Legal Update *from the* Tobacco Control Legal Consortium

November 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 MSA: Enforcement of Marketing Restrictions

The 1998 Master Settlement Agreement (MSA) between forty-six states and six U.S. jurisdictions and the major U.S. cigarette manufacturers was the largest legal settlement in U.S. history. Among the settlement terms were restrictions on the way in which tobacco companies advertise and market their products.

The Consortium's new publication, "The Tobacco Master Settlement Agreement: Enforcement of Marketing Restrictions," summarizes the MSA's limitations on tobacco product marketing and advertising, as well as the types of conduct the MSA does not affect. It provides an overview of the enforcement process, from informal inquiry to litigation, and describes recent enforcement efforts that involve restrictions on magazine advertising, free samples, outdoor ads, and branded merchandise. Finally, it notes other areas of industry conduct that raise current and likely future challenges for MSA enforcement.

This legal synopsis was written by Dennis Eckhart, Senior Assistant Attorney General at the California Department of Justice, who leads the Department's enforcement of the MSA in California. To view a pdf version of the synopsis, click on the image above or go to www.wmitchell.edu/tobaccolaw/resources/eckhart.pdf.

Court Upholds California's Hard-Hitting Ads

The Ninth Circuit Court of Appeals recently rejected claims by two tobacco companies that California's hard-hitting tobacco prevention advertising violates their First Amendment rights by unfairly damaging their reputations. The companies, tobacco giants R.J. Reynolds Tobacco Co. and Lorillard Tobacco Co., sued because California imposes a surtax on cigarettes sold in the state and uses part of the proceeds to pay for advertisements that criticize the tobacco industry. The tobacco companies argued that this is "a case of compelled subsidization of speech prohibited by the First Amendment." The court rejected these claims, stating "The implication of the tobacco companies' argument is that industries subject to an excise tax are entitled to a special veto over government speech funded by the tax. . . . This suggestion fundamentally misunderstands the history of taxation in the United States." *R.J. Reynolds v. Shewry, No. 03-16535.*

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- Local Land Use Regulation for the Location and Operation of Tobacco Retailers

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Illinois Court to Hear Oral Arguments in "Light" Cigarette Case

The Illinois Supreme Court will hear oral arguments on Nov. 10 in the appeal of the massive $10.1 billion judgment against Altria Group Inc.'s Philip Morris USA unit over the marketing of "light" cigarettes. The suit was the first class-action "lights" case to go to trial. The lawsuit sought damages for Illinois smokers who claimed they were misled into believing that Marlboro Lights and Cambridge Lights cigarettes were less hazardous than Philip Morris's higher-tar brands. The size of the Illinois verdict, and the fact that similar cases are pending in other states, have generated great interest in this appeal. *Sharon Miles* (original lead plaintiff) *v. Philip Morris*.

Ruling Could Lead to Confusion in Enforcing NY's Smoke-Free Law

In a recent decision that could have implications for the enforceability of smoke-free laws that do not impose penalties directly on smokers who violate them, a New York trial court dismissed $650 fines against three Long Island bars where patrons were seen smoking. According to Justice Paul Baisley, Jr., New York's Clean Indoor Air Act holds business owners—but not their smoking customers—responsible for violations. Bar owners must post "no smoking" signs in their establishments and admonish people who light up in defiance of the law, but are not required to deny service to patrons who ignore these requests, according to the judge. Health department inspectors who found patrons smoking in the three bars failed to observe whether the bar owners had asked the smokers to quit when they first started smoking. The judge noted that "The mere fact that patrons continued to smoke in defiance of the law is not *ipso facto* evidence of the establishment's failure to comply with the law." If upheld, this interpretation of the law could undermine the enforceability of the New York law and similar laws in other jurisdictions. Smoke-free law proponents plan to appeal the ruling. *Patricia Ann Cottage Pub Inc. v. Mermelstein, No. 005806-2004*.

Contact Us:

Phone:
651-290-7506
Email:
tobaccolaw@wmitchell.edu
Web:
www.tclconline.org
Address:
875 Summit Avenue
St. Paul, MN 55105

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