

Legal Update

from the Tobacco Control Legal Consortium



Dear Tobacco Control Professional:

May/June 2006

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.

What's New at California's Technical Assistance Legal Center?

California's Technical Assistance Legal Center (TALC) is a state-funded project that works directly with California communities to help design and implement innovative tobacco control laws. TALC has developed dozens of model ordinances, fact sheets, and other advocacy tools over the years, and its staff attorneys lead regional trainings across the state to help advocates and government agencies fully understand existing tobacco control policy and envision new possibilities.

When it comes to new and emerging tobacco control strategies—restricting smoking in apartment buildings, for instance, or using a local tobacco retailer licensing law to help fund enforcement—TALC attorneys combine their deep expertise in tobacco control with an innovative spirit for finding new ways to use the law to protect the public's health.

But legal support is a critical part of any public health campaign, of course—not just tobacco control. That's what recently motivated TALC's Program Director, Marice Ashe, to launch the Public Health Law Program (PHLP), a new program that brings TALC's approach to other pressing public health concerns, such as obesity and infectious disease control.



Marice Ashe, Program Director of the Technical Assistance Legal Center in Oakland, California

PHLP was founded on the premise that, for any public health movement, legal support is necessary to safeguard against the threat of litigation, to safely push limits of existing law and practice, and to institutionalize social change through the legal system. PHLP works with community organizations, public health and planning departments, schools, elected officials, and others to help develop groundbreaking policy solutions to public health challenges as—or even before—they arise. For instance: how can a city legally prevent a fast-food outlet from opening in a low-income neighborhood? To what extent can schools legally limit students' access to junk food and its marketing? In the event of a flu pandemic, how can private employers work with the local health department to protect employees' well-being without violating their individual constitutional rights?

With the flexibility to explore emerging issues like these in a dynamic political environment, PHLP attorneys are following TALC's lead in helping California communities advance their policy goals in innovative ways.

For more about TALC and PHLP, visit <http://talc.phil.org> and www.phlaw.org.

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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

States Sue Tobacco Companies over \$1.2 Billion in Settlement Payments

Attorneys general in more than twenty-six states, including New York, Illinois, Massachusetts, and Ohio, have filed lawsuits against the nation's largest tobacco companies, seeking to recover approximately \$1.2 billion in payments under the 1998 [Master Settlement Agreement](#) (MSA). The states are suing the major domestic tobacco firms for their share of MSA settlement payments, which they receive as annual compensation for the costly effects of tobacco use, including public health and education. The cigarette makers are balking at paying the states the full amounts, claiming that a settlement provision allows them to pay the states less if their tobacco sales and market shares decline. The companies contend that because they lost tobacco sales and market shares to smaller rival companies not burdened by the settlement, the larger companies should be able to keep a portion of the settlement payments. This rapid succession of lawsuits follows a recent breakdown in talks between the National Association of Attorneys General and the tobacco companies.

Minnesota Supreme Court Upholds Tobacco Fee

On May 16, the Minnesota Supreme Court unanimously upheld a new 75-cents-per-pack fee on cigarettes, reversing a lower court decision that the fee violated Minnesota's 1998 settlement with the industry. The legislature passed the "health impact fee" last year to offset smoking-related health costs. The health impact fee is expected to generate more than \$200 million annually, and had already collected more than \$110 million by December. At that time, Ramsey County District Court Judge Michael Fetsch invalidated the fee, ruling that it conflicted with the agreement in which the state settled past and future claims against the tobacco industry in exchange for billions of dollars in settlement payments. The state's high court overturned this decision, finding that the landmark 1998 settlement did not prevent the state legislature from imposing future taxes or fees on tobacco for smoking-related costs.

Writing for the majority, Chief Justice Russell Anderson said that the settlement did not surrender the legislature's "sovereign power" to recover costs due "to the use of tobacco products and to discourage smoking." Many states awaited this ruling with interest, since tobacco companies had begun citing the lower court ruling as "evidence" that the power of any state to raise cigarette taxes (or fees) was limited by the 1998 Master Settlement Agreement that settled the states' tobacco lawsuits nationwide. For a copy of the Minnesota Supreme Court opinion, click [here](#).

"Self-Extinguishing" Cigarette Bills on Rise Throughout U.S.

Over the past eighteen months, legislators in more than a dozen states have introduced legislation to require stores in their states to sell "self-extinguishing" cigarettes, which stop burning when not actively smoked. Illinois is the latest state to pass a self-extinguishing cigarette law, which will go into effect at the beginning of 2008. Vermont's law on self-extinguishing cigarettes went into effect on May 1, 2006, and similar laws have already passed in New York, California, and Canada. Proposed federal legislation would require self-extinguishing cigarettes nationally.

Cigarette fires have been the leading cause of U.S. fire fatalities for decades, killing tens of thousands of people in the past 30 years, according to the [National Fire Protection Association](#) (NFPA), a research group that provides data for state and federal fire codes. NFPA reports that deaths have declined with falling smoking rates, but cigarette fires still kill 700 to 900 people a year. Senior citizens suffer disproportionately, dying in cigarette fires at almost four times the rate of other Americans. Nationwide, nearly one in 10 fatal building fires begin with a cigarette and end with the death of a senior citizen, according to NFPA. For more information about the self-extinguishing cigarette issue, including legislative updates and research reports, click [here](#).

Punitive Damages in Tobacco Litigation Take Center Stage

U.S. Supreme Court to Hear Philip Morris Punitive Damages Case

In what could prove to be a significant turning point in tobacco products litigation, the U.S. Supreme Court announced May 30 that it will hear Philip Morris USA's appeal of a \$79.5 million dollar punitive dollar award to the family of Jesse Williams, an Oregon smoker for forty years who died of lung cancer. *Williams v. Philip Morris*. The Supreme Court has not ruled on punitive

damages in tobacco products litigation to date, and its ruling in the *Williams* case may offer more definitive guidance on the issue of punitive damages awarded to plaintiffs for the “highly reprehensible conduct” of tobacco companies.

In the *Williams* case, a trial court reduced the punitive damages to \$32 million, an Oregon appeals court then reinstated the original \$79.5 million, and in February 2006, the Oregon Supreme Court reaffirmed the judgment. For the Tobacco Control Resource Center’s legal backgrounder on this case, click [here](#).

In two other recent, high-profile tobacco product liability cases, state courts have upheld individual plaintiffs’ multi-million dollar punitive damages awards:

- In April, a California appellate court upheld a \$28 million punitive damages award against Philip Morris in the suit of the late Betty Bullock, who smoked the company’s cigarettes for 45 years and died of lung cancer in 2003. *Bullock v. Philip Morris*. The California court affirmed the trial court’s judgment that Philip Morris intentionally concealed the deadly nature of its products for decades, manipulated its products to make them more addictive, and pitched advertising campaigns to young people like Bullock, depicting smoking as glamorous and romantic. The court majority found the 33-to-one ratio of punitive to compensatory damages justifiable in light of the “extreme reprehensibility” of Philip Morris’ misconduct. To view the opinion, click [here](#).
- The U.S. Supreme Court refused to review the Philip Morris appeal in the California case of *Boeken v. Philip Morris Inc., 05-600*, leaving stand a \$50 million damage award to the family of Richard Boeken, another forty-year smoker who died of lung cancer.

Other Significant Tobacco Liability Cases

Massachusetts High Court Rules Tobacco Firms Cannot Blame Smokers as Defense

In a recent landmark decision, Massachusetts’ Supreme Judicial Court ruled that Philip Morris cannot defend itself against a wrongful death lawsuit by the widow of a deceased smoker by arguing that he should have known the health risks of cigarettes and that he unreasonably put himself in danger by smoking. *Haglund v. Philip Morris Inc.*, No. 09483 (Mass. May 18, 2006). In striking down the traditional “personal responsibility” tobacco industry defense, the court said that cigarettes are so dangerous they cannot be used safely by anyone. The ruling, believed to be the first of its kind in the nation, was hailed by the tobacco control community as a significant precedent. Although the *Haglund* decision concerns suits against cigarette makers in Massachusetts alone, the ruling may influence the approach of courts in other states. Such a development would be extremely significant, since tobacco companies’ first line of defense in wrongful death suits has been to blame the victims for “assuming the risk” of death. For a copy of the opinion, click [here](#).

New Zealand High Court Dismisses Pioneering Tobacco Liability Case

On May 3, 2006, in a blow to efforts in New Zealand to hold tobacco companies responsible for selling a deadly product, the New Zealand High Court dismissed *Pou v. British American Tobacco (BAT) and WD and HO Wills*. Janice Pou and her adult children brought a \$310,000 lawsuit claiming the tobacco companies owed her a duty in 1968 to warn her of the potential health risks caused from smoking cigarettes. Convinced by advertisements and statements by tobacco companies that smoking was glamorous and safe, Mrs. Pou began smoking in 1968 at age 17. She died of lung cancer at the age of 51.

The Court found that the balance of the evidence did not show that cigarettes produced by the tobacco companies caused Mrs. Pou’s lung cancer. The Court also said that it was common knowledge in 1968 that smoking was dangerously unhealthy, addictive and could cause cancer. According to the Court, even if Mrs. Pou was unaware of the dangers of smoking in 1968, she would have been aware of the dangers of smoking by 1974 when written warnings began appearing on cigarette packages in New Zealand. The Court concluded that the damaging effects to her health caused by the cigarettes she smoked prior to 1974 were supplanted by the damaging effects to her health caused by her own free and informed choice to smoke after 1974.

The plaintiff argued that the tobacco companies owed consumers a duty to cease manufacturing and distributing cigarettes on the basis that they are a dangerous product. The Court rejected this claim as “draconian,” because it would amount to a judicial prohibition of a product that has always been sold legally in New Zealand.

Mrs. Pou’s children, who continued the lawsuit after her death, have not yet decided whether to appeal. To view the New Zealand High Court opinion, click [here](#).

Delaware Supreme Court Hears Appeal on Legacy Ads

The Delaware Supreme Court recently heard oral arguments in an appeal of a lawsuit brought by Lorillard Tobacco Company regarding the lawfulness of counter-marketing advertisements run by the American Legacy Foundation. Many of the ads in the foundation’s “Truth” campaign use edgy tactics to impress young people with the health risks of smoking. According to Lorillard, these ads violated the “vilification provision” in the 1998 multimillion dollar Master Settlement Agreement (MSA) between state attorneys general and the four major tobacco companies, which prohibits Legacy from vilifying or making personal attacks on any person, company or governmental agency. At issue was the meaning of the terms “vilification” and “personal attack,” which are not defined in the MSA. In a hearing last August, Vice Chancellor Stephen P. Lamb of the Delaware Chancery Court ruled that the foundation’s ads did not violate the MSA. He said that disparagement was not vilification, that the ads did not vilify the tobacco industry because they were neither “cruel slander” nor “vitriolic,” and that “personal attacks” required the targeting of “a particular person or company.” Lorillard appealed the ruling, arguing that Judge Lamb’s method of defining terms such as “personal attack” and “cruel slander” was an unprecedented and uncertain way to define terms found in Delaware contracts.

During the Delaware Supreme Court hearing, the foundation defended its ads as truthful and effective, pointing out that during the time the ads aired, the teen smoking rate dropped from 20 to 16 percent. The Tobacco Control Legal Consortium joined the Campaign for Tobacco-Free Kids, the American Cancer Society, the American Medical Association, and more than a dozen other medical and health professional organizations in submitting a “friend of the court” [legal brief](#) in support of the American Legacy Foundation. The five-judge panel has not yet issued a ruling on the case.

For background information on the four years of *Lorillard v. American Legacy Foundation* litigation, click [here](#).

Resource Roundup



Fundamentals of Smoke-free Workplace Laws

A dozen leading national organizations in public health and tobacco control, led by Americans for Nonsmokers’ Rights and the American Cancer Society, have collaborated in producing guiding principles for developing, enacting and implementing effective smoke-free air laws that protect people from the disease and death caused by secondhand smoke. These guidelines are based on the experiences and lessons learned from tobacco control advocates throughout the country over several decades. The organizations that recommend these principles are:

- American Cancer Society
- American Heart Association
- American Lung Association
- Americans for Nonsmokers’ Rights
- American Public Health Association
- APPEAL
- Campaign for Tobacco-Free Kids
- National Latino Council on Alcohol and Tobacco Prevention
- The Praxis Project
- National Association of Local Boards of Health
- Tobacco Control Legal Consortium
- Tobacco Technical Assistance Consortium

For a copy of Fundamentals of Smoke-free Workplace Laws, click [here](#).

Upcoming Tobacco Law Events

“World No Tobacco Day 2006”

- May 31, 2006
- The only global event established to call attention to the impact of tobacco use on public health.
- For more information on this event, click [here](#).

5th Annual CDC Public Health Law Conference

- June 12 – 14, 2006; Atlanta, Georgia
- For registration information, click [here](#).

13th World Conference on Tobacco OR Health

- July 12 – 15, 2006; Washington D.C.
- For registration information, click [here](#).

14th Annual Conference of the National Association of Local Boards of Health

- July 26 – 28, 2006; San Antonio, Texas
- For registration information, 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.