

Legal Update

from the Tobacco Control Legal Consortium



September 2005

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.

"There is No Constitutional Right to Smoke"



Opponents challenging smoke-free legislation throughout the country often level charges that smokers have a special legal right to smoke, and that smoke-free laws infringe on this right. The Tobacco Control Legal Consortium's latest publication, "There is No Constitutional Right to Smoke", prepared by Samantha Graff of the Technical Assistance Legal Center at the Public Health Institute in Oakland, California, was written to debunk the notion that a constitutionally protected right to smoke exists. This brief, user-friendly law synopsis explains why smoking is not a specially protected liberty or privacy right under the U.S. Constitution's Due Process Clause or Equal Protection Clause. It highlights two types of state laws that may create a limited right to smoke, and describes how these laws can be amended or repealed so they do not impede local tobacco control efforts.

We hope this publication will be especially helpful to the work of advocates and other tobacco control professionals. To view a pdf version of the synopsis, click on the image above or go to <http://www.wmitchell.edu/tobaccolaw/resources/No+Constitutional+Right+to+Smoke.pdf>.

Legal Consortium Submits Brief in DOJ Case on Behalf of 19 National Public Health Organizations

On September 1, 2005, the U.S. District Court authorized the Tobacco Control Legal Consortium to file a friend-of-the-court amicus brief in *United States v. Philip Morris, et al.*, on behalf of nineteen national public health organizations. The brief urged the court to strengthen the remedies proposed by the Department of Justice in several important respects. The Tobacco Control Legal Consortium's brief was one of four amicus briefs accepted by the court.* The court said that these briefs would provide the court with unique information and perspectives beyond those available from the parties. For a copy of the opinion, please contact us at kcork@wmitchell.edu.

The Legal Consortium submitted its brief on behalf of the Consortium, the Tobacco Control Resource Center, the American Medical Association, the American Public Health Association, the American Academy of Pediatrics, the American Association of Public Health Physicians, the American College of Chest Physicians, the American College of Occupational and Environmental Medicine, the American College of Physicians, the American College of Preventive Medicine, the American Dental Hygienists' Association,

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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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the American School Health Association, the American Thoracic Society, the Community Anti-Drug Coalitions of America (CADCA), the Legal Resource Center for Tobacco Regulation, Litigation and Advocacy at the University of Maryland School of Law, the National Association of County and City Health Officials (NACCHO), the National Association of Local Boards of Health (NALBOH), and the Tobacco Law Center and the Tobacco Public Policy Center. **Citing a number of these organizations, District Court Judge Gladys Kessler concluded that “[t]he wealth of knowledge, expertise, experience and devotion to the nation’s public health represented by all of these groups simply cannot be ignored. . . . Indeed, it would be just plain foolish to reject such a resource.”**

The Legal Consortium’s brief generally supports the arguments already made by the Department of Justice, as well as arguments made by the intervening public health groups, who filed their brief August 31.[†] The Legal Consortium’s brief calls for:

- Expanded disclosure requirements, including disclosure of tobacco industry marketing plans to the independent entity that would be responsible for public education and counter-marketing; public disclosure of tobacco industry documents uncovered in litigation outside the United States; and disclosure of tobacco industry funding of supposedly-independent third-party organizations;
- Expansion and strengthening of prohibitions against specific marketing practices, including expansion of the government’s proposed restriction on misleading product descriptions such as “low tar;” a ban on all brand name sponsorships; a prohibition on the collection of data about youth; and a ban on direct communications from tobacco companies to youth;
- Expansion of the industry’s duty to disseminate “corrective statements” to prevent future deception, including possible extension of the time period for corrective messages, consultation with health experts in formulating messages, and possible use of graphic imagery to increase the messages’ impact; and
- Expansion of the powers of the proposed Independent Investigations Officer to allow more effective monitoring of the industry.

The brief was prepared under intense time pressure by Mark Gottlieb, Dick Daynard, Chris Banthin, Lissy Friedman and Sara Guardino of the Tobacco Control Resource Center at Northeastern University School of Law. Scott Nelson of Public Citizen in Washington generously served as local counsel. For a copy of the brief, click [here](#).

* The other amicus briefs were filed by the Citizens Commission to Protect the Truth, the Regents of the University of California, and a coalition of groups led by Essential Action.

[†] The intervening health groups are the American Cancer Society, the American Lung Association, the American Heart Society, Americans for Nonsmokers’ Rights, the Tobacco-Free Kids Action Fund, and the National African American Tobacco Prevention Network.

Recent Significant Cigarette Lawsuits

- **“Light” Cigarette Class Action:** The Missouri Court of Appeals recently upheld last year’s lower court decision that certified a class-action lawsuit against Philip Morris USA for misleading smokers about the health risks of “light” cigarettes. The suit alleges that Philip Morris engaged in unfair, deceptive practices by representing that light cigarettes contain less tar and nicotine than regular cigarettes. The court upheld the earlier ruling, agreeing that the class action was an appropriate way to deal with claims that the company misled smokers, a violation of Missouri’s Merchandising Practices Act. In January 2005, the Legal Consortium joined an [amicus brief](#) that supported the plaintiffs in seeking the class action. Philip Morris attorneys say they plan to appeal the decision to the Missouri Supreme Court. For a copy of the decision, click [here](#).
- **“Eclipse” Brand False Advertising Suit:** In late July, the state of Vermont filed suit against R. J. Reynolds, alleging that the tobacco company used false and misleading advertising to promote its “Eclipse” brand of cigarettes. This is the first lawsuit targeting a so-called “reduced risk” cigarette that purports to deliver smokers the taste of tobacco without actually burning it. Led by Vermont Attorney General William Sorrell, the lawsuit follows an investigation that began over a year and a half ago, when the Attorney General’s office issued a civil investigative subpoena to Reynolds, directing the company to produce documents about its claims and the scientific and consumer research supporting

those claims. The other states participating in this investigation and supporting the lawsuit are California, Connecticut, Idaho, Illinois, Iowa, Maine, New York, and Tennessee.

The lawsuit charges Reynolds with making misleading claims that Eclipse cigarettes carry less risk of cancer and other health ailments – claims that allegedly violate both the state’s consumer fraud laws and the 1998 Master Settlement agreement with the tobacco industry. As reported in this spring’s *Legal Update*, thirty-seven states, along with the District of Columbia and Puerto Rico, informed R. J. Reynolds last March that one or more of them would sue if it continued its current advertising. For a copy of the complaint, please contact us at kcork@wmitchell.edu.

- **Cigarette Makers to Pay Millions to Tobacco Growers.** The North Carolina Supreme Court recently ruled that cigarette makers must pay \$424 million to tobacco growers in 14 states. The payments are part of 1998’s Master Settlement Agreement designed to pay tobacco growers and tobacco quota-holders \$5.1 billion over 12 years to help compensate them for reduced tobacco demand. The agreement allowed payments to be reduced if losses were compensated in some other way, such as through last year’s Congress-approved tobacco-quota buyout. A legal battle ensued over whether tobacco companies had to pay growers to cover the period until they began making tobacco-quota buyout payments later this year. This decision will affect approximately 80,000 tobacco growers and over 300,000 tobacco quota-holders. For a copy of the decision, click [here](#).

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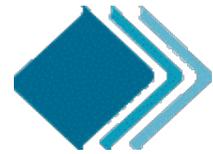
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The *Legal Update* newsletter is a service of the Tobacco Control Legal Consortium.

Groundbreaking Massachusetts Verdict Upholds Eviction of Condo Tenants for Smoking

In a case that could have far-reaching implications for secondhand-smoke litigation, a Boston Housing Court jury ruled this summer that a South Boston couple could be evicted from their one-bedroom condominium for heavy smoking inside their unit, even though smoking was allowed in their lease. The defendants fought the eviction, arguing that the building’s shoddy construction and aging ventilation system were to blame for the smoke seepage into other units. The jury found the couple’s heavy smoking violated a clause in the lease prohibiting “any nuisance; any offensive noise, odor or fumes; or any hazard to health.” *Harwood Capital Corp. v. Carey*, No. 05-SP00187.

Although this decision is not binding on other courts, tobacco law specialists have hailed it as one of the nation’s first to declare smoking a nuisance serious enough to become grounds for eviction. For more on landlord and tenant rights in secondhand smoke intrusion cases, visit the website of the Legal Consortium’s legal center affiliate in Michigan, the Smoke-Free Environments Law Project, at <http://www.mismokefreeapartment.org>.

Vermont Second State to Require “Fire-Safe” Cigarettes

Vermont recently became the second state after New York to implement a law requiring that all cigarettes sold in Vermont are “fire safe.” Fire-safe cigarettes (also known as “reduced ignition propensity” cigarettes) tend to extinguish on their own in a few minutes if they are not puffed on. The law, based closely on legislation already enacted in New York, is expected to reduce the number of fire-related deaths in Vermont that are caused by cigarettes. Over the past decade, nearly 40 people in Vermont were killed in cigarette-related fires. Between 1999 and 2003, the last year for which statistics are available, 15 of Vermont’s 65 fire deaths were caused by cigarettes left unattended. The law will take effect May 2006.

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.