Boards of Health as Venues for Clean Indoor Air Policy Making

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Objectives. This study sought to determine the tobacco industry's strategies for opposing health board actions and to identify elements necessary for public health to prevail.

Methods. Newspaper articles, personal interviews, and tobacco industry documents released through litigation were reviewed.

Results. Twenty-five instances in which the tobacco industry opposed health board regulations were identified. It was shown that the tobacco industry uses 3 strategies against health boards: "accommodation" (tobacco industry public relations campaigns to accommodate smokers in public places), legislative intervention, and litigation. These strategies are often executed with the help of tobacco industry front groups or allies in the hospitality industry.

Conclusions. Although many tobacco control advocates believe that passing health board regulations is easier than the legislative route, this is generally not the case. The industry will often attempt to involve the legislature in fighting the regulations, forcing advocates to fight a battle on 2 fronts. It is important for health boards to verify their authority over smoking restrictions and refrain from considering nonhealth factors (including industry claims of adverse economic impacts) so as to withstand court challenges. (*Am J Public Health.* 2002;92:257–265)

In the United States, many states and localities have boards of health that can issue regulations to protect public health independent of legislative approval. Most health boards are also designed to be insulated from the political pressures experienced by legislators, and often the regulations they issue must be based solely on health considerations. Most boards are appointed for fixed terms (only 29% of boards have elected members[1]), so members are generally not subject to reelection concerns or susceptible to the influence of campaign contributions.[2–4] These facts, combined with the overwhelming evidence that secondhand smoke causes disease in nonsmokers,[5–8] make health boards a logical venue to issue tobacco control measures.

There are 3 main strategies the tobacco industry uses against health board smoking regulations: "accommodation" (public relations campaigns to accommodate smokers in public places), legislative intervention, and litigation. (These strategies are in addition to the industry's overarching strategy of state preemption, which removes the authority of local governmental bodies to issue tobacco control policies.[9–15]) Although boards of health are designed to be insulated from political pressures, the industry, in certain of its strategies, relies on politics to oppose health board regulations.[16,17] In the present article, we examine the tobacco industry's strategies and provide case studies.

Despite industry opposition, some boards of health have successfully passed and defended regulations, while others have had their regulations repealed, amended, or weakened. Successful regulation of secondhand smoke by a board of health requires that the board acquire the public support necessary to withstand the political attack that the tobacco industry will mount, derive its authority from a statute and associated case law that will permit it to withstand a legal challenge by the tobacco industry, and carefully craft the regulation in anticipation of such a challenge.

METHODS

We obtained information from newspaper articles, the Americans for Nonsmokers' Rights Tobacco Industry Tracking Database, previously unreleased tobacco industry documents that have been made available through litigation against the tobacco industry and now can be viewed on the Internet at sites maintained by the industry, and public documents associated with litigation against boards of health. Search terms included "board of health," names of localities that had experienced health board challenges, and names of organizations and individuals involved on both sides of the issue. We also conducted interviews with individuals attempting to pass the selected health board actions and involved with the associated industry challenges, including grassroots tobacco control advocates, members of voluntary health organizations, and members of the boards of health. We did not interview tobacco industry representatives; we believed that the internal documents most credibly represented the industry perspective.

We identified 25 appointed boards of health in 7 states that possessed the authority to pass health regulations independently and that had issued or considered issuing regulations related to clean indoor air and consequently encountered industry opposition. Although additional communities passed or attempted to pass health regulations, we focused on these 25 communities because they clearly illustrated tobacco industry strategies. The cases we describe subsequently are not recent because information about recent cases is not available in internal industry documents, which usually date to 1995 or earlier. However, reports of health board actions and the opposition against them suggest that the strategies outlined in these cases were still being used in 2001.

RESULTS

Accommodation

In its accommodation strategy, the tobacco industry's attempts to convince decision makers that regulation of indoor smoking (specifically, smoke-free dining laws) is unnecessary and that establishments should take voluntary action to accommodate smokers and nonsmokers. These campaigns usually occur as a health board is considering a regulation. The industry rarely acknowledges its involvement in accommodation campaigns[18]; instead, it

uses existing hospitality groups or coalitions or organizes and funds new ones to act as surrogates.[16,17,19–23] These organizations include beverage associations,[24,25] convenience store associations,[24,26] and tavern–restaurant associations.[20,22,27] Claims of adverse economic consequences for restaurants and bars form the centerpiece of the arguments advanced through accommodation programs.

Because boards of health are supposed to consider only health factors in their decision making, accommodation campaigns are generally unsuccessful. There have, however, been instances in which the industry used this approach successfully to pressure boards into rescinding smoking restrictions in restaurants and bars.

A case study involving Wake County, North Carolina, is illustrative of the accommodation strategy. In 1993, inspired by the 1992 US Environmental Protection Agency report[5] classifying secondhand smoke as a class A carcinogen, the Wake County Board of Health proposed smoking control rules that would phase out smoking in airports, workplaces, and restaurants over a 3-year period. By 1996, smoking areas were to be permitted in these establishments only when they were serviced by separate heating, ventilation, and air conditioning systems.

In May 1993, just after the board voted to hold public hearings on the proposed regulation, the Tobacco Institute, the tobacco industry's political and lobbying arm based in Washington, DC, developed a plan to defeat or stall the scheduled vote. Even in the tobacco-growing state of North Carolina, the Tobacco Institute recognized the need to create the false impression that opposition was not originating from the industry. The Tobacco Institute plan recommended the following:

> Identify core working group to develop and coordinate overall strategy. *As much as possible, it is essential for the tobacco industry (especially tobacco companies) to maintain a low profile for the strategy to work most effectively.* The coalition should be a broad-based group drawn from throughout the county. While we expect to see a fair number of growers and allied supporters at the hearing, *it is important for us to recruit for public activities supporters not obviously linked to the industry and who also live or work in Wake County.*[28] [italics added]

The Tobacco Institute specified how members of the coalition should be selected and trained:

> Individuals or associations should be contacted only if it is reasonably certain they will oppose WCSCR [Wake County Smoking Control Rules]. Brief allies, provide background materials and update regularly. Organize a broad-based coalition to take the lead in opposing WCSCR publicly; *identify one or two lay spokespersons for the groups who are not affiliated with the tobacco industry.*[28] [italics added]

Jerry Williams, executive vice president of the North Carolina Restaurant Association, was listed as one such ally. Williams later claimed credit for the industry-financed lawsuit against the health board and recruited plaintiffs, some of whom were unaware of industry involvement.[29] The Tobacco Institute also advised mobilization of the National Smokers Alliance, an organization created on the part of Philip Morris by the public relations firm Burson-Marstellar,[30] and distributed talking points, answers to common media questions, and fact sheets to the industry-generated coalition.[28]

The industry also wanted to redefine the issue from public health to government intrusion: "Fashion the issue not as a question of smoking or [environmental tobacco smoke] and health, but rather unfair, unreasonable and unnecessary government interference in private enterprise."[28] Williams often cited such arguments: "If the health department can [regulate smoking] because of the health implications they can come back and say, 'you can no longer serve chocolate cake.' It opens the door to endless possibilities of regulations."[29]

This accommodation strategy failed to stop the board of health from adopting the restrictions. Later, however, the tobacco industry shifted to a legal strategy and sued the board, which backed down and amended the ordinance to include much weaker provisions. Subsequent state legislation (House Bill [HB] 957) preempted the authority of Wake County to improve the inadequate regulation resulting from the tobacco industry lawsuit.

Legislative Intervention

When the accommodation strategy fails to prevent a health board from passing a smoking regulation, the industry will often turn to the legislative branch of government, where it exerts more influence. The industry lobbies the legislative body for 2 purposes: to use any authority possessed by the legislative body to limit health board actions and to pass legislation to remove the health board's authority over smoking.

Limiting health board actions. This goal can be accomplished in a variety of ways. For example, the health boards we examined were appointed by their local legislative bodies, and therefore legislators could be influenced to deny reappointment to board members supportive of smoking restrictions. This was the strategy explained by Philip Morris government affairs executive Chris Smiley in a memorandum regarding opposition to a health board smoking regulation in New York's Westchester County:

> Since the B.O.H. [board of health] is an appointed board of officials we need to put pressure on the legislator[s] even if they are not directly responsible. The only way we can beat this ban is if our accounts call their legislators and put the pressure on them in hope that they will in turn put the pressure on the B.O.H.[31]

The tobacco industry has used 3 variations of this strategy, pressuring legislatures to (1) cut health department budgets, (2) deny reappointments of board members in favor of smoking restrictions, and (3) deny health boards access to use of localities' legal counsel.

Another example involved Guilford County, North Carolina. In 1993, the county's legislature attempted to use its authority over the health board to limit the board's actions, considering the removal of board members who supported smoking restrictions and refusing the board the resources necessary to defend itself against a lawsuit filed by Lorillard Tobacco Co, located in Guilford County.

On September 27, 1993, the board of health voted 6–5 to pass regulations restricting smoking in workplaces and bars and ending smoking in restaurants.[32] Guilford's regulations were part of a statewide movement to pass local clean indoor air laws before implementation of state legislation (HB 957) that would preempt localities from imposing smoking restrictions. The matter came before the health board after the county's legislative

body, the board of commissioners, sidestepped a local lawyer's petition to consider the issue and referred it to the board.[33]

Public criticism from the board of commissioners led the health board to place a moratorium on enforcement of the regulations and to consider alternatives.[34] Shortly after the board passed its regulations, County Commissioner Melvin Alston publicly encouraged county citizens to defy the new rules[35] and announced his plan to propose a board of commissioners resolution opposing the regulations.[35] Later, with Commissioner Joe Wood, he declared that he would oppose reappointing the 2 board members who most vocally supported the regulations: Lynn Snotherly and Dr Leon Holt.[36] The following day, Commissioner Robert Moores publicly called for removing all 6 health board members who voted for the regulations.[37]

Ultimately, the board of commissioners voted 6–4 against removing the 6 board members but refused to reappoint Snotherly; Holt left the board when his term expired. Former chairperson of the Guilford County ASSIST [tobacco control] Coalition Richard Rosen felt that the commissioner's vigorous attempt to undermine the health board's effort was the result of tobacco industry influence; Lorillard Tobacco Co was considered one of the county's outstanding corporate citizens (R. Rosen, verbal communication, April 2000).

Although the moratorium had been enacted on October 5, a group of plaintiffs including Lorillard sued the Guilford County Board of Health on October 29 to void the regulations. The board of health was prevented from responding to the suit when the board of commissioners denied it the $70 000 needed to defend the suit and refused to allow the board access to the county attorney.[38] The commissioners also attacked Guilford County Health Director Ron Clitherow, who had encouraged the health board to pass the regulations. Clitherow resigned shortly thereafter. As health board members left, either voluntarily or for lack of reappointment, the county commissioners began appointing members opposed to smoking restrictions,[39] including a tobacco farmer.[40] As a result, opponents of smoking restrictions were in the majority.

The issue over legal fees ended when the health board agreed to extend the moratorium until a virtually identical legal challenge against nearby Halifax County's smoking regulations was resolved.[41] When the Halifax rules were overturned, Guilford's health board repealed its regulations.[42]

Removal of health board authority. In addition to pressuring local legislatures to use any authority they possess over the board of health to limit its actions, the industry sometimes also pressures legislatures to pass laws or resolutions restricting or removing the board's authority to enact regulations. This strategy is usually initiated during the debate over health board smoking restrictions, when opposition is mobilized in the legislature. Although these restrictive measures can sometimes be passed at the local level, the industry prefers they pass at the state level to preempt localities from adopting smoking regulations through their health boards.

The industry uses 3 major approaches to restrict health board authority through legislation: (1) requiring boards of health to obtain approval from local legislatures before enacting regulations, (2) requiring health boards to follow complicated and lengthy rule-making procedures to allow the industry more time to mobilize opposition and create more opportunities for procedural appeals, and (3) forbidding health boards from considering smoking restrictions or regulations that would have an economic impact. These measures discourage tobacco control advocates from using the regulatory process to pass restrictions and take the issue back to the legislature, where the industry exercises more influence.

A situation illustrating this strategy occurred in the state of Ohio. At a 1994 conference of Philip Morris lobbyists and other employees involved in government affairs, company executives reported on their efforts in Ohio to illustrate the approach of what they called "practical preemption"[26] to restrict the authority of local boards of health without openly attacking the politically popular concept of local government "home rule." Philip Morris drafted state legislation to transform the board of health rule-making process into a time-consuming, complicated operation. As Philip Morris executive Jim Pontarelli explained, "The legislation still respects the concept of home rule/control. It doesn't prevent boards of health from proposing bans, it just adds a bureaucratic nightmare of hoops they must jump through before they can get their proposal on the books."[26]

The legislation required elected officials to vote on any smoking regulation proposed by their health board before it became law. The health board was also required to adopt a "resolution of intent" as the first step of the rule-making process and to hold 3 hearings at least 7 days apart on this resolution before proceeding. The resolution was to be published in every newspaper within the health board's jurisdiction twice before each hearing. After the hearings, the board was required to issue a written report to the local legislature for review. A similarly convoluted process would then begin at the legislative level, and the legislative body could amend the proposal without the health board's approval. If the health board disagreed with the changes, the process started all over again. Pontarelli summarized the industry's goals:

> If, at any point, a single newspaper in some Godforsaken corner of an affected county is overlooked during the publishing of the notices, the whole process has to go back and start from scratch. You get the picture. This entire process would take—at the very least—three full months. This gives us lots of time to marshal our retailers and our other allies, to generate letters, opinion pieces, etc.
> It also gives us a solid shot at elected officials, who have to sign off on the proposal and take whatever political heat they have coming to them for doing so. And it gives us a chance to amend the proposal and make it more to our liking, if it looks like it's going to get passed anyway.
> This process won't stop every Board of Health smoking restriction from getting through, but it does place tremendous burdens on the other side, making it as difficult as possible and forcing them to expend resources.[26]

In 1995, Harry J. Lehman, a lobbyist for RJ Reynolds Tobacco Co,[43,44] circulated this proposed legislation, which eventually became known as HB 299. Following a similar industry strategy in which pro-tobacco legislation is presented as tobacco control legislation,[22,45] the bill included provisions nominally preventing youth access to tobacco, but the primary purpose was to reduce the power of boards of health. Youth access provisions, which generally are not effective in reducing youth smok-

ing,[46] were inserted to discourage health advocates from opposing the bill. Ultimately, the bill expanded to a measure that would preempt all local smoking laws, whether passed by health boards or by local legislatures.

Although tobacco control advocates recognized that the tobacco industry was responsible for HB 299, the industry was hardly visible during the debate. Instead, Phil Craig, local lobbyist and executive director of the Ohio Licensed Beverage Association, led the opposition. Craig formed a coalition, Ohioans for Sensible Tobacco Regulations, whose publicly disclosed members consisted mainly of individuals involved with hospitality businesses. Craig regularly reported coalition activities to executives at Philip Morris, RJ Reynolds, and Brown & Williamson.[47–52] The bill was voted out of committee but never passed the full state assembly, because voluntary health organizations and other health advocates successfully mobilized against it.[53]

The idea of removing authority from boards of health resurfaced in 2000 when Republican State Representative Robert Schuler introduced a bill identical to the proposal drafted in 1995[44] after he met with a "coalition of hotel, motel, bar and restaurant owners" led by Phil Craig. Unlike HB 299, this legislation remained focused only on removing authority from health boards. It would require the legislative authority of a locality to approve any smoking rules issued by its board of health. On March 28, 2000, the Ohio General Assembly passed the bill by a vote of 76–18. The measure was expected to pass the Senate, but when Governor Robert Taft threatened to veto the bill, the Senate withdrew it from consideration.[54,55]

Litigation

When a health board smoking regulation passes or nears passage despite accommodation or legislative intervention, the tobacco industry often uses litigation or the threat of litigation to overturn the regulation or intimidate the board of health into repealing it. (Tobacco interests generally file litigation in federal court, where they have experienced more favorable decisions than in state courts, particularly in product liability, even though federal claims against boards of health are usually unsuccessful.) Similar to the accommodation strategy, the industry rarely acknowledges its involvement and acts through surrogates. Our research revealed only one instance in which a tobacco company was named as a plaintiff, in Guilford County, North Carolina. Nevertheless, the industry has always been heavily involved in recruiting plaintiffs, determining legal strategies, and financing legal costs.[20,56]

The industry relies on more than one argument in these legal challenges, but the most popular argument charges that the board of health does not possess the authority to enact the smoking regulations in question, either because the board exempted certain businesses from smoking restrictions (and thereby considered factors irrelevant to health) or because state law preempts the restrictions (a claim usually found to be untrue). The industry also often asserts that the health board failed to follow the correct procedure in adopting the rules.

Although the industry challenges regulations that contain exemptions, it is usually responsible for incorporation of these exemptions. Tobacco interests lobby boards of health to grant exemptions on the basis of economic impact—most typically for bars and bingo parlors—and then challenge regulations on the grounds that the boards inappropriately considered economic factors when they should have considered only health factors. The industry also claims that such exemptions violate the US Constitution's equal protection clause, because establishments that are allowed smoking areas are granted an alleged economic advantage over those that are not. This practice of lobbying for exemptions in order to challenge the legality of the regulations based on these exemptions may be a calculated strategy, or it may be the natural outcome of the separate strategies of attempting to weaken regulations and to legally revoke them.

Opinions from state or local legal officials can be helpful in withstanding industry litigation; when the industry sued the Mid-Ohio River Valley Health Department in West Virginia as a result of the smoking regulations passed by its health board, an opinion from the state attorney general was crucial in winning the case for the health department. According to the court:

> [T]he attorney general is a constitutional officer (W.Va. Const., Art.7, '1) whose express statutory duties include giving "written opinions and advice upon questions of law" . . . W.Va. Code, '5-3-1 (Michie Cum.Supp. 1995). . . . Furthermore, although such opinions are, without question, not precedent or binding as authority upon the Supreme Court of Appeals, they are considered particularly persuasive when issued rather contemporaneously with the adoption of a statute, rule or regulation in question. Walter v. Ritchie, 156 W.Va. 98, 191 S.E.2d 275 (1972).[57]

Likewise, an unfavorable opinion may save tobacco control advocates from wasting resources on a regulatory pathway that will ultimately fail when challenged in court. However, advocates should first consider an attorney general's previous positions on the issue and recognize that the office is highly politicized, a factor that may affect the attorney general's original stance.

The industry first realized health boards posed a serious threat when the New York State health board, known as the Public Health Council, considered strong (for the time) smoking restrictions in 1986.[20,58,59] The regulation ended smoking in most public places and workplaces and mandated that restaurants with more than 50 seats reserve 70% of seating for nonsmokers. Smaller restaurants, hotel rooms, tobacco stores, and bars were exempted from the regulations. The Tobacco Institute recognized that the regulations could set "an alarming precedent"[60] and began considering a legal challenge. Michael Irish, director of government affairs for Philip Morris, advised his superiors that "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.'"[60]

After an unsuccessful attempt to convince the state legislature to challenge the health council's regulations, the industry searched elsewhere for potential plaintiffs. On March 13, 1986, State Senator Thomas Bartosiewicz; State Assemblyman Robert Wertz; the Brooklyn Chamber of Commerce; the United Restaurant, Hotel, and Tavern Association; Dennis Paperman (president of the Brighton Beach Board of Trade); and Fred Boreali of Boreali's Restaurant Inc sued the Public Health Council and State Health Commis-

sioner David Axelrod on the grounds that the council had exceeded its powers. Although no tobacco companies were named as plaintiffs, several of the named plaintiffs were identified in industry planning documents as potential litigants in an industry-organized lawsuit.[61] Furthermore, an industry law firm (Hinman, Straub, Pigors & Manning)[62–66] represented the plaintiffs.

On April 23, Justice Harold Hughes of the trial court (the State Supreme Court of Schoharie County) found in favor of the plaintiffs and ruled that the council regulation was null and void because the council had usurped the legislature's lawmaking authority (*Boreali v Axelrod,* Supreme Court of Schoharie County, 1987).[67,68]

The state appealed, and the Appellate Division of the Supreme Court ruled 3–2 to uphold Hughes' decision (*Boreali v Axelrod,* 130 AD2d 107).[69] The state then appealed to the highest court in New York, the Court of Appeals, which ruled 6–1 against the state (*Boreali v Axelrod,* 71 NY 2d 1).[70]

In its opinion, written by Judge Titone, the Court of Appeals found 4 indicators that the council had overstepped its authority. First, the Public Health Council exempted certain establishments (e.g., bars and small restaurants) from the regulations because of economic concerns. The court determined that these factors could be considered only by a legislative body. Second, the council created rules without legislative guidance; the court determined that the council's proper function should be instead to supplement legislation with details regarding implementation. Third, the council acted on an issue previously debated by the legislature. The court found that "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."[70] Finally, the court ruled that no public health expertise was needed to develop the regulations.

This decision effectively prevented local boards of health in New York from passing smoking restrictions.[20] Every time a local health board took action and the industry challenged its smoking regulation by arguing that the board did not have authority to act, the court referred to *Boreali* and found for the plaintiffs. As of this writing, no New York health board has passed a 100%-smoke-free health regulation. Such a regulation might withstand a court challenge, because it renders the first indicator of the *Boreali* test (that the health board inappropriately considered economic factors by including exemptions) inapplicable.

Another case study, involving the state of Massachusetts, is illustrative of the litigation strategy. Local boards of health in Massachusetts have been successful in defending state health board smoking regulations against litigation. The Massachusetts Restaurant Association has been cooperating with the tobacco industry[27]; in June 1998, the association filed suit against the Boston Public Health Commission as a result of the commission's smoking regulations. Individual restaurants have filed lawsuits challenging health board regulations in 4 other Massachusetts localities: Amherst, New Bedford, Northampton, and Barnstable. All 5 localities passed regulations despite threats of litigation, although New Bedford's regulations were amended as a result of pressure from the legislature.

In all of these cases, the requests for preliminary injunctions suspending the rules were denied, allowing them to go into effect as scheduled. When the Barnstable case was appealed, the State Supreme Judicial Court (the highest court in Massachusetts) essentially ended this legal debate over the authority of Massachusetts health boards to regulate smoking by ruling in favor of the Barnstable Board of Health.[71–75]

Massachusetts' experience in defending these health board smoking restrictions indicates a successful approach for countering the tobacco industry's litigation strategy. One of the main factors in Massachusetts health boards' success in this litigation involved a unique element of the Massachusetts Tobacco Control Program: the Community Assistance Statewide Team (CAST). CAST, which consists of a team of attorneys from several organizations (the Massachusetts Tobacco Control Program/Department of Public Health, the Tobacco Control Resource Center based in the Northeastern University School of Law, the Massachusetts Association of Health Boards, and the Massachusetts Municipal Association[76]), provides local health advocates with the legal expertise needed to enact regulations in the appropriate manner and draft them to withstand industry challenges.

CAST reviews drafts of local health board regulations and ordinances to ensure legal viability and suggests appropriate changes. CAST members sometimes attend local public hearings and advise on the enactment process to avoid procedural errors that could form the basis of a legal challenge; they also review proposed changes in regulations as they are being developed. This legal expertise has not only produced regulations less vulnerable to industry litigation but has also made it more difficult for the industry to intimidate localities into rescinding, weakening, or avoiding clean indoor air policies.[76]

Another factor in the success of health boards' smoking regulations is that Massachusetts state law grants broad authority to local health boards, both in statute and in the court rulings interpreting this statute. These rulings, which afford health boards a great deal of discretion, are integral to Massachusetts' success in defending litigation against smoking regulations. According to the 1985 decision in *Arthur D. Little, Inc. v Commissioner of Health*, courts should strike a board of health regulation only if the challenger can prove "the absence of any conceivable ground upon which [the rule] may be upheld."[77] Likewise, if a public health issue is "fairly debatable," the court cannot substitute its own judgment for that of the board of health.[77] This situation contrasts starkly with that in New York when the court ruled in *Boreali* that "no special expertise or technical competence in the field of health was involved in the development of the antismoking regulations."[70]

DISCUSSION AND COMMENT

The 3 strategies of accommodation, legislative intervention, and litigation are the tools with which the tobacco industry has opposed health board (and other) smoking regulations (Table 1). They continue to be effective strategies for the industry: in August 2000 smoking regulations passed by the Princeton Health Commission in New Jersey were struck down after the National Smokers' Alliance filed suit,[78–80] and in November 2000 the Ohio State Legislature would have passed

TABLE 1—Tobacco Industry Strategies to Oppose Boards of Health and Subsequent Outcomes in 25 Localities

Outcome	Locality (or State)	Year	Legal Intervention			
			Accommodation	Limiting Health Board Actions	Removal of Authority	Litigation
Passed–upheld or unchanged	Amherst, Mass	1998				✓
	Barnstable, Mass	2000				✓
	Boston, Mass	1998	✓			✓
	Westchester County, NY	1996				✓
	Licking County, Ohio	1992	✓			✓
	Mid-Ohio Valley, WV	1994				✓
Passed–repealed						
	Halifax County, NC	1993				✓
	Princeton, NJ	2000				✓
	Dutchess County, NY	1999			✓	✓
	Nassau County, NY	1996	✓	✓		✓
	Niagara County, NY	1998	✓		✓	✓
	New York State	1987		✓	✓	✓
	Delaware County, Ohio	1998				✓
	Franklin County, Ohio	1993	✓			✓
	Knox County, Ohio	1994				✓
Passed–amended						
	Falmouth, Mass	1998	✓			
	New Bedford, Mass	1999		✓		✓
	Wakefield, Mass	1997	✓	✓		
	Forsythe County, NC	1994		✓		
Passed–rescinded						
	Bourne, Mass	1996	✓			
	Guilford County, NC	1993		✓		✓
	Wake County, NC	1993	✓			✓
	Monongalia County, WV	1998	✓			✓
Unknown as of yet						
	State of Arkansas	2001	✓		✓	
	Putnam County, NY	2000				✓

a bill (HB 298) removing authority from local health if not for a threatened gubernatorial veto.[55,81] Tobacco control advocates were able to counter these strategies successfully in other areas of the country: in January 2001 the highest court in Massachusetts ruled (in a lawsuit against health board smoking regulations brought by restaurant owners) that health boards possessed broad authority over regulating smoking in public places,[71,72,74,75] and in February 2001 the Arkansas State Board of Health passed regulations ending smoking in restaurants even as the state legislature considered a bill removing the board's authority over regulating smoking.[82,83]

Because the legislative intervention strategy involves influencing the legislative body, advocates must realize that pursuing health board regulations will not necessarily allow them to avoid a political fight within the legislative body. Advocates may believe that because a health board is generally composed of health advocates, grassroots support is less important for the success of a smoking regulation than when clean indoor air is pursued through legislation. However, even when health advocates work through boards of health, grassroots support is crucial in order to neutralize the industry's legislative strategy to oppose the health board action. Strong grassroots support remains pivotal to the success of clean indoor air policies, regardless of venue.

In its litigation strategy, the industry usually challenges the authority of health boards on the basis of exemptions from smoke-free regulations. The industry typically fights for exemptions based on economic arguments and then uses these exemptions to challenge regulations on the grounds that consideration of such factors is beyond the authority of health boards. Advocates should persuade health boards not to consider any testimony relating to topics outside of health, particularly in that the negative economic impact predicted by the tobacco industry has never been substantiated in objective studies.[84–90]

Health boards also provide exemptions to avoid the implementation problems inherent in any sudden transition. They, therefore, restrict smoking in places where most of the population is exposed and exempt establish-

ments, such as bars, in which implementation may be particularly difficult and that serve a limited population. They may also craft limited regulations based on the sensitivity of children to secondhand smoke (i.e., justifying regulations allowing smoking in bars on the basis that it would not affect the health of children). As discussed earlier, however, such exceptions may cause legal difficulties; the tobacco industry and its allies will argue in court that if secondhand smoke poses such a significant health threat, it should be restricted everywhere. If health board authority is interpreted narrowly to preclude the board from allowing exemptions, advocates may be forced to recommend an all-inclusive smoke-free workplace regulation if they choose to use the regulatory pathway. However, an incremental approach that begins with general workplaces, moves to restaurants, and ends with bars is often most effective from a perspective of implementing smoke-free environments.[91]

If advocates determine that health board authority is interpreted narrowly in their state, they may decide to pursue smoking restrictions outside of the health board venue. It should be remembered, however, that even if health regulations are defeated or challenged and repealed, the effort may not be in vain. Often, the policy battles are highly publicized because the tobacco industry wants to create a public controversy over the issue and exaggerate possible negative effects of the proposed policy. If advocates stay focused on health issues, these campaigns can serve to educate the public about the health hazards of secondhand smoke and may elicit action in the legislature.[20]

Before advocates attempt to use the regulatory pathway, they should assume that the industry will sue, and they should analyze the state authorizing statute, as well as applicable case law, to make certain that a board of health has the authority to pass the smoking restrictions in question. Most state authorizing statutes are broad, and court interpretation and case law are the determinants of a health board's authority. Despite similar laws, state courts have interpreted authority broadly in some states (e.g., West Virginia, Massachusetts) and narrowly in others (e.g., New York).

Massachusetts' experience illustrates that a strong state tobacco control program offering legal expertise to health boards can facilitate advocacy by providing information, legal guidance, and assistance in drafting viable regulations. Although Massachusetts has experienced much success against attacks on health board regulations, it should be noted that the state's strong tobacco control infrastructure contributes greatly to its success and that the methods Massachusetts uses in enacting clean indoor air policies may not be relevant outside of this infrastructure.

Boards of health can be effective venues for tobacco control, but the regulatory approach is not the easy path that public health advocates often expect. As with local ordinances pursued legislatively, success requires public health advocates to anticipate and prepare for aggressive tobacco industry opposition at every step. ■

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