

# 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).

## World's Nations Set Unprecedented Standards for Smoking Regulation

In a dramatic development that would have been unthinkable only a short time ago, 146 countries, representing eighty percent of the world's population, have unanimously adopted powerful new standards calling for comprehensive smoke-free regulation worldwide. Acting under the authority of the world's first public health treaty, the Framework Convention on Tobacco Control, delegates gathered in Bangkok in early July approved official guidelines for smoking regulation.

The global treaty requires participating countries to protect their citizens from secondhand smoke. The new guidelines specify that these smoking laws should completely eliminate smoking in all indoor workplaces and indoor public places. The guidelines recommend that if any exceptions are unavoidable, they should be eliminated within five years. The guidelines specifically reject the use of ventilation systems or designated enclosed smoking rooms as alternatives to smoke-free policies. They also declare that the right to be protected against secondhand smoke is grounded in basic human rights, including the right to health and the right to life.

The United States remains one of the few large countries not to ratify the treaty. Still, the new guidelines now represent the *de facto* world standard for what is scientifically and ethically acceptable. Endorsed even by tobacco-manufacturing countries like China and Japan, they raise the bar for policymaking in the United States and around the world. Those working in this area will want to familiarize themselves with the guidelines and make active use of them in policy advocacy. The guidelines can be found at the World Health Organization's website by clicking [here](#).

## Recent Significant Tobacco Cases

### Appellate Court Hears Schwab "Light" Cigarettes Case

On July 10, a federal appeals court heard arguments on whether a \$200 billion lawsuit against Philip Morris USA and other major tobacco firms by "light" cigarette smokers should proceed as a class action. The hearing before the U.S. Court of Appeals for the Second Circuit is the most recent development in *Schwab v. Philip Morris, USA*. The three-judge panel will decide whether to

### In This Issue:

- [World's Nations Set Unprecedented Standards for Smoking Regulation](#)
- [Recent Significant Tobacco Cases](#)
- [Legal Challenges to Smoke-free Laws](#)
- [Ask the Lawyers](#)
- [The Global Perspective](#)
- [Resource Roundup](#)
- [Upcoming Events](#)

### Affiliated Legal

#### Resource Centers:

#### California

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#### 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

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#### New Jersey

[Tobacco Control Policy and Legal Resource Center/New Jersey GASP](#)

#### Ohio

[Tobacco Public Policy Center](#)

uphold last summer's ruling by a federal judge granting class action status in the case, a ruling that could potentially expose tobacco companies to hundreds of billions of dollars in liabilities.

As reported in our [October 2006](#) and [February 2007 Legal Updates](#), the *Schwab* lawsuit claims that the tobacco companies deceived smokers into thinking that "light" cigarettes were safer than regular cigarettes. The Tobacco Control Legal Consortium joined the Tobacco Control Resource Center, Public Health Advocacy Institute at Northeastern University, in two *amicus* briefs supporting class certification in this case.

### **Watson "Light" Cigarettes Case Remanded to State Court**

Last month, in a setback to Philip Morris, the U.S. Supreme Court unanimously reversed an Eighth Circuit Court of Appeals 2005 ruling that the deceptive "light" cigarette marketing class action case, [Lisa Watson v. Philip Morris](#), can be brought in federal court. The tobacco companies unsuccessfully argued that when they performed tar and nicotine tests in light cigarettes, they were acting as "federal officers" because the tests were required by the Federal Trade Commission. The tobacco companies then invoked the "federal officer removal" statute, which authorizes removal of a case from state to federal court. Defendants in class actions generally fare better in federal court than in state court.

The U.S. Supreme Court rejected the tobacco industry's argument, and remanded the *Watson* case to state court. The Court unanimously held that complying with federal regulations was different from acting under the authority of a federal officer. As explained in our [April 2007 Legal Update](#), a ruling upholding the lower court's decision would not only have affected several pending "light" cigarette lawsuits, including cases in Missouri and Minnesota, but would have been at odds with the core tenets of federalism. To read the Supreme Court decision, click [here](#).

### **U.S. Supreme Court to Hear Maine Internet Law Case**

The U.S. Supreme Court granted *certiorari* in a significant case involving federal preemption and the right of a state to regulate the sale of tobacco via the Internet. [Rowe v. New Hampshire Motor Transport Association, 06-457](#). Back in 2003, the State of Maine passed a "tobacco delivery law" that regulates the sale of tobacco products, purchased through the Internet and by phone, to ensure that these products do not reach minors and are not delivered by unlicensed tobacco retailers. Trade associations for delivery companies successfully challenged the law, arguing that a federal statute supporting the free flow of interstate commerce preempted the Maine law. In May 2006, the First Circuit Court of Appeals ruled that the Federal Aviation Administration Authorization Act of 1994 preempted the Maine law.

In October 2006, the Tobacco Control Legal Consortium, along with the Campaign for Tobacco-Free Kids, the American Cancer Society and the American Lung Association, filed an *amicus* brief in the U.S. Supreme Court supporting the State of Maine's petition for *certiorari*. Our brief argued that the First Circuit's decision unreasonably restricts Maine and other states from regulating direct Internet or phone sales of tobacco and controlling youth access to tobacco. For a copy of the *amicus* brief, written by the Consortium's Maryland affiliate, click [here](#). The U.S. Supreme Court hearing date is yet to be scheduled.

## **Legal Challenges to Smoke-free Laws**

**Kansas.** On June 22, 2007, the Kansas Supreme Court upheld the smoke-free law in Lawrence, Kansas. [Steffes v. City of Lawrence](#). The court found that the Kansas Clean Indoor Air Act did not preempt the Lawrence law, and that the ordinance language used commonly understood terms, and was not vague or indefinite.

**Minnesota.** On June 7, 2007, the Eighth Circuit Court of Appeals upheld the trial court summary judgment ruling in favor of Beltrami County's smoke-free ordinance. [Steele v. County of Beltrami](#). The court said there was no constitutional right to smoke and, similarly, no constitutional right to be protected from secondhand smoke. It concluded that such issues are better left to legislators.

**Michigan.** On June 5, 2007, the Michigan Court of Appeals upheld the trial court ruling in favor of the quad-county smoke-free law. [McNeil v. Charlevoix County](#). The court found the regulations consistent with the duties promulgated by the Michigan Clean Indoor Air Act, and the more restrictive regulations in compliance with the statewide law.

The Legal Consortium's Michigan affiliate, the Smokefree Environments Law Project, along with the American Cancer

Society, American Lung Association, and the American Heart Association, submitted an *amicus* brief on behalf of the county at the circuit court and at the appellate court. Both briefs were drafted by Attorney Cliff Douglas.

**Indiana.** On June 27, 2007, the Indiana Superior Court granted West Lafayette summary judgment on a challenge brought by a bar owner against the city's smoke-free ordinance. *Harry's Chocolate Shop v. City of West Lafayette*. The court held that there were inherent distinctions between bars and restaurants and tobacco bars, retail tobacco shops and private clubs. Another case in Fort Wayne, Indiana is awaiting an order for dismissal after the City's smoke-free ordinance was amended to address many issues raised in the plaintiff's complaint. *Wayne Wood v. City of Fort Wayne*.

**Alaska.** An Anchorage case challenging the language of a smoke-free referendum was dismissed after parties negotiated new language for the ballot measure during the preliminary injunction hearing. *Crawford v. City of Anchorage*. The citizens of Anchorage voted against the referendum to overturn the law.

## Ask the Lawyers

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!

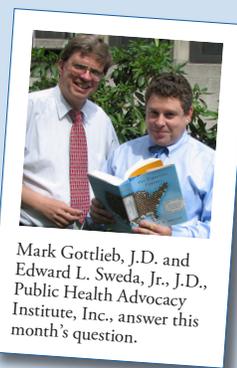
**Q** “How much money in damages have the tobacco companies actually paid to plaintiffs harmed by smoking? How much in additional awarded damages to be paid is pending appeal?”

**A** Despite the thousands of lawsuits filed against tobacco companies by those harmed by smoking, only eight verdicts have survived appeals and resulted in payments to the plaintiffs. Two types of damages are typically awarded: compensatory and punitive damages. Compensatory damages include lost wages, medical expenses, and sometimes pain and suffering, as well as other losses suffered by the plaintiff. Punitive damages are intended to punish the defendant for particularly reprehensible conduct and to deter such conduct in the future. Not surprisingly, most of these eight verdicts include punitive damages.

Compensatory and punitive damages verdicts have resulted in payments to plaintiffs of approximately \$118 million, including interest accrued during appellate proceedings. Approximately \$300 million in compensatory and punitive damages verdicts stemming from nine trials are pending appeal. Billions of dollars in potential liability are still at stake in pending lawsuits.

NOTE: This tally does not include the over \$200 billion that tobacco companies agreed to pay in settlement of the states' lawsuits of the 1990s, which were not personal injury cases.

— Mark Gottlieb, J.D., Executive Director of the Public Health Advocacy Institute (PHAI) at Northeastern University School of Law, and Edward L. Sweda, Jr., J.D., Senior Attorney for the Tobacco Products Liability Project of PHAI.



Mark Gottlieb, J.D. and Edward L. Sweda, Jr., J.D., Public Health Advocacy Institute, Inc., answer this month's question.

## The Global Perspective



## FCTC Spurs Dramatic Progress on Global Tobacco Control Agenda

The Second Meeting of the Conference of the Parties to the Framework Convention on Tobacco Control, held in Bangkok from June 30 to July 6, was both a reflection of the ongoing transformation of world attitudes toward tobacco, and an impetus for further progress. With much of the world now endorsing

the sweeping regulatory agenda outlined by the treaty, countries have begun the arduous process of fleshing out the treaty's broad language. The four hundred delegates gathered in Bangkok made clear progress on important elements of that agenda. By week's end, the Conference had agreed to each of the regulatory goals set by the global networks of nongovernmental organizations, the [Framework Convention Alliance](#), and the [Global Smokefree Partnership](#).

In addition to the adoption of unequivocal guidelines for development of smokefree legislation (see article on page 1), these achievements included:

- Agreement to begin work on a new global treaty (technically, a “protocol” to the Framework Convention) to address tobacco smuggling
- Agreement to develop guidelines for eliminating tobacco advertising and sponsorship or, where this is not constitutionally permissible, regulating advertising
- Agreement to develop guidelines for cigarette warning labels
- Agreement to begin work toward guidelines on monitoring the tobacco industry, reeducating the public about tobacco and health, and helping tobacco users quit
- A commitment to continue initial work on tobacco product testing standards and economically viable alternatives to tobacco growing

The eight-year process of treaty development and implementation has helped cement support for comprehensive tobacco control among senior officials from many countries. This transformation has been speeded by emergence of an increasingly sophisticated global network of NGOs, with more than 150 NGO representatives attending the Bangkok proceedings. Under the auspices of the Framework Convention Alliance, the Global Smokefree Partnership and other worldwide networks, NGOs offered formal statements during conference proceedings, organized more than a dozen technical briefings for delegates, prepared a daily newsletter, worked with media representatives, and provided technical assistance and support to delegates. Among the NGO representatives were four attorneys from the Tobacco Control Legal Consortium and its affiliates: Doug Blanke of the [Tobacco Law Center](#) in Minnesota, Dick Daynard of the [Public Health Advocacy Institute](#) in Massachusetts; and Chris Bostic and Erin Smith of the [Legal Resource Center for Tobacco Regulation, Litigation and Advocacy in Maryland](#).

## Canada's Supreme Court Upholds Strong Tobacco Control Laws

Last month, after years of complex litigation, the Supreme Court of Canada unanimously upheld Canada's 1997 law that limits tobacco advertisements, dismissing claims from three large Canadian cigarette companies that the legislation is unconstitutional and violates their freedom of expression. The law upheld by the ruling requires large, pictorial health warnings that cover 50 percent of the front and back of cigarette packs; bans “false, misleading or deceptive” marketing of tobacco products; bans tobacco sponsorships; and places restrictions on tobacco advertising, including limiting advertising to adult publications and establishments and prohibiting “lifestyle advertising.” The Court's compelling opinion includes thoughtful analysis of the nature and role of tobacco advertising, and of common industry advertising strategies, and will be of great value to advocates in other countries. Congratulations are due to the Canadian Cancer Society, which was allowed to intervene in the case in support of the national and provincial authorities, for its contribution to this success. To read the landmark ruling, click [here](#).

## Resource Roundup

- A recent *Morbidity and Mortality Weekly Report* (July 20) contains the first study to assess changes in a biological marker of secondhand smoke (SHS) exposure in the general population of nonsmokers after a comprehensive state smoke-free law was implemented. Check out “Reduced Secondhand Smoke Exposure After Implementation of a Comprehensive Statewide Smoking Ban — New York, June 26, 2003 – June 30, 2004,” at [www.cdc.gov/mmwr/weekcvol.html](http://www.cdc.gov/mmwr/weekcvol.html); additional information is available at [www.cdc.gov/tobacco](http://www.cdc.gov/tobacco).
- The National Networks for Tobacco Control and Prevention just launched a new website at [www.tobaccopreventionnetworks.org](http://www.tobaccopreventionnetworks.org) that contains tobacco control strategies, tools, and resource materials for priority populations. The National Networks for Tobacco Control and Prevention are funded by the Centers for Disease Control and Prevention (CDC), Office on Smoking and Health (OSH) to assist with the implementation of programs and initiatives to address tobacco-related disparities among six populations: African Americans; American Indian/Alaska Natives; Asian Americans/Pacific Islanders (AAPI); Hispanic/Latinos; lesbian, gay, bisexual, transgender (LGBT) communities; and low socio-economic status (Low SES) groups.
- The American Lung Association’s 2007 State Legislated Actions on Tobacco Issues (SLATI) Mid-Term Report is available at the SLATI website at <http://slati.lungusa.org/midtermreports.asp>. The SLATI report summarizes 2007 state legislative activity to date on major tobacco control issues such as smokefree air, cigarette taxes and fire safety standards for cigarettes. The report is updated regularly throughout the year as laws take effect.

## Upcoming Events

- Register now for the 2007 National Conference on Tobacco or Health, which will be held in Minneapolis, Minnesota, October 24–26, 2007. For more information about the conference or to register online, click [here](#). If you have any questions about the conference, click [here](#).
- The Tobacco Public Policy Center at Capital University Law School will host its third annual conference on Monday, October 1 at the Crowne Plaza Hotel in Dublin, Ohio (outside of Columbus). This one-day conference, Building Bridges: Tobacco Control in a Broader Context, will focus on how tobacco control advocates and advocates in related fields can work in partnership on shared policy objectives. Please check the [Tobacco Public Policy](#) website for more information on the conference in upcoming weeks.

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