# Rosemary's Baby

By Norman E. Kjono

Washington has the highest unemployment rate in the nation, the state is contending with a $2 billion-plus deficit, our high tech boom has crashed, and Boeing has laid off 30,000-plus employees with more pink notices to come.

With our state economy near depression our legislators should be doing everything possible to stimulate local business. At the least, legislators should be acutely sensitive to "first do no harm" regarding the interests of hospitality small businesses who contribute taxes to state coffers.

But there's the real world and there's our Washington legislature. Two state legislators have sponsored a scheme for hospitality businesses: mandate customer smoking restrictions that will reduce clientele and revenues, while adding prospective liability. Apparently reducing revenues and increasing liabilities is a way to improve our economy. Word is legislators plan to make it up on volume.

The special-interest scheme is Sen. Rosemary McAuliffe's SB 5791 and Rep. McDermott's HB 1868, which would extend the state's smoking ban to taverns, restaurant's etc.

While the degree of economic harm those bills will do to hospitality businesses is stridently denied by tobacco control, one fact is certain: the proposed legislation will not improve hospitality economic prospects. Contrary to anti-tobacco's claims about the success of California's smoking ban, that state's hospitality industry revenue growth has been one-half the national average since the ban. Based on that model Washington hospitality businesses can, at a minimum, expect to see their revenue growth decline by similar amounts. That's quite a plan for pulling out of a recession.

What is not uncertain is who will profit from expansion of the Washington smoking ban: Big Pharmaceuticals who lavishly support anti-tobacco activists with advocacy grants and their political supporters through campaign contributions.

According to data from Centers for Disease Control and Prevention the history of smoking bans and smoking cessation product sales is that not only do sales of those products increase when smoking bans are mandated but advocacy for smoking bans is carefully coordinated with product introduction. A CDC graphic that illustrates the point appears below. As noted on the graphic, the National Cancer Institute's intervention test COMMIT program began 1984, NCI's Project ASSIST was announced 1991, Washington's office smoking ban was promulgated in 1994, and the tobacco Master Settlement Agreement is dated November 1998. Sales of smoking cessation products dramatically increased after Project ASSIST's 1994 nationwide coordination of smoking bans.

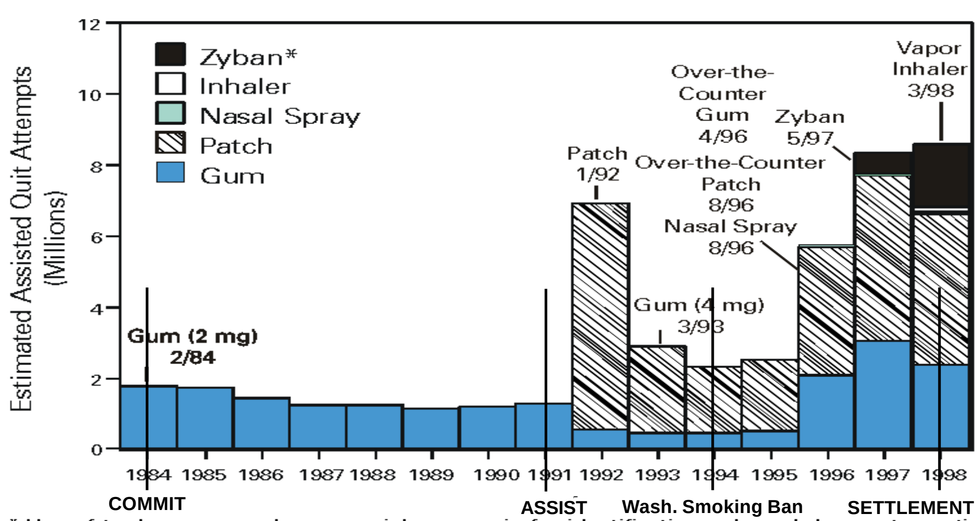
Along the way, Big Tobacco also profited handsomely under the auspices of anti-tobacco programs (see graphic page 2.) During ASSIST intervention years from 1992 to 1997 nationwide youth smoking rates increased 43 percent, thereby guaranteeing an expanding future tobacco products market. Those historic increases in youth smoking occurred while tobacco product costs also increased by levying record new cigarette taxes. Increases in youth smoking correspond to anti-tobacco interventions, particularly Project ASSIST. During the 1990s declines in adult current smokers leveled off and increases in former smokers stopped. Tobacco companies now enjoy a stabilized and expanding market for their products, while states sit awash in new cigarette taxes.

Enhanced smoking cessation product sales from expanding smoking bans is an outcome of paid advocacy such as a November 1998 recommendation by Attorney General Gregoire's tobacco task force that Washington policy be *coordinated* with the Robert Wood Johnson Foundation, the largest shareholder of Nicotrol distributor Johnson & Johnson. Both the state and local tobacco control advocates are $1 million-plus recipients of grants from the RWJ foundation.

In light of the foregoing it can be said that, given a choice between the interests of their small business constituents and the benefits of Big Pharmaceutical largess, each legislator who votes to give birth to "Rosemary's Baby" SB 5791 makes a statement that their constituents' interests are far behind those of Big Pharmaceutical camapign donors.

The consequences of tobacco control now expand beyond "Target Group" smokers to small business owners. The public will foot the bill for special-interest policy. A "tax for thee and not for me" on cigarettes may be enjoyable to a nonsmoker who wants a tax free-ride to finance the state's budget, but that advocacy comes home to roost when it decreases revenues to a small business a nonsmoker may own.

**FIGURE 1. Use of pharmacologic aids to smoking cessation, by year, and month aid was introduced — United States, 1984–1998**




* Use of trade names and commercial sources is for identification only and does not constitute endorsement by CDC or the U.S. Department of Health and Human Services.

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A new variable has also been introduced to the tobacco control equation: product and tort liability. PJAX, Inc., a truck terminal in Richland Pennsylvania, illustrates the point. February 3, 2003 a jury awarded $2.7 million in damages to the heirs of a woman who was run over by a truck while returning from a smoke break. PJAX's smoking ban (requiring employees to go off premises to smoke) was responsible for her injury and death. Plaintiff's counsel successfully argued that the property owner where PJAX was located was responsible for making the property safe for PJAX and its employees. Based on that verdict landlords who require smoking bans in leases and employers who impose unreasonable "campus-wide" smoking bans may now face increased liability.

Adding to liability issues are the National Cancer Institute's January 2, 2003 conclusions that nicotine (including that found in smoking cessation products such as Nicotrol patches, Nicorette gum, NicoDerm CQ patches, and COMMIT lozenges) stops the elimination of damaged cells from the body, thereby increasing the risks of cancer. NCI research adds to that of Dr. John Cooke at the Stanford University School of Medicine that concluded in June 2001 nonsmoked nicotine (as in smoking cessation products) increases blood supply to tumors and can accelerate tumor growth.

We arrive at a profitable equation for tort lawyers: those who followed anti-tobacco's lead by imposing unwarranted work place smoking bans may now face liability to employees or tenants for the risks the bans impose, and those who promote use of smoking cessation products could face liability for increased cancer risks those products may cause. I addressed those issues January 29, 2003 in "Cancer Risk: Nicotine Replacement Therapy May Do Smokers More Harm Than Good," published in *The Los Angeles Daily Journal.*

Could tavern or restaurant owners now bear liability if a customer is injured going into a back alley to have a smoke, similar to the PJAX incident? Why do we taxpayers put up with policy that enriches special-interests while imposing increased costs and liability on our state and small business?

Current tobacco control advocacy takes us to hospitality business owners facing the burden of reduced revenues while prospectively shouldering increasing liability. Unfortunately, most small business owners have yet to recognize the risks and costs that tobacco control has imposed on them.

The present mood in our legislature is illustrated by Rep. Laura Ruderman's (D-45th) response to me, "A desire to reduce people's exposure to second hand smoke does not constitute and (sic) endorsement of nicotine replacement products." The obvious answer to that statement is that if one votes to pass a ban that will *predictably* result in increased sales of smoking cessation products now linked to cancer one necessarily and by definition endorses such products.

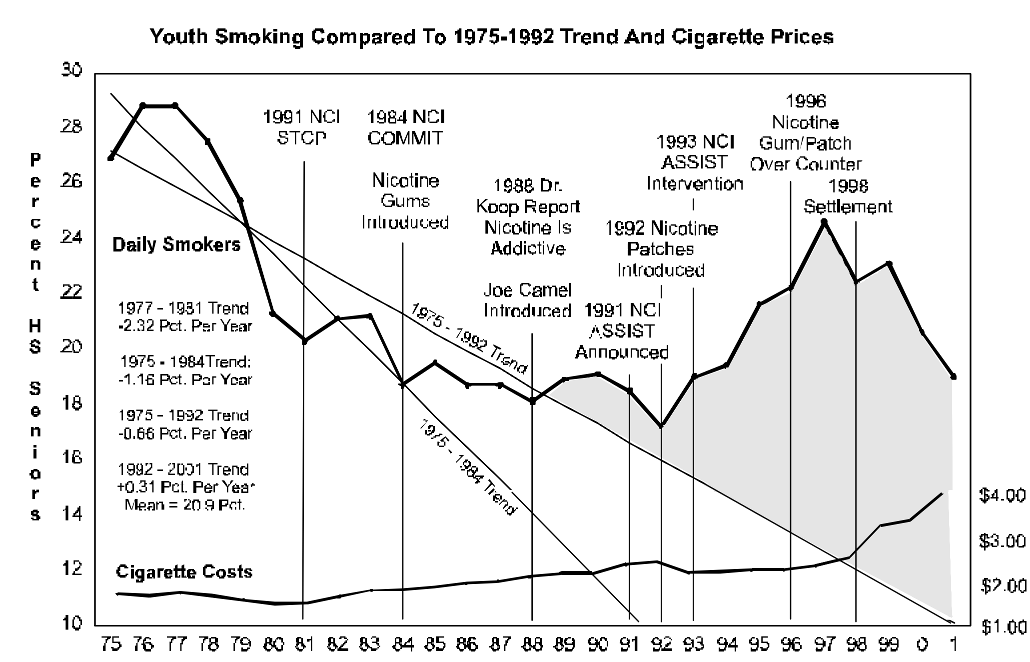
In addition, U.S. District Court 1998 conclusions about the EPA 1993 junk science secondhand smoke report and the 4th Circuit Court of Appeals affirming the importance of EPA issues in its December 2002 ruling say Ms. Ruderman's response presumes a fact that is not in evidence: that smoking bans address a legitimate public health issue, to begin with.

Big Tobacco didn't have the chutzpah to promote nicotine products with links to cancer in the name of public health, but anti-tobacco does. Tobacco control has tied health and work place policy in an unworkable knot. Our legislature would now add reducing revenue to hospitality businesses and increasing potential liability to the perverse behavior of our health department promoting in the name of public health smoking cessation nicotine products linked to cancer. Such policy is apparently necessary to address a second hand smoke problem our federal courts say does not exist as represented.

We must cut through the contrived complexities of tobacco control's self-serving Gordian Knot. The proposed legislation puts hospitality business owners at risk beyond loss of revenue. If our legislators lack the will or integrity to defeat SB 5791 trail lawyers could seize the litigation advantage, exploiting a Catch-22 crafted by special-interests.

But should tax payers and business owners bear that cost?

*Redmond WA February 23, 2003*




| Year | Daily | Trend | Variance | Cig. Price |
|---|---|---|---|---|
| 1975 | 26.9 | 27.20 | -0.30 | 153.4 |
| 1976 | 28.8 | 26.54 | +2.26 | 150.3 |
| 1977 | 28.8 | 25.88 | +2.92 | 156.8 |
| 1978 | 27.5 | 25.22 | +2.28 | 149.9 |
| 1979 | 25.4 | 24.56 | +0.84 | 140.4 |
| 1980 | 21.3 | 23.90 | -2.60 | 131.3 |
| 1981 | 20.3 | 23.24 | -2.94 | 132.8 |
| 1982 | 21.1 | 22.58 | -1.48 | 148.1 |
| 1983 | 21.2 | 21.92 | -0.72 | 163.2 |
| 1984 | 18.7 | 21.26 | -2.56 | 165.9 |
| 1985 | 19.5 | 20.60 | -1.10 | 170.9 |
| 1986 | 18.7 | 19.94 | -1.24 | 180.0 |
| 1987 | 18.7 | 19.28 | -0.58 | 185.8 |
| 1988 | 18.1 | 18.62 | -0.52 | 194.4 |
| 1989 | 18.9 | 17.96 | +0.94 | 205.2 |
| 1990 | 19.1 | 17.30 | +1.80 | 204.5 |
| 1991 | 18.5 | 16.64 | +1.86 | 224.8 |
| 1992 | 17.2 | 15.98 | +1.22 | 230.9 |
| 1993 | 19.0 | 15.32 | +3.68 | 206.2 |
| 1994 | 19.4 | 14.66 | +4.74 | 208.4 |
| 1995 | 21.6 | 14.00 | +7.60 | 210.9 |
| 1996 | 22.2 | 13.34 | +8.86 | 211.8 |
| 1997 | 24.6 | 12.68 | +11.92 | 221.8 |
| 1998 | 22.4 | 12.02 | +10.38 | 243.2 |
| 1999 | 23.1 | 11.36 | +11.74 | 314.2 |
| 2000 | 20.6 | 10.70 | +9.90 | 327.7 |
| 2001 | 19.0 | 10.04 | +8.96 | 387.7* |

Year 2001 Daily (19.0%) Is 189.2 % Of Trend (10.04)

2001 Cents Per Pack

Smoking Rate Source: HS Senior Daily Smokers, "Monitoring The Future Study," Table 1.

1975 To 2000 Cigarette Price Source: Gruber, Jonathan, National Bureau Of Ecomonic Research, Paper No. 7780 "Youth Smoking In The U.S.: Evidence And Implications." *2001 data are 2000 Plus WA I-773 60 cents.