

# Legal Update



Tobacco Control  
Legal Consortium



## Dear Tobacco Control Professional:

Welcome to the latest issue of the *Legal Update*, the newsletter of the Tobacco Control Legal Consortium. The Consortium is a national network of legal programs supporting tobacco control policy change across the United States. We invite you to visit our website at [www.tclconline.org](http://www.tclconline.org).

## Light Cigarettes in the United States: 2007

Cigarettes promoted as “light,” “ultra light” or “low tar” now dominate the cigarette market, largely because so many smokers believe falsely that these products are less hazardous than other cigarettes. The truth, of course, is that “light” cigarettes are every bit as deadly as other cigarettes. Internal tobacco industry documents show that cigarette manufacturers have not only been aware of this fact for many years, but have carefully cultivated and perpetuated consumers’ misperceptions. In recent years, light cigarette smokers and former smokers have filed lawsuits alleging that cigarette manufacturers fraudulently misled them to believe light cigarettes are less harmful than other brands. Most significantly, the federal district court ruling in the U.S. government’s racketeering case against cigarette manufacturers concluded that the manufacturers have indeed defrauded the public about this issue, and ordered a halt to the use of such terms as “light” and “low tar.” That ruling is now on appeal.

The Tobacco Control Legal Consortium’s new synopsis, entitled *Light Cigarette Lawsuits in the United States: 2007*, is an overview of light cigarette litigation and its mixed record in state and federal courts to date. The synopsis was written by Edward Sweda, Mark Gottlieb, and Christopher Banthin, all seasoned tobacco control attorneys at the Public Health Advocacy Institute, at Northeastern University School of Law.

The synopsis provides a brief history of light cigarettes and their marketing, and describes the way in which tobacco litigation can advance public health goals. It examines light cigarette class actions and individual light cigarette lawsuits in the U.S., and identifies key federalism issues at play in the litigation. Finally, it highlights significant findings from the 2006 landmark ruling that leading cigarette manufacturers violated the federal Racketeer Influenced and Corrupt Organizations Act – in part, because of their light cigarette marketing.

To view this synopsis, click [here](#), or contact the Tobacco Control Legal Consortium to request a printed copy. We hope you find this publication a useful and informative resource in your work.



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## Affiliated Legal Resource Centers

**California**  
[Public Health Law & Policy Technical Assistance Legal Center](#)

**Colorado**  
[Tobacco Advocacy Resource Partnership](#)

**Maryland**  
[Legal Resource Center for Tobacco Regulation, Litigation & Advocacy](#)

**Massachusetts**  
[Public Health Advocacy Institute, Inc.](#)

**Michigan**  
[Smoke-Free Environments Law Project](#)

**Minnesota**  
[Tobacco Law Center](#)

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

**Ohio**  
[Tobacco Public Policy Center](#)

## Recent “Light” Cigarette Litigation

### U.S. Supreme Court to Hear “Light” Cigarette Advertising Case

On January 19, the U.S. Supreme Court agreed to hear arguments on whether tobacco companies can be sued under state law for deceptive advertising of “light” cigarettes, or whether federal law prohibits such lawsuits. Under the [Federal Cigarette Labeling and Advertising Act](#), states cannot impose requirements or prohibitions “based on smoking and health” on the advertising or promotion of cigarettes. The issue in *Altria Group v. Good*, No. 07-562 is whether this federal law shields Philip Morris from liability for representing that Marlboro Lights are lower in tar and nicotine than standard cigarettes and for using the “Lights” descriptor in its advertising. The stakes in this case are extremely high, since the fate of more than 30 similar “light” cigarette lawsuits against tobacco companies such as Philip Morris and R.J. Reynolds may depend on the court’s ruling. The case is expected to be argued later this year. For an overview of the *Good* case, along with other light cigarette lawsuits, click [here](#).

### Minnesota Court of Appeals Reinstates “Light” Cigarette Class Action

On December 4, 2007 (after our publication on “light” cigarette litigation went to press), the Minnesota Court of Appeals reversed and remanded to Hennepin County District Court a lawsuit that was filed on behalf of smokers who claimed they were intentionally deceived by R.J. Reynolds Tobacco Co.’s marketing of “light” cigarettes. The case, *Dahl v. R.J. Reynolds Tobacco Co.*, is one of many U.S. lawsuits that challenge the marketing, advertising and distribution of “light” cigarettes. In *Dahl*, the district court ruled in 2004 that the plaintiffs’ claims were predicated on a duty “based on smoking and health,” and thus preempted by the [Federal Cigarette Labeling and Advertising Act](#). In the December decision, the Minnesota Court of Appeals, adhering to the U.S. Supreme Court’s 1992 ruling in *Cipollone v. Liggett Group, Inc.*, reversed the district court’s judgment. The appellate court ruled that “state law claims for intentional fraud and misrepresentation that are not predicated on a duty based on smoking and health, but rather on a broader, more general duty not to fraudulently misrepresent or deceive, are not preempted by federal law.” For a copy of the *Dahl* decision, click [here](#).

## Other Recent Significant Tobacco Litigation

### Legal Consortium and Others File *Amicus* Briefs in Appeal of DOJ Case

In August 2006, U.S. District Court Judge Gladys Kessler found in favor of the Department of Justice in the landmark [United States v. Philip Morris USA](#), the U.S. government’s massive racketeering case against the tobacco industry. The case is on appeal to the U.S. Court of Appeals for the District of Columbia.

Several organizations, including the Tobacco Control Legal Consortium, filed *amicus curiae* briefs this fall to support the Department of Justice strategically as it urges the D.C. Circuit Court of Appeals to affirm Judge Gladys Kessler’s ruling. On November 26, 2007, the Tobacco Control Legal Consortium filed an *amicus* brief that addresses critical First Amendment issues raised by the defendants on appeal. Our brief, written by David Vladeck, a highly regarded appellate advocate and professor at Georgetown University Law Center, argues that because the defendants’ commercial speech was false, misleading, and deceptive, it was not protected by the First Amendment. We explain that the defendants’ statements are not protected by the Noerr-Pennington Doctrine, a judge-made principle that provides First Amendment protection to the collective activities of companies when they join together to seek to influence government policies. Finally, we argue that Judge Kessler’s remedies, which include a campaign of corrective communications, were ordered to prevent future harm rather than correct the effects of past conduct and do not offend the First Amendment. For a copy of the Legal Consortium’s *amicus* brief, click [here](#).

The Tobacco Control Legal Consortium’s Massachusetts affiliate, the Public Health Advocacy Institute (PHAI) also filed an *amicus* brief in the DOJ appeal, arguing that tobacco companies continue to misinform and deny responsibility for the harm their products cause, and that two remedies proposed at trial but not adopted by the trial court should be implemented: 1) an education and counter-marketing program; and 2) youth smoking reduction targets. The brief argues that setting up a program to correct misinformation and penalties for the industry if it fails to reduce youth smoking will reduce the tobacco industry’s opportunity to violate the federal anti-racketeering statute. The Institute filed the brief on behalf of itself, the American Medical Association, the American Association of Orthopaedic Surgeons, the American Thoracic Society, and the Mississippi State Medical Association. For a copy of the Public Health Advocacy Institute’s *amicus* brief, click [here](#).

## South Carolina Supreme Court to Consider Smoke-free Ordinance Challenges

On January 9, the South Carolina Supreme Court heard arguments in *Foothills Brewing Concern v. City of Greenville*, one of two significant cases on the right of local authorities to enact indoor smoke-free laws. In Greenville, city attorneys are appealing Circuit Court Judge John Few's 2007 ruling that language in the state's youth access law expressly preempts local governments from passing smoke-free ordinances. This ruling was in opposition to a ruling by Circuit Judge Deadra Jefferson in a challenge to a smoke-free ordinance in another South Carolina community, the town of Sullivan's Island.

An appeal of the [Sullivan's Island ruling](#) is pending before the South Carolina Supreme Court. The Tobacco Control Legal Consortium drafted and filed an *amicus curiae* brief on behalf of Sullivan's Island, which was joined by twelve national public health organizations, including the American Cancer Society, the American Medical Association, the American Heart Association, and the American Lung Association. The brief, which was written by Tobacco Law Center Staff Attorney Julie Ralston Aoki, argues that the smoke-free ordinance is not only within the scope of the Town's home rule authority, but is also consistent with other state law and is not preempted by state or federal law. For a copy of the Legal Consortium's *amicus* brief in *Beachfront Entertainment, Inc. v. Sullivan's Island*, click [here](#).

The South Carolina Supreme Court's rulings on the Greenville and Sullivan's Island challenges could affect smoke-free laws in at least ten other South Carolina communities, including Charleston and Columbia, South Carolina's two largest cities.

## U.S. Supreme Court Hears Maine Internet Law Case

On November 28, the U.S. Supreme Court heard oral arguments in *Rowe v. New Hampshire Motor Transport Association*, [06-457](#), a case involving federal preemption and the right of a state to enact and enforce laws to protect public health, including the ability to regulate the sale of tobacco via the Internet. For background information about this case, please see our [July 2007](#) and [August 2007 Legal Updates](#). For a copy of the Legal Consortium's *amicus* brief, written by Kathleen Dachille, Director of the Legal Resource Center for Tobacco Regulation, Litigation and Advocacy, click [here](#).



### The Global Perspective

## European Union to Require More "Fire-Safe" Cigarettes

European Union officials recently endorsed a plan to require all cigarettes sold in Europe to be made with fire-retardant paper that slows burning and extinguishes if the cigarette is left unattended. The new slower burning cigarettes could help reduce the number of home and wild fires each year. Drafting the

European Union's new safety standards for cigarettes could take up to two years. Canada enacted similar standards in 2005 and Australia is planning to introduce safety standards soon. An overview of "fire safe" cigarettes in the United States is available in a recent Tobacco Control Legal Consortium law synopsis, [Regulating Cigarettes for Fire Safety](#).

## Thailand to Go Smoke-free

On February 1, smoking will be prohibited in Thailand's bars, restaurants and outdoor markets. Smokers who violate this smoke-free regulation will be fined 2000 baht (approximately \$60), and bar and restaurant owners who fail to enforce it are liable for up to 20,000 baht (approximately \$600). Thailand already prohibits smoking at public places, such as government buildings, train stations and hospitals.



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](mailto:tobaccolaw@wmitchell.edu). Thank you!

**Q I hear a lot about “light” cigarette litigation in the U.S. What about the tobacco industry’s marketing of these products elsewhere in the world? Have there been similar “light” cigarette lawsuits in other countries?**

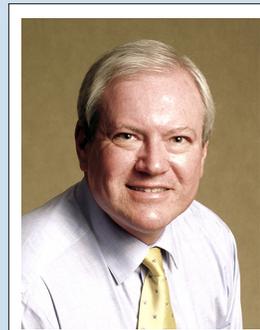
**A** As the smoking rates have continued to decline in the U.S. and other developed countries, the tobacco industry has become increasingly dependent on cigarette sales in other markets, particularly the developing countries. The aggressive marketing of “light” cigarettes in these markets will undoubtedly continue to be a major focus of tobacco companies. Recent litigation has played an important role in educating the public about the deception of “light” cigarettes. In addition to the “light” cigarette cases pending in the U.S., there have been “light” class actions filed in other countries, such as Canada and Israel. There have also been a number of smoking and health cases filed in several countries outside of the U.S., including Argentina, Brazil, Chile, France, Italy, Poland, Spain, Canada, Nigeria, Australia and Finland. Some of these cases also involve allegations relating to the deceptive nature of “light” cigarettes.

Several developments over the past decade have assisted the litigation efforts and will almost certainly provide momentum for future “light” cigarette cases in the U.S. and other countries. First, the release of the 2001 report by the National Cancer Institute that found “light” cigarettes do not reduce smokers’ health risks not only helped educate the public on the hazards of “light” cigarettes, but also supported litigation efforts in the U.S. and abroad. Secondly, the release of internal tobacco industry documents in the 1990s, several of which are cited in the National Cancer Institute report, revealed that the tobacco companies recognized for decades that people unwittingly perceive “light” cigarettes to be a safer option than full-flavor brands. Further, the decision by the European Union and certain countries, such as Brazil, to ban the use of “light” descriptors on cigarette packages has also contributed to the increased attention surrounding “light” cigarettes. Finally, Judge Kessler’s recent ruling that the tobacco industry falsely marketed and promoted “light” cigarettes as less harmful than full-flavor cigarettes will bolster current and future litigation efforts in the U.S. and abroad.

– **Charles W. Patrick, Jr. and Greg Lofstead**  
**Richardson, Patrick, Westbrook & Brickman, LLC**

### **About the Firm**

In 2003, Richardson, Patrick attorneys helped win a landmark consumer fraud judgment against Philip Morris for \$10.1 billion in the *Price v. Philip Morris, Inc.* case. This Illinois case was the first to find a tobacco company liable for decades of deceptive labeling of cigarettes as “light” or “lowered tar.” Although the verdict was later reversed by the Illinois Supreme Court, the case brought nation-wide attention to the deceptive dangers of “light” cigarettes. Richardson, Patrick currently represents the province of New Brunswick in its health care cost recovery litigation against the tobacco industry.



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Greg Lofstead, J.D.,  
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## Smokin' Links

The Tobacco Control Legal Consortium's Michigan affiliate, the Smoke-Free Environments Law Project (SFELP), has compiled dozens of valuable tobacco control presentations on its website. Check out the *PowerPoint Presentations on Smoke-Free Environments Issues* section of SFELP site by clicking [here](#).

## Resource Roundup

- **GoingSmokeFree.org: A Toolkit for Implementing Smoke-Free Laws.** The Robert Wood Johnson Foundation, in partnership with the Campaign for Tobacco Free Kids and Americans for Nonsmokers' Rights, has created GoingSmokeFree.org, a free online resource to help states and communities implement smoke-free laws. The site is a clearinghouse of activities, events and tools for states and communities in planning, implementing and supporting smoke-free laws.
  - To access the toolkit, click [here](#).
  - To learn more and view other resources, click [here](#).
- **The 'Tobacco Wars' – Global Litigation Strategies.** Noted public health law professor Lawrence O. Gostin recently published an article in JAMA (12/05/07) summarizing tobacco litigation strategies used in the United States and abroad. According to Gostin, tobacco companies are aggressively seeking new markets now in “the poorest, least-regulated countries.” He concludes that the most promising strategy to combat them is to litigate within a human rights framework, using the argument “that tobacco is so detrimental that it violates the rights to health, life, and a sanitary environment.” To link to an extract of the JAMA article, click [here](#). To learn more about the World Health Organization's Framework Convention on Tobacco Control, which identifies civil and criminal litigation as a public health strategy, click [here](#).
- **Potential Master Settlement Agreement Violations Evidenced in Judge Kessler's Findings in *USA v. Philip Morris USA, Inc., et al.*** This analysis and compilation of tobacco company violations of the 1998 Master Settlement Agreement between forty-six states and the tobacco industry, was prepared by attorneys Sara Guardino, Christopher Banthin and Richard Daynard of the Legal Consortium's Massachusetts affiliate, the Public Health Advocacy Institute. For a copy of the report, click [here](#).
- ***A Broken Promise to Our Children: The 1998 State Tobacco Settlement Nine Years Later.*** An annual report that assesses whether states are keeping their promise to use proceeds from the 1998 state tobacco settlement to combat tobacco use was released recently by the Campaign for Tobacco-Free Kids, American Heart Association, American Lung Association and American Cancer Society Cancer Action Network. The report finds that states have increased funding for tobacco prevention and cessation programs by 20 percent to \$717.2 million, the highest level in six years. Most states, however, still fail to fund these programs at minimum levels recommended by the U.S. Centers for Disease Control and Prevention (CDC), and the states combined are providing less than half what the CDC has recommended. For a copy of the full report, click [here](#).

## Upcoming Events

- **The 4<sup>th</sup> National Summit on Smokeless and Spit Tobacco** will be held March 4–6, 2008, at the Cox Convention Center/Renaissance Hotel in Oklahoma City, Oklahoma. For more information about this event, click [here](#).
- **The 2008 Caribbean Tobacco Control Summit** will take place March 5–6, 2008, at the Condado Plaza Hotel & Casino in San Juan, Puerto Rico. Included on the agenda are sessions on smoke-free laws, anti-tobacco litigation, advocacy and empowerment, evaluating smoke-free policies, and tobacco industry practices and product regulation. For more information about this event, click [here](#).
- The Technical Assistance Legal Center of the Public Health Institute and the Center for Tobacco Policy & Organizing are co-sponsoring two **regional trainings for tobacco control advocates** and law enforcement officers March 13, 2008 in Los Angeles, and March 19, 2008 in Sacramento, California. Each one-day training will provide advocates with tools to build policy campaigns in areas such as tobacco retailer licensing, smoke-free multi-unit housing, and

protecting people from secondhand smoke exposure outdoors. For more information about these trainings, click [here](#).

- The National African American Tobacco Education Network (NAATEN) and the National Network on Tobacco Prevention and Poverty (NNTPP) will hold a Joint Conference entitled “**Promising Practices from the Field: Tobacco Control Strategies for Priority Populations**” April 23–24, 2008, in Detroit, Michigan. For more information about this event, click [here](#).

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Note: 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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