

# 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).

## U.S. DOJ Ruling Applies to Tobacco Industry Deceit Internationally

On March 16, U.S. District Judge Gladys Kessler ruled that the remedies in her August 17, 2006 Order in the massive federal racketeering case (*U.S. v. Philip Morris*) apply to misleading and deceptive tobacco industry practices outside, as well as within, the United States. The judge also denied the tobacco company defendants' request for clarification of her August 17, 2006 order prohibiting the companies from making "any material false, misleading or deceptive statement or misrepresentation" in the future. She found that the extensive evidence of wrongdoing detailed in her 1,700-page [Final Opinion](#) should make it clear which illegal conduct is prohibited. The Opinion chronicles fifty years of tobacco industry deceit and deception in painstaking detail.

Judge Kessler's ruling is the latest development in the historic *U.S. v. Philip Morris* case. By ruling that the tobacco companies are prohibited from spreading fraudulent and misleading health messages and descriptors about their products throughout the world, the judge is recognizing the significant role the U.S. tobacco companies play in the global tobacco epidemic.

The U.S. Court of Appeals for the District of Columbia Circuit has stayed Judge Kessler's ruling and order as the case is appealed by the tobacco company defendants, the Justice Department and the public health organizations that were allowed to intervene in the case. The Justice Department and intervening public health organizations are seeking stronger remedies than the judge believed she could impose given a 2005 federal appeals court ruling. This controversial ruling found that under the civil Racketeer Influenced and Corrupt Organizations Act (RICO), the government could not seek the tobacco companies' past revenues and profits as a remedy in the case.

To read Judge Kessler's latest ruling in the DOJ case, click [here](#). For the Legal Consortium's "The Verdict Is In: Findings from *United States v. Philip Morris*" publication, click [here](#).



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## Affiliated Legal Resource Centers:

**California**  
[Technical Assistance Legal Center \(TALC\)](#)

**Colorado**  
[Secondhand Smoke Technical Assistance Resource Center](#)

**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](#)

## Lead DOJ Prosecutor Alleges Political Interference in Handling of Case

Sharon Eubanks, former lead prosecutor in the massive federal racketeering case against Big Tobacco (*U.S. v. Philip Morris*), has alleged publicly that her team received significant pressure from senior officials in the Department of Justice to go easy on the tobacco companies, once it became clear that the Department of Justice had the evidence necessary to prevail in the lawsuit. In particular, she claims that top officials at the DOJ insisted that she lower the government's request for tobacco-industry funding for a national cessation program from \$130 billion to \$10 billion. [Read a transcript of her comments.](#)

## U.S. Supreme Court Strikes Down Damages Award in Williams Case

The U.S. Supreme Court reversed a lower court's award of almost \$80 million in punitive damages to the estate of Jesse Williams, an Oregon man who smoked Philip Morris's Marlboro cigarettes for decades and died of lung cancer at 67. In a 5-4 decision, the Court held that the punitive damages award improperly punished the tobacco company for harm it inflicted on nonparties to the litigation – that is, victims who were not named in the lawsuit. The Court did not address the tobacco company's contention that the size of the punitive damages award was “grossly excessive.” Nor did the Court set limits on the amount of punitive damages that could be awarded to punish and deter reprehensible business practices that injure and kill. The case now goes back to the Oregon Supreme Court, which could order a new trial, reduce the award or reinstate its decision. For more information on this case, see [Legal Update, Feb./March 2006](#) and [Legal Update, Oct. 2006](#). To read the U.S. Supreme Court decision in *Williams v. Philip Morris*, click [here](#).

## Legal Consortium Files Amicus Brief in Austin Smoke-free Challenge

On March 8, 2007, the Tobacco Control Legal Consortium filed an *amicus* (friend-of-the-court) legal brief supporting the city of Austin in a challenge to Austin's smoke-free ordinance. The case, *Roark & Hardee v. City of Austin*, is currently before the Fifth Circuit Court of Appeals. Austin's Smoking in Public Places ordinance requires that owners or operators of public places take “necessary steps” to prevent or stop another person from smoking. The Legal Consortium argued that the U.S. District Court erred in October 2006 when it found that the term “necessary steps” was unconstitutionally vague. Joining the Legal Consortium in the brief were the American Cancer Society, American Heart Association, American Lung Association, Campaign for Tobacco-Free Kids, and Americans for Nonsmokers' Rights. To read the brief, click [here](#).

## Dueling Rulings on State Preemption of Local Smoke-free Laws

- **South Carolina:** Two South Carolina Circuit Court judges have come to opposing decisions on the same issue: whether a state law prohibits local governments from enacting their own smoke-free laws. On March 8, Circuit Judge John Few overturned the city of Greenville's smoke-free ordinance, finding that a 1996 amendment to the state's Clean Indoor Air Act prohibits local governments from imposing any restrictions on indoor smoking beyond those contained in the Act. To read the Greenville decision, click [here](#).

Only three months earlier, Circuit Judge Deadra Jefferson interpreted the same law as permitting local smoking restrictions, and upheld a similar smoke-free law in the town of Sullivan's Island. (See [Legal Update, Jan. 2007](#).) The losing parties in both cases have appealed the decisions, and the legal uncertainty is likely to be resolved by either a state Supreme Court ruling or new legislation.

- **Pennsylvania:** Two district court judges have issued different opinions on whether Pennsylvania's Clean Indoor Air Act of 1988 preempts local governments from enacting their own anti-smoking laws. On March 2, Court of Common Pleas Judge John Bozza struck down Erie County's smoke-free law prohibiting smoking in indoor public places. The judge found that the Act's preemption provision, which the legislature attempted to repeal in 1999, was never in fact repealed, and that the county was thus barred from enacting its own smoke-free ordinance. To read the Erie decision, click [here](#). The county plans to appeal the ruling.

In a similar recent challenge to Allegheny County's smoke-free ordinance, Judge Michael Della Vecchia upheld the ordinance, but delayed implementation for bars and restaurants until April 30, 2007, to give the state legislature time to clarify the preemption issue in new legislation. The judge described the controversy surrounding the repeal of the preemption clause in the Clean Indoor Air Act as “a legal quagmire.” He said that the debate over whether

local governments have the authority to enact indoor smoke-free laws belongs on the floor of the Legislature, not in a courtroom. (See [Legal Update, Jan. 2007](#).)

## Delaware Court Dismisses Foreign Government Tobacco Suit

On February 23, the Delaware Supreme Court upheld the dismissal of a lawsuit brought by the country of Panama and the Brazilian state of Sao Paulo, which were seeking to recover the costs of medical treatments for injured smokers. The Court held that the tobacco companies did not owe a direct legal duty to foreign governments when citizens of those governments who bought tobacco products later became injured as a result of using those products. To read the Court's decision, click [here](#).

## Belmont Considers Historic Smoke-free Law

On March 13, the city of Belmont, California had the first public hearing on a sweeping proposed law that would prohibit smoking in multi-unit apartments, taxicabs, within 20 feet of any public building or business entrance, and on any public street or sidewalk. The city already prohibits smoking in common areas of apartment buildings, but would extend the law to cover smoking in individual apartments. Several public hearings are planned before the City Council votes on the proposal. The Legal Consortium's California affiliate, the [Technical Assistance Legal Center at the Public Health Institute](#) in Oakland, assisted in drafting the proposed ordinance. To read a copy of the proposed law, click [here](#).

## Ask the Lawyers

This month we're introducing a new *Legal Update* feature entitled "Ask the Lawyers." The purpose of this column is to answer general questions that you may have on tobacco law issues. If you have a question 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 "What exactly is an *amicus curiae* brief?"

**A** *Amicus curiae* is Latin for "friend of the court." An *amicus* or "friend-of-the-court" brief is a written legal document presented to an appellate court that argues why a party to the case should prevail. The brief is filed by an outside party (person or organization) not involved in the litigation, but with a strong interest in the subject matter. The court allows the *amicus* to –

- Advise it on a matter of law directly affecting the litigation
- Inform the court of relevant additional information or arguments
- Draw the court's attention to implications of a potential holding on a particular group, jurisdiction, industry

The *amicus* brief must contain new and relevant matter – not just repeat the same information raised in the main brief. At the same time, appellate cases are limited to the factual record and to arguments that were raised in lower court. Thus, an *amicus* brief might include new and relevant medical evidence of the dangers of secondhand smoke or economic data on the effects of a smoke-free law in a particular jurisdiction. The *amicus* should cite the most reputable and well-documented sources available.

What function can an *amicus* brief serve? An *amicus* brief can focus the court on a decision's impact beyond the current litigation by bringing to the court's attention legal arguments and perspectives different from the parties' views or by addressing policy or social issues that are beyond the dispute and outside the record. It can also buttress or supplement a weak party brief by supplying additional information, such as case law developments in other states or similar relevant matters, or by advancing arguments raised in the main brief.



Kerry Cork, J.D., Tobacco Control Legal Consortium, answers this month's question.

Along with the potential benefits to drafting and filing an *amicus* brief, there are risks. Drafting an *amicus* brief can be an expensive and time-consuming undertaking, and can involve a great deal of negotiation and coordination with other parties. Also, a poorly or hastily drafted *amicus* brief runs the risk of duplicating arguments or introducing irrelevant issues, and may raise more questions than it answers. What's more, an *amicus* brief can be filed only if all parties have given their written consent, the court grants the *amicus* permission, or the court requests a brief. Given the significant investment of time, money, and resources, as well as the procedural hurdles in *amicus* involvement, parties should carefully consider their interest in filing an *amicus* brief, the function the brief will serve, and whether the potential benefits of drafting and filing a brief would be outweighed by the costs. In some cases, a better option might be to join the brief of another *amicus*.

The impact of an *amicus* brief on a court's decision is often difficult to gauge. Still, even if *amicus* briefs are not acknowledged in opinions, they can be very influential. A court's ruling may rest on a ground stressed by an *amicus* rather than by a party, or rely on information or factual analysis provided only by an *amicus*. In sum, participating as an *amicus* is one way that nonprofit organizations, public health, and public interest organizations with limited resources can help support or defend a tobacco control policy in court, and guide the court toward decisions that best serve the common good.

—Kerry Cork

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The Legal Update newsletter is a service of the Tobacco Control Legal Consortium.

## Resource Roundup

- **Hookah Report.** Check out the American Lung Association's new tobacco policy trend alert report on hookah smoking/hookah bars, "[An Emerging Deadly Trend – Waterpipe Tobacco Use.](#)" The report explores the science behind this relatively new tobacco use trend, and debunks the idea that hookah smoking is harmless.
- **Tobacco Laws Affecting California.** The Legal Consortium's California affiliate, the Technical Assistance Legal Center (TALC), has just released a new edition of "Tobacco Laws Affecting California," a user-friendly guide to all tobacco-related laws in effect as of January 1, 2007. The booklet includes information on California state laws and regulations related to tobacco, as well as on federal laws and regulations that apply within California. To download a PDF of the booklet, go to TALC's website at [www.talc.phlaw.org](http://www.talc.phlaw.org).

## Upcoming Event

The University of Maryland School of Law Center for Tobacco Regulation is holding a conference on "Safer Tobacco Products: Reducing Harm or Giving False Hope?" from 8 a.m. to 4 p.m. on April 20, 2007, in Baltimore, Maryland. For more information about the conference, click [here](#).

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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