

# Legal Update

from the Tobacco Control Legal Consortium



February/March 2006

## Dear Tobacco Control Professional:

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](http://www.tclconline.org).

### "Public Health Policy for Internet Cigarette Retailers"



Buying cigarettes over the Internet has become a common way for some consumers to evade rising state sales and excise taxes. Of added concern to public health advocates is the failure of many Internet cigarette retailers to verify the age of purchasers or take other steps to avoid illegal sales to minors.

The Tobacco Control Legal Consortium's latest publication, *Public Health Policy for Internet Cigarette Retailers*, provides an overview of the problems associated with Internet cigarette retailers, and the state and federal laws that can be used to address these problems. It was written by Christopher Banthin, Deputy Director of the Tobacco Control Resource Center at Northeastern University School of Law in Boston, Massachusetts.

This law synopsis explains the marketing and operation of Internet cigarette retailers and describes state efforts to collect tobacco taxes on sales by Internet cigarette retailers. It discusses obstacles to state action, including the threat of legal challenges, as well as the issue of Native American sovereignty, since many domestic Internet cigarette retailers operate on Native American lands.

To view a PDF version of the synopsis, click on the image above. The synopsis is also available at <http://www.wmitchell.edu/tobaccolaw/resources/Banthin012506.pdf>. We hope you find this publication a useful and informative resource.

### Oregon Supreme Court Compares Philip Morris's Conduct to Manslaughter

"Extraordinarily reprehensible." So wrote the Oregon Supreme Court in describing Philip Morris's conduct in marketing cigarettes to the public over decades – conduct the court cited in its recent decision to uphold the award of \$79.5 million in punitive damages to the family of an Oregon smoker who died of lung cancer. The court unanimously upheld a lower court decision in favor of the family of Jesse D. Williams, a janitor who died of tobacco-related illness at 67. In its ruling, the court responded to a 2003 U.S. Supreme Court decision, *State Farm Mutual Insurance v. Campbell*, which set guidelines for lower courts in determining when punitive damages are appropriate, what evidence may (and may not) be considered, and how large an award is constitutionally permitted.

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### Affiliated Legal Resource Centers:

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

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Construing the evidence most favorably to the plaintiff because of the jury verdict in the decedent's favor, the Oregon Supreme Court concluded that the jury could reasonably have found that "Philip Morris, with others, engaged in a massive, continuous, near-half-century scheme to defraud the plaintiff and many others, even when Philip Morris always had reason to suspect – and for two or more decades absolutely knew – that the scheme was damaging the health of a very large group of Oregonians – the smoking public – and was killing a number of that group." According to the court, "[t]he tobacco company's conduct here was extraordinarily reprehensible, by any measure of which we are aware." In fact, in a particularly dramatic point of comparison, the court observed that, "[v]iewing the facts in the light most favorable to plaintiff, Philip Morris's actions, under the criminal statutes in place at the beginning of its scheme in 1954, would have constituted manslaughter. Today, its actions would constitute at least second-degree manslaughter, a Class B felony." (statutory citation omitted).

For a copy of the decision in *Williams v. Philip Morris*, click [here](#).

## Global Tobacco Treaty Implementation Begins

Representatives of more than 110 countries gathered in Geneva, Switzerland from February 6 to 17 to plan implementation of the world's first public health treaty, the [World Health Organization's Framework Convention on Tobacco Control \(FCTC\)](#). The Framework Convention, which was negotiated over four years and went into force on February 27, 2005, was developed in recognition of the need for a global strategy to confront a global epidemic that countries cannot address through domestic legislation alone.

The treaty, which is already being described as one of the most successful in the history of the United Nations, has set a global benchmark for appropriate national tobacco control policies. To date, the treaty has been ratified by 124 countries representing three-quarters of the world's population. Conspicuously absent is the United States. Despite having signed the treaty in 2004, the U. S. government has yet to submit the treaty to the Senate for ratification. If ratified, the treaty would obligate the United States to adopt stronger warning labels, restrict tobacco advertising, and implement effective protection against secondhand smoke, among other things.

At the "Conference of the Parties" in Geneva, the participating countries met for the first time to begin negotiating the process for implementing the treaty and continuing to improve the level of tobacco control. In effect, this meeting, and subsequent similar meetings, will "build the machinery" to hold the world's governments accountable for their commitment to reverse the epidemic of tobacco use. While this process will move slowly, rules developed in the initial meeting ensure that nongovernmental advocates will be active watchdogs in the ongoing treaty process, and that high priority will be given to developing guidelines on secondhand smoke exposure and regulation of advertising that crosses national borders.

For background information on the Framework Convention, click [here](#). For additional information from the Framework Convention Alliance of nongovernmental organizations about the recent negotiations, along with press statements, briefing papers, and country data, click [here](#).

## California High Court Upholds Cigarette Handout Prohibition

In a recent unanimous decision, the California Supreme Court upheld the state prohibition on cigarette giveaways, rejecting a cigarette company's argument that the handouts were "promotions" that could only be regulated by the federal government. California law prohibits all distributions of free cigarettes and smokeless tobacco, except in limited circumstances where no minors are present. R.J. Reynolds argued that handing out free cigarettes is a promotional activity that cannot be regulated by state law, since the federal government has exclusive authority to regulate tobacco ads and promotions. It claimed that the Federal Cigarette Labeling and Advertising Act (FCLAA) preempts states from imposing any "requirement or prohibition based on smoking and health" regarding the advertising or promotion of cigarettes, and that federal law governs Reynold's conduct in giving away cigarettes.

The court, however, found a difference between federally regulated promotional activities, such as sponsorship of sporting events, which states cannot restrict, and cigarette sales and distribution, which states can regulate to protect public health. According

to Justice Joyce Kennard, “Distribution of cigarettes in any form, whether free of charge, sold at a discount or sold at full retail price, creates the same health hazard, and should be equally subject to state regulation.” This decision is thus significant in that it helps articulate the limitations of preemption within the FCLAA.

On a narrower issue, the court ordered a Los Angeles judge to reconsider a \$14.8 million fine against R.J. Reynolds for distributing free cigarettes in 1999, to determine whether the company acted in good faith or whether the state unduly delayed its lawsuit. Either determination could reduce the amount of the fine.

The Tobacco Control Legal Consortium, as *amicus curiae*, submitted a legal brief supporting the State of California in the case. Joining in the Consortium’s brief were the League of California Cities and the California State Association of Counties. For a copy of the *People v. R.J. Reynolds* opinion, click [here](#). To read the Legal Consortium’s brief, click [here](#).

## California Rules Secondhand Smoke “Toxic Air Contaminant”

A recent decision by California’s Air Resources Board (ARB) made California the first state to classify secondhand tobacco smoke as a toxic air contaminant (TAC). A TAC is defined as an air pollutant that may cause or contribute to an increase in deaths or serious illness, or that may pose a present or potential hazard to human health. According to the board, each year in California tobacco smoke is responsible for the release of 40 tons of nicotine, 365 tons of respirable particulate matter, and 1900 tons of carbon monoxide into the environment.

The board’s decision to list secondhand smoke as a TAC was based on a comprehensive report on secondhand smoke exposure and its health effects entitled *Proposed Identification of Environmental Tobacco Smoke as a Toxic Air Contaminant*. This four-part report includes an executive summary, an evaluation of exposures to secondhand smoke in California, an assessment of the health effects of exposure, and responses to public comments. To read the new regulation, click [here](#).

## Uruguay Becomes First Smoke-Free Nation in the Americas

On March 1, in a development as stereotype-shattering as the 2004 elimination of smoking in Irish pubs, Uruguay will become the first smoke-free nation of the Americas. Under a Presidential Decree of September 5, 2005, smoking will end in all Uruguayan workplaces and public places—including bars and restaurants. Despite the pervasive role of smoking throughout South America, this stable and progressive nation of 3,500,000 now moves ahead of its North American counterparts, thanks in large measure to the leadership of its President, Doctor Tabaré Vázquez, an oncologist with first-hand understanding of the health effects of tobacco smoke, and the strong support of key legislators and leading non-governmental organizations. Implementation of the new decree will be supported by a public education campaign to extend “A Million Thanks” to the nation’s smokers for respecting the new policy.

## England’s Pubs and Clubs To Go Smoke-Free

As of next summer, England, too, will join the growing list of smoke-free nations, following the House of Commons’ historic Valentine’s Day decision to outlaw smoking in all enclosed workplaces and public places. After months of controversy, and in a stunning repudiation of Blair government proposals to exempt some pubs and thousands of “private members’ clubs,” the House of Commons voted, by 384 to 184, to extend smoke-free protections to all of England’s 124,000 pubs and clubs. When the votes were cast, even Prime Minister Blair and Health Minister Patricia Hewitt, faced with overwhelming defeat, were induced to vote against their own weaker bill. While the bill must still pass the House of Lords, approval there is considered reasonably certain. To read the new law, click [here](#). For more information on the debate, click [here](#).

England is the last of the United Kingdom to join the movement to smoke-free air. Scotland will end smoking in workplaces and public places next month, and Northern Ireland will do so in April of next year. The National Assembly for Wales endorsed a similar measure last year, but has been awaiting authority from London to legislate in this area, which will now be granted as part of the bill approved by the House of Commons.

## Resource Roundup

### “Hookah Bars and Clean Indoor Air Laws”

The Legal Consortium’s Ohio affiliate, the Tobacco Public Policy Center at Capitol University Law School, has released a timely new fact sheet that discusses the proliferation of hookah bars and the legal issues they raise for the drafting and implementation of smoke-free laws. For a copy, click [here](#).

## Smokin’ Links

Can’t keep up with the whirl of new smoke-free laws around the world? Who can? Action on Smoking and Health of Scotland, that’s who. For ASH Scotland’s country-by-country global overview, updated twice a month, click on [Smoke-free Legislation Around theWorld](#).

## Upcoming Tobacco Law Events

2006 Spring Training Workshops – Technical Assistance Legal Center (TALC)

March 23 – Sacramento, CA

March 29 – Anaheim, CA

Three workshop tracks:

- Smoke-free housing policies and ordinances
- Enforcement tips: PC308, black market cigarettes, and hookah
- Emerging issues and innovations in tobacco retailer licensing

For registration information, contact TALC at <http://talc.phi.org>.

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