is the most powerful tool in passing legislation, but New York advocates do not possess vehicles such as initiatives to harness public opinion and create change. Thus, public opinion regarding tobacco can only be voiced in the selection of legislators, which diffuses the tobacco issue with many other concerns. Because of this, New York advocates have had to rely on media advocacy heavily.

State tobacco control advocates need to continue their vigilance over the tort reform issue and protect individuals' rights to sue the tobacco industry. The situation around the Civil Justice Reform Act mirrors that of California's 1987 "Napkin Deal", so-named because it was written on a napkin in a Chinese restaurant [1]. The agreement gave manufacturers and insurance companies protection from lawsuits. The tobacco industry won a provision which gave immunity to companies manufacturing and

selling “inherently unsafe” products “such as sugar, castor oil, alcohol, tobacco, and butter” [1]. Doctors (represented by the California Medical Association) were assured protection of their current lawsuit protections, and trial lawyers were guaranteed increases in contingency fees for malpractice cases. New York’s situation resembles California’s in that doctors are trading the rights of their patients to sue tobacco companies for their own protection against malpractice suits.

Another major priority for tobacco control advocates at the state level should be campaign finance reform. Although Governor Pataki and legislative leaders passed a lobbying reform bill in 1999, the new provisions were not sufficient to decrease the tremendous amount of influence industries such as the tobacco industry possesses over Albany. The release of tobacco industry documents was a rare opportunity to glimpse the magnitude of this influence, and such an opportunity is unlikely to materialize again. Advocates should use this momentum to pursue campaign reform measures that not only address the behavior of lobbyists and contributors, but also the behavior of the recipient policymakers.

The tobacco industry documents released as a result of litigation by Minnesota and other states have become an essential resource for tobacco control. The evidence linking Pataki and legislators to tobacco money was the only way to push a tobacco tax increase through the New York legislature, increase the funding for tobacco control, and pass a lobbying reform proposal. Tobacco control advocates in other states should research their own legislature and public officials in the industry documents to determine whether restaurant organizations and other business groups which materialized in tobacco control controversies are financially supported or organized by the industry. If they follow the example of the advocates in New York City, they can use this information to discredit such organizations and their arguments.

ASSIST had been very successful in setting up local coalitions to advocate for clean indoor air, and academic centers like Roswell Park have helped pool information from coalitions’ different experiences and helped to progress tobacco control on the local level. As a result, tobacco control has enjoyed many successes at the local level, passing strong smoke-free dining restrictions in New York City, Suffolk County, Erie County and Livingston County, and strong marketing and advertising restrictions in Suffolk and Nassau Counties. Media advocacy has been exemplary in New York City. These successes have resulted from advocates holding legislators publicly accountable, keeping the argument focused on health issues, discrediting tobacco industry front groups, and providing evidence to contradict industry claims.

New York City has been particularly successful in passing tobacco control legislation in light of its size and Philip Morris’ extensive and prolific connections in the city. The advocates have been consistently vocal in exposing industry scare tactics (such as claims of adverse economic impact) and coercive behavior toward their beneficiaries (i.e., arts groups). In addition, advocates have revealed industry front groups such as the New York Tavern and Restaurant Association. New York City’s use of ASSIST money to place advertisements revealing tobacco connections in newspapers, developing the ADVOCASH program, and maintaining an informative policy-oriented website are excellent examples for other localities.

The passage of New York City’s Smoke Free Air Act demonstrated the tobacco industry’s reliance on the claim that smoke-free dining restrictions result in a negative economic impact on businesses. Even after the restrictions were implemented and studies indicated no loss of business, the

industry continues to point to New York City as an example of smoking restrictions impacting business in a detrimental manner. Advocates in locations considering smoke-free dining restrictions should be prepared to recognize and publicize flaws in the industry's studies and determine which economic analyses are impartial and competent.

Localities outside New York also met with tremendous success in the late 1980s and early 1990s. Several counties such as Suffolk and Erie passed clean indoor air laws, and amended them to include smoke-free restaurants in the 1990s. However, the tobacco industry has begun to recognize the significance of local successes such as these and their role in negating industry arguments regarding economic loss and competitive disadvantages for restaurants. As a result, the industry has been spending more money to hire politically-connected individuals to represent their interests to the county legislatures. Industry lobbyists are not only targeting bellwether localities, such as Suffolk, but also traveling to Niagara and Erie Counties in upstate New York, where such matters bear little consequence to the rest of the state. In addition, the industry has formed "hospitality coalitions" to mimic grassroots opposition to tobacco control bills, and proposed "accommodation" bills to compete with the stronger restrictions. Furthermore, the industry proposes amendments to bills that have already passed in attempts to eliminate the smoke-free phase-ins of restaurants.

The tobacco industry has also prevented localities from passing smoking restrictions by removing one promising avenue of action: the local Boards of Health. The industry has repeatedly sued local New York Boards of Health for passing amendments to the local health code which amount to smoking restrictions. The industry has met success time and again by arguing that because a Board of Health exempted a certain location (i.e., bars), it considered economic ramifications of its ordinance, which it is not allowed to do. Board of Health should consider only the ramifications on health. If advocates wish to approach a local Board of Health in the future to pursue a smoking restriction, they should keep this in mind and discuss the possibility of a uniform regulation making *all* workplaces smoke free. A restriction without exemption would not be subject to the industry's successful "economic consideration" argument. Furthermore, tobacco control advocates in localities should be aware that there is a growing trend to pass legislation removing authority from Boards of Health, and prepare to counteract this strategy.

Advocates should also prepare to argue that the *Boreali* decision throwing out action by the local Boards of Health has become outdated. The original decision and subsequent rulings on the same issue have stated that the medical expertise offered by Boards of Health is not needed in to formulate smoking restrictions. However, in recent years, the tobacco industry has released many scientific studies to validate their claims. Most if not all of these studies are poorly done or biased, yet legislatures accept all studies with equal weight. This is another reason why the industry prefers dealing with legislatures; they are able to persuade lawmakers with these studies that there is no proof that secondhand smoke causes harm and that smoking restrictions lead to a 30% decline in the restaurant business. Board of Health members are much more familiar with medical literature and are able to determine which studies are impartial and scientifically sound.

Despite strong opposition from the tobacco industry and, in recent years, a hostile governor, tobacco control advocates in New York have achieved many notable successes by continuing to mount an aggressive program directed at engaging the public, exposing the tobacco industry and its front groups. They have had the strength to challenge politicians – including their allies – and the discipline

to avoid counterproductive compromises, such as accepting preemption simply to get a bill passed.

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