

Legal Update

from the Tobacco Control Legal Consortium



November 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.

"Secondhand Smoke and the Family Courts: The Role of Smoke Exposure in Custody and Visitation Decisions"



Given the abundance of scientific evidence describing the health risks of secondhand smoke, particularly for children, family courts are increasingly considering a child's exposure to these risks in custody and visitation cases. The impact that secondhand smoke has on children is a relatively new issue for most trial courts and family law attorneys.

The Tobacco Control Legal Consortium's latest publication, *Secondhand Smoke and the Family Courts: The Role of Smoke Exposure in Custody and Visitation Decisions*, was written to assist courts, practitioners and lay people who are faced with a custody or visitation proceeding in which a child's exposure to secondhand smoke has been or may be raised. It was written by Professor Kathleen Hoke Dachille and Kristine Callahan of the Legal Resource Center for Tobacco Regulation, Litigation and Advocacy at the University of Maryland School of Law.

This Law Synopsis presents an overview of how family courts draft custody and visitation orders and then discusses specific cases that involve the use of secondhand smoke exposure as a factor in these decisions. It explains how judicial notice can be used to introduce scientific data on the adverse health effects of secondhand smoke exposure. Finally, it makes clear why the consideration of parental smoking in custody and visitation disputes does not infringe upon the right to parental autonomy. It includes an appendix of authoritative sources documenting the health effects of secondhand smoke exposure.

To view a pdf version of the Synopsis, click on the image above. The Synopsis is also available at www.wmitchell.edu/tobaccolaw/resources/family%20law.pdf. We hope you find this publication a useful and informative resource.

What's New at the Maryland Legal Center?

The Center for Tobacco Regulation at the University of Maryland School of Law is bursting with activity during its fifth year of operation. Director Kathleen Dachille, Research Fellow Kristine Callahan and tobacco control clinic students are opening discussions with the Department of Human Resources to persuade the agency to promulgate regulations that would protect foster children from exposure to secondhand smoke. A comprehensive policy analysis, a substantial legal synopsis and draft regulations will be sent to the Department soon. The Center is also creating an educational brochure for

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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

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tenants suffering from smoke drift in the apartment setting; a legal analysis of tenants' rights is also being prepared to assist attorneys representing those tenants. Managing Attorney Michael Strande has traveled throughout Maryland, updating local health departments on changes in the law and the implications those changes have for local tobacco control programs. Strande has been actively involved in planning for an upcoming event on college campuses encouraging students to stop smoking and to support clean indoor air laws.

In preparation for the 2006 Maryland General Assembly session, which begins in January, Center staff and students are working with legislators considering the introduction of tobacco control bills. Gaining momentum from the passage of similar laws in Vermont and California, a key focus for the session will be a bill requiring that cigarettes meet fire safety standards. Drafting the bill, written testimony and related documents, students are learning about the legislative process firsthand. Similarly, students drafting a bill to ban the sale of flavored tobacco products are learning about the importance of every word in a statute. Center staff have also expended significant time and effort supporting the public health and tobacco control community in preparing for the introduction of the Clean Indoor Air bill.



Kathleen Dachele, Director of the Legal Resource Center for Tobacco Regulation, Litigation and Advocacy at the University of Maryland School of Law

To round out the public education, agency regulation and legislative projects, Dachele has been appointed Special Assistant Attorney General to assist Vermont in its action against R.J. Reynolds for the marketing of the *Eclipse* cigarette. Knowing that significant change takes time, the Maryland Legal Center expects to maintain the frenetic pace for some time.

Note: The Maryland Legal Center's website is www.law.umaryland.edu/tobacco.

Washington Voters Approve Sweeping Smoke-Free Law

By a margin of 62 percent to 37 percent, voters in the State of Washington have adopted one of the nation's strongest state smoke-free laws. The ballot measure, approved November 8, makes Washington the ninth state to prohibit smoking in bars and the fifteenth to prohibit smoking in restaurants. Advocates' efforts to regulate smoking at the local level had been stymied by a February 2005 ruling of the Washington Supreme Court, holding that state law preempts local regulation. The new ballot measure introduces a comprehensive statewide solution that will take effect December 8.

The most striking aspect of the campaign was the fact that the business community mounted only token opposition. "Why has the long fight over the rights of smokers versus nonsmokers apparently flamed out?" asked the *Seattle Times*, which then answered its own question: "Basically, a couple of things happened. Public sentiment shifted and smoking-ban opponents with deep pockets abandoned the fight." "We're not going to do anything to fight," said the state restaurant association, because the proposal "is going to pass overwhelmingly." By the morning after the election, passage of this historic law was being relegated to the inside pages of some newspapers—one of the surest signs yet that the long-predicted transformation of social norms is well underway. For a copy of the Washington initiative, click [here](#).

Latest News in United States v. Philip Morris, et. al

U.S. Supreme Court Refuses to Restore \$280 Billion "Disgorgement" Claim; Philip Morris Trial Attorney To Defend Lewis Libby

To the disappointment of many tobacco control advocates, the U.S. Supreme Court declined on October 17 to hear the Department of Justice's petition for the Court to review a lower court decision limiting the remedies available to the government in the case. Through nine months of trial, the government presented compelling evidence that tobacco manufacturers have conspired for decades to mislead the public about the dangers of smoking, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO). (For the government's powerful Executive Summary of the evidence in the case, click [here](#).) Although the government sought an order forcing the companies to pay \$280 billion in "disgorgement" of past illegal profits, the U.S. Court of Appeals for the D.C. Circuit ruled earlier this year that disgorgement is not available as a remedy, holding that the RICO Act does not allow remedies that punish past conduct, but is instead limited to remedies that prevent and restrain

future lawbreaking. The Supreme Court declined to review the decision. Despite this setback, the case remains one of the most important in history. If District Court Judge Gladys Kessler finds in favor of the government, the remedies still available in the case would permit the Court to prevent future deception by dramatically re-shaping the environment in which tobacco is sold and promoted. To read some of the remedies proposed in the case, click [here](#) for the legal brief submitted by the Department of Justice, [here](#) for the brief of the health advocacy groups admitted to the case as Intervenor, and [here](#) for the legal brief submitted by the Tobacco Control Legal Consortium on behalf of nineteen health organizations.

Post-trial briefing has been completed. On November 15, the Parties are to file lists of the trial exhibits, and the case will be taken under advisement by Judge Kessler. Judge Kessler has not indicated when she is likely to rule. The public health groups admitted to the case as Intervenor have publicly demanded that the government include them in any settlement negotiations in the case, but the government has made no commitment to do so.

Meanwhile, Philip Morris' co-lead attorney in the RICO trial, Theodore Wells of the New York law firm of Paul, Weiss, Rifkind, Wharton & Garrison, has been retained to defend I. Lewis Libby, former Chief of Staff to Vice President Dick Cheney, against charges related to the investigation of the leak of the identity of CIA employee Valerie Plame. A highly-regarded corporate and criminal defense attorney, Wells has represented many high-profile political and corporate defendants charged with white collar crime cases.

Groundbreaking Decision Opens Door to Tobacco Health Care Recovery Suits

The Canadian Supreme Court recently ruled that the province of British Columbia (B.C.) can sue to recover five decades of tobacco-related health care costs. British Columbia had sued several large tobacco companies to recover the cost of medical treatment for citizens exposed to tobacco products. The lawsuit was brought under the Tobacco Damages and Health Care Costs Recovery Act of 2001, a law designed to ease the process of making tobacco companies pay for smoking-related health care costs. The law limits traditional defenses used in civil suits and makes it easier for the province to prove the link between smoking and disease. Defendants argued that the law unconstitutionally violated the independence of the judiciary, denied them a fair trial, offended the rule of law and improperly extended beyond the territorial reach of the province.

By finding the British Columbia law constitutional, the Canadian Supreme Court cleared the way for health care cost recovery actions by a number of provincial governments. Legislation is already in place in Newfoundland and is being considered in Nova Scotia, Ontario, and several other provinces. Although health care is less costly in Canada than in the United States, the potential magnitude of provincial litigation is enormous. Lawsuits brought in the 1990s by U.S. state attorneys general involved health care programs that cover only about ten percent of state populations. In Canada, all citizens receive publicly-funded care. To read the Supreme Court opinion, click [British Columbia v. Imperial Tobacco Canada Ltd.](#)

Massachusetts Profits from Online Cigarette Vendor Settlement

As part of a court settlement with Massachusetts Attorney General Thomas Reilly, an online cigarette vendor called *eSmokes* recently turned over to the state the names and addresses of Massachusetts residents who bought more than 131,000 cartons of cigarettes online between November 2003 and February 2005. By purchasing cigarettes over the Internet, consumers avoid paying state excise taxes; these consumers now owe Massachusetts an estimated \$1.98 million. According to the *Boston Globe*, the total owed the state could rise to \$3 million with interest and penalties added. Internet sales have flourished around the country because prices are significantly lower than local retailers. For example, cartons of Marlboros, which typically cost \$47 at Massachusetts retail stores, can be purchased online for \$35 or less.

Although a federal law called the Jenkins Act requires out-of-state vendors to disclose customers' names to the states, only four online vendors have complied to date. Other Internet retailers, primarily those on Native American reservations, have argued that the law does not apply to them. Internet retailers have been struggling to survive since U.S. credit card companies agreed, under pressure from state attorneys general, to prohibit the use of their cards for illegal online sales. The Tobacco Control Legal Consortium will examine the challenges of policing Internet cigarette retailers in a forthcoming release in our Law Synopsis series.

California Enacts Law Requiring “Self-Extinguishing” Cigarettes

California has joined New York and Vermont in becoming the third state to require tobacco companies to meet standards for so-called “self-extinguishing” cigarettes, which are designed to stop burning if they are not actively smoking. Similar bills are pending in Massachusetts and New Jersey. With implementation of California’s law, 20 percent of U.S. smokers will be using self-extinguishing cigarettes.

Last month, *Tobacco Control* published two articles on issues relating to fire-safe cigarettes. The first article studies New York’s experience in implementing fire safety standards for cigarettes and the tobacco industry’s arguments opposing them. For an abstract of “Effect of the New York State cigarette fire safety standard on ignition propensity, smoke constituents, and the consumer market,” click [Tobacco Control 2005;14:321-327](#). A second article investigates tobacco industry strategies for thwarting fire-safe cigarette legislation in the U.S. For an abstract of “From strange bedfellows to natural allies: the shifting allegiance of fire service organizations in the push for federal fire-safe cigarette legislation,” click [Tobacco Control 2005;14:338-345](#).

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