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# **Proceedings of the Academy for Studies in Business Law**

**October 12-15, 1999  
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Co-Editors  
Western Carolina University**

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# **MERGER MANIA: LEGAL AND STRATEGIC RESPONSE OPTIONS FOR SMALL BUSINESS**

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## **ABSTRACT**

*Merger mania is once again gripping our nation. The merger trend is slated to continue because of a combination of emerging information technologies, deregulation, privatization, and lowered trade barriers. The implication for small business is significant: when competitors consolidate, the small business is more vulnerable to the strong arm tactics available to these larger competitors. Some of those tactics are illegal, but large competitors might violate the law, either willfully or unknowingly. It is the responsibility of small business to be vigilant in knowing its rights in this area and enforcing them. This paper will present the legal and strategic response options of a small business when faced with a merger that will create a new dominant firm. The history and rules of merger law will be described; legal response options, then strategic response options will be discussed; finally a recent case in which a small business was confronted by this problem will be reported and used to illustrate various response options.*

## **INTRODUCTION**

Imagine that you are a small business owner. After years of hard work you have achieved a market share of 20% of your niche market. One day, as you read your monthly trade journal, you learn that your two largest competitors have announced a merger. The new firm will become dominant in the market, with about 70% of sales. Past aggressive business tactics of the merging firms raises your concern that the newly dominant firm will throw its weight around. Will you be able to compete effectively in the new environment? Is the merger legal? What can you do to challenge its legality or respond strategically to this new threat? This paper will address these concerns.

## **LEGAL HISTORY**

As long ago as 1911, President William Howard Taft recognized that monopolies and concentrated industries are a threat not only to the public, but to small business as well (Schnitzer 1978). The antitrust laws were enacted to counter that threat. The first federal antitrust statute was the Sherman Act of 1890. It made it a federal crime for a firm to either monopolize an industry or to act in concert with other firms to restrain trade. However, federal prosecutors found it difficult

to enforce this act, and in 1914 Congress attempted to strengthen enforcement by enacting the Clayton Act. This act made certain specific actions, like price fixing, automatic violations of the Sherman Act. It also made it illegal for firms to merge if there was a reasonable likelihood that the merger would result in less competition. This was an important change, because the Clayton Act's anti-merger provision did not require proof of actual harm, only proof that harm "may" result. This lighter burden of proof made it easier for federal regulators to prevent a proposed merger, compared with attempting to break up an existing monopoly (Cheeseman 1998).

From the point of view of small business, however, there has always been one major problem: while the antitrust laws authorize the federal government to act, they do not require it to act. Enforcement is discretionary. It is a matter of policy, ultimately set by the president. And different presidents have had varying attitudes towards antitrust enforcement. A president who is sensitive to the campaign contributions of big business, and who wishes to curry favor with Wall Street, will not be a vigorous enforcer of antitrust laws. A small business owner does however have an option aside from attempting to persuade regulators to do their duty: it can bring a private lawsuit to block a merger or it can sue for damages sustained by anti-competitive practices (Dunfee and Gibson 1985). However, these lawsuits are expensive. They require specialized legal talent and expensive expert witness testimony. They involve difficult application of imprecise statutory language, so appeals are likely. By the time the appeal process is complete years may have passed, and the small business plaintiff may have ceased to exist.

### **WHEN ARE MERGERS ILLEGAL?**

A merger will be declared illegal when a court determines that the merged firm may have a degree of market power in a certain product market. Market power is inferred from a high concentration of market share. Before market share can be assessed however it is first necessary to determine what the "relevant product market" is (Gellhorn 1981). For example, in the famous DuPont cellophane case (1956), the court was required to determine whether the relevant product was cellophane or all flexible package wrappers, including tinfoil and paper wrappers. Dupont controlled 75% of the cellophane market, but only 20% of the larger flexible package wrapper market. The court decided that the relevant product market in that case was cellophane, because the other package wrappers were not acceptable substitutes in many applications.

Once the relevant product market has been determined, the court will turn its attention to the "relevant geographic market". Consider for example towns A and B that are 5 miles apart, each with ten movie theatres. If one firm owns nine theatres in town A, and none in town B, then that firm has market share of 90% if the relevant geographic market is town A only. But if the relevant geographic market is both towns, that same firm has market share of only 45%. The courts will decide the size of the relevant geographic market based on the distance that consumers are willing to travel to obtain the product. In this example, most consumers are willing to drive 5 miles to see a movie, so the relevant geographic market is both towns.

After determining the relevant product market and the relevant geographic market, the court will determine the market share of the merged firm. If the number is high, market power will be inferred and the merger will be blocked by the court. How high is high? The Antitrust Division and FTC have issued Guidelines that state that a market share of 35% or more will imply market power, in many cases (U.S. Dept. of Justice and FTC 1998).

## LEGAL RESPONSE OPTIONS FOR SMALL BUSINESS

Small business has six legal response options when threatened by market dominance of a newly merged firm. These are: (A) hire an attorney; (B) persuade the government to block the merger; (C) threaten to sue; (D) bring a multiple party lawsuit against the offender; (E) bring a private lawsuit against the offender; (F) sell out to the newly dominant firm.

## STRATEGIC MANAGEMENT RESPONSE OPTIONS FOR SMALL BUSINESS

There is considerable literature on the subject of strategies for firms (large and small) which are suddenly in a weakened competitive position. However, studies (Chen 1995) have shown that low market share firms can be as effective as their high share competitors. The key is to develop and quickly implement a package of strategies and tactics without injuring long term performance (Ibid.).

When consolidations occur in heretofore fragmented markets (such as the Whitewater Kayak example), the surviving firms must quickly employ both short and long-term initiatives in order to minimize the negative effect consolidation may have on their competitive position. This section of the paper builds upon the work of four leading authors of strategy, Thompson and Strickland (1998) and Hill and Jones (1998).

Depending on the nature of the market (industry segment), responses can be categorized into three groups: (1) Becoming bigger yourself, (2) Creative counter-punching, and (3) Attacking rather than becoming defensive.

*Becoming A Bigger Player* – This strategy can be realized by (1) merging with one or more surviving firms, (2) changing current corporate strategy and increasing size by creating a chain store organization, (3) growing by converting the firm to a franchise operation and selling franchises throughout the marketing region, and (4) developing strategic alliances for supplying existing chains and/or franchises.

These “bigger player” strategies attempt to replicate what the ‘sudden consolidators’ move to create – a new, large competitor capable of exploiting all the advantages of size: market penetration, national brand image, and economies of scale throughout the value chain such as in advertising, marketing, production, and purchasing.

*Creative Counter Punching* – This strategy is focused upon determining and implementing several specific activities each designed to focus on competitors’ weaknesses and/or increase profitability and responsiveness of the firm. Counter punching can apply to both immediate (i.e., quickly) responses or longer-term efforts.

*Quick Responses* (Thompson, et. al.): These responses are designed to demonstrate to the consolidated competitor that the small firms are not conceding market share. These responses are often most successful when implemented in a low profile manner (Chen, op. cit.).

Implementation can be largely underway before the tactic becomes visible to the larger competitor:

Begin avoiding suppliers that also serve the consolidated firms  
Cultivate your valued suppliers and attempt to be a major purchaser of their products  
Induce differentiation by

- Lengthening warranty coverage
- Reducing delivery time to customers
- Offer free or low cost training to the customers on the use of the firm's products
- Create and implement simultaneous initiatives in a variety of areas such as
  - Price cuts
  - Increased advertising
  - Free samples
  - Rotating specials on specific items in the product line
  - Aggressive rebate programs

*Longer Term Responses* (Thompson; Hill; op cit.) – Longer-term approaches are designed to attain or retain influence on the competitive nature of the industry or market segment. These responses help define the competitive forces and often can lead to paradigm shifts that greatly reduce the competitive advantages enjoyed by a consolidated firm:

- Develop and protect proprietary competencies
  - Product design processes
  - Production technologies and know-how
  - Optimizing the mix of value chain competencies – knowing how much money to be allocated to each element and what level of resulting competencies to attain
- Develop and sign exclusive agreements with dealers and distributors (this will help block inroads by the newly consolidated competitor)
- Develop and maintain a 'war chest' of cash and marketable securities whose liquidity and interest income can be used to ride out price wars and other strategies of larger competitors. Note: Find and work with a bank who has expertise in cash management strategies for small businesses.
- Maneuver around the strengths and product-market penetration of the larger competitor. Find niches (product, geographic regions, etc.) and areas of differentiation (special sales and service activities, customized products, etc.) not easily copied by the larger firm.
- Identify weak-loyalty customers of the consolidated firm and target them for special advertising and marketing
- Attempt sudden bursts of intense promotional activity to attract back customers. Note: the timing is crucial when using this strategy – try random timing, but do not go head to head with national campaigns financed by the larger newly consolidated firm.

*Final Comment on Strategy Options:* All strategies and tactics require resource commitments. Small business owners must (1) find and use competent financial services advisors in order to maintain a healthy capital structure (mixture of debt and equity in the balance sheet), (2)

maintain adequate liquidity through effective cash management, and (3) develop realistic seasonal borrowing and lines of credit with a bank that understands the firm's industry. With the advent of both national and international financial institutions and systems, adequate short and long term financing of operations and growth is sufficiently available that difficulties in financing for small business is no longer a strategic disadvantage.

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## **A FALSE ADVERTISING: MADE IN THE USA BUT NOT IN THE STATES: USING THE LAW TO EFFECT CHANGE**

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### **CASE DESCRIPTION**

*The primary subject matter of this case concerns the overlap of legal and ethical responsibilities for multinational corporations. Secondary issues examined include specific statutes used to impose legal liability, but especially laws on false advertising. The case has a difficulty level of appropriate for junior and senior level. The case, as written, is designed to be taught in three class hours and is expected to require three hours of outside preparation by students. It is appropriate for a business law class, a business and society class or upper level management class.*

### **CASE SYNOPSIS**

*What is the role of state and federal law in regulating conduct by multinational corporations? In a January 1999 lawsuit, human rights organizations and an international union claimed that California's Unfair Practices Act made U.S. retailers legally accountable for the low wages, long hours and freedom limitations imposed on workers from Asian countries, including China, who manufacture clothing in Saipan. One basis for this suit was that the retailers were falsely advertising their products as 'Made in the USA' when the apparel was made in Saipan, a U.S. territory. Imposing legal liability is complicated even if the working conditions violate U.S. law, because U.S. retailers do not own the manufacturing plants. Instead, the retailers contracted with Chinese and Korean manufacturers with plants in Saipan. Legal issues include determining responsibility for the conduct of a contractor, whether U.S. laws are binding on non-U.S. companies located in U.S. territories and whether U.S. companies engaged in business in U.S. territories are obligated to follow U.S. law. In addition to legal responsibility, there is the question of moral accountability. How is moral accountability determined? What moral standards do U.S. customers expect from these retailers? What should a corporation do if it is morally accountable? This case provides a practical illustration of how law and moral standards are different. Students will analyze application of statutory law, discuss the interrelationship between business conduct and law and examine the relationship between the law and moral accountability.*

## **INTRODUCTION**

"Made in U.S.A." Jamie said. "That's the label I look for when I shop. I try to buy U.S. made goods even though they are sometimes more expensive and sometimes not as well made. My dad was a union man, though, so I try to support jobs for American workers."

"But Jamie," commented Kamali, Jamie's brother and shopping companion, "You know that just because a label says 'Made in USA' doesn't mean that it was actually manufactured in the United States by U.S. workers. In January, 1999, a number of retailers, including The Gap, Wal-Mart, Tommy Hilfiger, Sears, J. Crew and others were sued for falsely advertising that their clothing was made in the USA when it wasn't."

"You know, Kamali, I find that hard to believe. 'Made in USA' isn't an ambiguous statement. What else could it mean?"

"Technically, the advertisements are correct. However, what they don't tell you is that the clothing is made in Saipan, a territory of the United States."

"I have no problem with that, Kamali. The principle is the same, isn't it?"

"Actually, Jamie, it's not. Let me tell you a little bit about Saipan. Saipan is the largest and most populated island of the Commonwealth of the Northern Mariana Islands (CNMI). These islands were reconstructed and supervised by the United States beginning at the end of World War II. Prior to that, they had been supervised by Japan."

"So Saipan is a territory because it was one of the 'spoils of war'?" Jamie asked.

"Yes. The U.S. used CNMI as a military training facility until 1975 when a plebiscite resulted in a negotiated covenant with the U.S."

"What's in that covenant? Are citizens of CNMI U.S. citizens?"

"The covenant contains interesting provisions. The government is organized into three branches, including a governor, a bi-cameral legislature and a Supreme Court. In addition, CNMI has a delegate to the U.S. But the key provisions related to this issue are that CNMI controls its own labor laws and exports to the United States are duty-free. And yes, CNMI residents are citizens of the United States."

"So," Jamie thought out loud, "I'll bet that Saipan encourages industry by marketing itself as having a free market economic system that is exempt from the minimum wage laws of the U.S. and that allows duty-free exports to the U.S. What an attractive combination for businesses!"

"You're right". Kamali continued. "The Saipanese government permits garment manufacturers to bring in a substantial number of workers from Asia on work visas. These workers make apparel that is sold mostly to U.S. retailers. Garment manufacturing is the second largest industry behind tourism. CNMI law allows companies to bring in workers if there are not sufficient workers from CNMI to take jobs. However, employers must feed and house non-resident workers."

"So 'Made in USA' doesn't necessarily mean made in one of the states in the United States. I'm going to check with my friend Bonita Barrister to find out the legal basis for suing the companies for false advertising."

Jamie contacted her friend, Bonita Barrister, who was an attorney interested in the California lawsuit. (The complaint can be found at the following web site:

<http://www.globalexchange.org/economy/corporations/saipan/MarianaComplaint.DOC>)

Jamie asked, "Who filed this lawsuit and why?"

Bonita Barrister answered: "An international labor union and three human rights organizations filed this lawsuit on behalf of past and present workers in Saipan and the general public."

"I thought this was a false advertising case. Why are human rights organizations involved?"

"There are several reasons that these organizations filed the lawsuit. I need to give you a little background on the law being used. But realize the underlying reason for the lawsuit is the working conditions of the workers manufacturing the clothing."

Bonita explained, "The lawsuits were filed by these organizations under California law as private attorney generals."

"What is a private attorney general, and how does a member of an activist group become one?"

"That's an interesting question. A private attorney general is anyone who believes the public has been injured by unfair business conduct. According to the California Unfair Trade Practices Act, competitors who have been injured by anti-competitive conduct, governmental entities seeking an injunction to protect the public and consumers have the right to sue. So members of activists groups have the right to file suit against companies for violations of this law just as anyone else has that right."

"California's Unfair Trade Practices Act makes it illegal for businesses to engage in unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices. These kinds of practices destroy or prevent fair and honest competition." Barrister continued. "For example, the law prohibits 'unfair, deceptive, untrue or misleading advertising. "

Barrister explained further, "The purpose of this law is to prevent practices by which a business intends to deceive the public. Clearly practices that violate another state, federal or local law would be illegal under the statute. But realize that the statute's prohibitions are broader than that. The statute prohibits any unfair business practice and that is defined as "a practice that offends an established public policy or . . . is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."

"So the statute must be designed to prevent practices that are illegal, but also those that might fall into the "gray area" but harm the public?" Jamie asked.

"That's correct, " Barrister noted.

"From your description of the statute, I think it was adopted to prevent companies from lying in advertisements, from using bait and switch techniques and the like. It seems a stretch of the statute to argue that the statute prohibits 'sweatshops.'"

Barrister replied, "The legislature undoubtedly didn't consider this specific use of the statute. But as I said, the statute is very broad. It prohibits unfair or illegal practices, and any violation of the law, state, federal or local would be sufficient. In addition, the basis for the suit is that the US companies lied about their use of sweatshops."

Jamie responded, "I have looked at the complaint filed against these U.S. companies. I cannot believe that retailers like The Gap, Wal-Mart, Sears, J. Crew or Tommy Hilfiger would take a chance on buying from companies that manufacture under the alleged conditions. Doesn't the lawsuit claim that the workers were forced to work at least 70 hours a week without overtime, in unsafe conditions and 'imprisoned' in work barracks during the time they were not working?"

"Yes, those are some of the allegations included in the lawsuit." Barrister agreed.

"Some workers earn less than minimum wage because they must "donate" 20 hours per week to the factory. Workers who complain may be beaten or punished. There are also freedom issues because the workers signed 'shadow' contracts . . ."

"Shadow contracts?" Jamie interrupted. "What are those?"

"Shadow contracts are agreements signed by the workers that are not to be shown to the inspectors who come to the plants. Those agreements prohibited dating, pregnancy and filing complaints."

"Wow! So do I understand this correctly?" Jamie paused. "The California lawsuit alleges that these U.S. manufacturers are guilty of unfair trade practices because they contracted with companies that manufacture in conditions that violate U.S. labor laws? And that is a violation of California's Unfair Trade Practices Act?"

"What are the other allegations about the working conditions?"

"To help you out, I contacted a human rights organization in Saipan. The organization contacted Amy, who is on the telephone right now. Amy works at a garment manufacturing plant in Saipan. Why don't you ask her some questions and then I'll give the other reasons that I believe the workers didn't file the lawsuits." Barrister replied.

Jamie thought for a moment, then posed his first question.. "Amy, how long did you agree to work in CNMI?" "I signed a contract for a one-year work permit. I am told I can renew it if my employer agrees." Amy answered.

"How did you find out about the job?"

"I was recruited and agreed to pay \$3,000 for the opportunity to work here."

"How will you repay the fee?"

"I will pay it through the wages I earn here. I earn \$2.15 per hour and I work as many hours as I can per week. I need the money."

"What do you think about the working conditions?"

"I don't think about them very much. It is hard work, but there are few jobs in China. Having a job is better than not having one. I think that if I can work for several years I can send money home to my family." Amy continued, "I have heard about these lawsuits that have been filed. They claim that the working conditions are bad and the pay is low. I know that I get tired standing the assembly line sewing jeans. I sometimes want to take breaks even if they are not at the scheduled times. But I want the company to make the quota, so I stay on and work longer hours if necessary. And I have adjusted to the limits on water and restroom breaks. After all, that is why I am here--to work."

"Have you seen anyone, such as a government official, inspect the plants?" Jamie asked.

"I've seen inspectors who retail companies that buy the clothing. Those inspectors come in to make sure that the correct fabrics, designs and finished clothing are made. The inspectors don't talk to the workers; they talk to management to be sure that we are making the proper products."

"Then I'd guess," Jamie said, "That the lawsuits will make things easier for you."

"I don't know if they will or not. Perhaps there will be no more jobs for other people who live near me in China. Perhaps many of us would get fired, and if we do, we must return to China still owing money to the recruiters. I do not want to do anything that will risk my job. And besides, don't we have the right to decide whether we want to work and for how much?" Amy queried before she hung up the phone.

"Amy is reluctant to talk and for good reason." Barrister commented after a pause.

"Remember that the contractors are usually Korean and Chinese-owned companies that recruit young women from China, Bangladesh, Thailand and the Philippines. As Amy said, workers pay a fee to find the jobs. These fees range from \$2,000 to \$8,000 and are to be repaid with the wages from the job. If a worker gets fired or laid off for any reason, then the worker can be deported within 90 days. If he or she is deported, then the worker probably cannot pay the debt. Depending on the country, the workers may suffer severe consequences for such non-payment."

"Now you can more clearly see the basis of the lawsuit." Barrister continued, "These retailers violated California's laws because they falsely advertise that these products are 'Made in USA', when they are made by individuals who are not U.S. citizens in a territory where U.S. laws don't apply. The public has thus been deceived and the companies have misled the public as to the conditions under which these garments are manufactured."

"But what if the manufacturers didn't know about the working conditions?" Jamie queried.

"Shouldn't they at least have an opportunity to show that they didn't deliberately mislead the public?"

"Manufacturers know from what companies they purchase clothing. And the issue has been around for years. Remember when Kathie Lee Gifford cried on national television that she didn't know her clothing had been manufactured in 'sweatshops'?"

"Yes, I recall that, and I remember her husband handing out \$100 bills to workers in New York. I just thought that was a publicity stunt."

"It may have been one, Jamie," Barrister noted. "But the issue was a real one. Those workers hadn't been paid in months. And Gifford's clothing had been made by workers as young as 12 who worked long hours for low pay. That was in 1996. Those incidents put retailers like Wal-Mart on notice that there is an issue of working conditions at the manufacturing plants in Saipan. Wal-Mart also uses the Made in U.S.A. label to market some of its clothing. The argument is that it knew or should have known of the conditions in Saipan."

"I recall Wal-Mart's 'Made in the U.S.A.' advertising promos. The stores display the American flag and imply that the clothing is manufactured in the United States. I did also think the label meant U.S. jobs for U.S. citizens." Jamie commented.

"That's the basis used to argue that the companies engaged in deceptive advertising. Also, the lawsuit claims that the companies knew or should have known about the sweatshops because of actions by the U.S. Department of Labor. The Department has developed an Anti-Sweatshop campaign. As part of the campaign, companies are listed as Trendsetters, in part for their treatment of employees. One of the defendants, The Gap, was removed from the list for failing to sufficiently police conditions of its subcontractors. Also, President Clinton urged creation of the Apparel Industry Partnership, a group of apparel manufacturers, that has developed a Code of Conduct for all its members. Key provisions of that code encourage companies to comply with minimum wage laws and adopt minimum safety standards for the workplace."

"But isn't this lawsuit unfair? Won't some companies settle these suits just to avoid the expense of defending them? And won't some people file frivolous lawsuits just to take advantage of the 'fear' such lawsuits might cause to businesses that are not truly acting illegally?"

"That's the argument that some corporations and attorneys have made." Barrister responded.

"That's one of the risk of using the law to bring about social change."

### **DISCUSSION QUESTIONS**

Should U.S. retailers be held legally responsible for the conduct of the companies from which they purchase the products? Explain.

Assuming that the information about the working conditions in Saipan is true, does the government of Saipan have an obligation to protect workers from mistreatment?

Assuming that the allegations in the lawsuit are true, should federal and state law be applied to this situation to prevent sweatshop labor? How?

What are the ethical and moral responsibilities of the retailers in this situation?

## **A FRESH LOOK AT THE FOREIGN CORRUPT PRACTICES ACT**

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### **ABSTRACT**

*With the expansion of global business, the subject of international bribery has become more important. The Foreign Corrupt Practices Act (FCPA) passed in 1977 and amended in 1988 made it illegal to make payments to a foreign official or political party in order to obtain business. Claims have been made that U.S. businesses have been put at a disadvantage since only the U.S. has made bribery of foreign officials illegal. This paper reexamines the FCPA and discusses methods of avoiding charges of contravention of the Act. The importance of preventing the appearance of a bribe is emphasized.*

### **INTRODUCTION**

In the 1970's, the U.S. press and governmental officials disclosed a number of business scandals involving large payments by U.S. corporations to officials of foreign governments for the purpose of securing lucrative business contracts. Sometimes the senior management of U.S. based multinational corporations were not aware that lower level managers of their subsidiaries in foreign countries were making payments. Often these payments were not considered illegal or unethical and in some countries payments were given favorable tax treatments.

The SEC was astounded at the extent to which corporate executives and employees falsified books and records and circumvented internal control systems to make bribes to foreign officials. The United States statutory prohibition against bribing foreign officials and parties, the Foreign Corrupt Practices Act of 1977, grew out of these revelations. In general, the response from foreign governments to the U.S. proposals that they enact similar legislation has been cool until recently. Many of them regarded the move as hypocritical since it is permissible for U.S. companies to give large sums of money, termed campaign contributions, to U.S. political parties to further the special interests of businesses. Some people regarded the FCPA as an attempt to impose professed U.S. values on other countries. Many U.S. firms have criticized the Act as it places them at a competitive disadvantage to foreign firms which are permitted to bribe.

### **IMPACT ON U.S. FIRMS**

A 1983 poll of 1,200 U.S. large corporations indicated that 78 percent of them believed that the FCPA made it difficult to sell in countries where bribery is a way of life. Fifty-five percent felt

that unless the law was rigorously enforced, small “grease payments” would grow into major bribes of governmental officials. If a low level official is given a small bribe commensurate with the value of the service given in return, then a more important official might expect a large payment at some time in the future. The Commerce Department has estimated that during 1994 and 1995 alone, U.S. firms lost 100 contracts worth \$45 billion to overseas rivals as a result of bribes paid to governmental officials (Radebaugh & Gray, 1997, 540).

In 1988, the FCPA was amended to clarify the law. “Grease payments” to foreign officials would be permitted if the officials had little authority and the payments were for specific services. These were exemplified as obtaining permits, visas and work orders, expediting phone services and police protection, mail service, power and water supply, loading and unloading cargo and inspection.

Penalties under the Amendment were increased and can be severe, including a fine of up to \$2 million for a company and up to \$100,000 for an individual and that person can be imprisoned for up to five years. The 1988 Amendment allowed for the assessment of only civil penalties for violation of the law when due to negligence or absence of intent to bribe. Criminal penalties might not apply in that case (Radebaugh & Gray, 1997). If a civil action is undertaken, the Attorney General has discretionary powers to seek, instead of a penalty, an injunction or restraining bond to prevent the act believed to be a bribe or offer to bribe. A further relaxation compared with the original Act allows for exemption of culpability of a parent company if it can be demonstrated that it attempted to make the foreign subsidiary comply with the FCPA (Radebaugh & Gray, 1997).

But what exactly constitutes bribery? Although expressed in legal language, the message of the FCPA is understandable in principle. It prohibits the payment or offer of payment or gifts to an official of a foreign government if the intent is to influence the official with the purpose of obtaining or retaining business. A similar prohibition applies to subscriptions to a foreign political party if the intent is to obtain or retain business. These provisions apply to all U.S. corporations, aliens resident in the U.S. and all U.S. citizens wherever they may be.

The term bribery does not occur in the Act and it is clear that intent to influence is the key part. The person making the payment or offer must intend to induce the official to direct business to the payer. An interesting defense can be the legality of a bribe in a foreign country. It can be a legitimate defense if it can be shown that payments are legal in that country. Another defense could be that the payment for travel expense of the official was directly related to demonstration of products or services or for the performance of a contract with the foreign government. It would be permissible to pay the expenses of a government official to travel to a factory to see a demonstration of a product or to see manufacturing facilities for a possible but this same trip would be illegal if it were for entertainment or educational purposes only. Another example is the yearly airplane demonstration in Paris. Manufacturers of these defense-related planes may pay for the trip of foreign officials to attend the show. They may not pay for the officials to visit the Louvre.

It should be clear that the crime is not the foreign official’s acceptance of a bribe. It really takes place when the bribe is offered, and is not dependent on the official’s actions to favor the individual who makes the payment. There may be no response to the offer of payment but the offer itself is illegal. An attempt to influence a public official to act in a way that serves a private interest is a crime.

A difficult area to deal with is the use of a third party in deals between a company and a foreign official or political party. A company may conceal a bribe by paying a large fee to a

consultant who is the party in direct contact with the official. It would be implicit that the consultant, who could be a resident or national of a foreign country, would pass some of the fee to the official. Payment in this form would not absolve the U.S. company of culpability, however, but it may be difficult to prove that the payment to the consultant was intended, at least in part, as an illegal bribe.

## ACCOUNTING

What does all this mean to the accountant? Good record keeping is essential to demonstrate that disbursements of funds are not for the purpose of making bribes. In its investigations, the SEC found that in some firms

1. Records were falsified to conceal bribes
2. Records were inadequate to show their purpose and they may have included bribes
3. Some transactions were not recorded (Radebaugh & Gray, 1997)

The FCPA requires that companies maintain records in reasonable detail, that they accurately reflect transactions and must state the nature of the transaction. A system of internal accounting controls must be maintained.

In order to meet these requirements each firm must establish and maintain a system of internal accounting controls to give assurance that:

1. Transactions are made with management authorization.
2. Transactions are recorded to permit preparation of financial reports according to U.S. GAAP or other criteria and to maintain accountability for assets.
3. Access to assets will only take place with management's authorization.
4. Records of assets must be compared with actual assets at reasonable intervals (Radebaugh & Gray, 1997).

It has always been expected that a company would keep accurate records of transactions and payments; this is part of properly managing a business. But now, not to do so can be construed as a violation of the FCPA's accounting requirements and could lead to criminal prosecution even though no foreign bribes have been made. The government has entered a new area not realized or understood by many firms. Fortunately, it is unlikely that there would be any liability for inadvertent errors and usually for prosecution there has to be evidence that internal controls are knowingly circumvented with the intent to conceal a bribe.

In order to assure itself of the effectiveness of internal controls, a company may hire an outside accountant to study them. But a study may not have the objective of ascertaining compliance with the specific accounting provisions of FCPA; it may be only to fulfill the need for a normal audit. Unless specifically requested to do so, an auditor does not usually express an opinion on compliance with the accounting provisions of FCPA; it would necessitate going beyond adherence to GAAP only. The auditor should be able to point out entries which might suggest a bribe even though no bribe was intended. The position of an internal auditor is of great importance in this regard since he or she can best question large cash disbursements.

### **PREVENTIVE METHODS**

What should be done to avoid appearing to contravene the FCPA? The obvious and immediate step is not to bribe or offer to bribe officials in other countries. But a company must be like Caesar's wife; not only did she have to be virtuous but it had to be transparently obvious that she was virtuous.

A company doing business in other countries should issue a policy statement to all employees stating that bribery is illegal, unethical and will not be permitted. But a simple statement of this nature is not sufficient; the term "bribery" must be defined so that it is clear to employees that small gifts or payments are permissible if intended to expedite or secure a routine government action. "Grease" payments such as payment of travel or hotel expenses would be allowed if related to the promotion of a company's products or services. It must be understood that such payments or gifts could be scrutinized by the Justice Department. The Department of Justice will give an opinion if contacted before the payment is made but, of course, this can take up to 30 days and brings attention to the questionable payment.

Certain precautions should be taken. When retaining an agent to act for the company in another country, in addition to making the usual inquiries about background, business knowledge of another country and integrity, it may be worthwhile to look into his or her contacts with his or her government. Contact the commercial attache at the U.S. embassy in the country where the agent is located and ask for information, particularly with respect to the prospective agent's relations with government officials. If the information is documented, it demonstrates efforts to avoid bribery. Agents who have previously held government positions or who have a personal relationship with a government official should be avoided or treated with extreme care (Radebaugh & Gray, 1997).

Commission or other payments to an agent should be made with detailed knowledge of what they are for, particularly to prevent the transfer of part of them to a government official. Questions could also be asked if the agent operates through a "front" company to which payments are made by him. Such an arrangement raises suspicions that the "front" company is a means of illegally transferring funds to another party which is a member of the government or a government official.

It is important to monitor activities in the foreign countries in which one's company does business, especially in countries where bribery is permitted as a normal way of conducting business. If a case of bribery, public corruption or payoff is reported in the media, it should lead to careful scrutiny of one's own company's operations in that country.

Self study is especially important if there is news or even only a rumor that a competitor or someone in a related business is involved in a payoff that might violate a provision of the FCPA.

Sometimes a competitor from another country will make a bid which will include a bribe under some other name and get the business. Other countries permit payments of some kind to a foreign government to get business. A successful bid of this nature may prompt the sales force of a subsidiary of one's own company to take similar action for a bid in order to get some other business.

### **THE HEART OF THE CONCERN**

In spite of the provisions of the FCPA, serious issues, some ethical, some legal, remain unresolved and can be a source of contention. Consider what may be considered reasonable payments by a company to expedite services such as utilities hook-up or to cover bonafide travel expenses of an official. The term "reasonable payments" can be open to many opinions. At what level is it not reasonable or permissible? And what is reasonable in one country may not be in another.

It is inconceivable that a payment to an official or political party, even though offered to cover expenses, would not be expected to have some influence on the likelihood of obtaining business. And payments for expediting a service seem to have the same nature as a bribe since such help should be for all, as part of the official's job. Yet they are allowed by FCPA. Payments for facilitating or expediting a service are similar to a bribe except in degree. Many will think that people should be paid only for their normal day's work and if a bonus is deemed appropriate, it should not come from an outside source (and this includes tips). The U.S. is the only country that has a legal stricture against payments to foreign officials and some observers feel that it represents attempts to extend U.S. law to other countries. They point out that campaign contributions are legal in the U.S. but the same U.S. nationals in living in another country may not make them in that country. In both cases payments, if made must surely be expected to lead to favorable treatment of the payer. U.S. policy is sometimes perceived as reflecting a "holier than thou" attitude and does not always practice at home what is preached abroad.

In many Asian and other countries, various forms of kickbacks are viewed as gratuities or can be compared to the cost of legal fees in the U.S. for conducting business transactions. As it is proper to pay lawyers while being involved in transactions in the U.S., in other countries it is acceptable to pay a gratuity to those who made the transaction possible (Chan, 1996).

Nevertheless, in spite of these doubts over ethics, at an OECD meeting some representatives agreed on February 15, 1999, to place an antibribery measure before their respective legislatures. The process may not move quickly. Some of the Western countries who made the agreement allow tax deductions for bribes paid abroad (Simpson, 1999).

### **CONCLUSION**

The passage of the Foreign Corrupt Practices Act in 1977 (and its 1988 Amendment) has been controversial since before its implementation. Although it was passed in reaction to the Watergate scandal and questionable business dealings of the day, it has remained in contention as U.S. firms may be seen as less able to compete in the global marketplace than their foreign counterparts who are not constrained by such a law.

Record keeping and appearance are important aspects of the Act. Because it is difficult, if not impossible, to legislate ethics, many have argued with the specifics, if not the spirit, of the Act. Ethics is a rather personal concern, not consistent within a country and certainly not consistent throughout the world. As a result, the Act will probably continue to be controversial even if some other countries decide to enact similar legislation. Ethics and law are not always clearly related.

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## **WORKPLACE SUBSTANCE ABUSE PREVENTION ISSUES**

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### **ABSTRACT**

*On Mother's Day, May 9, 1999, another substance abuse tragedy occurred in the workplace. On this occasion, the workplace was a bus owned by Custom Bus Charters with 43 passengers on their way to a Mother's Day gambling excursion at a Mississippi casino. Twenty-two of the passengers were killed when the bus plunged down an embankment. After the accident, the drug tests administered to the driver came back positive for marijuana. The debate surrounding the prevention of tragedies like this one continues with employers still searching for ways to prevent them. As workplace substance abuse incidents become more frequent, the impact of these events has been chronicled. In the workplace itself, the abuse of drugs and alcohol affect the financial bottom-line. For example, The National Institutes of Health estimate that a drug abuser costs an employer approximately \$7,000 annually (Overman, 1999). Substance abuse exacerbates absenteeism, turnover, employee theft, accidents, product defects, productivity, crime, and violence. The purpose of this paper is to examine current substance abuse issues of which management should be cognizant. The issues to be examined include economic and hidden costs, legal, and employee relations.*

### **INTRODUCTION**

On Mother's Day, May 9, 1999, another substance abuse tragedy occurred in the workplace. On this occasion, the workplace was a bus owned by Custom Bus Charters with 43 passengers on their way to a Mother's Day gambling excursion at a Mississippi casino. Twenty-two of the passengers were killed when the bus plunged down an embankment. After the accident, the drug tests administered to the driver came back positive for marijuana. The debate surrounding the prevention of tragedies like this one continues with employers still searching for ways to prevent them.

A common stereotype is that drug users were male, black, and homeless. Consequently, businesses did not have to be concerned about substance abuse. In fact, 74 percent of drug users are employed outside the home, and eleven percent of employed adults are current illicit drug users.

Since many substance abusers are in the workforce, businesses are affected. Therefore, this serious societal problem becomes a workplace problem (Overman, 1999).

As workplace substance abuse incidents become more frequent, the impact of these events has been chronicled. In the workplace itself, the abuse of drugs and alcohol affect the financial bottom-line. Substance abuse exacerbates absenteeism, turnover, employee theft, accidents, product defects, productivity, crime, and violence. The following statistics report the seriousness of the impact of substance abuse for employers:

U.S. Department of Labor estimates that workplace drug use costs employers \$75 to \$100 billion annually in lost time, accidents, health care, and workers' compensation costs. Sixty-five percent of all accidents on the job are directly related to drugs or alcohol. Substance abusers are absent three times more often and use 16 times as many health care benefits as non-abusers. Substance abusers are six times more likely than their co-workers to file a workers' compensation claim (Bahls, 1998). The National Institutes of Health estimate that a drug abuser costs an employer approximately \$7,000 annually (Overman, 1999).

The purpose of this paper is to examine current substance abuse issues of which management should be cognizant. The issues to be examined include economic and hidden costs, legal, and employee relations.

### **WORKPLACE SUBSTANCE ABUSE ISSUES**

The issues of which employers should be aware are categorized as cost, legal, and employee relations. A discussion of each issue category follows.

#### **Cost**

The economic costs associated with drugs and alcohol from accidents, health care, and workers' compensation have been increasing. A study by the National Institute on Drug Abuse and the National Institute on Alcohol Abuse and Alcoholism verify the increased economic costs from 1992 to 1995. The total economic costs of both alcohol and drugs increased approximately 12 percent in this three year period. Not only did the total costs associated with alcohol and drug abuse increase, but the costs also increased in each impact area (see Table 1).

Some of the costs associated with drug and alcohol abuse are more visible and measurable than others. The U.S. Department of Labor developed a list of hidden costs that employers may not normally address (see Table 2).

The assessment process for costs is a difficult and complex task for most organizations. However, monitoring and analyzing these costs over time may be a critical part of developing a substance abuse program in the workplace and of evaluating the effectiveness of the program.

## **Legal**

When addressing substance-abuse problems in the workplace, employers are confronted with numerous legal issues. The most pressing legal concerns revolve around the rights of employers to test employees and applicants for substance abuse. Courts have addressed testing issues such as privacy rights, negligence concerns, and violations of the Americans with Disabilities Act (ADA) and Title VII of the 1964 Civil Rights Act.

The right of employers to test has been litigated extensively. Today, litigation focuses not so much on whether an employer may test but on how tests should be conducted. Employers in the private sector may utilize drug testing to screen employment applicants, to investigate accidents, and to promote a drug free workplace through random testing (Bahls, 1998).

Violation of workers' privacy has also been litigated extensively, and for the most part, the courts have upheld employers' rights. With respect to privacy, courts employ a balancing test that attempts to balance the privacy rights of the individual employees and the rights to a safe workplace of other workers. Employers that can demonstrate that their testing program is not unnecessarily intrusive and is designed to eliminate and protect the safety of other workers will generally be upheld. Negligence concerns and testing revolve around employment decisions based on drug testing. With respect to individuals, the risk of a "false positive" or sloppy chain-of-custody can lead to negligence and possibly defamation litigation.

The Americans with Disabilities Act (ADA) specifically states that a drug test is not considered a medical exam. In addition, the ADA excludes from the definition of a qualified individual with a disability anyone who currently uses illegal drugs. Furthermore, the ADA allows employers to prohibit the use of alcohol and illegal drugs at the workplace (Cihon and Castagnera, 1999). On one hand, the ADA protects specific rights of employers with regard to prohibiting the use of alcohol and drugs in the workplace and testing. On the other hand, the ADA provides protection for former drug users and recovering alcoholics. Refusing to hire someone who used to be addicted or someone that the employer "perceives" to be addicted may be invitation to an ADA lawsuit.

Other legal issues that employers must address include various state laws that may restrict employer efforts to combat substance abuse in the workplace and the National Labor Relations Act. Unionized employers may unilaterally establish drug testing for employment applicants. However, in unionized companies, drug testing of current employees is a mandatory subject for collective bargaining.

## **Employee Relations**

When substance abuse goes unchecked in the workplace, the impact on employee relations between managers and subordinates and between co-workers can be devastating. When someone is not pulling his or her weight because of a substance abuse problem, the work still must get done. The U.S. Postal Service study found that drug using employees were one third less productive

(Overman, 1999). Covering up these problems by sending a drunk or high employee home for medical reasons used to be a common practice.

Numerous surveys report that employees who do not abuse drugs and alcohol are concerned and troubled by the problems created by employees who do. In a Gallup Poll, 42 percent of employees surveyed report that drug abuse greatly affects the safety of the workplace (Overman, 1999). Employees around the country report that they feel safer in a drug-free workplace and that drug prevention efforts by their employers demonstrate that the employer "cares" about the health and well being of its employees. Crime associated with illegal drug trafficking at work also concerns workers. Many drug users obtain their drugs at work from co-workers raising security issues. Forty four percent of those seeking help on a "cocaine hotline" admitted selling drugs to other employees, and 18 percent admitted to stealing from co-workers to support their habit (Overman, 1999).

There are stories from people in all walks of life ranging from the mailroom to the boardroom and from professional athletes to politicians whose careers have been lost due to substance abuse. However, many employers and employees seem to share a somewhat distorted picture of just what substance abusers look like. A 1995 study asked for perceptions of drug users, and 95 percent of Americans "pictured a black drug user." According to the *National Household Survey on Drug Abuse* from the Substance Abuse and Mental Health Services Administration, 74 percent of all current drug users were white, 13 percent were black, and nine percent were Hispanic (DHHS, 1999). Another myth destroyed by recent research is that substance abuse is primarily a male problem. The National Institute on Drug Abuse reports that among teenagers of today the gender gap in alcohol and drug abuse has disappeared and that girls are 15 times more likely than their mothers to begin using illegal drugs by age 15.

Substance abuse takes on many forms with different substances emerging as the "drug of choice" across individuals and geography. According to enforcement agencies, the abuse of prescription drugs has been on the rise. One survey reported at least 25-30 percent of drug abuse in the workplace involved prescription drugs (Bhals, 1998). The use of methamphetamine is reportedly widespread in California and is emerging in Denver, Atlanta, Baltimore, and Boston. Whereas, the use of MDMA (Ecstasy) and other hallucinogens is reported in Boston, Columbia, New York, Seattle, Newark, and San Diego. Furthermore, Ketamine (Special K), GHB (gamma hydroxy butyrate), and Rohypnol (Roofies) are all emerging drugs across the country (Coward, 1999).

In summary, the issues confronting employers and employees in a variety of workplace settings are having a debilitating affect on the quality of work life in the United States. The benefits to a workplace where substance abuse is being effectively dealt with are many. Protection of the health and safety of everyone in the workplace creates an environment where employees have fewer accidents, make fewer mistakes, and are more productive. The key for employers and employees is not why have a substance abuse program but rather what practices and policies to implement.

## **TABLES AND BIBLIOGRAPHY WILL BE FURNISHED UPON REQUEST**

# THE USE OF INTERACTIVE HEALTH COMMUNICATION TO REDUCE CHILDREN'S EXPERIMENTATION WITH TOBACCO

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## ABSTRACT

*The new focus in health care is the assessment of the health of an entire community in order to better understand its unique health problems. This study surveyed the health of an entire city in Pennsylvania, with the intent to use the data to develop innovative health programs to improve the health status of residents of the city. A second purpose of the study was to discover if the availability of this health information could be used to attract resources from managed health care organizations in the city to develop innovative programs to improve the residents' health.*

*The survey instrument was a questionnaire that contained questions concerning residents' perceptions of the health status of the city, a description of their own health behaviors, and demographic information about each family in the city. The city of Wilkes-Barre has a population of 43,000 in approximately 17,000 housing units.*

*There was a final response of 4,040 surveys representing a 23.9 percent response rate. Managed health care providers in the city were very interested in the initial descriptive data from the community health assessment. Several new health programs have been developed as a result of this primary data.*

*One community health problem uncovered by the survey was that the city has one of the highest adult tobacco use rates (43%) in the nation. The survey also found that 58 percent of the respondents had smoked at least 100 cigarettes in their lifetime. A separate study conducted last year about children's cigarette use in Wilkes-Barre found 37 percent of the children experimented with cigarettes, with the mean age of experimentation being 11.2 years of age.*

*These results were used to bring together several health agencies, including managed health care, in the development of several health programs to deal with this health issue.*

*One of these programs was an intensive educational program offered to children in the public and private schools in the City of Wilkes-Barre. Due to the early age of children's tobacco experimentation, third and fourth graders were chosen to be targeted. A group of fifteen highly able and motivated tenth and eleventh grade high school students were chosen as peer leaders to conduct these educational programs in the city's third and fourth grade classes.*

*These selected high school students were first enrolled in a five day, one college credit course, to teach them the basics of societal marketing. They were taught strategies for marketing their program in a way that will gain community acceptance, as well as strategies for marketing to the children. the idea of not smoking. The results of the second survey were used to receive support*

*from community agencies to develop and launch an Interactive Health Communication System to provide information about nicotine addiction.*

*This program consists of an interactive web site where children and adults can access information and ask questions about the dangers associated with tobacco use and suggestions on how to stop the use of tobacco. The major functions of the IHC is to provide children with information about nicotine addiction, so they can make an informed decision regarding tobacco experimentation. This study demonstrated the value and use of primary data in the development and implementation of innovative health promotion programs*

## INTRODUCTION

The new focus in the delivery of health care services is the use of primary data to better define community health problems. Survey data also needs to be gathered to evaluate the success or failure of programs utilized to abate the identified health problems. This study examined the use of primary data to acquire funding for the development of a peer leader education program and a web-based Interactive Health Communication program for selected grades in a school district. In the past, preventive health information was normally developed and disseminated by government agencies. It is now becoming common for a variety of entities to develop, sponsor, and disseminate health information by using the process of Interactive Health Communications (IHC).

The major health problem uncovered by this first survey was that the city had one of the highest adult tobacco use rates (43 percent) in the nation. The survey also found that 58 percent of the respondents had smoked at least 100 cigarettes in their lifetime making it more likely that these individuals will continue this dangerous habit. A previous study conducted by one of these authors last year about children's cigarette use in Wilkes-Barre, found 37 percent of the children experimenting with cigarettes with the mean age of experimentation being 11.2 years of age.

The Centers for Disease Control and Prevention (CDC) (1998) reports that tobacco use is the leading cause of death in the United States, causing over 400,000 deaths each year and that second-hand smoke is responsible for over 80,000 additional deaths every year. The CDC also reports that smoking cigarettes is the leading cause of avoidable death in the United States greater than the toll of deaths from AIDS, car accidents, alcohol, and suicides. Recent estimates by the Office of Technology Assessment, found that each smoker who died in 1990 would have lived 15 years longer if he or she did not smoke.

The CDC (1998) reports that there are an estimated 47 million US adults and 4.5 million adolescents currently using cigarettes in 1995. The number of adults smoking cigarettes is dropping while the number of children beginning the addictive habit is escalating. The CDC (1998) reports that three thousand children begin smoking cigarettes every day. This translates into 1 million children beginning the road to addiction each year, the vast majority of these children begin the habit before they enter high school. It appears that nicotine addiction has become a pediatric disease, attracting over one million children each year.

In 1994, the Institutes of Medicine (IOM) issued a major report demonstrating that cigarettes and other forms of tobacco are addicting and that most tobacco users use tobacco regularly because they are addicted to nicotine. The CDC (1997) reports that if people didn't smoke when they were young, they were unlikely to start when they are adults. Therefore, this nation has developed an

interest in preventing tobacco use by getting to people before they start. In the long run, tobacco use can be reduced through a youth centered policy that prevents children from ever experimenting with this dangerous product.

The IOM (1997) believes that only two cigarettes each day will make the child addicted to nicotine within two years and that tobacco use is a learned behavior in which a child forms beliefs about the benefits of smoking cigarettes. Youths are led to believe that tobacco consumption is a social norm among attractive, vital, successful people who seek to express their individuality, who enjoy life, and who are socially secure.

A study conducted by Conrad (1992) revealed that adolescents began cigarette smoking as a result of social influences, promotional efforts by tobacco producers, social pressure, and curiosity. Once the habit is established it becomes the norm. Forty percent of adolescents believe that smoking helped them socialize; over 30 percent felt it helped them relax. The benefit least endorsed by teens related to weight control, with percentages about 16 percent. When teens are taught the long-term effects of smoking at a very early age the chances of them smoking drop rapidly.

Experimenting with tobacco is attractive to children because the habit allows them to develop a social identity acceptable to their culture. If a child is with smoking friends, he or she doesn't want to feel left out. The more a child is around smoking as an adolescent, the greater the chance of being a smoker in the future. Children gain a positive attitude concerning tobacco use from the promotional efforts of tobacco manufacturers and the social learning that takes place by modeling their parents and friends who use tobacco.

The 1994 Surgeon's General report argues that children's use of tobacco progresses in five stages: development of a positive attitude about smoking, trying tobacco, more experimentation, regular use of tobacco and finally addiction. A positive attitude about smoking cigarettes may be a process that is learned from not only tobacco promotion but also from friends and parents that smoke. Therefore, a countervailing educational program is required in order to interrupt the development of a positive attitude about tobacco products.

A new attempt to educate children about high-risk health behaviors includes classroom education by older children supplemented by information available by the Internet. According to the Science Panel on Interactive Communication and Health (1999), IHC represents the interaction of an individual, patient, or professional through electronic means in order to transmit health information. This use of rapid electronic applications has tremendous potential to improve health by making information available in order for individuals to make health-related decisions. These applications may provide a way for individuals responsible for their own high-risk health behaviors. Gustafson et al. (1999) believes that these interactive methods have improved in recent years as a result of better communication methods, such as the Internet. These new applications have the ability to focus on a single health topic like tobacco use or on a variety of health-related issues. Some of the uses of IHC include: promotion of health behaviors, health decision-making and promotion of peer information exchange. These specific attributes make IHC especially appealing to the prevention of nicotine addiction by children.

Skutchfield and Keck (1997), offered a model to develop programs to prevent chronic diseases produced by high-risk health behaviors like tobacco use by children. This model consists of several sequential steps. These steps include specifying program objectives, identification of intervention populations, choose intervention sites, select channels of communication and evaluation

and modification of interventions. This model was supplemented in the city of Wilkes-Barre, Pennsylvania with the use of primary survey data.

This study attempts to answer the following questions regarding the development of a peer education program supported by an Interactive Health Communication System for an entire city:

1. Can primary data be utilized to unite a community in the development, implementation and evaluation of a peer leader education program to prevent children from experimenting with tobacco?
2. Will the availability of primary data attract resources to develop and launch a web-based interactive health communication program to provide information to children and their parents about the dangers associated with the use of tobacco products?

## **METHODS**

This study relied on survey methodology, one survey was used to develop and implement a peer leader training tobacco education program for an entire city school district. The second survey was utilized to measure the impact of this education program on the knowledge and attitudes about tobacco use by children who were educated in the third and fourth grades.

The first survey instrument was obtained from the appendix of a book "Planning for Community-Oriented Health Systems" (Rohrer, 1996). Permission was obtained from the author to use this instrument in the assessment of the health of residents in Wilkes-Barre. This comprehensive questionnaire contained questions concerning residents' perceptions of the health status of the city, availability of health services in the city, a description of their own health behaviors, and demographic information about each family in the city.

This survey instrument was duplicated and packaged by part-time college students hired by the City of Wilkes-Barre. The survey was distributed by employees from the Public Works Department in late December. The survey included a letter from the Mayor of Wilkes-Barre requesting citizen support in the development of Public Health programs for the city. Residents were asked to return the surveys to the Health Department in a postage-paid, confidential envelope within two weeks after receipt. The results were then analyzed and descriptive statistics were completed on the data.

The results of these first studies were utilized to form partnerships with the Wilkes-Barre City Health Department, the Wilkes-Barre Area School District, and the Health Care Administration Program at King's College in an effort to prevent children from experimenting with tobacco products. A three thousand dollar grant was received from the Pennsylvania Tobacco Prevention Network, which was funded by the Pennsylvania Department of Health. These funds were utilized in the development, implementation and evaluation of an innovative training program designed to prevent children from using tobacco.

A course was developed for peer leaders who would be prepared to go back to the Wilkes-Barre area schools and educate younger children about the dangers of using tobacco. This course

provided students with all components of the tobacco addiction process and the long-term health effects of tobacco use. Teaching methodologies, development of course objectives and evaluation techniques were also part of this course. It was felt that younger children (3<sup>rd</sup> and 4<sup>th</sup> grade) would be more receptive to materials taught by highly respected high school students than by parents or teachers.

The peer leaders were given resources supplied by the grant and the Pennsylvania Department of Health for use in their training program for young children. In order to receive one college credit from King's College, and a grade for the course, the peer leaders were required to go back to the Wilkes-Barre City elementary grades and educate third and fourth grade students about the danger of using tobacco products.

The second survey consisted of a pretest and posttest of student's knowledge, attitudes about tobacco use and their intentions to experiment with tobacco. These surveys were administered before and after the peer leader education program that resulted from this study. Data resulting from the first survey was disseminated to community groups in order to acquire resources for the launch of an IHC.

## **RESULTS**

The first survey instrument was a questionnaire that contained questions concerning the practice of high-risk health behaviors by adults and children in the city of Wilkes-Barre, Pennsylvania. The survey was distributed to all 17, 000 housing units in the city. There was a final response of 4,040 surveys ( 23.9 %).

The first survey revealed the high-risk behaviors practiced by residents of the City of Wilkes-Barre. One of the major health problems found in the city of Wilkes-Barre was the use of cigarettes by the population. This study revealed that fifty-eight percent of adults had consumed more than 100 cigarettes in their lifetime (Table 1). The 100 cigarettes smoked in lifetime separates experimental from regular smokers. The National Center for Health Statistics reports that adolescents who smoke 100 cigarettes almost always continue to smoke into adulthood his is disturbing because these individuals would either be current smokers or ex smokers which makes them more susceptible to continuing this dangerous health habit.

A study conducted by of of the authors (1998) found a very use of cigarettes by children. In fact, addiction to nicotine begins in this city by age 11 and many continue smoking cigarettes through their adult life. This survey allowed us the opportunity to gain a great deal of information about the use of cigarettes by residents of Wilkes-Barre and the factors that are significantly associated with that use.

### **Peer Leader Training**

Over four hundred young children (aged eight to eleven) received this peer training in May 1999. Prior to the training program these children completed a pretest with question about knowledge and attitudes about tobacco and questions about their intentions to experiment with cigarettes (Table 2). After the completion of the training they were again tested in order to evaluate the effectiveness of this peer led training program (Tables 3, 4).

The results of this community intervention include:

- ◆ A thirty-six percent increase in their awareness that a large number of adolescents smoke cigarettes.
- ◆ A ten percent increase in their knowledge that cigarettes cost a lot of money and that there are many places where smoking is not allowed.
- ◆ A thirty-two percent increase in the knowledge that there are over four thousand chemicals in each cigarette.
- ◆ A fourteen percent increase in their awareness that one becomes addicted to nicotine.
- ◆ A twenty percent increase in their knowledge that cigarette use is one of the major risk factors for heart disease.
- ◆ The posttest also revealed that 39.2% of the mothers and 39.4% of the fathers of these children use cigarettes. Over fifty percent of the children who had a parent who smokes indicated an intention to attempt to get their parent to stop using cigarettes.

## **DISCUSSION**

This study demonstrated the value and use of primary data in the development and implementation of innovative health promotion programs. The results of this study were also used to facilitate collaboration among community leaders in order to intervene in nicotine addiction among young children. In order to solve problems the real cause of the problem must first be defined. The solution of problems requires a great deal of information about the problem under consideration. There needs to be local data for local decision-making regarding health problems. An assessment of the health of a community can give community health planners the required information to determine health problems and develop programs to abate these problems.

This study examined the use of primary data to acquire funding for the development of a peer leader education program and a web-based Interactive Health Communication program for an entire city school district. In the past, preventive health information was normally developed and disseminated by government agencies. It is now becoming common for a variety of entities to develop, sponsor, and disseminate health information by using the process of Interactive Health Communications (IHC). This study surveyed the health of an entire city in Pennsylvania, with the intent to use the data to develop educational programs to prevent tobacco experimentation by children.

The major health problem uncovered by the first survey was one of the highest adult tobacco use rates (43 percent) in the nation. The survey also found that 58 percent of the respondents had smoked at least 100 cigarettes in their lifetime making it more likely that these individuals will continue this dangerous habit. A study conducted by one of these authors (1999) about children's cigarette use in Wilkes-Barre found 37 percent of the children experimenting with cigarettes with the mean age of experimentation being 11.2 years of age. This indicates that intervention must begin at an earlier age than presently used.

The results of the first survey were used to obtain a grant to develop and implement a peer leader education program to prevent children from experimenting with tobacco. The second survey instrument consisted of a pretest and posttest of knowledge and attitudes of the children that participated in the tobacco education program. The results of the second survey were used to receive support from community agencies in order to develop and launch an Interactive Health Communication System to provide information about nicotine addiction. This program consists of an interactive web site where children and adults can access information and ask questions about the dangers associated with tobacco use and suggestions on how to stop the use of tobacco. The major functions of the IHC will be to provide children with information about nicotine addiction so they can make an informed decision regarding tobacco experimentation.

The CDC (1998) believes that survey data can make it possible to monitor local tobacco-related health problems and tailor programs to deal with local populations. The majority of young people who smoke on a daily basis confirm that they want to quit smoking but are unable to do so. Once addicted these very young children find it very difficult to stop using tobacco. It seems that the only way to prevent tobacco use is to educate children about the dangers of tobacco use before they experiment with this dangerous product.

This country is capable of providing better health service while at the same time reducing the costs of providing these services. Those charged with the delivery of health services must recognize that the tremendous changes in the delivery of health care in this country provides opportunities for public health that need to be exploited. In order for prevention programs to work a community health assessment must first be completed in order to discover health problems and then develop community support for solving the identified health problems.

This study demonstrates that local surveillance data about high-risk health behaviors can be used to attract community attention and resources for local prevention efforts. Other communities need to complete similar studies and collaborate with local health care institutions to develop and implement community preventive health initiatives.

#### **TABLES AND REFERENCES AVAILABLE FROM THE AUTHORS**

## **TITLE IX AND SEXUAL HARASSMENT: WHEN IS A SCHOOL DISTRICT LIABLE FOR HARM TO ITS STUDENTS?**

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### **ABSTRACT**

*Over its last two terms the United States Supreme Court has rendered diametrical opinions in two cases involving sexual harassment of students. In its 1997-1998 term the Court in the case of **Gebser v. Lago Vista Independent School District** held that a school district would not be liable under Title IX of the Education Amendments to a teenage female student who had consensual sexual relations with her teacher because the student had failed to complain about the teacher's conduct towards her to a district official. In its 1998-1999 term the Court in the case of **Davis v, Monroe County Board of Education** held that.. a school district would be liable for the continual hostile sexual harassment of an elementary school female student by a male student where both the student and her mother had made numerous complaints about the male student's conduct to the teacher and principal without official action being taken.*

*In both cases the Supreme Court Justices voted 5-4. The swing vote was Justice Sandra Day O'Connor. What was the distinction between the two cases? What conclusions can a school district and its administrators draw from these cases? Are there procedures which School Administrators can put in place to avoid the outcome of the Davis case and achieve the result of the Gebser case? The authors believe that by examining two other cases decided in the same term as Gebser, *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, the defense available to a school district will become apparent.*

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