



Legal Update

“Going Too Far? Exploring the Limits of Smoking Regulation”

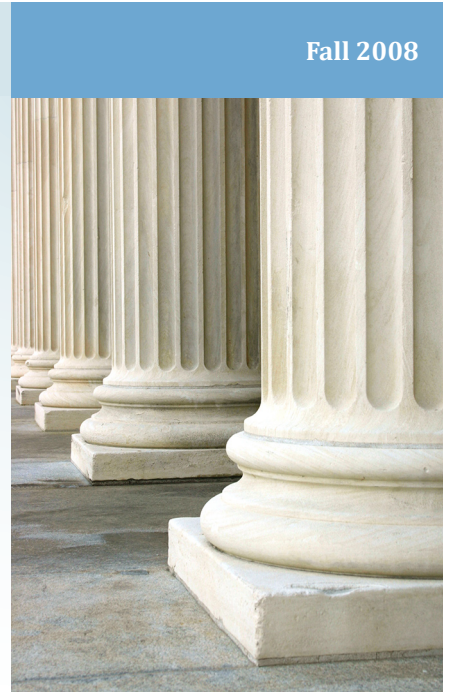
- “Should smoking be prohibited in outdoor spaces such as beaches, parks, and golf courses? What about personal yards or motor vehicles?”
- “Should employers have the right to prohibit employees from smoking, even outside the work environment?”

These are just a few of the thorny questions discussed at a public health law and policy-based symposium that the Tobacco Control Legal Consortium hosted October 23, 2007 at William Mitchell College of Law, in St. Paul, Minnesota. The title of this lively symposium was “Going Too Far? Exploring the Limits of Smoking Regulation.”

The Consortium held this forum to give attendees an opportunity to improve their understanding of divergent views about the impact of expansive new outdoor and workplace smoke-free policies on autonomy, privacy, personal liberty, and public health, and to test their views against those of respected colleagues. Participants included approximately fifty nationally recognized experts in tobacco control policy, public health lawyers, academics and leading professionals from national public health organizations.

Symposium speakers and moderators were Simon Chapman, a leading figure in tobacco control and Professor of Public Health at the University of Sydney, Australia; David Sweanor, Canadian law professor and policy expert; Jim Repace, biophysicist and visiting professor at Tufts University School of Medicine; Lewis Maltby, President of the National Workrights Institute; Marice Ashe, Director of Public Health Law and Policy at the Public Health Institute in Oakland, California; Micah Berman, former Executive Director of the Tobacco Public Policy Center and Assistant Professor at New England School of Law; Dr. Rob Crane, Assistant Professor of Medicine at Ohio State University; and Douglas Blanke, Executive Director of the Tobacco Control Legal Consortium.

The WILLIAM MITCHELL LAW REVIEW published the symposium proceedings earlier this year, Vol. 34:4 (2008). Electronic versions of the symposium papers can be found online at www.tobaccolawcenter.org under Tobacco Control Legal Consortium, “Resources and Publications.” We hope you will find these papers informative and useful in your work on behalf of the public’s health.



Contents

Features

“Going Too Far? Exploring the Limits of Smoking Regulation”

Supreme Court Upholds Smokers’ Right to Sue

Smoke-free Laws and Legislation

Master Settlement Agreement Turns 10

No Lighting Up at Rose Bowl

California Renters Set Legal Precedent in Secondhand Smoke Case

Tobacco in the Courts

Oral Arguments Heard in Appeal of DOJ Case

San Francisco Tobacco-free Drug Store Law Upheld

South Carolina Again Upholds Right of Locals to Pass Smoke-free Laws

The Global Perspective

Strict Global Standards Set for Health Warning Labels, Advertising Bans and Protection Against Industry Interference

India Enacts Historic Smoke-free Law

Departments

From the Director’s Desk

Ask A Lawyer

Resource Roundup

Upcoming Events

Supreme Court Upholds Smokers' Right to Sue

In a major victory for public health and corporate accountability, the United States Supreme Court on December 15 narrowly upheld the ability of smokers to sue tobacco manufacturers for deceptive health claims. The 5-to-4 ruling in *Altria Group, Inc. v. Good*, one of forty pending cases against tobacco manufacturers for deceptive marketing of “light” and “low tar” cigarettes, narrowly rejected industry arguments that the Federal Cigarette Labeling and Advertising Act prevents consumers and state officials from suing manufacturers for fraudulent health claims. Had a majority of the Court accepted this radical argument, the case would not only have ended all “light” cigarette litigation, but also would potentially have barred any future cases involving deceptive health-related claims of any kind. Indeed, even the state lawsuits that resulted in the \$246 billion Master Settlement Agreement ten years ago would arguably have been barred by such a tortured reading of the federal law. Instead, the Court’s ruling allows litigation to proceed, affirming the position adopted by a plurality of the justices in the Court’s seminal 1992 *Cipollone v. Liggett Group* decision. With the support of five justices in the new ruling, that position now becomes binding legal precedent.

In June of this year, the Tobacco Control Legal Consortium filed a friend-of-the-court (*amicus curiae*) brief in the case on its own behalf and on behalf of the American Association of Retired Persons and Public Justice, supporting the interpretation of federal law adopted by the majority. The Consortium’s Maryland affiliate, the Legal Resource Center for Tobacco Regulation, Litigation & Advocacy, also filed an *amicus* brief on behalf of Maryland organizations.

“Light” cigarette cases are now expected to gain momentum, although many legal hurdles remain. Among them is uncertainty about the potential impact of proposed FDA legislation on future “lights” cases. The pending FDA legislation would preserve all cases currently in the courts, but as to future cases, would specifically allow only new “product liability” suits. Because “light” cigarette cases are not based on theories of product liability, but rather on deception, the effect of the FDA bill on future “lights” cases is unclear.

- » [Read the Supreme Court’s ruling](#), PDF, 276 Kb.
- » [Read the Legal Consortium’s *amicus* brief](#), PDF, 177 Kb.
- » [Read the Legal Consortium’s law synopsis on “light” cigarette litigation](#), PDF 1.63 Mb.
- » [Read damning court findings from the government’s RICO case, summarizing the deceptive conduct of tobacco executives in marketing “light” cigarettes](#), PDF, 1.3 Mb.



The Tobacco Control Legal Consortium’s *amicus curiae* brief



The Tobacco Control Legal Consortium’s law synopsis on “light” cigarette litigation

Smoke-free Laws and Legislation

Master Settlement Agreement Turns 10

November marked the ten-year anniversary of the landmark Tobacco Master Settlement Agreement (MSA) between 46 state attorneys general and the five major tobacco manufacturers that resolved state suits to recover costs associated with treating smoking-related illness. The other four states, Minnesota, Florida, Mississippi and Texas, reached separate earlier settlements with the tobacco companies.

The MSA requires the participating manufacturers to pay the states approximately \$10 billion annually for the indefinite future as reimbursement to the states for the costs incurred as a result of tobacco use. The agreement also provides for restrictions on the advertising and marketing of cigarettes, especially the targeting of youth. Since the settlement agreement was signed, cigarette sales nationally have fallen more than 20 percent, and youth smoking has declined dramatically.

During this same period, overwhelming medical evidence of the health hazards of tobacco and secondhand smoke has resulted in a proliferation of smoke-free workplace laws that now cover over half the U.S. population. This decade has also seen cigarette tax rates rise 90 times in 44 states and the District of Columbia, as cited in a [recent report](#) by the Campaign for Tobacco Free Kids.

Despite these gains and the decline in cigarette sales nationwide, [nearly 21% of U.S. adults \(45.3 million people\) smoke cigarettes](#). Significantly, smoking-related illness remains the nation's number one cause of preventable death. Although, to date, the states have received approximately \$79.2 billion from the Master Settlement Agreement and \$124.3 billion from tobacco taxes, they have spent only 3.2 percent of this combined tobacco money on tobacco cessation and prevention programs. Not one of the states receiving money from the MSA has met the Centers for Disease Control and Prevention's recommended state-by-state spending levels for tobacco prevention and cessation programs. In fact, only nine states are funding tobacco prevention programs at even **half** the CDC-recommended level.

Sadly, at a time when [the annual U.S. costs of cigarette smoking, based on medical expenditures and lost productivity, is estimated at more than \\$193 billion, and health care costs associated with exposure to secondhand smoke at \\$10 billion](#), less than 5 percent of the Master Settlement proceeds are being spent on tobacco prevention and cessation.

» [Read the 1998 Master Settlement Agreement](#), PDF, 214 Kb.

» For more information on the Master Settlement Agreement, see the [National Association of Attorneys General](#) and the [Campaign for Tobacco-Free Kids](#) – particularly "[A Decade of Broken Promises: The 1998 State Tobacco Settlement Ten Years Later.](#)"



No Lighting Up at Rose Bowl

On October 20, the city of Pasadena, California adopted a smoke-free ordinance that covers outdoor smoking in most commercial areas of town, including the annual Rose Bowl Parade. The ordinance prohibits smoking in outdoor shopping and dining areas, within 20 feet of building entrances and windows, in outdoor lines – including lines for ATMs, ticket counters, taxi stands, telephones and information kiosks – and at outdoor public gatherings such as parades and fairs. Violators will be fined \$100 for a first offense, \$200 for a second, and \$500 for subsequent offenses. The law took effect November 21.

Pasadena joins more than 40 other California cities and towns with outdoor smoke-free laws, including many that bar smoking in outdoor public lines. For lists of other U.S. communities with smoke-free outdoor ordinances, check the [Americans for Nonsmokers' Rights website](#).

» [Read the Pasadena ordinance](#).

California Renters Set Legal Precedent in Secondhand Smoke Case

A Dublin, California couple used the city's landmark secondhand smoke nuisance law to stop a neighbor from smoking near their apartment. This may be the first time in the U.S. that a party has obtained a temporary restraining order against a neighbor to prevent secondhand smoke exposure.

Nancy and Chuck Sanders, who are allergic to smoke, claimed their neighbor's secondhand smoke was entering their unit through the ventilation system. After trying almost 18 months to get the neighbor to stop smoking near their unit, the couple decided to take advantage of their city's smoking pollution control ordinance. Under Dublin law, a private citizen can bring a legal action to abate secondhand smoke as a nuisance. The couple went to court and obtained a restraining order prohibiting the neighbor from smoking within 25 feet of their apartment or in any room in the apartment complex that shares an air duct or ventilation system with their unit. The order is valid until March 6, although it is no longer needed. Both Nancy and Chuck Sanders and their neighbor have since moved.

» [Read the Dublin, California ordinance.](#)

Tobacco in the Courts

Oral Arguments Heard in Appeal of DOJ Case

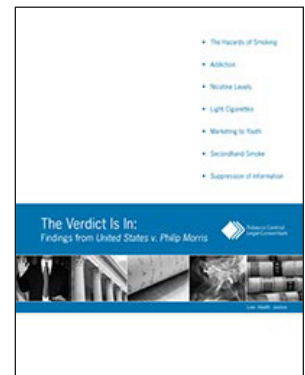
On October 14, a federal appeals panel heard oral arguments in the Department of Justice civil racketeering lawsuit against the major tobacco companies. In 2006, U.S. District Court Judge Gladys Kessler ruled that the tobacco industry conspired to defraud the public about the adverse health effects of smoking in violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act. Despite the overwhelming evidence of wrongdoing cited in her opinion, Judge Kessler did not order the millions of dollars in damages sought by the Justice Department, because she believed a controversial appeals court ruling restricted the monetary remedies she could impose. Both sides appealed and the order was stayed pending the outcome of the current case.

The Justice Department and intervening public health organizations are urging the U.S. Court of Appeals for the District of Columbia to affirm Judge Kessler's ruling and to authorize remedies that were proposed at trial but not adopted by the trial court. The tobacco companies are seeking to have Judge Kessler's decision overturned. It is unclear when the appeals court will issue a ruling.

» [Read Judge Kessler's 1700-page Final Opinion in U.S. v. Philip Morris](#), PDF, 5.7 Mb

» [Read the Tobacco Control Legal Consortium's summary of the Final Opinion, "The Verdict Is In: Findings from the United States v. Philip Morris"](#), PDF, 6.75 Mb

» For more information about the DOJ case, see the [Legal Update Jan./Feb. 2008](#), PDF, 1 Mb and [March 2007](#), PDF, 728 Kb



The Tobacco Control Legal Consortium's summary of the Final Opinion

San Francisco Tobacco-free Drug Store Law Upheld

Tobacco company and pharmacy lawyers fighting a San Francisco law prohibiting the sale of tobacco products in drug stores have had little luck with their argument that the law violates their clients' rights. On November 6, a federal judge rejected Philip Morris' plea to halt San Francisco's enforcement of the nation's first ban on the sale of tobacco products in drug stores. The ordinance, which took effect Oct. 1, prohibits tobacco sales in the city's nearly 60 drug stores, including large pharmacy chains such as Walgreens and Rite Aid, but not in supermarkets and big-box retailers with pharmacies. Philip Morris argued that the ordinance violates its freedom of speech by limiting its ability to communicate with customers. The city denied that the ordinance limits advertising and countered that it applies only to the sale of a product, which is conduct – not speech. U.S. District Judge Claudia Wilken of Oakland agreed, denying a temporary restraining order that would have put the ordinance on hold until the company's case went to trial.

Earlier this fall, Walgreens filed a separate suit in San Francisco Superior Court, arguing that by exempting

supermarkets and retailers, the law was discriminating against drugstores. Walgreens, which operates 52 stores in San Francisco, claimed that its stores would lose millions of dollars in revenue if the law took effect. On September 30, Judge Peter Busch denied the company's request for a [preliminary injunction](#) (PDF, 353 Kb), accepting the city's argument that it had a rational basis for singling out businesses, like pharmacies, that are perceived as promoting health. Walgreens has appealed.

On December 11, Boston banned cigarette sales at drug stores. Other U.S. cities and states, such as New Hampshire, Illinois and Tennessee and New York, are considering similar laws prohibiting the sale of tobacco in drug stores.

» [Read San Francisco Health Code, prohibiting tobacco product sales at pharmacies.](#)

» [Read court documents from *Philip Morris USA, Inc. v. City and County of San Francisco*, and *Walgreen Co. v. City and County of San Francisco*.](#)

South Carolina Again Upholds Right of Locals to Pass Smoke-free Laws

For the second time this year, the South Carolina Supreme Court upheld the right of local governments to pass laws prohibiting smoking inside public places. In a unanimous decision, the court ruled that state law does not expressly preempt the regulation of smoking by a local government, clearing the way for jurisdictions, such as Sullivan's Island, to enact workplace smoke-free laws. The decision was unsurprising, given the court's ruling in March on a similar preemption challenge to Greenville's smoke-free ordinance.

In this fall's decision, the court struck down Sullivan Island's criminal penalty for violators, which originally called for a \$500 fine and 30 days in jail. The town has since amended the ordinance, making violation of the law a civil violation with a much lower fine and no jail time.

» [Read the South Carolina Supreme Court's decision.](#)

» For more information about the Sullivan's Island and Greenville cases, see [Legal Update March/April 2008](#), PDF 929 Kb and [Jan./Feb. 2008](#), PDF, 1 Mb



The Global Perspective

Strict Global Standards Set for Health Warning Labels, Advertising Bans and Protection Against Industry Interference

International leaders in tobacco control and delegates from countries representing more than 85 percent of the world's population met in Durban, South Africa from November 17 to 22, to approve guidelines to strengthen the first global public health treaty. The Framework Convention on Tobacco Control, ratified by 160 nations, requires parties to adopt a comprehensive range of measures designed to reduce tobacco-related illness and death around the world.



During this third Conference of the Parties, delegates accepted most of the key positions advocated by the Framework Convention Alliance, the advocacy network of more than 350 non-government organizations in over 100 countries. Delegates adopted strong international guidelines to protect the treaty and related public health policies from tobacco industry sabotage – a significant problem around the world. The recommendations call for a range of measures, including tight conflict-of-interest regulation; strict limits on interactions between government health policymakers and the tobacco industry; the rejection of self-regulation and public/private partnerships; and the exclusion of the industry from government health advisory bodies and councils.

The delegates also adopted strong global guidelines on tobacco product packaging and health warning labeling, and called for a comprehensive ban on tobacco product advertising, promotion and sponsorship. More detail about the adopted guidelines can be found at the [Framework Convention Alliance website](#).

Finally, during the conference, the Global Smokefree Partnership released two resources related to the international guidelines on smoke-free regulation that delegates adopted at last year's session:

- The [Framework Convention on Tobacco Control Article 8 toolkit](#) contains information for policymakers, the media and the public on the best practices and policies in advocating for comprehensive smoke-free air laws that will comply with Article 8.
- The [Status Report on Article 8](#) highlights the many countries and sub-national jurisdictions where enactment and enforcement of smoke-free policies protects hundreds of millions of people from secondhand smoke.

» [Read the Guidelines for Implementation of Article 8 — Protection from exposure to tobacco smoke.](#)

» [Read more about the third Framework Convention on Tobacco Control.](#)

» [Read more about the international tobacco treaty.](#)

India Enacts Historic Smoke-free Law

On October 2, India became the world's largest country to enact a nationwide smoke-free law. The law prohibits smoking in workplaces and public places, including bars, restaurants, hotels, schools, and dance clubs, but allows certain establishments, such as restaurants seating 30 or more, to build separate smoking rooms.

Some Indian officials have expressed skepticism about the government's ability to enforce the smoke-free law effectively. Still, public support for prohibiting smoking inside all public places and workplaces in India is almost universal. In a poll conducted this August in four Indian cities – Mumbai, New Delhi, Chennai and Kolkata – 97 percent of Indians surveyed expressed support for the smoke-free law, with 92 percent expressing strong support.

No question exists about the devastating toll of tobacco use and secondhand smoke in India. A recent study on smoking in India, published in the *NEW ENGLAND JOURNAL OF MEDICINE*, estimates that 120 million Indians smoke – about 10 percent of the country's population of 1.2 billion. By 2010, nearly 1 million Indians will die each year from smoking-related causes.

» [Visit the NEW ENGLAND JOURNAL OF MEDICINE website.](#)

From the Director's Desk

The public's health narrowly escaped disaster last week when, by a vote of 5 to 4, the U.S. Supreme Court upheld the right of consumers and state officials to act against deceptive cigarette marketing. The decision in *Altria Group, Inc. v. Good* barely affirmed what most Americans would have thought unquestionable: that laws against fraud apply to cigarette manufacturers just as they do to every other business. Indeed, that was the conclusion of a plurality of the Court in the historic *Cipollone* decision sixteen years ago. If not for the efforts of activist members of the Court to re-shape the legal environment, that case would have been considered relatively settled law.

But as last week's ruling reminds us, efforts to combat what the Supreme Court itself has called "perhaps the single most significant threat to public health in the United States" can expect a cool reception from a divided Court. A Court that in 2000 denied the Food and Drug Administration the power to regulate cigarettes as a drug delivery device and in 2001 barred states from eliminating tobacco billboards near schools has in the last several years disallowed state regulation of internet tobacco sales and twice overturned an Oregon case awarding large punitive damages to the widow of a deceased smoker. The widow's case now faces an extraordinary third review by the Supreme Court, a faction of which seems intent on reversing the repeated unanimous rulings of the Oregon Supreme Court, which has likened Philip Morris USA's conduct to the felony of manslaughter.

The Supreme Court's decisions, of course, are couched in scholarly legal terms, and turn on seemingly-neutral rules of statutory interpretation, jurisdiction and constitutional jurisprudence. And yet a cynical observer could be forgiven for pointing out that, in case after case, whatever the legal principle in dispute, a consistent near-majority of the Court has pressed for outcomes that would surrender the powers of states, curtail litigation or disallow regulation, all while sheltering tobacco companies from accountability. In last week's decision, the majority decision of the Court itself questioned why Congress would have intended the result the dissenters advocated: "namely, permitting cigarette manufacturers to engage in fraudulent advertising." At a time when the public health community looks hopefully to 2009 for a re-invigorated federal response to the tobacco epidemic, it is sobering to realize that at least one divided branch of government may remain less than enthusiastic.



A handwritten signature in black ink, appearing to read "Doug Lankford".

Ask A Lawyer

Q “I’m aware that several smoke-free organizations encourage individual landlords to go smoke-free voluntarily. I’ve also heard that some California cities mandate that apartments be smoke-free. Is there a policy option in-between?”

A Yes, a middle-of-the-road option for low-income housing is available through a government incentive called the Low Income Housing Tax Credit. This is a program in which federal and state governments offer financial assistance in the form of tax credits to developers to build, acquire or rehabilitate housing for low-income residents. Participation in the program is voluntary, but the financial assistance available to developers in the form of tax credits acts as a persuasive incentive.

State, city or county governments develop a qualified allocation plan that establishes a point system to promote the type of development desired. Developers compete for tax credits by accumulating points, which they acquire by aligning their development plans to the criteria established by the unit of government. For example, the project may receive a certain number of points for providing on-site services for residents by locating near mass transit, or by providing Internet access to building residents.

Two states, California and Maine, and two cities, Minneapolis and St. Paul, include smoke-free policies in their qualified allocation plans. To get an extra point in California, at least half the units must be smoke-free and contiguous; in Minneapolis and St. Paul, 100 percent of the units must be smoke-free and the smoke-free policy must be stated in the lease; and in Maine, 100 percent of the units must also be smoke-free and management must offer information on cessation services in the building.

Using the Low Income Housing Tax Credit program as a tool to implement smoke-free policies in multi-unit buildings is an attractive alternative to mandated policies because it acts as a carrot, not a stick. For that reason, city councils or county boards may be more willing to adjust a qualified allocation plan to allow a point for smoke-free policies, rather than to mandate smoke-free apartments. Also, because this plan is a government program, it has the potential to promote change more broadly and, perhaps, more quickly, than private programs working with individual landlords.

For more information:

California: www.treasurer.ca.gov/ctcac/tax.asp

Maine: www.mainehousing.org/PROGRAMSLihtc.aspx?ProgramID=51

Minneapolis: www.ci.minneapolis.mn.us/cped/lihtc_rfp_home.asp

St. Paul: www.stpaul.gov/index.asp?NID=1507



Warren Ortland, J.D., from the Tobacco Law Center answers this month’s question.

If you have a question about a tobacco law-related issue that you’d like us to address in this column, or a topic you’d like us to cover in future publications, please send us an e-mail at tobaccolaw@wmitchell.edu. Thank you!

Resource Roundup

Helping Smokers Quit: State Cessation Coverage. The American Lung Association recently released a report that examines and identifies tobacco cessation treatments and services covered by states for their residents. The report cites evidence that smokers often succeed in quitting when they use cessation resources, but they do not always know where to find the help they need. In addition to the report, the ALA released [state-specific information](#) that identifies local smoking cessation resources.

» [Read the Helping Smokers Quit report](#), PDF, 1.11 Mb

Latest CDC Adult Smoking & Mortality Statistics. The November 14th *Morbidity and Mortality Weekly Report* contains two tobacco-related articles. The first, “Cigarette Smoking Among Adults – United States, 2007,” reports that, after three years during which the prevalence of cigarette smoking among U.S. adults remained virtually unchanged, the prevalence of smoking dropped significantly from 2006 and 2007 – nearly a full percentage point. The second article, “Smoking-Attributed Mortality, Years of Potential Life Lost and Productivity Losses – United States, 2000-2004,” reports that from 2000 to 2004, approximately 443,000 persons in the U.S. died prematurely each year as a result of smoking or exposure to secondhand smoke.

» [Read the CDC’s Morbidity and Mortality Weekly Report](#).

Developing Smoke-free Implementation Regulations Toolkit. The Tobacco Technical Assistance Consortium recently released the Developing Smoke-free Implementation Regulations Toolkit, a web-based resource designed to help health departments, advocacy organizations, and others in the public health community draft and adopt regulations to implement comprehensive smoke-free laws. The toolkit includes:

- Examples of effective state and local implementation language
- Model implementation and enforcement rules
- An introduction to public health rulemaking
- An overview of smoke-free policy for lawyers
- Other useful resources for smoke-free implementation

» [Explore the Smoke-free Implementations Regulations Toolkit](#).

Upcoming Events

Second Annual Symposium on Tobacco Control. This symposium, hosted by the Center for Tobacco Control Research and Education at the University of California – San Francisco, will be held February 20, 2009, in San Francisco. The symposium theme is “It’s About a Billion Lives: Advances in Tobacco Control. Celebrating Five Years of Tobacco Research and Education at UCSF.” For background information about this event, click [here](#).

20th National Conference on Chronic Disease Prevention and Control: Cultivating Healthy Communities. The Centers for Disease Control and Prevention will host this celebration of two decades of progress in the prevention and control of chronic diseases from February 23 to 25, in National Harbor, Maryland. For program and registration information, click [here](#).

14th World Conference on Tobacco Or Health. This conference, held every three years, brings together the foremost tobacco control activists and researchers from around the world. The conference will be held March 8 – 12, 2009, in Mumbai, India. Online registration closes February 9, 2009. For program and registration information, click [here](#).



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Michigan

[Smoke-Free Environments Law Project](#)

Minnesota

[Tobacco Law Center](#)

New Jersey

[Tobacco Control Policy and Legal Resource Center/New Jersey GASP](#)

Disclaimer: While we make every effort to ensure the information in this newsletter is accurate and complete, the Tobacco Control Legal Consortium is unable to guarantee this information. Material is provided for informational purposes and is not intended as legal advice. We encourage readers with questions to consult an attorney familiar with the laws of their jurisdictions.

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