Youth Access Provisions of the MSA, Five Years Later

By Laura Hermer
Health Law & Policy Institute

Most nicotine addiction begins during adolescence, and the prevalence of tobacco use by children and adolescents is substantial.¹ In 1996, 66.2 percent of all people who became daily smokers that year were under the age of 18 — the age at which one may legally be sold cigarettes.² More recently, the CDC found that 28.5 percent of high school students in the United States smoked cigarettes at least once in the past 30 days, and that 13.8 percent smoked on 20 or more of the past 30 days.³ Approximately 70 percent of adolescent smokers regret ever having started the habit.⁴

In 1998, participating cigarette manufacturers entered into a multi-billion dollar settlement with 46 states, 5 territories and the District of Columbia regarding actual and potential claims for damages incurred from spending public funds on medical care for sick smokers. Among its other provisions, the Master Settlement Agreement (MSA) noted that “Settling States and the Participating Manufacturers are committed to reducing underage tobacco use by discouraging such use and by preventing Youth access to Tobacco Products” [MSA I].

Towards this end, it included a number of provisions meant to effectuate this intent. Included in these are a handful of concrete restrictions intended to help prevent youth access to tobacco products. One provision restricts participating manufacturers from providing gifts to minors based on proofs of purchase [MSA III(h)]. Another prohibits participating manufacturers from providing free cigarette samples at any location other than establishments that restrict the entry of minors [MSA III(g) and II(c)]. The last restricted participating manufacturers from producing packs for sale containing fewer than 20 cigarettes [MSA III(k)]. This final provision expired at the end of 2001.

Notably, little has happened with respect to these youth access provisions in the five years since the MSA was signed.

Since the signing of the MSA five years ago, it does not appear that any major participating manufacturer ceased exchanges of coupons for gifts. Brown & Williamson, for example, periodically offers gifts with its cigarettes, or in exchange for coupons on cigarette packs and cartons.⁵ It further claims to restrict provision of gifts and other promotional items to individuals who are both 18 years of age or older and smokers.⁶ Phillip Morris and R.J. Reynolds each offer longstanding programs in which individuals may exchange coupons or proofs of purchase found in cigarette packs for gifts and other items.⁷ Phillip Morris claims to place restrictions similar to Brown & Williamson’s on the age and identity of those who may request and receive promotional

¹ Id. at 41, 785-41,786.
⁴ See CDC, supra note 2.
⁵ See, e.g., Carla Beardi, Radio promotion aims to give Kool younger profile : Revitalization plan for aging brand will focus on taste in ads this fall, Advertising 7/3/2000 71;28:33 (noting that “The marketer this week will begin giving away a miniradio with special packs of Kool, in an effort to attract smokers aged 21 to 30”).
literature and merchandise from the company. R.J. Reynolds's website, on the other hand, appears to contain no information specific to restrictions placed on individuals seeking to redeem coupons for gifts or other merchandise.

With respect to the restriction on providing free cigarette samples, it does not appear that any suits have been brought against any participating manufacturer expressly for violations. At least one participating manufacturer, R.J. Reynolds, agreed to stop mailing cigarette samples to individuals nationwide after the Attorney General of Arizona demanded that they stop the practice in 2000. However, no suit was ever brought concerning it. R.J. Reynolds was also fined nearly $15 million for distributing free samples of tobacco products in a prohibited location. In that case, the superior court judge found that R.J. Reynolds distributed over 100,000 packs of cigarettes at places such as street fairs and other locations at which minors were present. That suit, however, was brought under a California law prohibiting the provision of free tobacco samples on public property, and not under the terms of the MSA.

With respect to pack sizes, it does not appear that “kiddie” packs have made a strong appearance in settling states since the start of 2002, when the MSA’s prohibition against them ended. Nevertheless, states with a serious interest in limiting youth access to tobacco products might consider enacting through their own legislatures a similar, but permanent, provision. California, for example, took this step in 2001. Similarly, states might also consider prohibitions on the sale of bidis (cigarettes, usually imported from India, that come in different flavors such as chocolate, vanilla, cinnamon and that are sold in packs of 20 or less) and smokeless tobacco products such as Revel, a blend of tobacco and mint flavoring in non-dissolvable packs which are placed in the mouth.

The MSA is notable for the concrete youth access provisions that it does not contain. For example, it contains no provisions regulating self-service displays of tobacco products. The MSA also omits any provisions preventing participating manufacturers from permitting their products to be used as part of a self-service display. Self-service displays make it easier for youth to obtain tobacco products for a variety of reasons. Self-service displays prevent sales clerks and other individuals from exercising an important aspect of control over tobacco products sales. They are frequently located at child-level. They also function not only as advertisements, but also as potential sources of items which children might take without anyone seeing.

Without such provisions, Participating Manufacturers are not required to take any steps to prevent the use of their products in such displays, and accordingly cannot not be held liable under the terms of the settlement for failure to take such steps.

---

8 See, e.g., Phillip Morris U.S.A., Marketing Practices, viewed at http://www.philipmorrisusa.com/responsible_marketing/marketing_practices.asp on June 5, 2003 (claiming that it restricts participation in “cigarette brand continuity” programs to individuals age 21 or older who provide a copy of government-issued I.D. verifying name, age and address, and certify the document’s validity).


11 See, e.g., California court fines tobacco company millions, Nation’s Health, June 1, 2002 32;5:.

12 Id.

13 See id. The relevant law is CA Health & Safety Code § 118950(b) (providing in relevant part that “It is unlawful for any person, agent, or employee of a person in the business of selling or distributing smokeless tobacco or cigarettes from engaging in the nonsale distribution of any smokeless tobacco or cigarettes to
The MSA also contains no restriction of any kind on the ability of Participating Manufacturers to operate or lease tobacco products vending machines, or to contract with operators or lessors of such vending machines. Numerous studies, however, have shown that minors generally have substantial success in illegally purchasing tobacco products through vending machines. Moreover, only approximately half of all states have statewide restrictions on the siting of tobacco products vending machines.

The MSA leaves the ability of states and localities to restrict the siting of tobacco products vending machines totally unaffected. States and localities may continue to regulate vending machine placement, to the extent permitted by their own laws. Thus, the standard courses of action taken by most states and municipal governments interested in restricting youth access to tobacco products vending machines remain open to them, just as if the MSA had never been enacted.15

07/17/03

---

15 The MSA provides that the participating manufacturers will not oppose legislation to limit youth access to vending machines. MSA, Exhibit F(1).