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Public Health Policy For Internet Cigarette Retailers

Christopher Banthin

Enter the word “cigarettes” in an Internet search engine and you will probably find an Internet cigarette retailer (“Internet cigarette retailer”) at the top of your list of search results. The number of Internet cigarette retailers has increased dramatically in recent years. In 2000, Professor Kurt Ribisl of the University of North Carolina at Chapel-Hill and colleagues undertook the first comprehensive survey of the number of domestic Internet cigarette retailers and identified 88 Internet cigarette retailers operating through hundreds of websites.¹ Four years later, their follow-up study identified 775 domestic Internet cigarette retailers.²

This trend is a concern because tobacco use is the leading preventable cause of death in the United States. Cigarettes kill 400,000 Americans every year.³ Tobacco-related deaths exceed the number of people killed by alcohol, AIDS, car crashes, illegal drugs, murders, and suicides combined.⁴ Additionally, smoking-attributable health-care expenditures are approximately \$75.5 billion annually.⁵

This Synopsis discusses problems associated with Internet cigarette retailers, and the state and federal laws that can be used to address these problems. Section I of this Synopsis discusses the marketing and operation of Internet cigarette retailers. Section II outlines efforts by states to collect their tobacco taxes on sales by Internet cigarette retailers and to prevent Internet cigarette retailers from selling to children. Section III discusses impediments to state action, the most significant being the threat of legal challenges under the Commerce Clause of the United States Constitution. This section also addresses Native American sovereignty, as many domestic Internet cigarette retailers operate from within Native American lands.⁶

Section I — Public Health Concerns Regarding Internet Cigarette Retailers

The marketing of tax-free cigarettes largely has driven the boom in Internet cigarette retailers. Internet cigarette retailers typically fail to charge state sales and excise taxes, which customers are otherwise required to pay when purchasing cigarettes from vending machines, convenience stores, or other traditional “brick and mortar retailers.”⁷ The price differences can be substantial. In the United States, since January 2002, thirty-six states and the District of Columbia have increased their excise taxes on cigarettes.⁸ Sixteen states and the District of Columbia now have an excise tax of \$1.00 or higher per package of cigarettes.⁹ By failing to include the applicable New Jersey excise taxes, for example, many Internet cigarette retailers offer a carton of cigarettes for \$24 less than what is charged by New Jersey brick and mortar retailers for a carton of the same brand name cigarettes.¹⁰

Public health advocates are concerned that cheap cigarette prices offered by Internet cigarette retailers may cause more people to smoke. Smoking rates are inversely correlated to cigarette prices.¹¹ The higher the cost of a package of cigarettes, the fewer people

Key Points

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will smoke.¹² On average, for every ten percent increase in the cost of a pack of cigarettes, overall smoking rates will decrease three to five percent, and smoking rates among children will decrease by seven percent.¹³ Conversely, when cigarette prices drop (as is the case when the applicable state tobacco taxes are evaded) smoking rates increase.¹⁴ Thus far thankfully, there is no evidence to suggest that Internet cigarette retailers increase smoking rates in this manner.¹⁵

However, in lobbying against tobacco taxes, some cigarette manufacturers have sought to exploit the fear that Internet cigarette retailers undermine tobacco taxes. They have argued that increases in tobacco taxes are ineffective because they drive consumers to purchase the tax-free or partially taxed cigarettes from Internet cigarette retailers.¹⁶

Thus far, there is no evidence to suggest Internet cigarette retailers increase smoking rates in this manner.¹⁷ However, this lack of evidence has not stopped some cigarette manufacturers from exaggerating the concerns about Internet cigarette retailers in an effort to oppose increases in tobacco taxes. Some cigarette manufacturers and other like-minded groups argue that increases in tobacco taxes are ineffective because they drive consumers to purchase the tax-free or partially taxed cigarettes from Internet cigarette retailers.¹⁸ The argument concludes that tobacco tax increases are bad for state revenue because states do not collect the taxes they would otherwise collect from local retailers.¹⁹

Despite its seeming persuasiveness, this argument is false. Increases in state tobacco taxes continue to demonstrate a decrease in smoking rates and an increase in tobacco tax-related state revenue.²⁰ Furthermore, current tax enforcement efforts discussed in Section II of this Synopsis help ensure that Internet cigarette retailers do not counteract the public health benefit resulting from state tobacco taxes.

In addition to preserving the efficacy of state tobacco taxes, public health advocates are also concerned that Internet cigarette retailers operate with little or no understanding of who their customers are and whether their customers are adults or children. An investigation in 2002 found that nearly all Internet cigarette retailers lack effective age verification protocols.²¹ The most common protocols simply asked customers their age.²² In contrast, only nine percent of the Internet cigarette retailers surveyed required customers to provide a driver's license

number, which can be compared against state motor vehicle records or other databases.²³ Only six percent indicated that a photographic identification would be needed upon delivery.²⁴ No Internet cigarette retailers were registered with parent-controlled filtering or blocking software.²⁵

The payment requirements established by Internet cigarette retailers also appear unlikely to prevent sales to minors. The largest credit card company warned Internet cigarette retailers that issuance of its credit card cannot be taken as proof that the customer is over eighteen years of age.²⁶ Children under the age of eighteen can acquire credit cards if a parent co-signs.²⁷ Moreover, minors might take advantage of Internet-based payment services such as "paypal.com," which allows users to deposit funds into an account and then transfer funds to pay for online purchases.²⁸ A search of the online retailers using paypal.com revealed numerous Internet cigarette retailers.²⁹

The manner in which Internet cigarette retailers affect smoking rates, particularly among children, remains an open question. The most recent data shows that Internet cigarette retailers provide relatively few of the cigarettes smoked by children.³⁰ Additionally, increases in state tobacco taxes remain an effective means for reducing smoking and raising states revenue.³¹ To help ensure the continued efficacy of state tobacco taxes and to prevent Internet cigarette retailers from undercutting tobacco control achievements of the past, states may wish to consider the tobacco control policies discussed in the next section.

Section II — State Laws for Internet Cigarette Retailers

In the relatively brief period of time since the emergence of Internet cigarette retailers, states have responded with a broad array of regulatory and law enforcement approaches. The approaches range from prosecution of Internet cigarette retailers for violations of existing minimum age sales laws³² to a ban on all direct-to-consumer deliveries of cigarettes.³³ This part of the Synopsis discusses laws in two areas: tax and youth access.

Tobacco Tax Laws for Internet Cigarette Retailers

The law is clear that whenever an Internet cigarette retailer sells cigarettes to a customer, tobacco taxes are owed to the state where the customer is located.³⁴ When customers purchase cigarettes from a grocery store or other brick and mortar retailer, they are technically liable for paying the state excise tax ("tobacco tax") on that purchase.³⁵ The tax liability may not be readily apparent to customers because states typically require the cigarette wholesaler or some other intermediary to collect and remit the tobacco tax for each package of cigarettes before the package ever reaches the retail store display.³⁶ The stamp on each package of cigarettes is proof that the state tobacco tax was collected and remitted to the state.³⁷

Because interstate tax law complicates the application of this collection and remittance requirement to Internet cigarette retailers,³⁸ states may opt to collect directly from Internet cigarette retailer customers.³⁹ A federal law passed in 1949, which is referred to as the Jenkins Act,⁴⁰ simplifies the procedure for locating Internet cigarette retailer customers. The Jenkins Act requires any person or business that ships cigarettes to a state imposing a tobacco tax to disclose to local tax enforcement officials the name and address of the shipper and the person to whom the cigarettes are shipped.⁴¹ The disclosure also must include the brand names and quantities sent to each address.⁴² States may use this information to collect the tax directly from the customer, who will likely think twice about purchasing from Internet cigarette retailers in the future after having to pay shipping costs and state tobacco taxes, and receiving special attention from state tax officials.⁴³

Several states have successfully used the Jenkins Act.⁴⁴ Washington state, for example, sued an Internet cigarette retailer under the Jenkins Act, ultimately forcing the Internet cigarette retailer to turn over all its relevant customer information to the state.⁴⁵ The court found that states have an implied right to sue under the Jenkins Act because the Act was passed explicitly to benefit states and state enforcement is consistent with its goal.⁴⁶

While the Jenkins Act enforcement provides a tax enforcement option for any state, some states have adopted new laws to increase tobacco tax compliance as well as simplify collection. For example, in addition to complying with the Jenkins Act reporting

requirements, Internet cigarette retailers selling in California must also collect all applicable tobacco taxes and remit them to the state. If the Internet cigarette retailer opts not to collect and remit such taxes, then the Internet cigarette retailer must clearly disclose to each customer the following:

If these cigarettes have been shipped to you from a seller located outside of the state in which you reside, the seller has reported pursuant to federal law the sale of these cigarettes to your state tax collection agency, including your name and address. You are legally responsible for all applicable unpaid state taxes on these cigarettes.⁴⁷

This notification is important because the offer of tax-free cigarettes is a primary promotional technique for Internet cigarette retailer.⁴⁸ Californians who think they can evade state tobacco taxes by purchasing from an Internet cigarette retailer, will be disabused of this notion shortly after their first purchase.

Youth Access Laws for Internet Cigarette Retailers

When tested in compliance checks, Internet cigarette retailers frequently sell to children. Many states have reacted by passing youth access laws tailored specifically for Internet cigarette retailers. Rhode Island became the first such state in 2000.⁴⁹ Before shipping a tobacco product into Rhode Island, Internet cigarette retailers must obtain a copy of the customer's government identification showing that he or she is at least 18 years of age, along with a written attestation as to the authenticity and accuracy of the photocopy.⁵⁰ Internet cigarette retailers selling to Rhode Island customers must also limit delivery to the address listed on the identification and use a delivery service that requires the signature of the addressee or another adult.⁵¹

Since Rhode Island passed its law in 2000, numerous states have adopted similar laws with additional requirements. For example, California mandates that Internet cigarette retailers check back with customers, in part to confirm that the potential customer is an adult.⁵² The California requirement states:

The distributor or seller shall submit to each credit card acquiring company with which it has credit card sales identification information in an appropriate form and format so that the words “tobacco products” may be printed in the purchaser’s credit card statement when a purchase of tobacco product is made by credit card payment.⁵³

The distributor or seller shall make a telephone call after 5 p.m. to the purchaser confirming the order prior to shipping the tobacco products. The telephone call may be a person-to-person call or a recorded message. The distributor or seller is not required to speak directly with a person and may leave a message on an answering machine or by voice mail.⁵⁴

The “check back” requirement, which exists in some other states, is meant to inform parents or guardians about their children’s purchases, information that might otherwise remain hidden. The “check back” requirement also intensifies minors’ concern that a parent or guardian will intercept the delivery of the tobacco products, which should dissuade at least some children patronizing Internet cigarette retailers.

Other laws in California include requiring a two carton minimum per order, prohibiting the use of cash and money orders as a payment option.⁵⁵

A few states have banned Internet cigarette retailers from shipping cigarettes directly to consumers to keep Internet cigarette retailers from selling to children.⁵⁶ New York was the first state to adopt this approach in August 2000.⁵⁷ The New York law prohibits all tobacco retailers, including Internet cigarette retailers, from shipping cigarettes directly to consumers with few exceptions.⁵⁸ Alaska followed New York’s example in 2003.⁵⁹ In December 2004, Arkansas similarly banned Internet cigarette retailers when the Supreme Court of Arkansas upheld the Arkansas Tobacco Control Board’s ruling that tobacco retailers must have a physical space in the state in order to obtain a license to sell cigarettes directly to consumers in Arkansas.⁶⁰

State Enforcement and Compliance

The super-geographical nature of the Internet can make enforcement very complicated. Internet cigarette

retailers are scattered throughout the country.⁶¹ Many of the domestic Internet cigarette retailers are located on lands of sovereign Native Americans tribes where state laws are largely unenforceable.⁶² Internet cigarette retailers even operate from other countries.⁶³

States have developed a variety of strategies to cope with these unique enforcement challenges. A common enforcement option is the compliance check, which states have used to keep illegal sales rates low among traditional brick and mortar retailers.⁶⁴ The enforcement official recruits a minor to attempt to buy from Internet cigarette retailers and to document his or her experience as evidence for possible prosecution under state minimum age sales laws.⁶⁵ Typically, the penalties get harsher each time a retailer sells to a minor.⁶⁶ In order to reduce the expense and complexity of prosecuting an individual or business located out-of-state, several states have cooperated in multi-state enforcement efforts.⁶⁷

Another enforcement option was adopted in Maine in late 2003. The Maine law categorizes Internet cigarette retailers into one of two categories: those that are licensed with the state and those that are unlicensed.⁶⁸ This list is given to all common carriers that are likely to be asked to deliver tobacco products into the state, such as FedEx or UPS. The U.S. Postal Service is also provided with a copy.⁶⁹ Once notified, the Maine law would prohibit all delivery services from shipping products into Maine on behalf of tobacco retailers not licensed with the State.⁷⁰ This approach reduces illegal sales by Internet cigarette retailers by controlling their ability to deliver products to customers in Maine. Additionally, by focusing on the delivery services used by Internet cigarette retailers, Maine avoids the expense and complexity of prosecuting enforcement actions against individual retailers.

(The legality of Maine’s approach has recently come into question. In a challenge to this law, a federal court recently ruled that federal transportation law preempts the Maine law.⁷¹ This decision may be appealed. Also, despite this adverse ruling, the Attorney General for the State of New York recently entered into an agreement with DHL, a major domestic shipping company, which prohibits it from shipping tobacco products directly to all consumers located in the United States.⁷² Talks with other shipping

companies continue.⁷³⁾

Another enforcement strategy is the use of licensing for Internet cigarette retailers.⁷⁴ States use licenses to monitor the marketing and sales of numerous goods and services, such as automobiles, gasoline, alcohol, insurance sales, certain legal representation, pharmacies and more. As of 2000, almost one half of the states and numerous municipalities required traditional brick and mortar tobacco retailers to obtain a license before selling tobacco products.⁷⁵ The licensing requirement allows authorities to prohibit a retailer from selling tobacco products for a probationary period, or permanently, if need be. If applied to Internet cigarette retailers, a streamlined application process through the mail or via the Internet occurring once a year, for example, could provide state officials with important information about the retailers selling in the state. The license application process could also provide Internet cigarette retailers with information about state youth access and tax law policies.

Section III—Federal Law and Conceptual Concerns for State Regulation of Internet Cigarette Retailers

While the federal government thus far has not responded directly to the problems associated with Internet cigarette retailers,⁷⁶ the review of some federal laws is instructive when developing state policies for Internet cigarette retailers. Many legal challenges brought against state regulation of Internet cigarette retailers, and indeed the state regulation of the Internet in general, have centered on the Commerce Clause of the U.S. Constitution.⁷⁷ Some argue that the borderless space of the Internet would be well served by exclusive, federal oversight.⁷⁸

Recent scholarship and judicial decisions, however, arrive at the opposite conclusion.⁷⁹ States have a longstanding and essential role in protecting the public's health.⁸⁰ Without the experiences shared by states through the development of their various public health policies, the public health laws and officials at the state and federal levels would be less effective at protecting the population in general from large scale public health threats.⁸¹ The advantages gained by state participation in the development of public health policy in this country suggest that judicial analysis under the Commerce Clause should

largely defer to public health policies of states.

In general, the Commerce Clause gives Congress the authority to regulate business operating in more than one state.⁸² Courts also interpret the Commerce Clause to limit the manner in which state laws may affect interstate commercial activity.⁸³ This limitation to state law applies even on issues where the federal government has not exercised its Commerce Clause authority; in other words when the federal Commerce Clause authority is "dormant." The tobacco industry has used this "Dormant Commerce Clause" numerous times to challenge state tobacco control laws, including state laws for Internet cigarette retailers.

For example, a group of tobacco companies and Internet cigarette retailers challenged New York's ban on all home deliveries of tobacco products.⁸⁴ The lower court struck down the law under a dormant commerce clause analysis, but on appeal, the court reversed and upheld the law finding that New York demonstrated sufficient justifications for banning such tobacco sales.⁸⁵ The appellate court determined that the New York law was not "economic protectionism" designed to favor in-state tobacco retailers. Instead, the New York law applied equally to all Internet cigarette retailers, including those located in-state.⁸⁶ Had New York lawmakers chosen only to ban shipments from out-of-state Internet cigarette retailers, then the court might have ruled otherwise. Under a Dormant Commerce Clause challenge, in general, if a court finds that a state law is simple economic protectionism designed to hinder out-of-state businesses from accessing in-state markets, then the court will strictly scrutinize the law, which usually leads to a per se invalidation of the law.⁸⁷

Because the court determined that the New York ban, on its face, did not discriminate against out-of-state tobacco companies, the companies had the burden of showing why the ban violated the Dormant Commerce Clause. A state law that applies evenhandedly to in-state and out-of-state business may still be invalidated under the Dormant Commerce Clause, but only if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."⁸⁸ The intensity of the burden that will be allowed depends on "the nature of the local interest involved."⁸⁹ Preservation of public health, safety and welfare weigh strongly in favor of states.⁹⁰ In this case, the out-of-state tobacco companies could not provide sufficient reasons why

the continuation of home deliveries of cigarettes was more important than protecting the public health in New York from tobacco-related harm exacerbated by Internet cigarette retailers.

Although less of an impediment than the threat of legal challenges brought under the Dormant Commerce Clause, the issue of “jurisdiction” is relevant for the state regulation of Internet cigarette retailers. The issue of jurisdiction asks generally whether a court has a right to exercise its authority to haul an out-of-state business into court. The prevailing jurisdiction test for Internet-based conduct was established in 1997 and is known as the “interactive-passive test.”⁹¹ “Interactive” sites, which enable users to form contracts, take orders for good and services, transfer commercial computer files, or otherwise conduct business over the Internet, usually expose the sites’ proprietors to out-of-state jurisdiction.⁹² Courts are much less likely to have jurisdiction over websites that only display information in a passive manner.⁹³

Under this prevailing analysis, when an Internet cigarette retailer ships tobacco products to a customer in violation of the customer’s state laws, the courts in that state will most likely have jurisdiction over the Internet cigarette retailer. Internet cigarette retailers display goods for sale, they take orders and collect money, and they ship cigarettes into the state. It is reasonable that people who operate the Internet cigarette retailers should expect that they be subject to the laws in every state where they sell.⁹⁴

Another important issue for state regulation of Internet cigarette retailers is that of Native American sovereignty. Over one half of the Internet cigarette retailers based in this country operate on Native American lands.⁹⁵ However, the U.S. Supreme Court has said that states have the legal right to require cigarette retailers on Native American lands to collect sales and excise taxes for cigarettes sold to non-tribal members and to keep records about each sale. Because of tribal sovereign immunity, however, states are barred from directly prosecuting the Native American retailers.⁹⁶ In other words, even if a state caught an Native American-based Internet cigarette retailer selling to children, the retailer could legitimately claim immunity from any monetary fines or other punishment arising from the crime.

The sovereignty of Native American tribes suggests that state authorities should strongly consider partnering with their Native American counterparts. Indeed, several states have developed compacts with tribes to collect cigarette taxes on sales to non-tribal members.⁹⁷ A compact might include revenue sharing provisions, allowing a tribal government to retain a portion of tobacco tax revenues partly in exchange for its efforts in the collection of taxes from retailers operating within their jurisdiction. This approach is beneficial because it would further familiarize tribal governments with the policy and processes of using tobacco taxes to dissuade smoking among Native Americans, who have some of the highest smoking rates.⁹⁸ States would gain by understanding tribal governmental efforts for improving public health.

In lieu of negotiating a compact, states have some other options. For example, Maine avoids having to confront this issue of sovereign immunity by going after the common carriers that deliver cigarettes from Internet cigarette retailers located on Native American lands. Under this scenario, the punishment for an Internet cigarette retailer selling to children would be to cut off the retailer from its customers. With regard to the collection of tobacco taxes, states may wish to pursue Jenkins Act enforcement. Because Native American sovereignty does not provide immunity from federal law, Internet cigarette retailers located on Native American lands must disclose their customer lists for tax collection purposes. Recently, the State of Washington successfully forced a Seneca Nation-based Internet cigarette retailer to turn over its customer list.⁹⁹

CONCLUSION

Historically, states have developed most of the effective tobacco control policies in this country. While Congress may pass legislation to regulate Internet cigarette retailers in the future, states may pursue immediately numerous tobacco control policies to respond to Internet cigarette retailers that sell cigarettes to minors or that disregard tax law.

Endnotes

- ¹ See Kurt M. Ribisl et al., Web Sites Selling Cigarettes: How Many Are There in the USA and What Are Their Sales Practices?, 10 TOBACCO CONTROL 352, 355 (2001).
- ² Kurt Ribisl, Cigarettes on the Internet, American Public Health Conference, (Nov. 10, 2004).
- ³ See Centers for Disease Control and Prevention, Cigarette Smoking —Attributable Morbidity United States, 2000, MORBIDITY AND MORTALITY WEEKLY REPORTER, 52: 842-44 (2003) available at <<http://www.cdc.gov/mmwr/PDF/wk/mm5255.pdf>> (visited on June 20, 2005).
- ⁴ See Eric Lindblom & Katie McMahon, Toll of Tobacco in the United States of America, Campaign for Tobacco Free Kids, Washington, D.C. (Mar. 1, 2005) available at <<http://www.tobaccofreekids.org/research/factsheets/>> (visited on June 20, 2005).
- ⁵ See Centers for Disease Control and Prevention, Annual Smoking—Attributable Mortality, Years of Potential Life Lost, and Economic Costs – United States, 1995-1999, MORBIDITY AND MORTALITY WEEKLY REPORTER, 51: 300-03 (2002) available at <<http://www.cdc.gov/mmwr/PDF/wk/mm5114.pdf>> (visited on June 20, 2005).
- ⁶ See Ribisl, *supra* note 1.
- ⁷ Kurt Ribisl, The Potential of the Internet as a Medium to Encourage and Discourage Youth Tobacco Use, 12 TOBACCO CONTROL i48, i48-i50 (Supp. 2003).
- ⁸ See Katie McMahon, State Cigarette Taxes & Projected Benefits from Increasing Them, Campaign for Tobacco-Free Kids, at <http://www.tobaccofreekids.org/research/factsheets/pdf/0148.pdf> (Nov. 3, 2004).
- ⁹ See *id.*
- ¹⁰ See *id.*
- ¹¹ See Surgeon General David Satcher, Reducing Tobacco Use: A Report of the Surgeon General, U.S. Dept. of Health and Human Services (2000), at 322.
- ¹² See *id.*
- ¹³ See *id.* at 337.
- ¹⁴ See *id.*
- ¹⁵ See Sara M. Abrams, et al., Internet Cigarette Purchasing Among Ninth-Grade Students in Western New York, 36 Preventive Medicine 731 (2003) (discussing research showing that high school students were not buying from Internet cigarette retailers to avoid local cigarette prices); see also National Household Survey on Drug Abuse, The NHSDA Report: How Youth Get Cigarettes 2 (2002) (surveying cigarette buying trends among children 12 to 17 years of age).
- ¹⁶ See e.g. Hope Yen, Ex Surgeon General Seek New Cigarette Tax, Boston Globe, Feb. 4, 2004, at A2 (noting Philip Morris statement that increasing taxes are counterproductive because they simply cause more smokers to evade taxes by purchasing from Internet cigarette retailers).
- ¹⁷ See Sara M. Abrams et al., Internet Cigarette Purchasing Among Ninth-Grade Students in Western New York, 36 PREVENTIVE MEDICINE 731 (2003) (discussing research showing that high school students were not buying from Internet cigarette retailers to avoid local cigarette prices); see also National Household Survey on Drug Abuse, The NHSDA Report: How Youth Get Cigarettes. 2 (2002) (surveying cigarette buying trends among children 12 to 17 years of age).
- ¹⁸ See, e.g., Hope Yen, Ex-Surgeon General Seek New Cigarette Tax, BOSTON GLOBE, Feb. 4, 2004, at A2 (noting Philip Morris statement that increasing taxes are counterproductive because they simply cause more smokers to evade taxes by purchasing from Internet cigarette retailers).
- ¹⁹ See Michelle Leverett et al., Tobacco Use: The Impact of Prices, 30(3) JOURNAL OF LAW, MEDICINE & ETHICS S88 (Sept. 2002) (noting basis for tobacco industry opposition to tax increases).
- ²⁰ See Mathew Farrelly, RTI International, State Cigarette Excise Taxes: Implications for Revenue and Tax Evasion at 2 (May 2003) at http://www.rti.org/pubs/8742_Excise_Taxes_FR_5-03.pdf (August 6, 2004) (finding that increases in tobacco taxes continue to add to state revenue and reduce smoking rates despite the presence of Internet cigarette retailers); see also Kenneth Warner, The Economics of Tobacco: Myths and Realities, 9 TOBACCO CONTROL 78 (2000) (countering the tobacco industry argument that tax increases decrease tobacco tax revenue in the analogous issue of black market cigarettes).
- ²¹ Kurt Ribisl, Annice Kim & Rebecca Williams, Are the Sales Practices of Internet Cigarette Retailers Good Enough to Prevent Sales to Minors? 92 AMER. J. PUB. HEALTH, 940-41 (June 2002).
- ²² See *id.*
- ²³ See *id.*

²⁴ See id.

²⁵ See id.

²⁶ See VISA, Accept Visa: Merchant Responsibility, at http://www.usa.visa.com/business/accepting_visa/new_acceptance/merchant_responsibility.html?it (visited on June 20, 2005).

²⁷ See id.

²⁸ See <<http://www.paypal.com>> (visited on June 20, 2005).

²⁹ See id.

³⁰ See supra note 15.

³¹ See supra note 18.

³² See *In Re Ziggy's Tobacco & Novelty*, No. 14.8 (Order of Washington State Liquor Control Board) (Dec. 21, 1999) in TOBACCO PRODUCTS LIABILITY REPORTER 2.492 (2000).

³³ See N.Y. PUB. HEALTH LAW § 1399-II (2002).

³⁴ Christopher Banthin, Cheap Smokes: State and Federal Responses to Tobacco Tax Evasion over the Internet, HEALTH MATRIX: JOURNAL OF LAW-MEDICINE, Vol. 14, No. 2 (Summer 2004) at 334-35.

³⁵ See id.

³⁶ See id.

³⁷ See id.

³⁸ See *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (noting that the Commerce Clause prevents tax collection and remittance requirements for retailers unless the retailer has a substantial nexus, i.e., physical presence, within the state).

³⁹ See id. Or states may choose to prohibit such sales. See *infra*, III. In addition, states may wish to explore participation in intra-state compacts, like the Streamline Sales and Use Tax Agreement. See <http://www.streamlinedsalestax.org/> (visited on June 20, 2005).

⁴⁰ See 15 U.S.C. §§ 375-378 (2004).

⁴¹ See id.

⁴² See id.

⁴³ In cases where an out-of-state retailer has few contacts with a state, which is typically the case with an Internet cigarette retailer, the Commerce Clause prohibits states from requiring the retailer to include the state sales and excise taxes in the sale. See *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). The tax is still owed on the purchase, but as a use tax by the individual.

⁴⁴ See, e.g., John Snell, Anti-Smoking Pushes Stretches to Internet, Oregon Becomes the First State to Go after Online Cigarette Sellers and their Customers for Failing to Pay State and Federal Taxes, *The Oregonian* (Jan. 02, 2005); *City Sues to Force Taxes on Internet Cigarette Sales*, Associated Press (Jan. 17, 2003).

⁴⁵ See *State of Washington v. www.dirtcheapcig.com, Inc.*, 260 F.Supp. 2d 1048 (W.D. Wash. 2003).

⁴⁶ See id.

⁴⁷ See CALIFORNIA REVENUE AND TAXATION CODE § 30101.7 (2004).

⁴⁸ See Ribisl, *supra* note 1.

⁴⁹ See R.I. GEN. LAWS 1956, §11-9-13.11 (2004).

⁵⁰ See id.

⁵¹ Id.

⁵² See CALIFORNIA BUSINESS AND PROFESSIONAL CODE § 22963 (2004).

⁵³ Id.

⁵⁴ Id.

⁵⁵ See id.

⁵⁶ The legal challenge to New York's ban on direct-to-consumer deliveries is discussed in Part III of this Synopsis.

⁵⁷ See N.Y. PUB. HEALTH LAW § 1399-II (2002).

⁵⁸ See id. An example of the exceptions is that persons other than common carriers may transport up to four cartoons of cigarettes at any one time to any one person.

⁵⁹ See ALASKA STAT. §§43.50.035 et seq. (2003).

⁶⁰ See *Arkansas Tobacco Control Board v. Santa Fe Natural Tobacco Company, Inc.*, -- S.W.3d -- 2004 WL 2823339 Ark. (Dec. 9, 2004).

⁶¹ See Ribisl, *supra* note 1.

⁶² See *infra* Section III.

⁶³ See Judith Mackay & Michael Eriksen, *The Tobacco Atlas* 60 (Paulo Jeremy & Candida Lacey eds., 2002).

- ⁶⁴ See SE Jones et al., Cigarette Acquisition and Proof of Age Among U.S. High School Students Who Smoke, 11 TOBACCO CONTROL 20 (2002). Ongoing debate within the public health community is focused on the efficacy of such compliance checks and other types of youth access laws. See PM Ling et al., It is Time to Abandon Youth Access Tobacco Programmes, 11 TOBACCO CONTROL 3 (2002); see also Joe DiFranza, Is It Time to Abandon Youth Access Programmes?, 11 TOBACCO CONTROL 280 (2002) (responding to call for abandonment of youth access programmes).
- ⁶⁵ See, e.g., Press Release, AG Reilly Sues Three Internet Cigarette Dealers Accused Of Selling To Massachusetts Teens, Office of The Massachusetts Attorney General (Sept. 18, 2003); see also Jones, *supra* note 62.
- ⁶⁶ See *id.*
- ⁶⁷ See Press Release, AG Sues Online Tobacco Sellers, Office of Attorney General for the State of Washington (April 2, 2003) available at http://www.atg.wa.gov/releases/rel_tobacco_040203.html (visited on June 20, 2005) (discussing a lawsuit filed in the State of Washington as part of an ongoing multi-state effort to reduce Internet cigarette retailer sales to children).
- ⁶⁸ See 22 MRSA §§1551, 1555-C, 1555-D (2004).
- ⁶⁹ See *id.*
- ⁷⁰ See *id.* Although the postal services “mailability” standards do not explicitly prohibit the shipment of tobacco products, see Mailing Standards of the United States Postal Service Domestic Mail Manual, available at <<http://pe.usps.gov/>>, the Postal Service’s enforcement division has been willing to work with the State of New York in that State’s efforts to stop cigarette mailings directly to customers in New York. See Press Release, Office of New York State Attorney General Eliot Spitzer, Leading Package Delivery Company Agrees to Stop Shipping Cigarettes to Individual Consumers (July 05, 2005).
- ⁷¹ See *New Hampshire Motor Transport Ass’n v. Rowe*, Docket No. 03178BH (Fed. Dist. ME 2003) (Decision and Order on Cross Motions for Summary Judgment) (May 27, 2005).
- ⁷² See Office of New York State Attorney General Eliot Spitzer, *supra*, note 70.
- ⁷³ See *id.*
- ⁷⁴ Arkansas recently applied its state tobacco license requirement to prohibit an Internet cigarette retailer based out-of-state from selling in Arkansas. See *Arkansas Tobacco Control Board v. Santa Fe Natural Tobacco Co., Inc.*, 2004 Ark. Lexis 765 (Dec. 9 2004). The licensure requirement that a licensee maintain a physical in-state presence appears to comport with the commerce clause. See *Ford Motor Co. v. Texas Dep’t of Transportation*, 264 F.3d 493 (2001) (prohibiting Internet retailer access to in state markets based on licensure requirement).
- ⁷⁵ National Cancer Institute, State and Local Legislative Action to Reduce Tobacco Use, Smoking and Tobacco Control Monograph No. 11, Dept. of Health and Human Services, Nat’l Inst. of Health, National Cancer Institute (August 2000).
- ⁷⁶ See United States General Accounting Office, Internet Cigarette Sales: Giving ATF Investigative Authority May Improve Reporting and Enforcement, Report No. GAO-02-743, (August 2002). Proposed legislation has been offered in Congress, but a final version has not been approved. See S. 1177, 108th Cong. (2003) (seeking to amend the Jenkins Act to improve compliance); see also H.R. 3047, 108th Cong. (2003) (establishing youth verification protocols similar to those adopted in Rhode Island and California).
- ⁷⁷ See *infra* Section III; see also *American Library Association v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997).
- ⁷⁸ See, e.g., David R. Johnson & David Post, Law and Borders – the Rise of Law in Cyberspace, 48 STANFORD LAW REVIEW 1367 (1996).
- ⁷⁹ See Jack Goldsmith & Alan O. Sykes, The Internet and the Dormant Commerce Clause, 110 YALE L.J. 785, 812 (2001).
- ⁸⁰ See Wendy Parmet & Christopher Banthin, Public Health Protection and the Commerce Clause: Controlling Tobacco in the Internet Age, ____ NEW MEXICO LAW REVIEW ____ [In press].
- ⁸¹ See *id.*
- ⁸² U.S. Const. art. I, §8, cl. 3.
- ⁸³ See *So. Pacific Co. v. Arizona*, 325 U.S. 761, 770-71 (1945).
- ⁸⁴ See *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 209 (2nd Cir. 2003)

⁸⁵ See *id.* The lower court felt that the law simply amounted to economic protectionism in favor of tobacco retailers located in New York, which under Dormant Commerce Clause jurisprudence usually leads to a per se invalidation of the law. *Santa Fe Natural Tobacco Co. Inc. v. Spitzer*, 2001 WL 636441, *14 (S.D.N.Y. June 2001) To support its conclusion, the lower court pointed to an exemption in the law that appeared to favor local retailers. See *id.* The exemption states:

[n]othing in this [law] shall be construed to prohibit a person other than a common or contract carrier from transporting not more than eight hundred cigarettes at any one time to any person in this state.

See 1999-2000 New York Session Laws Chapter 262 codified at §1399-11 (2) (2004). The appellate court felt this exemption was inconsequential – that in practice the law would apply evenly to stop both Internet cigarette retailers and instate retailers' from shipping cigarettes directly to their customers. See *Brown & Williamson Tobacco Corp.*, 320 F.3d at 209.

⁸⁶ See *id.*

⁸⁷ See *Hughes v. Oklahoma*, 441 U.S. 322, 336-37 (1979).

⁸⁸ See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

⁸⁹ See *id.*

⁹⁰ See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981).

⁹¹ A Category-Specific Legislative Approach to the Internet Personal Jurisdiction Problem in U.S. Law, 117 HARVARD LAW REVIEW 1617 (2004) (citing *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa 1997)).

⁹² *Id.* at 1618.

⁹³ See *id.*

⁹⁴ The inquiry as to whether a court has jurisdiction to impose a state's law on an out-of-state defendant is a two-step inquiry. The first step is to ask whether the defendant falls within the reach of a state's "long-arm statute." The second step is to ask whether asserting jurisdiction over a defendant comports with Due Process standards of the U.S. Constitution.

⁹⁵ See Ribisl, *supra* note 1.

⁹⁶ See *Okla. Tax Comm'n v. Citizens Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 507 (1991). The legal right to collect state tobacco taxes for sales to non-tribal members and the prosecution under state laws partly depends on the history of the particular Native American tribe, including treaties and/or recognition by the federal government or the state.

In theory, states could take legal action against the wholesalers that provide cigarettes to Internet cigarette retailers located on Native American lands. Typically, states allow wholesalers to distribute both untaxed and taxed packages of cigarettes to retailers based on Native American lands—untaxed packages to be sold to tribal members and taxed packages to non-tribal visitors. If too many packages are sold to non-tribal individuals, the states could force the wholesalers to reduce the amount of untaxed product being distributed within the particular Native American land.

⁹⁷ See, e.g., Tony Thornton, Packing a Higher Price, Tobacco Tax Increases Takes Effect Saturday, Tribes Will Lose an Advantage, THE DAILY OKLAHOMAN (Dec. 31, 2004) at 1A (noting implementation in changes to compact between Oklahoma state government and area tribes); Eijiro Kawada, Tribe to Charge Cigarette Tax, THE NEWS TRIBUNE (Jan. 6, 2005) at A01 (noting implementation of new compact between Washington state government and areas tribe); Eric Newhouse, Montana Smokers Smolder, GREAT FALLS TRIBUNE (Nov. 16, 2004) at 3A (noting compact between Montana state government and area tribes). The compacts involve a revenue-sharing agreement with tribes.

⁹⁸ See CDC, Cigarette Smoking Among Adults, United States 2003, 54(20) Morbidity and Mortality Weekly Reporter ("MMWR") 509 (May 27, 2005).

⁹⁹ See Curt Woodward, State Asking Hundreds to Pay Back Taxes on Cheap Smokes, Associated Press (July 14, 2005).



About the Tobacco Control Legal Consortium

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

