

Legal Update

from the Tobacco Control Legal Consortium



September 2004

Dear Colleague:

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.

The ADA and Legal Protection Against Secondhand Smoke



The serious health risks of secondhand smoke exposure are widely known. For some people with disabilities, secondhand smoke in the workplace and public places, such as restaurants, can be life-threatening.

The Consortium's new publication, "The Americans with Disabilities Act: Effective Legal Protection Against Secondhand Smoke Exposure," describes how people with disabilities can use the Americans with Disabilities Act (ADA) to assert a legal right not to be exposed to smoke in workplaces and public places. The article outlines when exposure to secondhand smoke qualifies as a disability under the ADA, explains the scope and constitutionality of the ADA as defined by recent cases in the Supreme Court and elsewhere, and identifies remedies under the ADA for smoking-related discrimination.

The synopsis was written by veteran tobacco control attorney Clifford Douglas of the Smoke-Free Environments Law Project. To view a pdf version of the synopsis, click on the image above or go to www.wmitchell.edu/tobaccolaw/resources/douglas.pdf.

Tobacco Trial of Century Opens

In an historic tobacco trial that started September 21, the U.S. Department of Justice (DOJ) is attempting to prove that U.S. tobacco companies conspired over fifty years to defraud consumers by denying the dangers of smoking and secondhand cigarette smoke. *U.S. v. Philip Morris USA, Inc.* The DOJ filed its Final Proposed Findings of Fact (2,543 pages; 15.5 MB) in July 2004. The Executive Summary alone covers 27 pages. The DOJ has also filed Final Proposed Conclusions of Law (Volume I) (175 pages), which set forth the legal grounds upon which the lawsuit is based, and Final Proposed Conclusions of Law (Volume II) Regarding Defendants' Affirmative Defenses (134 pages). The largest civil action in history, the case has already produced 645 court orders and 120 million pages of documents. Judge Gladys Kessler at one point admonished industry lawyers for what she called "a tsunami of objections" to the testimony of the government's first witness, former Food and Drug Administration Commissioner David Kessler. If the DOJ wins, the decision could significantly revamp the tobacco industry by forcing it to hike cigarette prices dramatically and to change how it markets and promotes its products. A web log for the trial can be found at www.tobacco-on-trial.com.

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- **Michigan**
Smoke-Free Environments Law Project (SFELP)
- **Minnesota**
Tobacco Law Center
- **New Jersey**
Tobacco Control Policy and Legal Resource Center

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Mom Jailed for Smoking Near Kids

A Virginia mother of two was sentenced recently to 10 days in jail for defying a court order not to smoke near her children. The judge allowed her to post a \$500 bond to stay out of jail while she appeals the ruling. As part of a custody arrangement, a court order last August barred Tamara Silvius from smoking around her children. The parents have joint custody and the children live with their father and often visit their mother on weekends. Tamara Silvius appealed the smoking restriction order to Caroline Circuit Court, where it was upheld, and has now appealed that decision to the Virginia Court of Appeals.

Consortium Joins as Amicus in *EIC vs. Tacoma-Pierce County Case*

The Washington Supreme Court will hear arguments on November 16 in a case to determine the interpretation of ambiguous state legislation that has effectively blocked the enactment of local smoke-free ordinances. The Entertainment Industry Coalition (EIC), a lobbying organization that represents gambling interests, brought a motion for a temporary restraining order and then a preliminary injunction to prevent enforcement of a Tacoma-Pierce County Board of Health and Health Department Resolution that prohibits smoking in most indoor public places and places of employment. The restraining order was denied, but the preliminary injunction was granted on the ground that the Resolution directly conflicted with Washington's Clean Indoor Air Act.

The Tobacco Control Legal Consortium filed an amicus curiae ("friend-of-the-court") brief in support of Tacoma-Pierce County. The brief defends the powers of local officials in Washington to restrict smoking and argues that an ambiguous state law does not preempt local health officials from acting. Several national organizations joined the brief, including the American Medical Association, the National Association of Local Boards of Health, the Campaign for Tobacco-Free Kids, the National Association of County and City Health Officials, and Americans for Nonsmokers' Rights, as well as the Washington State Medical Association. A successful appeal may unleash a burst of activity across the state and set a powerful precedent, not only in Washington but in other states as well.

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Funded by:



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