

# Legal Update

from the Tobacco Control Legal Consortium



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## 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).

## Trial Concludes in the United States' Tobacco Racketeering Lawsuit



The Washington, D.C. trial of the United States' massive lawsuit against the major cigarette manufacturers is nearing conclusion. One of the most enormous cases of all time, the suit alleges that the industry has conspired for fifty years to mislead the American people about the health effects and addictiveness of cigarettes, in violation of the Racketeer Influenced Corrupt Organizations Act ("RICO"). After hundreds of witnesses and 40,000 pages of testimony, the court may hear closing arguments this week.

At the same time, according to some press reports, the parties have taken part in mediated discussions behind closed doors, to explore the possibility of a settlement. Whether the outcome is determined by the court or by settlement, the case could result in a wide range of important public health measures, including profound changes in the way tobacco companies do business.

The Legal Consortium's latest publication, "The United States Government's Racketeering Lawsuit against the Cigarette Industry," prepared by attorneys of the Tobacco Control Resource Center in Boston, provides a background briefing on this important case to help you respond to the events ahead. It reviews the allegations against the defendants and their responses, some of the events prior to the trial and some of the key testimony.

The outcome of the case will depend on many factors. Clearly, though, the case has the potential to alter the landscape of tobacco control. We hope this new publication will help you understand and respond to those changes. To view a pdf version of the synopsis, click on the image above or go to <http://www.wmitchell.edu/tobaccolaw/resources/DOJ.pdf>. For fascinating observations from the courtroom, see Gene Borio's "Tobacco On Trial" blog at [www.tobacco-on-trial.com](http://www.tobacco-on-trial.com).

## "Simon II" Decision Ends Potential Threat to Private Tobacco Litigation

In a development that helps ensure the continued viability of litigation by injured smokers, a federal appellate court has overturned a 2002 ruling, known as *Simon II*, that would have established a single nationwide class action to resolve virtually all potential legal claims for punitive damages against tobacco manufacturers. In the 2002 ruling, innovative and highly-respected Federal District Court Judge Jack Weinstein of the Eastern District of New York had ordered the consolidation, in a single massive case, of all the potential punitive damage claims of the millions of smokers who have been diagnosed with smoking-related diseases. Smokers already pursuing legal cases in state and federal courts around the country would have seen their claims for punitive damages

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- Family Law and Secondhand Smoke

## 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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removed from the courts in which their cases are pending and transferred to the single massive case before Judge Weinstein, who would then have decided all issues related to punitive damages once and for all. The remaining portions of their cases, including their claims for medical bills, lost wages, pain and suffering and other compensation, would have remained in the courts of their home jurisdictions.

Many observers feared that the practical effect of this unprecedented approach would have been to end personal injury litigation against tobacco manufacturers, because it would have removed the punitive damage claims that provide the primary financial incentive for attorneys to accept these difficult cases. Further, the order would effectively have cut off the ability of those who develop diseases in the future, and those injured by secondhand smoke, to pursue punitive damages. For these reasons, the Legal Consortium joined with the major health voluntary organizations, the Campaign for Tobacco-Free Kids and other tobacco control organizations in a friend-of-the-court brief urging the Court of Appeals to reverse this decision. In last month's ruling, a three-judge panel of the U.S. Court of Appeals for the Second Circuit vacated the District Court's order and returned the case to the lower court. This appears to put to rest the possibility that Simon would mark the final chapter in the fifty-year history of tobacco litigation. To read the Second Circuit's decision, click [here](#).

## States Considering Suit Against R.J. Reynolds for "Harm Reduction" Claims

According to disclosure statements buried in R. J Reynolds' latest quarterly federal securities filings, some forty state attorneys general warned Reynolds in late March that one or more states plans to sue Reynolds over its advertising for its pseudo-cigarette "Eclipse," which Reynolds claims "may present less risk of cancer" than regular cigarettes. The attorneys general allege that Reynolds is in violation of the 1998 [Master Settlement Agreement](#), under which Reynolds is permanently prohibited from misrepresenting the facts about the health consequences of using any tobacco product. (For a summary of the settlement's restrictions on tobacco company advertising, click [here](#)).

One of many emerging cigarette substitutes and other novel products being positioned as "potentially reduced exposure products," or "PREPs," Eclipse is a cigarette-like delivery device that heats, rather than burns tobacco. The current scientific evidence does not prove whether Eclipse's unconventional design actually reduces the risk of disease. In fact, several studies suggest that Eclipse users may actually have higher blood levels of carbon monoxide than regular smokers. Yet most smokers think Eclipse is safer than regular cigarettes, and many think it is as safe as not smoking, according to another published study. Shiffman S, Pillitteri JL, Burton, SL, et al. Smoker and ex-smoker reactions to cigarettes claiming reduced risk. [Tobacco Control 2004,13\(1\):78-84](#).

A legal action by the states would be the first major challenge to the proliferation of unregulated—and, many experts say, unsubstantiated—harm reduction claims for unconventional tobacco products. For a valuable new report from the University of Minnesota's Transdisciplinary Tobacco Use Reduction Center, summarizing the issues and scientific evidence about Eclipse and other PREPs, click [here](#).

## Minnesota Judge Dismisses "Light" Class Action Suit

In May, a Minnesota state trial court dismissed a "light" cigarette suit on behalf of Minnesota smokers of Camel Lights, ruling that the plaintiffs' claims under state consumer protection laws are preempted by the federal [Cigarette Labeling and Advertising Act](#). As in other light cigarette litigation, the plaintiffs in this case claimed that, by marketing its cigarettes as "light," the tobacco company misled them into believing that its products delivered less tar and nicotine to smokers, and were thus safer than regular cigarettes. *Dahl v. R. J. Reynolds*. The *Dahl* plaintiffs were Minnesota smokers who claimed that deceptive labeling induced them to purchase a product they would not have otherwise purchased.

Hennepin County District Court Judge Diana Eagon's decision rested on an unprecedented reading of the federal Labeling Act, which prescribes mandatory health warnings for cigarette packaging and advertising, but also forbids states from imposing further requirements or prohibitions with respect to the advertising or promotion of cigarettes based on health concerns. Under Judge Eagon's broad interpretation of the preemption provision in the Labeling Act, cigarette consumers would be prevented from bringing almost any tobacco-related fraud claims.

Judge Eagon's decision stands in seeming conflict with a decision by another judge of the same county, issued earlier this year, approving class action treatment of virtually identical claims by Minnesota purchasers of Marlboro Lights. In that case, *Curtis et al. v. Philip Morris Co.*, Judge Allen Oleisky did not discuss federal preemption, but focused instead on whether a class action was the most appropriate way for consumers to seek redress for deceptive misrepresentations about Marlboro Lights.

The troubling *Dahl* ruling could have vast ramifications for tobacco litigation if Judge Eagon's interpretation of the preemptive scope of the Labeling Act is adopted in other cases around the country. In, for example, the groundbreaking *Price v. Philip Morris*, the Illinois Supreme Court is reviewing a massive \$10.1 billion verdict against Philip Morris for its allegedly deceptive advertising and sale of Marlboro Lights and Cambridge Lights. The lower court in *Price* dismissed a similar federal preemption argument, finding that plaintiffs' claims were "predicated not on a duty, based on smoking and health, but rather on a more general obligation—the duty not to deceive." Oral argument in *Price* occurred on November 10, 2004 and the case is awaiting decision.

Other ongoing "light" cigarette class actions include *Aspinall v. Philip Morris*, 675 N.E. 2d 57 (Mass. 2004), which was certified as a class action in August 2004, and *Dayna Craft v. Philip Morris*, a statewide "Lights" class action on appeal to the Missouri Court of Appeals (Eastern District) (oral argument occurred on March 8, 2005). In neither of these cases did the courts address whether state tobacco-related consumer protection claims were preempted by federal law. It remains to be seen what impact, if any, the *Dahl* decision will have on these pending class actions.

\* In *Dayna Craft*, the Tobacco Control Legal Consortium joined in an *amicus curiae* legal brief supporting class certification.

### Legal Consortium's "Friend of Court" Legal Briefs On-line

The Tobacco Control Legal Consortium has prepared and filed six, and joined in two, *amicus curiae* ("friend of the court") briefs in tobacco-related cases of national significance. We've submitted these briefs before the Supreme Courts of Kentucky, Washington, Montana, New Hampshire, Florida, and California, as well as the Second Circuit U.S. Court of Appeals and the Missouri Court of Appeals.

The legal briefs, which are available on the Legal Consortium's website at [www.tclconline.org](http://www.tclconline.org), address the following issues:

#### State Preemption of Local Smoke-free Ordinances

- *JTR Colebrook, Inc. v. Town of Colebrook* (New Hampshire)
- *American Cancer Society v. State of Montana* (Montana)
- *Lexington-Fayette County Food & Beverage Assoc. v. Lexington-Fayette Urban County Govt.* (Kentucky)

#### Federal Preemption of State Regulation of Tobacco Product Distribution

- *California v. R. J. Reynolds* (California)

#### Local Ordinance Conflict with State Clean Indoor Air Act

- *Tacoma-Pierce County Board of Health v. EIC* (Washington)

#### Access to Courts for Injured Tobacco Consumers

- *Simon II Litigation v. Liggett Group* (New York)
- *Dayna Craft v. Philip Morris Co.* (Missouri)
- *Engle v. Liggett Group, Inc.* (Florida)

#### "Light" Cigarettes Class Actions

- *Dayna Craft v. Philip Morris Co.* (Missouri)

#### Punitive Damages in Class Actions

- *Simon II Litigation v. Liggett Group* (New York)
- *Engle v. Liggett Group, Inc.* (Florida)

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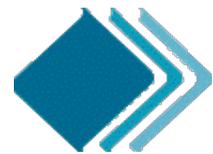
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