Legal Update *from the* Tobacco Control Legal Consortium

February/March 2005

Dear Colleague:

Welcome to the latest issue of the Tobacco Control Legal Consortium's online newsletter! The Consortium is a national network of legal programs supporting tobacco control policy change by giving advocates better access to legal expertise. We invite you to visit our website at www.tclconline.org.

Legal Consortium Affiliate Campaigns to Promote Smoke-Free Apartment Policies

The Legal Consortium's Michigan affiliate, the Smoke-Free Environments Law Project (SFELP), has launched an important new campaign to encourage landlords to adopt smoke-free policies in their apartment buildings. SFELP, of the Ann Arbor-based Center for Social Gerontology, has joined with local health departments and tobacco reduction coalitions in 20 Michigan counties and the Michigan Department of Community Health to address the needs of tenants complaining about secondhand smoke seeping into their units, as well as landlords questioning their right to adopt smoke-free policies.

The centerpiece of SFELP's smoke-free apartment campaign is a new, award-winning website called MISmokeFreeApartment.org, which stands for "Michigan smoke-free apartment." The website has two major sections — one targeted to landlords and one to tenants. Within weeks of announcing this campaign, the website was one of the top items listed by the major Internet search engines, such as Yahoo and Google, when users enter key words such as "smoke-free apartment."

The smoke-free apartment campaign includes a series of four colorful postcard mailings to landlords informing them of their legal rights to adopt smoke-free policies and reasons doing so makes economic sense. A survey was mailed to landlords in mid-February to determine the availability of smoke-free apartments and information was used to create a smoke-free apartment listing on the website. In addition, in certain localities in Michigan the campaign uses a combination of billboards and radio ads to heighten awareness of the issue of smoke-free air in apartments. Assistance in developing and implementing smoke-free apartment policies is available from SFELP and local coalitions.

To access the smoke-free apartment website, go to http://www.mismokefreeapartment.org. For a PowerPoint presentation describing the campaign and for related information, go to the *Apartments & Condominiums* section of the SFELP site at http://www.tcsg.org/sfelp/apartment.htm.

— Jim Bergman, Director
Smoke-Free Environments Law Project

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  Technical Assistance Legal Center (TALC)
- **Maryland**
  Legal Resource Center for Tobacco Regulation, Litigation & Advocacy (LRC)
- **Massachusetts**
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- **Michigan**
  Smoke-Free Environments Law Project (SFELP)
- **Minnesota**
  Tobacco Law Center
- **New Jersey**
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- **Ohio**
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Welcome, Ohio Tobacco Public Policy Center!

Ohio is the latest state to join the Tobacco Control Legal Consortium's network of legal resource centers. The Tobacco Public Policy Center at Capital University Law School was established last month to assist Ohio's tobacco control community and government entities in efforts to reduce smoking and tobacco use throughout Ohio. The Center is funded by a grant from the Tobacco Use Prevention and Control Foundation (TUPCF). With the assistance of Capital University Law School's faculty, staff and student resources, the Tobacco Public Policy Center conducts research and educates public health organizations, community groups and legislators on legal policy matters that impact tobacco use and regulation.

The Center's new executive director is Micah L. Berman. Micah previously worked as a trial attorney with the Antitrust Division of the U.S. Department of Justice and as an associate with the law firm of Stinson Morrison Hecker, LLP. Micah brings strengths in researching and investigating legal issues, as well as in collaborating with elected officials and policy makers. He earned his Juris Doctor with distinction from Stanford Law School and graduated with honors from Brandeis University with a Bachelor of Arts Degree in public policy. The Ohio Center's new website is http://www.law.capital.edu/tobacco/.

U.S. Ruling on $280 Billion Remedy

On March 4, 2005, the U.S. Department of Justice filed a motion asking the full U.S. Court of Appeals of the District of Columbia Circuit to reconsider a recent ruling by a three-judge panel in the federal government's ongoing Racketeer Influenced and Corrupt Organizations Act (RICO) case. The panel ruled that the government cannot force cigarette manufacturers to forfeit ("disgorge") $280 billion in past tobacco company profits for conspiring to mislead the public about the addictive nature and hazards of smoking. In February, the panel ruled that disgorgement of profits was not allowed as a remedy under the civil RICO law. According to the court, disgorgement is "a remedy aimed at past violations . . . a quintessentially backward-looking remedy," which is inconsistent with the purposes of the anti-racketeering law.

In a strong dissent, Judge David Tatel argued that the court ignored controlling U.S. Supreme Court precedent, misinterpreted the law, and created a split in the law among the federal circuits, all in deciding an issue not properly before the court. He pointed out that the government submitted evidence that, absent court intervention and despite the Master Settlement Agreement between the tobacco companies and the states, the companies are likely to continue to target young people and deceive the public about the health risks of tobacco.

The Justice Department is now seeking an "en banc" review that would allow all twelve judges on the Court of Appeals to review the case. Regardless of the outcome of the disgorgement issue, the Justice Department is free to seek other potential remedies, including national smoking cessation programs, sweeping marketing and advertising restrictions, a corrective advertising campaign, and an injunction aimed at preventing the tobacco companies' continued marketing to young people.

The lawsuit, filed in 1999, is in its sixth month of trial. The U.S. government has now rested its case, and the defendants have begun presenting testimony.

Washington Court Rules Local Smoke-free Ordinances Preempted

On February 10, the Supreme Court of the State of Washington issued a decision that could set an unfortunate precedent for some municipalities with smoke-free ordinances. In 2003, the Tacoma-Pierce County Board of Health passed a resolution that required all indoor public places to be smoke-free. The Entertainment Industry Coalition (EIC) challenged the resolution, claiming it conflicted with Washington's Clean Indoor Air Act, which exempts bars, taverns, bowling alleys, tobacco shops, and restaurants. In January 2004, EIC sued to enjoin implementation of the resolution, arguing that it was preempted by Washington's Clean Indoor Air Act.

Last spring, the Washington Court of Appeals upheld a trial court decision overturning the Pierce County resolution, and the Washington Supreme Court agreed to hear the case. The Tobacco Control Legal Consortium filed an *amicus* brief supporting the County. Joining in the legal brief were ANR, the Campaign for Tobacco-Free Kids, the National Association of County and City Health Officials, the National Association of Local Boards of Health, and the American Medical Association. The case was argued in November.

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The Court released its decision in February, ruling against the Board of Health and finding the local ordinance invalid. The Court said that, "A local regulation conflicts with a statute when it permits what is forbidden by state law or prohibits what state law permits. Where such a conflict is found to exist, under the principle of conflict preemption, the local regulation is invalid." The Court relied heavily on a recent Washington case where, under the theory of conflict preemption, it invalidated a local regulation issued by the Tacoma-Pierce County Board of Health that required certain water districts and providers to fluoridate their water supplies. *Parkland Light & Water v. Tacoma-Pierce Cty. Bd. Of Health*, 90 P.3d 37 (2004).

What does the Tacoma-Pierce ruling mean for Washington State? Communities that have passed, or are considering passing, smoke-free ordinances, may now be unable to restrict smoking in places other than those covered by Washington's Clean Indoor Air Act. In a broader sense, what does this ruling mean for other states, particularly those — like Washington — with no specific preemption or anti-preemption language in their statewide laws? Only time will tell.

To read the Washington decision, click here: http://www.courts.wa.gov/opinions/?fa=opinions.opindisp&docid=756759MAJ

Australian Tobacco Companies Appeal Ruling in Groundbreaking Suit by Ex-Smoker

In January 2005, seven Australian tobacco companies appealed the New South Wales Supreme Court's recent ruling that allows a chronically ill former smoker in Australia to sue the companies for deceptive practices. In September 2004, the Court rejected Myriam Peta Cauvin's claim against the tobacco companies on behalf of others who have suffered harm from their products — Australia's first class action claim against tobacco companies. Nevertheless, the ruling allowed Cauvin, who is described as dying from emphysema, to seek remedies that could alter the way tobacco companies do business in Australia. In addition to personal damages, Cauvin is seeking relief under the Trade Practices Act to remedy the effect of alleged misleading and deceptive conduct by the tobacco industry, including industry funding for a public education campaign on health risks of smoking and nicotine addition; cessation programs; and nicotine replacement therapy. Myriam Cauvin v. Philip Morris and Ors.

Michigan Company Tells Workers "No Smoking at Home"

While it's commonplace for employers to restrict smoking on the job, Weyco Inc., a medical benefits administration company based in Okemos, Michigan, received nationwide publicity recently for going a step farther and adopting an anti-smoking policy that covers its workers off-site, as well. Not only does the company refuse to hire smokers, but it dismisses employees who smoke, even if they light up off company property.

As a benefits administrator, Weyco is acutely aware of the impact of smoking on medical expenses. Weyco says its "nonsmokers only" policy is intended both to lower its health care costs and improve the health of its workers. According to Weyco, the smoking cessation classes and support groups the company introduced in connection with the policy have already helped 18 to 20 of Weyco's 200 workers quit smoking.

There is no constitutional right to smoke. Employers generally have a legal right to refuse to hire smokers, or to dismiss workers who smoke, unless a specific law, employment contract, or collective bargaining agreement prevents them from doing so. Nevertheless, Weyco's policy would be unlawful in twenty-nine states. This is because these states have adopted so-called "Smoker Protection" or "Lifestyle Discrimination" laws — often through the hidden influence of tobacco company lobbyists. These laws specifically prohibit employers from refusing to hire, disciplining or discharging employees because they use tobacco or other lawful consumable products outside the workplace. The American Lung Association has posted a very helpful list of these state laws at http://slati.lungusa.org/appendixf.asp.

In the twenty-one states with no such laws, employers like Weyco, faced with ever-increasing health care costs, are beginning to focus on the role of smoking in health care spending. The CDC estimates that each smoker costs the economy $1,623 annually in increased medical expenditures and another $1,760 in lost productivity. Given these figures, and given that there is no constitutional right to smoke, Weyco's non-smoking policy may well mark the beginning of a trend.

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California Supreme Court to Review Class-Action Tobacco Suit

The California Supreme Court has unanimously agreed to review a class-action suit filed against four tobacco companies on behalf of approximately 1 million Californian minors for alleged violations of state consumer protection laws. The court will decide whether California law can be used to prohibit cigarette advertising to minors, or whether such cases are preempted (barred) by federal statutes.

The suit accuses the companies of targeting minors with ads and promotions. It was filed on behalf of California children and teenagers who smoked at least one cigarette in the state between April 2, 1994 and December 31, 1999 — comprising what plaintiffs' lawyers call the "Joe Camel Generation." It seeks damages equal to the money the minors spent on cigarettes during that period, along with an order restricting future advertising. Back in 1994, the California Supreme Court ruled that, even though the federal government regulates cigarette advertising and labeling, R. J. Reynolds could be sued under California consumer protection statutes for targeting children in its advertising. In the current case, a state appeals court concluded that the earlier California decision has effectively been overturned by the U.S. Supreme Court's 2001 ruling in Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001), which rejected Massachussetts' efforts to regulate tobacco billboards and in-store advertising. The issue now goes to the state Supreme Court. The case is Tobacco Cases II, S12952.

Contact Us:

Phone:
651-290-7506
Email:
tobaccolaw@wmitchell.edu
Web:
www.tclconline.org
Address:
875 Summit Avenue
St. Paul, MN 55105

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