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Warning: Your Tobacco Sponsorship May Be Hazardous to Our Nation's Health

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WARNING: YOUR TOBACCO SPONSORSHIP MAY BE HAZARDOUS TO OUR NATION’S HEALTH

I. INTRODUCTION

“T’ll tell you why I like the cigarette business. It costs a penny to make. Sell it for a dollar. It’s addictive. And there’s fantastic brand loyalty.”

Events such as Nascar’s Winston Cup, World Cup Soccer, Cigarette boat races, America’s Cup, Wimbledon and the Superbowl display an array of athletic achievement and are known world wide. Consequently, so are the event sponsors, many of whom are tobacco companies. Until recently, not many people seemed to mind the association between tobacco products and sporting events. Now, however, the battle to eliminate tobacco sponsorship has become as competitive as the sporting events themselves.

Since the 1600s, tobacco has incited controversy due to its reported health risks. Despite the negative publicity tobacco has received, tobacco companies have stayed competitive, have protected their profits and have kept many citizens of the world smoking.


2. See S. WAGNER, CIGARETTE COUNTRY: TOBACCO IN AMERICAN HISTORY AND POLITICS (1971). In the 1400s, Christopher Columbus reported to Europe that Native Americans smoked the leaves for pleasure. See id. The first medical report of the effects of tobacco was in 1665, when a cat died from drinking “a drop of distilled oil of tobacco.” STANTON A. GLANTZ, THE CIGARETTE PAPERS 1 (1996). Initial investigations suggested that smoking caused cancer, and in the early 1950s, two professors, Richard Doll and Austin Bradford-Hill, published the first study which examined the link between smoking and lung cancer. See Nicholas Hellen, EC Ad Ban Goes Up in Smoke, EVENING STANDARD, Dec. 9, 1992, at 31. In 1964, the U.S. Surgeon General officially announced that smoking causes lung cancer. See PUBLIC HEALTH SERV., U.S. DEP’T OF HEALTH, EDUC. AND WELFARE, PUB. NO. 1103, SMOKING AND HEALTH, REPORT OF THE ADVISORY COMM. TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERV. (1964). The first health warnings were placed on cigarette packages in 1971. See Hellen, supra at 31. From 1971 to present, tobacco companies and governments have been working to establish the advertising limits for tobacco products. See id. One 1992 report, in fact, shows that banning cigarette advertising does reduce the number of people who take up smoking. See id.

Tobacco companies have been able to accomplish this goal largely through major advertising efforts and strong political support.\(^4\)

Now, however, in light of the disparaging medical evidence concerning tobacco, many nations are making an effort to curb the smoking habits of their citizens by limiting the exposure of their children to cigarette advertising.\(^5\) This limitation on children's exposure to advertising is based on the theory that those who start smoking as youngsters are more likely to continue smoking throughout their adult years.\(^6\) Perhaps the most widely publicized government crackdown on youth-oriented advertising involved a controversial cigarette logo featuring Joe Camel, a cartoon-like camel associated with Camel cigarettes.\(^7\)
In order to effectively limit children's exposure to cigarette advertising, many countries are attempting to limit tobacco advertising and sponsorship at sporting events.\textsuperscript{8} These efforts are fueled by the theory that limiting the exposure of children to “anti-health” advertising will cause a decline in the number of children who take up smoking.\textsuperscript{9} Countries have targeted advertising at sporting events to lower the risk of exposure to youths who presumably associate sports, and therefore smoking, with that which is “cool.”\textsuperscript{10} In

\textsuperscript{8} Sponsorship is “an investment in an activity or event that can be exploited commercially.” Tanya Hughes, \textit{Successful Sponsorship Hinges on Creating a Synergy Between Brand and Event}, \textit{Brand Strategy}, Sept. 30, 1994, at 1. Sponsorship Research International, a research group specializing in sponsorships, determined that 87% of consumers believed a company's sponsorship of an event meant that the company contributed significant financial aid to the event. See \textit{id}. Based on this belief, consumers purchased the sponsoring company's product, in an attempt to help support the event. See \textit{id}.


\textsuperscript{10} See Peter Roebuck, \textit{Tobacco and Sport Remain a Deadly Mixture}, \textit{Sunday Times} (Eng.), June 23, 1991, at Sport Sec. (explaining many smokers take up habit during teenage years, because “tobacco has been brilliantly marketed as rebellious, seductive and cool”). Children are “very impressionable and therefore vulnerable to the sophisticated marketing techniques employed by the tobacco industry . . . that associate the use of tobacco products with excitement, glamour, and indepen-
support of this premise, the United States has suggested that sports sponsorship "provides an opportunity for 'embedded advertising' that actively creates a 'friendly familiarity' between tobacco and sports enthusiasts, many of whom are children and adolescents." 11

These new restrictions are creating controversy in the sporting industry, a venue to which the tobacco companies turned as an alternative to television advertising. 12 Those who oppose advertising tobacco products at sporting events argue that sports exemplify "life and vitality," while tobacco kills more and more people every year. 13 Proponents of tobacco sponsorship of sporting events argue that tobacco sponsorship should be legal since tobacco itself is legal. 14

This Comment provides an overview of restrictions on tobacco advertising at sporting events implemented by Australia, the United States, Canada and France, 15 and the tobacco industry's legal challenges to these restrictions. Part II of this paper explores the evolution of case opinions and recent laws passed or pending in Australia, Canada, the United States and France, which severely limit or completely ban tobacco sponsorship and advertising at sporting events. 16 Part III analyzes the legal challenges set forth by both the tobacco industry and opponents of tobacco sponsorship. 17 In conclusion, Part IV assesses the impact of more stringent tobacco regulations on the worldwide sporting community. 18
Several countries have already passed broad laws regulating the tobacco industry, or are currently in the process of doing so. This section will explore the current state of the restrictions of tobacco advertising at sporting events in Australia, Canada, France and the United States, and the history underlying the regulations.

A. Australia

The Broadcasting and Television Act of 1942 (BTA) was the first attempt by the Australian government to regulate television advertising for tobacco products. This law required that tobacco companies include a warning of the health risks of smoking in their cigarette advertisements. In 1976, the BTA was amended by the Broadcasting and Television Amendment Act (BTAA) to completely prohibit the direct advertising of cigarettes.

Despite tougher restrictions on tobacco advertising, tobacco companies were sometimes able to get television exposure if the advertisement of their product was “accidental or incidental.”

19. Broadcasting and Television Act, 1942 (Austl.). Australia’s Broadcasting and Television Act of 1942 was amended in 1972 to require licenses to include a health warning with cigarette advertisements. See Broadcasting and Television Act, 1972, § 100A (Austl.). Section 100A(1) provided in pertinent part, “A licensee shall cause each advertisement for cigarettes or cigarette tobacco broadcast or televised from his station to be followed immediately... by the following statement: - 'Medical authorities warn that smoking is a health hazard.'” Id.

The Australian Parliament had the power to regulate broadcasting by virtue of the Commonwealth Constitution, which provides that the Parliament may make laws “with respect to ... telegraphic, telephonic, and other like services.” See Austl. Const. § 51(v).


21. Broadcasting and Television Amendment Act (BTAA), 1976, § 100(5A). Section 100(5A) provides, “A licensee shall not broadcast or televisual an advertisement for, or for the smoking of, cigarettes or cigarette tobacco.” Id. (emphasis added). The 1976 amendment provided an exception when the broadcast was an accidental or incidental accompaniment of the broadcasting or televising of other matter in circumstances in which the licensee does not receive payment or other valuable consideration for broadcasting or televising the advertising matter.” Id. § 100(10). The 1976 Amendment repealed Section 100A of the BTA, which had required that health warnings accompany cigarette advertisements. See id. § 6. For a discussion of the BTA, see supra note 20 and accompanying text.

22. Id. § 100(10). For example, if a television station is broadcasting a sporting event, and a billboard for a cigarette brand is in the background, the broadcast of the billboard would not be a violation of the BTA. Legislative history reveals that section 100(10) allows:

[P]eripheral or perimeter advertising... Advertising of slogans on billboards or fences around sporting ovals is permitted providing there is not abuse of the intention of the legislation... As I understand it, it also would be possible for sponsorship by particular sponsors to continue so long as it was not sponsorship in the direct sense of sponsoring certain
Australian courts have interpreted the term "accidental or incidental" in two significant cases: Benson and Hedges Co. v. Australian Broadcasting Tribunal,23 and Action on Smoking and Health, Ltd. v. Australian Broadcasting Tribunal.24

In Benson and Hedges, the court examined four separate allegations of the Benson and Hedges Company's violation of the BTA.25 By utilizing the policy statement of the Australian Broadcasting Tribunal,26 the Benson and Hedges court determined that the tobacco company expressly violated section 5(A) of the BTA on three of the four occasions in question.27 On one occasion, however, the court

cigarettes or cigarette tobacco. So those aspects do not cut across the intentions of the legislation at all.


26. See id. ¶ 3 (citing Tribunal's Policy Statement issued Dec. 29, 1983, POS 07). The policy statement issued by the Tribunal set forth the views of the court on the interaction between sections 100(5A) and 100(10). See id.

The policy statement suggested that before determining whether an advertisement falls within the section 100(10) "accidental or incidental" exception, a court must first consider (1) whether the item is an advertisement; and (2) if so, whether it is an advertisement for the smoking of cigarettes. See id.

The policy statement also defined an "advertisement" as "matter which draws the attention of the public, or a segment thereof, to a product, service, person, organization, or line of conduct in a manner calculated to promote or oppose, directly or indirectly, that product, service, person, organization or line of conduct." Id.

27. See id. ¶ 14. The three incidents which amounted to a violation of the BTA were as follows: First, the court determined that a television script promoting a Cricket match, which referred to the "first Benson and Hedges Test," displayed the Benson and Hedges logo, and concluded with "proudly brought to you by the Benson and Hedges Company" was an advertisement within section 5(A) of the BTA. Id. ¶¶ 20-21. The court acknowledged that there was a difference between advertising for cigarettes, and advertising a corporate name; however, the court did not find this distinction to be persuasive in this scenario:

I do not doubt that there can be a 'corporate image' which is reasonably distinct from the products sold or produced by the corporation. The question is, however, whether it was reasonably open to the [lower tribunal] to conclude in the present case that the products also were being advertised . . . the answer to this question must be a clear affirmative.

Id. ¶ 21. The court's analysis ended with its determination that Benson and Hedges violated section 5(A) of the BTA. Id. ¶ 23. As a result, the court did not determine whether Benson and Hedges' advertisement was "accidental or inciden-
held that the broadcast of the 1982 Rugby League Grand Final, sponsored by Benson and Hedges "Winfield" brand of cigarettes, was not a violation of the Act, but the broadcast of a ten minute pre-game dance performance was a violation of the Act.

The dance performance in question featured dancers dressed in the colors of the cigarette packaging, holding a banner displaying the brand of cigarette, and dancing to the commonly recognized theme song of the cigarette brand. The court explained that the Australian Broadcasting Tribunal's ("Tribunal") decision that the dance performance "was of an advertising character," was a reasonable conclusion, in light of the fact that the tribunal separated the performance from the actual game. In concluding that the broadcast of the rugby match was not a violation of section, pursuant to section 100(10). The court held that the lower tribunal's decision not to do the latter analysis was not clearly erroneous. See id.

Second, the court relied on a similar reasoning set forth in the Test Cricket analysis, when it determined that a ballerina's description of the Australian Ballet program, followed by a display of the Benson and Hedges coat of arms along with a voice over saying, "proudly sponsored by the Benson and Hedges Company" was a violation of section 100(5A) of the BTA. The court noted that although this advertisement was different, since it was made up mostly of ballet dancing, Benson and Hedges still violated the BTA by virtue of the statement of sponsorship.

Third, the court determined that the words, "a Winfield Company Sponsorship" at the beginning and end of an advertisement for a documentary film on Australia's victory over the United States in the America's Cup, violated section 100(5A) of the BTA. The court explained, "the use of the name 'Winfield,' whatever it may have done separately for the public image of [the tobacco company], turned the attention of viewers to Winfield cigarettes." The lower tribunal sought advice from the television station broadcasting the event, ATN, and the station noted, "Winfield colours include red & white, blue & white, and green & white - these are also the colours for three of the teams in the Sydney competition. Tchaikovsky's Fifth Symphony had achieved some significant public acceptance before Winfield sought to borrow it." The court explained that, since sporting events were often accompanied by "a degree of razzmatazz," there was a strong argument that, taking the dance performance and the game as a single sporting event, the performance could fall under an "incidental or accidental" broadcast, pursuant to section 100(10).
100(5A), the court criticized the tribunal's analysis, and determined that it would "not be possible, or reasonably practical, to televise the sporting activities without cigarette advertisements being caught on screen."

The next major case interpreting the BTAA was not until 1992, in *Action on Smoking and Health, Ltd. v. Australian Broadcasting Tribunal*. In this case, a broadcasting company televised billboards advertising Marlboro cigarettes located around a race track, and Marlboro logos on drivers, pit crews and cars at the 1990 Australian Grand Prix. Here, unlike in the dance sequence in *Benson and Hedges*, the tribunal reasoned that the broadcast of the Marlboro advertisements was prohibited by section 100(5A), but fit within the exception under section 100(10), since the broadcast of the advertisements was "incidental." The court explained that the facts of *Action on Smoking and Health* were more similar to the broadcast of the Rugby match, than to the pre-game dance sequence in *Benson and Hedges*.

The next major battle in the war against tobacco advertising involved legislative action. The Australian Parliament enacted the Tobacco Advertising Prohibition Act of 1992 (TAPA), which currently restricts tobacco advertising at sporting events. TAPA was
enacted after prior laws governing cigarette advertising in print and broadcast media became unworkable. The comprehensive law restricts both the broadcasting and publishing of tobacco advertisements.

The major controversy arising from TAPA is the ban on tobacco sponsorship at sporting events, which became effective in December 1995. Tobacco companies can, however, escape liability under the Act if the advertisements are published or broadcast during sporting or cultural events of "international significance." Currently, some legislators are trying to eliminate tobacco sponsor-

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Australian Ban on Advertising, Fin. Times Ltd. (Austl.), June 7, 1994, at 20. Philip Morris decided to sue after the company attempted to publish an advertisement for the recall of faulty lighters, but was met by opposition when Australian media groups claimed the advertisement violated federal law. See id. Eventually, the company modified its advertisement so that it was acceptable to the Australian audience. See id.

39. See (CTH) Broadcasting Services Act, 1992, tit. 275-2415, at 1 (Austl.). The purpose underlying TAPA was to provide a "comprehensive legislative framework" to govern the broadcasting industry "into the next century." Id. The Parliament also acknowledged that broadcasters "should be subject to social and cultural obligations in accordance with their ability to influence community views." Id. (citing Statement by Mr. Kim Beazley, Minister for Transport and Communications, Nov. 7, 1991, commenting on draft of law).

40. See TAPA §§ 13-22.

41. TAPA was amended in 1995, but the amendments did not significantly affect the Parliamentary prohibition on tobacco sponsorship of sporting events. TAPA defines a tobacco advertisement as:

[A]ny writing, still or moving picture, sign, symbol or other visual image, or any audible message, or any combination of 2 or more of those things, that gives publicity to, or otherwise promotes, or is intended to promote:
(a) smoking; or (b) the purchase or use of . . . tobacco products; or . . .
(f) any other words (for example the whole or a part of a brand name) . . .
that are closely associated with a tobacco product . . .

TAPA § 9(1) (emphasis added).

42. Id. § 18. Whether something is of "international significance" is debatable. For example, the Australian Grand Prix was considered to be an event of international significance, since without tobacco sponsorship, the motor race could have been moved to another country. See Amanda Meade, Tobacco Ads - Government Relents for Grand Prix, Sydney Morning Herald, Sept. 15, 1994, at 7. The Australian government was initially divided over whether to permit an exception for the 500cc Motorcycle Grand Prix. See Danielle Cook, Tobacco Brawl Splits Cabinet, Sydney Morning Herald, June 4, 1994, at 1. This dispute arose when the Minister for Sport, Mr. Downey, accused the Minister for Health, Mr. Phillips, of jeopardizing efforts to keep the motorcycle race in Australia. See id. Subsequently, a Labor Health Minister granted the exemption for the Motorcycle Grand Prix. See Simon Chapman, Greiner Does a Thatcher, 312 Brtr. Med. J. 1120 (1996).

The Australian government allowed exemptions for the Bathurst 1000 motor race and the 1995-96 cricket season. See Michael Sharp, Anti-Smokers Fume over Sports Exemptions, Sydney Morning Herald, May 10, 1995, at 5. Finally, the Australian government allowed an exemption for the America’s Cup yacht race, but race officials voiced an objection to the Australian yacht’s tobacco sponsorship by Philip Morris. See Chapman, supra at 1120. See also Alicia Larriera, America’s Cup Boat May Be Smoked Out, Sydney Morning Herald, July 5, 1994, at 1.
ship of sporting events entirely. For example, in 1994, Australia's Minister for Health announced a plan to narrow the "event of international significance" exception, to eventually completely restrict any type of tobacco advertisement at any sporting or cultural event. In order to entirely eliminate tobacco sponsorship at sporting events, the Parliament and anti-smoking groups have suggested using funds from the tax on tobacco products to support the sporting and cultural events.

B. Canada

Australia is not alone in its attempts to regulate tobacco sponsorship. From 1988 through 1995, the Tobacco Products Control Act (TPCA) governed Canadian tobacco companies. In a 1995 landmark decision, the Canadian Supreme Court held that five sections of the TPCA, which severely limited tobacco sponsorship, were unconstitutional. Tobacco giants R.J.R. MacDonald and Im-

In contrast, the World Series Cricket Tournament was not considered an event of international significance. See Australia Stumps Tobacco Ads, FIN. TIMES (London), Jan. 3, 1997, at 4. During the World Series, to comply with Australian law, the Pakistani team was forced to remove stickers bearing the name of their sponsor, a Pakistani corporation which sells cigarettes and cricket equipment, from their bats. See id.

A survey in Australia in 1994 revealed that two out of three people believed cigarette companies should be allowed to provide funds to sporting events. See Alicia Larriera, Smoking in Restaurants Gets Flick, SYDNEY MORNING HERALD, July 9, 1994, at 3. The survey revealed that, of the men surveyed, 65% believed tobacco sponsorship should be allowed, 31% believed it should not be allowed, and 4% were unsure. See id. The women's results were similar: 58% believed tobacco sponsorship should be allowed, 36% believed it should not be allowed, and 6% were unsure. See id.

43. See, e.g., Amanda Meade, Lawrence Firm on Sport Tobacco Ads, SYDNEY MORNING HERALD, June 2, 1994, at 2 (explaining Australian Minister for Health wants to "further diminish the opportunity for exemptions" to TAPA).

44. See, e.g., Amanda Meade, Lawrence Firm on Sport Tobacco Ads, SYDNEY MORNING HERALD, June 2, 1994, at 2.

45. See Peter Deeley & Iain Macleod, DAILY TELEGRAPH (Austl.), Dec. 7, 1990, at 32. In 1990, the Health Promotion Foundation held ten percent of annual tobacco taxes with the intent to buy out tobacco sponsorship in sports. See id.

46. See Tobacco Products Control Act (TPCA), R.S.C., ch. 20, §§ 35-37 (1988) (Can.). The purpose of the TPCA is to "prohibit the advertising and promotion and . . . labeling and monitoring of tobacco products." Id. The TPCA has been termed "one of the world's toughest anti-smoking laws." See Bernard Simpson, Ottawa Fans Tobacco Advertising Flames, FIN. TIMES (London), Nov. 26, 1996, at 8.

47. See R.J.R.-MacDonald v. Attorney General of Canada [1995] 127 D.L.R.4th 1. The provisions in question in R.J.R.-MacDonald were sections four, five, six, eight and nine of the TPCA. Section four provides, "[n]o person shall advertise any tobacco product offered for sale in Canada." TPCA, R.S.C., ch. 20, § 4 (1988) (Can.). Section five provides that, "Notwithstanding section 4, a retailer may . . . expose tobacco products for sale at the retailer's place of business . . . ." Id. § 5. Section six provides:
Imperial Tobacco, Ltd. filed a lawsuit and challenged the TPCA on the basis that (1) this type of legislation was reserved to the provinces of Canada, not the federal Parliament; and (2) the TPCA infringed upon the companies' freedom of expression and right to advertise established in the Canadian Charter of Rights and Freedoms. The Supreme Court agreed with the tobacco companies on both issues, and overturned the unconstitutional sections of the TPCA.

Since these sections of the TPCA were overturned, Canada has struggled to come up with effective yet legal legislation, without eliminating cultural and sporting events. Originally, many believed the Canadian Minister of Health would propose to completely ban tobacco sponsorship of sporting events; however, in

the name of a manufacturer or importer of tobacco products ... may be used, otherwise than in association with a tobacco product, in a representation to the public (a) that promotes a cultural or sporting activity or event; or (b) that acknowledges ... contributions made by the manufacturer ... of the tobacco product toward such activity ... .

Id. § 6. To circumvent section six, many tobacco companies established subsidiary companies with the name of a popular cigarette brand as the name of the subsidiary. See Gary M. Gillman and Ronald Chapman, Tobacco and Human Rights, 146 Nw L.J. 1232 (1996). Section eight provides that, "[n]o manufacturer or importer of tobacco products ... shall (a) apply the trade mark ... to any article other than a tobacco product or a package or container in which a tobacco product is sold or shipped ... ." TPCA, R.S.C., ch. 20, § 8 (1988) (Can.). Section nine prohibits distribution of tobacco products that have not been affixed with a health warning. Id. § 9.

In holding that the provisions of the TPCA were unconstitutional, the Supreme Court reversed the decision of the Court of Appeals. See R.J.R.-MacDonald v. Attorney General of Canada [1995] 127 D.L.R.4th 1. The Supreme Court's decision did, however, determine that the Parliament had the power to enact the law based on the Parliament's power to enact criminal laws. See id. For a detailed discussion of the history of the case at the trial and appellate stages, see MacDonald, Inc. v. Canada (AG): Reflections from the Perspective of Health, 40 McGill L.J. 229-77 (1995).


response to pressure from the cultural and sporting communities, the proposed legislation, known as Bill C-71, allowed tobacco companies to use their corporate names in connection with events. The Canadian Senate recently passed the bill, now known as the Tobacco Act. This Act has not been entirely well received.

Until the Tobacco Act, the Tobacco Industry Voluntary Packaging and Advertising Code of the Canadian Tobacco Manufactur-

52. *See* Anthony Wilson-Smith, *Trying to Snuff Out Smoking*, MACLEAN'S (Can.), Dec. 9, 1996, at 24 (explaining proposed legislation “fall[s] short of the total ban on sponsorship that was widely expected.”). The proposed legislation required that (1) any advertisements for the sporting events only list the time and place of the events; and (2) tobacco companies’ names on print advertising material for the sporting events could not occupy greater than 10% of the advertising space. *See id.* The proposed law also banned all print advertising for tobacco products, except in print material primarily for adults. *See id.*

53. *See* Tobacco Act, S.C., ch. 13, §§ 1-66 (1997) (Can.). Section 24 of the Tobacco Act specifically addresses the tobacco sponsorship of events, and provides in pertinent part, “[a] person may display a tobacco product-related brand element only within the bottom ten percent of the display surface of any promotional material.” *Id.* § 24. The Act defines a “brand element” as including, “a brand name, trade-mark, trade-name, distinguishing guise, logo, graphic arrangement, design or slogan that is reasonably associated with, or that evokes, a product, a service or a brand of product or service, but does not include a colour.” *Id.* § 2.

Both the tobacco industry and numerous arts and cultural groups lobbied against the bill, for fear that events such as the Grand Prix and the Jazz Festival would not be able to continue without tobacco sponsorship money. *See Tide Is Turning Against Tobacco*, MONTREAL GAZETTE, April 21, 1997, at B2. In response to this pressure, the government allowed extra time before the implementation of the rules so that the events could find new sponsors. *See id.* The effective date of the sponsorship provision of the Tobacco Act is October 1, 1998. *See Tobacco Act, S.C., ch. 13, § 24 (1997) (Can.).

54. *See* William Johnson, *Tobacco Legislation Is Authoritarian and Opportunistic*, FIN. POST (Can.), April 4, 1997, at 13. To pass Supreme Court scrutiny, the government must prove the law is “demonstrably justified.” *Id.* Whether the law is “demonstrably justified” depends on which report one believes. Based on a report from Health Canada, smoking in Canada declined from 38% in 1981 to 31% in 1994. *See id.* This same report continues, “but there has been no real change [in smoking rates] since 1986 (32%).” *Id.* Some Canadians believe the Supreme Court will also strike down Bill C-71, as it struck down TAPA, because the bill violates Canadians’ right to free speech. *See id.*

The tobacco industry has already vowed to challenge the new law in court. *See* Stephen Barrington, *Canada’s Latest Cigarette Marketing Regs Under Fire: Limits on Motorsport Sponsors Are Already Running Out of Gas*, ADVERTISING AGE, Apr. 21, 1997, at 62. The tobacco industry is arguing that the law is still too vague to interpret, making it “impossible to advertise anything.” *Id.*

Further, one day after the Senate approved the law, the Canadian government was already considering amendments. *See id.* For example, the new law bans tobacco imagery in motorsports, on cars, equipment and team clothes. *See id.* However, the Canadian government promised to loosen the rules for motor sports by late 1997. *See id.; see also* Amy Rosewater, *CART Winning Tobacco Battle in Canada*, PLAIN DEALER, April 23, 1997, at 5D (CART threatened to pull its motor races out of Canada if Bill C-71 was passed without motor sports exemption).
ers’ Council ("Code") governed tobacco sponsorship.\textsuperscript{55} The Code provided less stringent restrictions on tobacco sponsorship of sporting events than the TPCA provided.\textsuperscript{56} From the foregoing discussion of Canada’s attempts to regulate tobacco sponsorship, it is clear that the future of Canadian tobacco sponsorship is uncertain.\textsuperscript{57}

\textsuperscript{55} The Tobacco Industry Voluntary Packaging and Advertising Code of the Canadian Tobacco Manufacturers’ Council (Nov. 1, 1996) [hereinafter Voluntary Code], copy of Code from Canadian Tobacco Manufacturers’ Council to Author (on file with the Villanova Sports and Entertainment Law Journal). Prior to the Parliament’s enactment of TAPA, the country regulated tobacco advertisements through voluntary codes, in agreement with tobacco companies. See Gary M. Gillman and Ronald Chapman, Tobacco and Human Rights, 146 New L.J. 1232 (1996). The voluntary codes provided that, in the event of a dispute, the controversy would be solved privately through arbitration. See id.

\textsuperscript{56} Section four of the Code addressed tobacco sponsorship of sporting events, and provided:

4.1 No sponsorship advertising may depict any tobacco product or any package commonly associated with a tobacco product or any tobacco-related good;

4.2 Sponsorship advertising may contain the full corporate name of any manufacturer of tobacco products and may contain a tobacco trade-mark under the condition imposed by article 4.3;

4.3 It is permissible to use a tobacco trade-mark in sponsorship advertising if it is used in association with a sponsored event, events or activity. The principal purpose of sponsorship advertising which incorporates a tobacco trade-mark must be the promotion of the event, events or activity, which must be identified by text. A secondary purpose may be the development of goodwill toward a tobacco trade-mark, the owner and/or authorized user(s) of the tobacco trade-mark, derived from the association of the tobacco trade-mark with the event, events or activity.

4.4 Outdoor sponsorship advertisements purchased by a manufacturer or under the manufacturer’s authority shall not be placed within 200 metres of the perimeter of any primary or secondary school property.

4.5 Sponsorship advertising placed directly, or as authorized by, a manufacturer in print or broadcast media shall be confined to print publications or broadcast programs with a predominantly adult audience, as the case may be.

For clarification purposes, the broadcasting, live or delayed, of a sponsored event, in whole or in part, shall be deemed not to be sponsorship advertising under the Code.

4.6 All models or actors paid to appear in sponsorship advertisements shall be adults 25 years of age or older. This provision does not apply to photographs or representations of actual participants or performers in the sponsored event or activity who appear in sponsorship advertising for the event or activity.

\textit{Voluntary Code, supra} note 55, at 1.

\textsuperscript{57} Many tobacco organizations are skeptical about whether a new, tougher law will survive the scrutiny of the Canadian Supreme Court. See Bernard Simpson, Ottawa Fans Tobacco Advertising Flames, FIN. TIMES (London), Nov. 26, 1996, at 8; see also Canada Tobacco Industry to Fight Anti-Tobacco Bill, REUTERS FIN. SERV., Dec. 3, 1996, at 1 (quoting Rob Parker, president of Canadian Tobacco Manufacturers’ Council, stating "[t]he [proposed tobacco bill] in its present form, is contemptuous of the Supreme Court.").
C. United States

Tobacco advertising on television has been prohibited in the United States since 1971, pursuant to the Cigarette Labeling and Advertising Act (CLAA).\(^{58}\) Congress has twice failed at banning tobacco sponsorship of sporting events: the Tobacco Control and Health Protection Act (TCHPA)\(^{59}\) and the Protect Our Children from Cigarettes Act (POCCA).\(^{60}\) Both Acts were strongly opposed by supporters who believed the laws violated the First Amendment.\(^{61}\)

In 1980, the United States Supreme Court established a four-pronged test to determine if a governmental regulation is a violation of commercial free speech. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,\(^ {62}\) the Supreme Court held that the following four factors must be considered when determining whether a regulation is a violation of the First Amendment: 1) the advertisement must contain lawful information which is not misleading; 2) the government must have a substantial interest in the


61. See Stoner, *supra* note 59, at 649-50. The TCHPA provided in pertinent part:

> It shall be unlawful within the United States for the manufacturer, packager, or distributor of tobacco products . . . to sponsor or cause to be sponsored any athletic, music, artistic, or other event in the name of a tobacco product trademark or in a manner so that a tobacco product trademark is publicly identified as a sponsor of . . . such an event . . . [or] to pay or cause to be paid to have any tobacco product trademark appear on any vehicle, boat, or any other equipment used in sports.

*Id.* at 648 (quoting H.R. 5041, 101st Cong., 2d Sess. §§ 6(b)(2), (5) (1990)).

Similarly, the POCCA prohibited "displaying the registered brand name or logo of a tobacco product on cars, boats, animals, or other sporting equipment . . . unless the brand name is the name of a corporation in existence on August 1, 1988." *Id.* at 649 (quoting H.R. 1250, 101st Cong., 1st Sess. § 3(b)(2)(F) (1989)). POCCA also prohibited billboards or signs advertising tobacco products to be “located in a sports stadium or other sports facility.” *Id.* (quoting H.R. 1250, *supra* § 3(a)(2)(A)).

field in which it is regulating; 3) the regulation must advance the government's interest; and 4) the regulation must be narrowly drafted.\textsuperscript{63}

In attempting to comply with the \textit{Central Hudson} test, the FDA enacted regulations in mid-1996 prohibiting the sponsorship of sporting events by the brand name of a tobacco product, but not by the name of the tobacco company itself.\textsuperscript{64} The purpose underlying the FDA regulations was to limit children's exposure to tobacco products, and to reduce the "positive imagery" which makes tobacco products appealing to the younger generation.\textsuperscript{65}

\textsuperscript{63} See id. at 566. In \textit{Central Hudson}, the New York Public Service Commission, in an effort to limit fuel consumption in light of an impending fuel shortage, prohibited promotional advertising by an electrical company. \textit{Id.} at 558-59. The \textit{Central Hudson} Court struck down the Commission's advertising prohibition, since it infringed upon the electric company's First Amendment right to commercial free speech. \textit{Id.} at 572.

\textsuperscript{64} See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,617-18 (Aug. 28, 1996) [hereinafter Regulations]. The language of the regulations provide in pertinent part:

No manufacturer, distributor, or retailer may sponsor or cause to be sponsored any athletic, musical, artistic, or other social or cultural event, or any entry or team in any event, in the brand name (alone or in conjunction with any other word), logo, symbol, motto, selling message, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to . . . those used for any brand of cigarettes or smokeless tobacco. Nothing in this paragraph prevents a manufacturer, distributor, or retailer from sponsoring or causing to be sponsored any athletic, musical, artistic, or other social or cultural event, or team or entry in the name of the corporation which manufactures the tobacco product, provided that . . . the corporate name does not include any brand name (alone or in conjunction with any other word), logo, symbol, motto, selling message, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of cigarettes or smokeless tobacco.

\textit{Id.} at 44,618. This regulation became effective on February 28, 1998. See \textit{id.} at 44,396. Other provisions of the FDA regulation provide that (1) tobacco advertising in magazines which target readers under 18 years of age would be restricted by only allowing advertisers to publish ads in black and white with text only; (2) all cigarette vending machines would be prohibited, except those located in clubs in which only adults may enter; (3) no tobacco billboards would be permitted within 1000 feet of schools, and (4) all billboards for tobacco products would be restricted to black-and-white text only. See Shankar Vedantam, \textit{Battle Set to Begin Over Tobacco Rules}, PHILA. INQUIRER, Feb. 9, 1997, at A8.

In August 1995, President Bill Clinton directed the FDA to enact the regulations limiting exposure of children to tobacco products. See Clinton \textit{Will Allow FDA to Regulate Tobacco as a Drug"}, EXTEL EXAMINER, Aug. 10, 1995, at 2. The FDA also supported its jurisdiction over tobacco by issuing a 250 page proposal outlining its contention that tobacco is a drug. See \textit{id.}

\textsuperscript{65} See Regulations, \textit{supra} note 64, at 44,396.
Immediately following President Bill Clinton's announcement that he would allow the FDA to regulate the tobacco industry, the tobacco industry filed a lawsuit in a North Carolina federal court challenging validity of the FDA’s regulations. The tobacco industry claimed that the FDA’s restrictions on tobacco advertising were unconstitutional because (1) the FDA did not have the authority to enact the regulations, and (2) the regulations violated the First Amendment. Coyne Beahm, Inc. v. FDA sparked the beginning of the controversy.

The tobacco industry sought summary judgment. The court granted summary judgment in favor of the tobacco industry on the basis that the FDA had no authority to restrict the promotion and advertising of tobacco products. It denied summary judgment on the basis that the FDA had the authority to regulate access restrictions and labeling requirements on tobacco products.

66. See Coyne Beahm, Inc. v. FDA, 958 F. Supp. 1060 (M.D.N.C. 1997). Advertising companies and convenience stores were also a part of the lawsuit challenging the FDA regulations. See id.

The Campaign for Tobacco-Free Kids, a group supporting the FDA regulations, asserted, “[e]ven the [tobacco] industry does not argue it has a First Amendment right to advertise to children . . . . This is an issue of line-drawing. The [tobacco] industry argues the lines are improperly drawn. We and the FDA argue that the lines are reasonably drawn.” Shanker Vedantam, Battle Set to Begin Over Tobacco Rules, PHILA. INQUIRER, Feb. 9, 1997, at A8 (quoting Matthew Myers, lawyer for Campaign for Tobacco-Free Kids).


70. See Coyne Beahm, 958 F. Supp. at 1065. The FDA did not formally move for summary judgement, but suggested this remedy in its reply brief. See id. at 1065 n.1.

71. See id. at 1086.

72. See id. The court also ordered that the FDA regulations regarding tobacco products remain in full effect, pending an appeal by the plaintiffs. See id.
1. **FDA’s Authority to Regulate Tobacco Industry**

The tobacco industry's argument that the FDA did not have the power to regulate tobacco advertising rested upon two theories: (1) Congress has never given the FDA the power to regulate the tobacco industry, and (2) tobacco is not a "drug" or "device," subject to the Food, Drug, and Cosmetic Act (FDCA), over which the FDA has authority.

The FDA, however, asserted that it did have jurisdiction pursuant to the FDCA, since tobacco products are "combination products" with a drug component of nicotine, and device components intended to deliver nicotine to a person's body. The FDA also

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73. See id. at 1065.
74. See id.; see also 21 U.S.C. §§ 301-395 (1994). Section 321(g)(1) of the FDCA defines a "drug" as:

(A) articles recognized in the official United States Pharmacopoeia . . .
(B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and

75. See Coyne Beahm, 958 F. Supp. at 1074.
76. Id. at 1079. The FDA defines a "combination product" as, "[a] product comprised of two or more regulated components, i.e., drug/device, . . . that are physically, chemically, or otherwise combined or mixed and produced as a single entity." Id. at 1080 n.16 (quoting 21 C.F.R. § 3.2(e) (1995)). Some examples of products which satisfy the FDA's definition of combination products include pre-filled syringes, metered dose inhalers, nicotine patches and intravenous infusion pumps. See id. (citing 61 Fed. Reg. 44,396, 45,211 (Aug. 28, 1996).
contended it had broad authority in deciding whether to regulate products which are a combination of “drugs” and “devices.” Finally, relying on *Central Hudson*, the FDA asserted that it was not required to use the “least restrictive” regulations to accomplish its goals, but rather, it could use the “reasonable fit” test, provided the regulations were narrowly tailored.

2. The First Amendment

In *Coyne Beahm*, the tobacco industry asserted that the final prong of the *Central Hudson* test, whether the regulations were narrowly drafted so as not to violate the First Amendment, was at issue. In response to the tobacco industry’s allegations, the FDA argued that the restrictions did not violate the First Amendment since they were narrowly drafted and did not prohibit all forms of tobacco advertising.

The *Coyne Beahm* court resolved the dispute by relying on the plain language of the statute in question. Section 360j(e) of the FDCA allows the FDA to restrict the “sale” of certain devices. The court reasoned that the term “sale” does not include the advertising or promotion of a product. Accordingly, the court held that

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78. *See id.* at 1074-79.
82. 21 U.S.C. § 360j(e) (1994). Section 360j(e) provides in pertinent part, “The Secretary may by regulation require that a device be restricted to sale, distribution, or use . . . upon such other conditions as the Secretary may prescribe in such regulation, if, because of its potentiality for harmful effect . . . there cannot otherwise be reasonable assurance of its safety and effectiveness.” *Id.*
83. The court looked to the American Heritage Dictionary which defined a “sale” as:

1. The exchange of goods or services for an amount of money or its equivalent; the act of selling. 2. An instance of selling property. 3. An opportunity for selling or being sold; demand. 4. Availability for purchase; a store where pets are for sale.
5. A selling of property to the highest bidder; auction. 6. A special disposal of goods at lowered prices; coats on sale this week. 7. sales. a. Activities involved in the selling of goods or services. b. Gross receipts.

84. *See id.* at 1084. The court further supported its view by recognizing that Congress expressly used the terms “offer for sale,” “advertising,” and “advertise-
the FDA could not regulate the tobacco industry's promotion of its products. Importantly, the court noted that it was not required to delve into the First Amendment issue, since it already held that the FDA lacked the authority under the FDCA to restrict the advertising and promotion of tobacco products.

Along with the Coyne Beahm decision, recent developments have begun to shape the future of the tobacco industry's sponsorship of sporting events in the United States. First, the Liggett Group, one of the largest international tobacco companies, admitted that it knew of the dangers of using tobacco products, which it had previously denied. Second, the tobacco industry agreed to a $368.5 billion settlement with forty states which had initiated lawsuits alleging negligence on the part of the tobacco companies. The settlement, among other things, provides that the tobacco industry will not be allowed to sponsor sporting events.

ments" in other sections of the FDCA. See id. See also 21 U.S.C. §§ 321(n), 331(i), 331(m), 331(n), 331(o), 352(n), 352(q) and 353(c).

85. See Coyne Beahm, 958 F. Supp. at 1086.

86. See id. at 1086 n.33. For a general discussion of the FDA's regulation of tobacco advertising and sponsorship, see Lawrence O. Gostin et al., FDA Regulation of Tobacco Advertising and Youth Smoking: Historical, Social, and Constitutional Perspectives, 277 JAMA 410, 410 (Feb. 5, 1997).

87. See Interview by Charles Gibson with Bennett LeBow, Owner, Liggett Group (ABC Good Morning America television broadcast) (July 23, 1997). In a trial involving airline attendants' exposure to second-hand smoke, Bennett LeBow admitted that based on his own knowledge, reports he read and his personal feelings, he felt that, despite the tobacco industry's previous denial, smoking causes lung cancer, heart disease and emphysema. See id.

88. For a discussion of the events leading up to the tobacco settlement, see generally, The News Hour With Jim Lehrer, (MacNeil/Lehrer Productions, June 20, 1997). Michael Moore, Mississippi's Attorney General, was the legal negotiator of the settlement. See Mark Curriden, The Great Tobacco Deal, 83 ABA JOURNAL 20 (Aug. 1997). After approximately 90 days of negotiations, the parties reached the settlement on June 20, 1997. See id. at 20.

89. See generally Curriden, supra note 88, at 20-21. First, the agreement settles pending lawsuits against the tobacco companies and prohibits future class action negligence lawsuits brought by consumers. See id. at 21. Second, it provides tobacco companies immunity from punitive damages; however, there would be no limit on compensatory damages. See id. Third, the settlement provides the tobacco industry with a $5 billion annual cap on damages it would have to pay for lawsuits. See id. Fourth, it gives the FDA the authority to regulate tobacco products, provided that the FDA does not ban nicotine until 2009. See id. Fifth, by agreeing to the settlement, the tobacco companies agreed to reduce teenage smoking by 67% over the next 10 years, otherwise they would be subject to a $2 billion per year penalty. See id. Sixth, tobacco companies would be required to turn over internal documents to a panel of judges, which would then release the non-privileged documents to the public. See id. Finally, tobacco companies would have to agree that nicotine is addictive and that smoking causes cancer. See id.

For an in-depth discussion of the details of the proposed tobacco settlement, see Hearing of the Senate Judiciary Committee (Tobacco Settlement Review), FED. NEWS SERV., July 16, 1997.
In early 1998, the settlement was pending approval from Congress.  

D. France

Like Australia, Canada and the United States, the French government has also taken measures to eliminate tobacco advertising and sponsorship at sporting events. In 1991, France passed the controversial Loi Evin, a law which gradually phased out all advertising of tobacco products and sponsorship of sporting events by tobacco companies. This law triggered a controversial chain of events in the French sporting world.

First, a French auto racing team was sanctioned by a French court for advertising tobacco products during the 1992 Australian Grand Prix. The Loi Evin banned all advertising of tobacco products, which included foreign advertisements broadcast in France. The Cannon decision resulted in the Cannon Williams Renault auto racing team risking seizure of their cars and equipment if they traveled through or into France.

Second, after the Cannon decision, the French Grand Prix was canceled because the president of the French Motor Sports Federation could not guarantee that foreign teams sponsored by tobacco companies would not have their cars and equipment seized by the French government. Because of this lack of guarantee, the Inter-

90. See Curriden, supra note 88, at 20.

Interestingly, the French Health Education Committee released a report indicating that prior to the enactment of the Loi Evin, smoking rates among teenagers were declining. See Tobacco Lobby Steps Up Fight to Keep Ads, MARKETING WK, June 12, 1997, at 9. The report noted that from the time the Loi Evin was enacted in 1991, until 1996, the smoking rate among French youth increased from 30.5% to 34%. See id.

92. See Alan Fraser, Williams Dilemma, DAILY MAIL, Dec. 10, 1992, at 61. The racers displayed Camel logos on their cars while they were competing in foreign races that were broadcast in France. See id. For a discussion of the restrictions surrounding the broadcast of tobacco advertisements during the 1992 Australian Grand Prix, see supra notes 20-45, and accompanying text.
94. See Collings, supra note 93, at 31.
95. See id. Several French politicians sought to amend the law to allow tobacco advertising at motor sports events, so that the Grand Prix would not be can-
national Motor Sports Federation attempted to secure an alternative location for the French Grand Prix in Germany. To keep the Grand Prix in France, however, the French government adopted an amendment to the Loi Evin, which provided that sports that were "heavily dependent" on support from tobacco companies would not be penalized for displaying tobacco advertisements. Subsequently, the hefty fine imposed on the Cannon Williams Renault racing team was withdrawn.

III. Analysis

As Part II indicates, several countries are struggling with the tobacco industry to create laws which limit the public's, particularly children's, exposure to tobacco advertising. This section analyzes the arguments advanced by the tobacco industry against banning tobacco sponsorship at sporting events, and the nations' responses to these arguments.

A. Tobacco Industry Argument #1: Alternative, Less Restrictive Means to Promote the Health of a Nation Can Accomplish Goal of Limited Exposure of Tobacco Advertising to Children.

Tobacco companies argue that drastic measures, such as total bans on tobacco advertising, are too extreme. Some opponents of total bans on tobacco advertising argue that such drastic legislation was imposed to sway public opinion in favor of particular political candidates. Instead, through alternative, less restrictive measures,
nations can educate their youth about the dangers of tobacco addiction, while at the same time preserving the rights of those who manufacture, sell, market and use tobacco products. Examples of less restrictive measures include providing counter-advertising, raising smokers' insurance premiums, and allowing text-only advertising and sponsorships.

First, tobacco companies argue that countries could develop counter-advertising measures to reduce the risk of exposing children to tobacco. "Counter-advertising" consists of "running anti-smoking advertisements to counter the effect of cigarette advertisements." For example, in England, the Cancer Research Campaign decided to sponsor a motor racing car known as the "Stop before you Start" car. Those who oppose tobacco sponsorship argue that active counter-advertising measures would send the message to youths that smoking is not glamorous. Tobacco companies have not expressly rejected this alternative, although counter-advertising could cause the companies to lose profits from tobacco sales.

from American Association of Advertising Agencies) ("[The FDA regulations] make good headlines but they make lousy policy").

Similarly, in Canada, the former Health Minister David Dingwall's attempt to pass new legislation prohibiting tobacco sponsorship, has called, "the last great legislative battle of 1996." John DeMont, Tobacco's Top Guns, MACLEAN'S, Nov. 18, 1996, at 18. "[The] hard truth becomes as elusive as a wisp of smoke when politics, moral conviction and big money intersect." Id. Dingwall was defeated by a healthcare worker and NDP candidate, Michelle Dockrill, in the 1997 Canadian election. See Victors and Vanquished, MACLEAN'S, June 9, 1997, at 20.

100. For a discussion of counter-advertising methods, see infra notes 103-06 and accompanying text.

101. For a discussion of raising insurance premiums, see infra notes 107-08 and accompanying text.

102. For a discussion of text-only advertising, see infra notes 109-11 and accompanying text.

103. Stoner, supra note 59, at 666. Counter-advertising first began when the Federal Communications Commission required television stations to provide free broadcast segments to anti-smoking campaigns to counter the effects of cigarette advertising, pursuant to the "fairness doctrine." Id. The fairness doctrine was originally established to give equal air time to both sides of controversial issues, but the doctrine was abolished in 1989. See id. at 666 n.224. For the case abolishing the fairness doctrine, see Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989).

104. Bill Caven, Charity Takes on Tobacco Firms at the Race Track, THE HERALD (Glasgow), July 8, 1994, at 6. The Cancer Research Campaign wanted to "take the tobacco industry on 'at its own game.'" Id. The charity received support from numerous sports personalities, including racer Stirling Moss. See id.

105. See Stoner, supra note 59, at 666-68.

106. See id. at 667. For example, in 1992, Marlboro agreed to devote 30% of its advertising to counter-advertising measures during its promotion of the New York Marlboro Grand Prix Indy Race. See id. at 667 n.293.
Second, tobacco companies argue that countries could raise the insurance premiums of smokers. One of the major complaints by government officials is that, due to their bad habit, smokers are responsible for increased spending on healthcare.\textsuperscript{107} To combat this trend, countries should determine how much smokers add to healthcare costs, and distribute this amount to smokers through their health insurance premiums and sales taxes on cigarettes.\textsuperscript{108}

Third, another option is to limit the advertisements and sponsorships to text-only advertisements.\textsuperscript{109} Alternatively, tobacco companies could show their product only.\textsuperscript{110} This would take the image element out of the advertisement, possibly making the tobacco products less appealing to youths.\textsuperscript{111}

\textbf{B. Tobacco Industry Argument #2: Events Supported by Tobacco Industry Sponsorship Will Suffer Financial Setbacks.}

Since tobacco companies were largely ousted from broadcasting their advertisements on television world-wide, the tobacco industry channeled plenty of advertising money into other venues, such as the sporting world.\textsuperscript{112} One of the most compelling arguments against banning tobacco advertising and sponsorship is that many sporting and cultural events will lose a significant amount of support, which may not be replaced.\textsuperscript{113} Although there are other

\textsuperscript{107.} See Diane Francis, \textit{Taking the Tobacco War Too Far}, MAcLEAn's, Nov. 30, 1987, at 11.

\textsuperscript{108.} See id.

\textsuperscript{109.} See Action on Smoking and Health (ASH) educational pamphlet \textit{Tobacco Advertising and Its Legality} (visited Nov. 15, 1997) \texttt{<http://www.ash.org/papers/h400.html>}

\textsuperscript{110.} See id.

\textsuperscript{111.} See id.

\textsuperscript{112.} See Jeff Jensen, \textit{Non-Tobacco Sponsors Could Fill Void}, ADvERtISING AGE, Sept. 2, 1996, at 34. R.J. Reynolds Tobacco Co. and Philip Morris USA spent a combined total of over $50 million per year on motor sports. \textit{See id.}

\textsuperscript{113.} See John Griffiths, \textit{Motor Sport Industry 5}, FIN. TiMEs, Jan. 26, 1990, at V. For example, in Canada, the Alliance for Sponsorship Freedom, a national organization consisting of over 275 individuals, events and associations, has strongly opposed legislation restricting tobacco sponsorship because the legislation will effectively lead to the inability of events to fund themselves. \textit{See Government Set to Railroad Anti-Sponsorship Bill Through Parliament}, CAN. NEWS Wire, Dec. 3, 1996, at 30. In 1995, tobacco companies gave approximately $60 million in sponsorship funding, and $200 million in promotional support. \textit{See id.} Critics of tobacco sponsorship prohibitions note that proposed legislation could not come at a worse time, since the Canadian government has been gradually cutting back its funding to cultural events. \textit{See Anthony Wilson-Smith, Trying to Snuff Out Smoking}, MAcLEAn's, Dec. 9, 1996, at 24.

Motor racing will be the hardest hit, since tobacco companies have substantially funded the motor racing industry for the last 25 years. \textit{See Joseph Siano, Warning: Tobacco Law May Stunt Racing's Growth}, N.Y. TiMEs, Aug. 29, 1996, at B-15.
sponsors available to promote sporting and cultural events, these sponsors have to divide the amount of money they spend on broadcast, print and sponsorship advertising, whereas the tobacco industry puts the majority of its advertising money into sponsorship. The high profile events would probably be able to find sponsors to supplement the amount of money they previously received from tobacco companies, however the smaller events would suffer, since companies would not want to make a substantial financial investment in events which do not receive significant television coverage. 114

One alternative is for tobacco companies to expand into other product lines, since many countries allow the use of a company’s name for sponsorship purposes, just not the brand name of a tobacco product. 115 Another alternative is to contribute the money from the increased taxes imposed on cigarettes to funding sporting and cultural events. 116

Conservative estimates show that tobacco industries have contributed anywhere from $100 to $250 million per year to the American motor racing industry. See id.

Some possible alternative sponsors include electronic groups, financial management companies or car companies. See Griffiths, supra at V; see also Gareth Boreham & Karen Middleton, Rothmans Scraps Million-Dollar Foundation, ACE (Melbourne), June 17, 1994, at 4 (explaining tobacco giant canceled program to provide millions of dollars to cultural and sporting events, due to restrictions on tobacco advertising).

114. See Siano, supra note 113, at B-15. Less successful racing teams would find themselves scrambling for sponsorship dollars, and smaller racetracks would be forced to charge more for tickets to events or offer less prize money, which would lead to fewer competitors. See id. Also, money from tobacco companies helps improve the racetracks at smaller venues, and to advertise the smaller venues. See id.

The tennis industry in Australia may also suffer, because in two years, it has not been able to locate a new sponsor to replace its former tobacco company sponsor. See Deborah Smith and Anita Catalano, The Toughest Game in Town - Chasing the Elusive Sponsor, SYDNEY MORNING HERALD (Austl.), June 2, 1994, at 11. Similarly, Australia’s 1992 silver medal Olympic men’s hockey team, ranked in the top four teams in the world for the last ten years, was sponsor-less from 1988 through 1994, illustrating that winning games does not guarantee sponsorship. See id. Lack of sponsorship funds also forced the two-time Australian badminton champion, Tim Ho, to move to Hong Kong and coach full-time. See id.

115. See Griffiths, supra note 113, at V. For example, in 1989, Philip Morris spent $13 billion to purchase Kraft Foods as part of a “diversification” program so that the company was not completely dependent on its tobacco sales for profits. See id.


Conventional wisdom leads the general public to believe that advertising persuades consumers to smoke, and therefore, a ban on tobacco advertising will discourage consumers from smoking. Tobacco companies assert that they do not target teenage audiences with their marketing strategies, and further, that evidence shows that a ban on tobacco advertising would not lead to a decline in the number of young adults smoking.

A new study published in Advertising and Markets reveals that tobacco advertising bans may be “ineffectual or even counterproductive.” This conclusion is based on the fact that advertising tobacco products does not increase total demand for tobacco products, but merely encourages current users to try a new brand.

Justification for a ban on tobacco advertising is based on three arguments: (1) the ban of advertising will reduce smoking rates; (2) since public policy dictates against smoking, tobacco manufactures should not be allowed to promote their products by advertising their products “in an attractive and socially acceptable manner”; and (3) it is also a violation of public policy for tobacco companies’ spending on advertisements to be significantly greater than spending on anti-smoking campaigns.

117. See Roger Bate, The Marlboro Man Can’t Make You Smoke, Wall St. J. (Europe), Jan. 15, 1997, at 6. A study conducted in 1991 by the European Union determined that young people cited peer pressure for the reason they began smoking in 60% of the cases, and only 1.5% said they began smoking due to tobacco advertising. See id. The European Union study concluded that young people do not become aware of tobacco advertising until they become regular smokers. See id.

118. See Boddeywy, supra note 117, at 311. For example, tobacco advertising has been banned in Norway and Finland for several years, but smoking rates in those countries have remained steady or slightly increased. See id. Also, in countries with limited restrictions on advertising, such as the United Kingdom, the Netherlands and Belgium, smoking rates have declined. See id.; see also Joan McAlpine, Eastern Europe Had the Highest Rate of Smoking in the World Even Though Advertising Was Prohibited, Scotsman, Feb. 11, 1994, at 1 (noting spokesman for advertising association believed his industry is not effective because it does not have power to make people start or stop smoking).

Tobacco companies argue that they are not aiming their advertisements at children, but rather, that they are attempting to persuade those adults who smoke to switch to their brand of cigarettes. See Gail Appleton, Ad Executives Say Tobacco Industry Targets Youths, Reuters Bus. Rep., Dec. 18, 1996, at 1. “Just as you don’t blame General Motors for children who steal cars, nor should you say cigarette brands initiate kids smoking.” Study: Ads Do Influence Teens’ Cigarette Choices But Campaigns Don’t Appear to Sway Older Smokers, Ariz. Republican, Aug. 19, 1994, at A5 (quoting Thomas Lauria, spokesman for Tobacco Institute).

119. See Appleton, supra note 118, at 1.

120. See id. As tobacco consumption decreases, tobacco companies advertise to corner a larger portion of a smaller market. See Diane Francis, Taking the Tobacco War Too Far, Maclean’s, Nov. 30, 1987, at 11.
A 1993 article in the *British Medical Journal* also suggested that the link between smoking and advertising is not as clear-cut as some would think. As an example of the nebulous relationship between smoking and advertising, the article relies on smoking statistics in the former Soviet Union, where smoking has steadily increased in spite of the fact that there is no tobacco advertising in that region. The author of the article challenged researchers, who stop their analysis upon finding a relationship between smoking and advertising, to probe deeper, since there are numerous outside factors which contribute to a person's desire to start or stop smoking.

In response to the tobacco companies' argument that advertising does not have a direct adverse effect on the smoking rates of children, health groups assert the opposite is true. In fact, some believe that tobacco advertising and sponsorship is specifically targeted at children to induce young people to take up a habit that could last a lifetime. Opponents of tobacco advertising believe

121. *See* Simon Chapman, *Unraveling Gossamer with Boxing Gloves: Problems in Explaining the Decline in Smoking*, 307 *Brit. Med. J.* 429 (Aug. 14, 1993). Rather, Chapman argues that researchers limit their analysis to linking smoking rates to advertising and price fluctuations of tobacco products for four main reasons: (1) the reductionist nature of science - i.e., the scientific community wants concrete answers and concrete formulas to calculate the answers; (2) the explanatory privileging of recent events and factors; (3) the pragmatic concern for factors influenced by public policy, such as advertising, prices and laws restricting smoking in public; and (4) the fact that health groups fund the research. *See id.*

Other than advertising, alternative reasons for why children take up smoking have been suggested, including (1) psychological reasons, such as to reduce stress; (2) due to relationships with friends, parents, mass media, relatives, etc.; or (3) a link to the child's socio-cultural environment, such as a culture where men smoke, but women do not. *See Boddewyn, supra* note 117, at 311.

122. *See Boddewyn, supra* note 117, at 311.

123. *See id.* For example, the author suggests that there is an "interplay of continuous, uncontrolled, unmeasured, and sometimes unmeasurable variables," which may prompt a person to start or stop smoking, aside from tobacco advertising or fluctuations of the price of cigarettes. *See id.* Some of these variables include cultural, demographic, social, physiological, psychological, political, legal organizational, economic and educational influences, which are difficult to measure scientifically. *See id.*


125. *See id.* This allegation is based on the fact that a recent survey of 300 advertising executives in the United States showed that the executives believed tobacco companies market to teenagers. *See id.* The study showed that 77% of senior advertising executives (those with greater than 20 years experience) believed that targeting teenagers was a "goal" of tobacco advertising. *See id.*
that there is strong evidence which proves tobacco advertising influences children's decision to smoke.126

While both sides of this debate advance credible arguments, the fact is that both proponents and opponents of banning tobacco advertising are at a disadvantage because there are no conclusive studies on the relationship between advertising and tobacco use.127

As the United States Surgeon General noted, "[t]he extent of influence of advertising and promotion on the level of consumption is unknown and possibly unknowable."128


The tobacco industry argues that, ironically, one of the effects of a total ban on tobacco advertising is that consumers will not be informed of safer tobacco products.129 As the smoking community has become aware of the harmful health effects of tobacco, the tobacco industry has developed less harmful alternatives.130 For example, many tobacco companies are currently attempting to develop a cigarette with minimal second-hand smoke effects on nonsmokers, however, this type of development may not be successful if the tobacco companies are not able to market their products.131

E. Tobacco Industry Argument #5: Total Ban Will Adversely Affect Other Dangerous Products.

Because governments want to ban tobacco sponsorship in order to limit youths' exposure to dangerous products, it necessarily

126. See Study: Ads Do Influence Teens' Cigarette Choices But Campaigns Don't Appear To Sway Older Smokers, ARIZ. REPUBLIC, Aug. 19, 1994, at A5. A 1994 study by the United States Center for Disease Control determined that the three most popular cigarette advertising figures, Joe Camel, the Marlboro Man and the couples depicted in Newport advertisements, captured 86% of the teenage market. See id.; see also Adrian Vickers, Why Cigarette Advertising Should Be Banned: To Stop Children from Becoming Addicted to Cigarettes, 304 BRIT. MED. J. 1195 (1992) (stating cigarette advertisements have influence on children).

127. See Boddewyn, supra note 117, at 311.


129. See Roger Bate, The Marlboro Man Can't Make You Smoke, WALL ST. J. (EUR.), Jan. 15, 1997, at 6. Also, if all tobacco advertising is banned, so too will the health warnings which accompany tobacco advertisements. See id. This could lead to consumers not being as aware of the harmful effects of using tobacco products. See id.

130. See id. For example, first tobacco companies developed filters for their cigarettes, and then developed cigarettes with a lower amount of tar. See id.

131. See id.
follows that this reasoning will lead to two developments: (1) either smoking will be declared illegal because it is so harmful; or (2) the total ban on advertising will be followed by a total ban on advertising of other harmful products, such as caffeine or alcohol. In the United States, similar to the studies conducted on children's ability to recognize Joe Camel, researchers have also determined that an extraordinary number of teenagers recognize the "Budweiser Frogs." If the same reasoning that is applied to tobacco is used with alcohol, the frogs should no longer be on television. In Australia, however, a former Sports Minister indicated that she had no plans to ban further products, such as alcohol.

In France, the Loi Evin bans both tobacco and alcohol sponsorship of sporting events. France is currently in the middle of a controversy regarding the 1998 World Cup, to be held in Paris. Anheuser Busch, maker of Budweiser beer, entered a sponsorship contract to promote its beer products during the World Cup. France's new Sports Minister, however, is standing strong against...
Anheuser Busch’s planned sponsorship, relying on the *Loi Evin*. One suggested proposal is to make the World Cup stadium “extra-territoriale” for the duration of the competition. Anheuser Busch has spoken with French government officials and the European Commission in hopes of relaxing the requirements of the *Loi Evin*.

### IV. IMPACT

Given the importance of sporting events in our society, and a nation’s obligation to protect the health of its children, nations must strike a delicate balance between these two concerns. Most likely, tobacco companies will continue to be restricted, and nations may eventually implement a complete ban on tobacco advertising and sponsorship.

Advanced technology may be able to play a part in reducing children’s exposure to tobacco advertising. One option currently being developed is to substitute tobacco broadcast images with computer-generated images. This technology could substitute any two-dimensional image broadcast at sporting events, and could even create “virtual” billboards where none previously existed, thus reducing children’s television exposure to cigarette advertising, and allowing sporting events to retain their tobacco company sponsorships.

If countries follow through with proposed total bans on tobacco sponsorship, tobacco companies could take their sponsorship money to a location where tobacco sponsorship is not under siege. Especially in the motor racing world, many countries

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138. See id. France’s former government was willing to make an exception to the *Loi Evin* for the World Cup. See id. The new Communist Sports Minister, Marie-George Buffet, however, has indicated she will fight Anheuser Busch’s sponsorship. See id.

139. See *Passport to Paris*, FIN. TIMES (Fr.), Feb. 3, 1997, at 19. This proposal would make the stadium akin to an independent state for the World Cup event, exempt from French laws. See id.

140. See *Budweiser’s Sporting Chance*, CAMPAIGN (Fr.), Apr. 4, 1997, at 12. Anheuser hopes to escape the *Loi Evin* restrictions by emphasizing the worldwide impact of the World Cup competition. See id.

141. See Andrew Jack, *Now You See It, Now You Don’t - The Implications of a Device That Substitutes Broadcast Images*, FIN. TIMES, Nov. 4, 1994, at 12. This technology was originally developed for the aerospace industry. See id.

142. See id.

would welcome the publicity with open arms. In the Formula One racing series, for example, six out of the twelve major racing teams are sponsored by tobacco companies, and many countries would stand to gain recognition by hosting this event.

In Australia, the Tobacco Prohibition Act of 1992 (TAPA) currently governs tobacco sponsorship, but the real issue is the exceptions to the rule which have temporarily provided the tobacco industry with loopholes around the law. In the United States, in light of Coyne Beahm, Inc. v. FDA and the ongoing tobacco settlement negotiations, there are still many unanswered questions and many battles to be fought over tobacco sponsorship. In Canada, the recent enactment of the Tobacco Act may turn the tide against the tobacco industry, providing that the new law is not challenged by the tobacco companies. Finally, in France, the upcoming 1998 World Cup soccer event could lead to the first real challenge of the language of the Loi Evin.

Besides those countries discussed in this Comment, other countries are beginning to place pressure on the tobacco companies. This is a trend which is likely to continue. For example, both Belgium and Turkey recently announced that they were going to ban tobacco sponsorship of sporting events. Similarly, Mexico, Hungary, Latvia, Brazil and Belgium have either limited or are considering limiting tobacco sponsorship.

144. See id. ("A lot of countries a long way from [Great Britain] are prepared to spend a lot of money to have a grand prix").

145. See id.

146. For a discussion of TAPA and the current state of Australian law, see supra notes 19-45 and accompanying text.

147. For a discussion of the Coyne Beahm decision, see supra notes 66-86 and accompanying text. For a discussion of the tobacco settlement negotiations, see supra notes 88-90 and accompanying text.

148. For a discussion of the state of Canadian law and the Tobacco Act, see supra notes 46-57 and accompanying text.

149. For a discussion of the state of tobacco sponsorship in France, see supra notes 91-98 and accompanying text.

150. For example, in one of the last moves while Hong Kong was subject to British rule, the government banned all tobacco advertising of sporting and cultural events. See Ad Age's World Wire, Advertising Age, June 30, 1997, at 31.


152. See Mike France, The World War on Tobacco, Bus. Wk, Nov. 11, 1996, at 99. "While tobacco has always been highly regulated, the current international clampdown is unprecedented." Id. (quoting statement of David Sweanor, senior legal counsel for Canada's Non-Smokers' Rights Association).
In light of the foregoing, it is evident that this area of law is still in the early stages of development. Until nations establish a definitive and somewhat consistent rule on tobacco advertising at sporting events, it is likely both sides of the debate will be forced to compromise.

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