

# Legal Update



Tobacco Control  
Legal Consortium



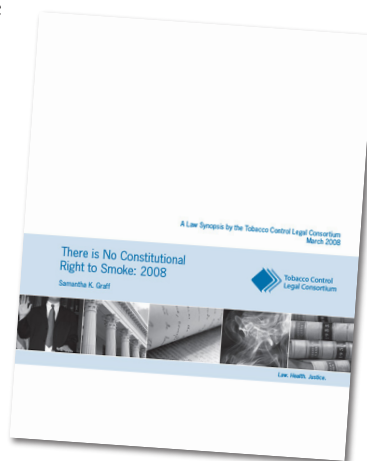
## Dear Tobacco Control Professional:

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).

## There Is No Constitutional Right to Smoke: 2008

Opponents of tobacco control policies often argue that smokers have a special, constitutionally protected right to smoke. To debunk this notion, the Legal Consortium has updated and revised its popular 2005 publication, “*There is No Constitutional Right to Smoke*.” The new edition was prepared by the author of the original publication, Samantha Graff of Public Health Law & Policy at the Public Health Institute – the Legal Consortium’s California affiliate. This law synopsis explains, in plain language, why smoking is not a specially protected liberty or privacy right under the U.S. Constitution’s Due Process Clause or Equal Protection Clauses. It highlights two types of state laws that may create a limited right to smoke in some states under some conditions, and describes how these laws can be amended so they do not impede local tobacco control efforts.

Like all our law synopses, this publication can be found online at [www.tobaccolawcenter.org](http://www.tobaccolawcenter.org) under Tobacco Control Legal Consortium, “Resources and Publications.” We hope you find this publication a useful and informative resource in your work as a tobacco control professional.



## Important New Court Rulings

The last several months have seen an outpouring of important judicial rulings with broad implications, both positive and negative, for tobacco control efforts nationwide.

### States Powerless to Control Online Cigarette Sales to Minors, Supreme Court Says

On February 20, 2008, the U.S. Supreme Court unanimously overturned the State of Maine’s attempt to control the online sale of cigarettes to minors by regulating the delivery of tobacco products. The high court ruled that state laws in this area are preempted by federal interstate trucking laws. This disappointing ruling opens the door for legal challenges to the cigarette delivery laws now in place in thirty-one other states.

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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](#)

As reported in our [August 2007 Legal Update](#), the Legal Consortium filed an *amicus* brief, arguing on behalf of many health and advocacy organizations that Maine’s law was a legitimate exercise of a state’s police powers. In a concurring opinion, Justice Ruth Bader Ginsburg urged Congress to remedy the regulatory gap created by the Court’s decision, and quoted the Legal Consortium’s brief, written by Kathleen Dachille, director of the Legal Consortium’s Maryland affiliate: “As cyberspace acts as a risk-free zone where minors can anonymously purchase tobacco, unrestricted online tobacco sales create a major barrier to comprehensive youth tobacco control.” Unfortunately, the Court’s decision has created just such a barrier, and leaves the protection of America’s minors to a Congress with a record of indifference to most tobacco-related problems.

To read the *Rowe v. New Hampshire Motor Transport Association* decision, click [here](#). To read the Legal Consortium’s *amicus* brief, click [here](#).

### **Smoke-Free in Austin City Limits**

On March 27, the Fifth Circuit U.S. Court of Appeals restored the Austin, Texas, smoke-free ordinance, which had been partially invalidated by a lower court for failing to spell out in detail the steps a business must take to implement the law. Several bars had challenged the law’s requirement that operators of public places take “reasonable steps” to ensure compliance with the ordinance on their premises – a provision the challengers said was unconstitutionally vague. The court minced no words in rejecting this claim, noting pointedly that “[f]rom this evidence, we find it apparent that, most of the time, the only ‘steps’ taken were in trying to find a loop-hole to avoid enforcing the ordinance. Such behavior is a clear violation of the ‘necessary steps’ provision.”



The Tobacco Control Legal Consortium worked closely with Texas advocates and the city’s counsel during earlier stages of the Austin litigation. On the appeal, we submitted an *amicus* brief on behalf of the American Cancer Society, the American Heart Association, the American Lung Association, the American Nonsmokers Rights Foundation and the Campaign for Tobacco Free Kids, and helped the city’s counsel prepare for the oral argument. For a copy of the court’s decision, click [here](#). For a copy of the Legal Consortium’s brief, written by consulting attorney Cliff Douglas, click [here](#).

### **Ohio Smoke-Free Law Upheld**

On March 11, a Hamilton County, Ohio, judge again dismissed a legal challenge to Ohio’s smoke-free law, rejecting bar and restaurant owners’ arguments that the law is unconstitutionally vague and denies them due process of law. County Common Pleas Court Judge Fred Nelson said neither the federal nor the state constitution creates a fundamental right to smoke in public, and added that “[t]he court declines to fabricate such a right.” The judge reaffirmed his earlier refusal to enjoin enforcement of the new voter-initiated law. Ohio’s Smoke Free Workplace Act is one of the strictest clean indoor acts in the U.S., prohibiting smoking in nearly all indoor public places and places of employment. To read the Ohio law, click [here](#).

### **Green Light for Greenville: South Carolina Cities Free to Regulate Smoking**

On March 31, the South Carolina Supreme Court reversed a lower court ruling that had overturned Greenville’s smoke-free ordinance. The state’s Supreme Court unanimously rejected the argument that South Carolina’s youth access law expressly preempts local governments from passing smoke-free ordinances, holding instead that the youth access law addresses only the distribution of tobacco products to minors, and does not deal with the regulation of smoking. To read the *Foothills Brewing Concern v. City of Greenville* decision, click [here](#).

A second similar case, involving the Town of Sullivan’s Island, is still pending before the same court. As reported in our [January/February 2008 Legal Update](#), the Legal Consortium filed an *amicus* brief in that case on behalf of many state and national organizations, raising many of the arguments accepted by the court itself in the new *Greenville* decision. The Sullivan’s Island case is expected to be heard early this summer.

### **Theaters’ Arguments Get the Hook in Colorado**

On March 20, 2008, the Colorado Court of Appeals upheld that state’s two-year-old smoke-free law against a constitutional challenge by several theaters, which claimed the law violated the First Amendment because it has no special exemption for smoking in theatrical productions. Although plays may be protected speech under the Constitution, the appellate court unanimously ruled that “[s]moking, by itself, is not sufficiently expressive to qualify for First Amendment protection.” The Colorado law has previously been upheld against other legal arguments by a Federal Court of Appeals. For a copy of the state court’s opinion, click [here](#).

## Curtain Dropping on Minnesota “Theater Nights”

In related news, the Minnesota Department of Health and local prosecutors are moving to curtail sham “theater nights” organized by several Minnesota bars hoping to circumvent that state’s new smoke-free law. Minnesota’s [Freedom to Breathe Act](#), which took effect October 1, 2007, prohibits indoor smoking in workplaces, including bars and restaurants, but exempts “smoking by actors and actresses as part of a theatrical performance.” Some bar owners have been inspired to call their bars “theaters” and their employees and customers “actors” – arguing that this allows the “actors” to smoke with impunity. The Health Department has begun a civil enforcement action against one bar, and will seek a definitive court ruling to end the practice, and two cities have begun misdemeanor prosecutions of other violators. The Legal Consortium’s coordinating office, the Tobacco Law Center at William Mitchell College of Law in Saint Paul, is assisting local advocates in responding to the cases. Rulings are expected by mid-summer.



## Historic Damage Award Overturned

On April 10, a New York appellate court reversed a 73-year-old lung cancer victim’s \$3.4 million compensatory damage award against two tobacco companies and threw out \$17.1 million in punitive damages against Philip Morris USA. New York’s Appellate Division, 1<sup>st</sup> Department, ruled (3-2) that Norma Rose had failed to prove that the tobacco companies negligently designed cigarettes by continuing to market a product with higher levels of tar and nicotine than “light cigarettes.” The court ruled that Rose provided no evidence that low-tar, low-nicotine cigarettes would “have been acceptable to the consumers that constitute the market for the allegedly defective product” – regular cigarettes.

In a 38-page dissent, two justices sharply criticized the tobacco companies, finding that the test of consumer acceptability amounted to “nothing more than a cynical effort by the defendants to maintain the commercial advantages of continuing to sell unreasonably dangerous addictive products to addicts.” The dissenting justices noted that it was clear that Rose’s repeated efforts to quit smoking were stymied because of the addictive level of nicotine in regular cigarettes and that it was the product’s design defect that led to “more than 50 years’ continued exposure to cancer-causing tar which was a substantial factor in causing her lung cancer.” The plaintiffs have said they will appeal. To read the *Rose v. Brown & Williamson* decision, click [here](#).

## Massive Class Action Case Terminated

On April 4, the U.S. Court of Appeals for the Second Circuit “decertified” what would arguably have been the largest lawsuit of all time: an \$800 billion “light cigarette” class-action lawsuit involving an estimated 60 million plaintiffs. The decertification ruling means that the case will not be allowed to go forward as a class action on behalf of the large group, and that claims must be pursued individually. The lawsuit had claimed that tobacco companies violated the Racketeer Influenced and Corrupt Organizations Act in falsely advertising the purported health benefits of “light” cigarettes and thus subjecting the plaintiffs to economic fraud. The plaintiffs alleged that the tobacco companies marketed light cigarettes as “lower risk,” even though the companies knew that smokers of “lights” would ultimately receive the same doses of tar and nicotine as smokers of regular cigarettes, either by inhaling more deeply or smoking more cigarettes to satisfy their cravings.

The Court ruled that the plaintiffs could not be treated as a class because “[i]ndividualized proof is needed to overcome the possibility that a member of the purported class purchased Lights for some reason other than the belief that Lights were a healthier alternative.” The decision overturned a September 2006 ruling by U.S. District Judge Jack Weinstein, who had issued a 540-page opinion supporting his decision to allow class-action treatment of the plaintiffs’ claims. While the Second Circuit’s decertification ruling is significant, it does not mean that other “light cigarette” class actions cannot succeed, as they have elsewhere in the U.S. For the Legal Consortium’s recent overview of light cigarette litigation, click [here](#). To read the *McLaughlin v. Philip Morris USA, Inc.* decision, click [here](#).

## Midwest Going Smoke-Free

On February 21, Nebraska Governor Dave Heineman signed the Nebraska Clean Indoor Air Act, making restaurants, bars, and gaming facilities smoke-free throughout the state. This makes Nebraska the 23rd state to pass a smoke-free law covering restaurants and bars. The law will not take effect until June 1, 2009.

On April 16, Iowa became the latest Midwestern state to join the smoke-free ranks, as Governor Chet Culver signed strong legislation passed by the legislature the week before. Although a coalition of Iowa bars and restaurants has threatened litigation, the law is expected to survive any legal challenge. Iowa's law will take effect July 1.

As Iowa and Nebraska join smoke-free Illinois and Minnesota, public attention is shifting increasingly to laggard Wisconsin. There, state legislators drag their feet despite the smoke-free policies already in place in six cities, and despite new Minnesota billboards pointing out to visitors entering from Wisconsin that "the air is cleaner here." No wonder Wisconsin Governor Jim Doyle warns that his state is fast becoming "the ashtray of the Midwest."

For more information on the new Iowa and Nebraska laws, click [here](#).

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 Can the Americans with Disabilities Act be used by disabled plaintiffs to achieve a smoke-free environment in public places such as restaurants?**

**A** Yes. Title III of the Americans with Disabilities Act provides the basis for a suit by certain disabled plaintiffs against a restaurant or bar that permits smoking. In general, under the ADA, plaintiffs must prove that (1) they have a physical or mental impairment, (2) this impairment implicates at least one major life activity, and (3) the limitation is substantial. The "ideal" plaintiffs seeking a smokefree environment as the remedy should have serious cardio or vascular impairments that substantially limit their ability to breathe or walk. Plaintiffs with a "less" significant impairment will be unlikely to withstand the defendant's motion to dismiss.

Once plaintiffs clear the disability hurdle, they must prove that the presence of secondhand smoke effectively prevents them from patronizing the establishment. In *Edwards v. GMRI, Inc.*, Civil Action Number 97-4327 (D. Md. March 1, 1999), the court held that "[j]ust as a staircase denies access to someone in a wheelchair, tobacco smoke prevents Plaintiffs [who suffered from asthma] from dining at Defendants' restaurants." If plaintiffs successfully prove that they are disabled and that the presence of secondhand smoke effectively prevents them from entering a restaurant or bar that allows smoking, the ADA gives a court the authority to order the establishment to modify its smoking policy to prohibit smoking in order to break down the barrier that prevents the disabled plaintiffs from patronizing the establishment.

—J.P. Szymkowicz

**About the Author**

J.P. Szymkowicz, a partner in the Washington, D.C. law firm of Szymkowicz & Szymkowicz, LLP, recently represented a disabled client who sought legal protection against secondhand smoke exposure under the ADA.

For the Tobacco Control Legal Consortium's law synopsis with information about using the ADA to assert a legal right not to be exposed to smoke in workplaces and public places, click [here](#).



J.P. Szymkowicz, J.D., Szymkowicz and Szymkowicz, LLP, answers this month's question.



## The Global Perspective



## Smoke-Free South of the Border

The Mexican Senate recently passed a nationwide smoke-free law that requires designated smoking areas for most public spaces and separate walled off rooms for smokers in restaurants and bars. Violators can face jail time of up to 36 hours, as well as stiff fines. The law also prohibits tobacco companies from sponsoring sporting events and will only allow tobacco products

ads in areas where children are not allowed, such as bars.

The law, endorsed by President Felipe Calderon, seeks to eliminate smoking by youth and to reduce exposure to secondhand smoke. Approximately 13 million Mexicans smoke, and about 60,000 Mexicans die every year from diseases associated with smoking

On April 3, Mexico City enacted a smoke-free law even more comprehensive than the federal law. The new law prohibits smoking in any public space, including offices, malls, restaurants and bars. One of the world's largest cities, metropolitan Mexico City is home to more than 18 million people.

These Mexican laws are historic tobacco control measures in Latin America, and just the latest international smoke-free laws to improve public health and protect nonsmokers from secondhand smoke.



## Russia Ratifies Framework Convention on Tobacco Control

On April 11, Russia's lower house of parliament, the Duma, ratified the World Health Organization's Framework Convention on Tobacco Control, the first international public health treaty. The move comes as good news in a country where between 400,000 and 500,000 people die annually from smoking-related diseases.

Russia's action leaves holdouts the United States and Indonesia as the most populous countries that have yet to ratify the treaty, which has now been accepted by countries representing over eighty percent of the world's population. For more information on the WHO Framework Convention, click [here](#). For a list of the countries that have ratified the treaty, click [here](#).



## Profiles in Public Health Law



### Maggie Mahoney Named "2008 Up & Coming Attorney"

Tobacco Control Legal Consortium staff attorney Maggie Mahoney has been selected by *Minnesota Lawyer* magazine as one of its "2008 Up & Coming Attorneys." This award is reserved for a handful of Minnesota attorneys who have distinguished themselves during their first ten years in practice, based on their leadership, professional accomplishment and service to the legal community. Readers of the *Legal Update* who have consulted Maggie for legal information and assistance will understand how well deserved the recognition is. To congratulate her, click [here](#).

## Public Health Law Opportunities

The World Health Organization is seeking applicants for three legal positions related to tobacco control. Application deadlines are early May. The positions include:

- A 6-month position as Technical Officer (Legal); for more information, click [here](#).
- A 2-year position as Team Leader (Framework Convention Instruments); click [here](#).
- A 2-year position as a Legal Officer; click [here](#).

## Resource Roundup

- **Model Tobacco-free or Smoke-free Event Policy.** The Legal Consortium's California affiliate, the Technical Assistance Legal Center, has developed two model policies to help organizations limit tobacco use at events they sponsor or operate: one restricting smoking, and the other restricting *all* tobacco use, including chew, dip and snuff. To read these model policies, click [here](#).
- **Smoke-Free Policies: An Action Guide.** The Partnership for Prevention recently released a publication entitled "Smoke-free Policies: Establishing a Smoke-free Ordinance to Reduce Exposure to Secondhand Smoke in Indoor Worksites and Public Places." To download a copy or order a hard copy, click [here](#).
- **Big Tobacco's Guinea Pigs: How an Unregulated Industry Experiments on America's Kids and Consumers.** A recently released report funded by the Robert Wood Johnson Foundation describes a new generation of tobacco products designed and marketed to recruit new youth users, create and sustain nicotine addiction, and discourage users from quitting. The report was prepared by a coalition of public health organizations – the Campaign for Tobacco-Free Kids, Cancer Action Network, American Heart Association, American Stroke Association, and American Lung Association. For a copy of the report, click [here](#).
- **WHO Report on the Global Tobacco Epidemic, 2008.** The World Health Organization recently released a landmark report containing the first comprehensive worldwide analysis of tobacco use and control efforts. The report presents government leaders with six policies to counter the tobacco epidemic. The tobacco control measures, which reflect and build on the WHO Framework Convention on Tobacco Control, have been given the acronym "MPOWER": **M**onitor tobacco use and prevention policies; **P**rotect people from tobacco smoke; **O**ffer help to quit tobacco use; **W**arn about the dangers of tobacco; **E**nforce bans on tobacco advertising, promotion and sponsorship; and **R**aise taxes on tobacco. To access the report, click [here](#).

## Upcoming Events

- **Tobacco Documents Workshop.** The University of California, San Francisco Center for Tobacco Control Research and Education will hold a one-day workshop on using tobacco industry documents for advocacy on May 17, 2008. For more information about this event, contact Jenni Alexander, [Jenni.Alexander@ucsf.edu](mailto:Jenni.Alexander@ucsf.edu) or call (415) 502-6341.
- **The Fifth World Conference on Nonsmoker's Rights,** sponsored by the National Center for Nonsmokers' Rights and by Law Professor John Banzhaf of Action on Smoking and Health (ASH), will be held at the George Washington University Law School, 2000 H St., Washington, D.C., on June 7–8, 2008. For more information about this event, click [here](#).

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

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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