



## FROM THE DIRECTOR

As the table of contents will reveal, for the last few months, courts around the country have been busy considering tobacco-related cases. Much of the litigation concerns punitive damages and class action cases; decades of litigation establishing when a cigarette manufacturer is liable for a smoker's illness or death has allowed litigants to move on these new issues. We will soon discover whether and how tobacco case law has had an impact on jurisprudence beyond tobacco cases.

This issue also recognizes the decades of public service of Maryland's now-retired Attorney General, J. Joseph Curran, Jr. As the lead article explains, Mr. Curran played a significant role in the development of tobacco control policy in Maryland. A new generation of elected leaders and public policy advocates will now work to extend the successes of the preceding years.

Finally, as this issue goes to print, we have learned that the Maryland General Assembly passed the Clean Indoor Air Act, which will soon be signed into law by Governor Martin O'Malley. Look for details about the successful campaign in the next issue.

*Kathleen Hoke Dachille*  
Center Director

## The Tobacco Control Legacy of Retired Attorney General Curran

A champion for public health, civil rights and consumer protection, J. Joseph Curran, Jr., retired in January 2007 after nearly five decades of public service. For twenty years, Mr. Curran served with distinction as Maryland's Attorney General; that service followed his years as Lieutenant Governor (1983-1987), State Senator (1963-1983), and State Delegate (1959-1963).<sup>1</sup> As Attorney General, Mr. Curran used his considerable authority to pursue companies and individuals who caused harm to the citizens of Maryland. Early in his tenure as Attorney General, Mr. Curran came to understand the public health crisis created by the sale and use of tobacco products and he worked methodically and creatively over the years to ameliorate that harm. Although detailing each and every effort in that campaign would fill a book. This article highlights some of the more recent tobacco-related projects spearheaded by Mr. Curran.

### *Suing the Tobacco Industry*

In 1996, Mr. Curran filed a lawsuit against the major cigarette manufacturers and tobacco industry

organizations seeking \$13 billion as reimbursement for health care costs paid by the State of Maryland to treat patients with tobacco-related illnesses. As one of the earliest-filing states and because of Mr. Curran's



stature among his colleagues, Maryland's attorneys played a leadership role in negotiating a global settlement, now known as the Master Settlement Agreement or MSA. Not only does the MSA provide for more than \$200 billion in damages to be paid to the states over 25 years, the agreement contains injunctive provisions designed to reduce smoking prevalence, particularly among

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**In This Issue**

*The Tobacco Control Legacy of Retired Attorney General Curran*..... 1

**• National News**

Maine’s Third Largest City Bans Smoking in Vehicles With Children as Passengers..... 5

The National Zoo in Washington D.C. Goes Smokefree..... 6

State Farm Properties Go Smokefree in Seven State.....6

Colorado Smoking Ban Applies to Theatrical Performances.....7

Ballot Initiatives Reap Results.....7

US Supreme Court Vacates Major Punitive Damages Award Against Philip Morris.....8

Tobacco Students Get The Inside Scoop.....8

Courthouse Doors Open Again in California.....9

The Supreme Court Hears *Watson v. Philip Morris*.....11

Update on Florida’s *Engle v. Liggett* Class Action Case.....12

The Weinstein Company’s Latest Production: Anti-Smoking Ads.....13

**• Maryland Happenings**

Baltimore City Passes Smoking Ban.....14

Baltimore City Hopes Pilot Program Will Create More “Ex” - Smokers.....14

State Cancer Council Hosts Successful Conference.....15

**• Inside the Center**

Exploring Economically Viable Alternatives for Tobacco .....16

Training Sessions Help Prepare Organizations for Legislative Session.....18

Center Director Visits Sister Center in Columbus.....18

MDQuit is Created and Center Director Joins Advisory Board .....19

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*Continued from page 1*

youth. Although smoking remains the leading preventable cause of death, adult and youth smoking prevalence declined after the implementation of the MSA. Mr. Curran's dedication to this effort continued throughout his service as his office participated in many investigations and negotiations associated with securing full compliance with the MSA.

### ***Youth Smoking Prevention***

Mr. Curran's commitment to Maryland children is well-known. He has worked to enhance penalties for sexual predators who harm children, educate the public about the risk of handgun ownership in homes with children, and reduce the prevalence of violence on television. This interest in protecting children is evident also in his tobacco work. In addition to aggressively pursuing MSA provisions designed to protect children from enticing cigarette marketing campaigns, Mr. Curran developed the Program to Reduce Youth Access to Tobacco Products in 2001.<sup>2</sup> After conducting a sting operation that revealed that minors were able to purchase tobacco at retail establishments in more than 60% of the attempts, Mr. Curran encouraged local governments to identify and penalize retailers who sell tobacco to minors and, with his colleagues in the Tobacco Work Group of the National Association of Attorneys General (NAAG), negotiated settlements with major chain retailers to adopt policies designed to reduce youth access to

tobacco. Today, many Maryland counties have active and effective enforcement programs and chain retailers such as CVS, Walgreen's, Exxon/Mobil, BP Amoco, Rite Aid, Walmart/Sam's Club, 7-Eleven, have implemented company policies designed to prevent youth tobacco sales in their stores.

Further, with his NAAG colleagues, Mr. Curran successfully worked to terminate R.J. Reynolds Tobacco Company's Kool Mixx marketing campaign, a hip-hop based campaign targeting minors, particularly African American youth.<sup>3</sup> Mr. Curran was actively involved in NAAG negotiations that resulted in Reynolds' agreement to stop selling candy, fruit and liquor-flavored tobacco products.<sup>4</sup> Taking a leadership role that included testimony before the U.S. Senate and meetings with the Motion Picture Association of America, National Association of Theatre Owners, and Directors Guild of America Social Responsibility Task Force, Mr. Curran initiated a NAAG effort to reduce the prevalence of the depiction of smoking in movies and to encourage the entertainment industry to use its influence to prevent youth smoking. In November 2005, Mr. Curran called for Hollywood to include public service announcements in DVDs of movies depicting smoking and on the eve of his retirement was encouraged by the news that movie producers, the Weinstein Company, would include the effective anti-tobacco ads on the DVD, *Clerks II*. (For more on the Weinstein

decision, see article on page 13.) There is no doubt that this work has contributed to the decline in youth smoking prevalence in Maryland, a decline that will result in lower adult smoking prevalence and smoking-related illness in decades to come.

### ***Legal Advice and Contribution to the Public Debate***

Over the years, the Attorney General has been asked many times for advice about tobacco-related matters. As early as 1993, Mr. Curran advised the Maryland State Board of Education that all public schools must adhere to State law and eliminate smoking rooms and all other indoor smoking in schools. The School Board immediately advised its schools to come into compliance. That same year, Mr. Curran testified before the Baltimore City Council, advising that the legislative body has the authority to regulate tobacco billboard advertisements throughout the City. With confidence in that advice, Baltimore City passed a law regulating cigarette advertising on billboards. In response to a State Delegate's inquiry, in 2000, Mr. Curran concluded that local governments have the authority to require that retailers display tobacco products only in areas inaccessible to consumers, meaning no self-service tobacco displays.<sup>5</sup> Several counties have passed such restrictions relying on that advice.<sup>6</sup> In 2002, Mr. Curran issued an *Opinion of the Attorney General*

*Continued on page 4*

*Continued from page 3*

upholding a local government's broad authority to regulate smoking when done to protect the public health, specifically concluding that a county could restrict smoking on private property if necessary for the public health.<sup>7</sup> With his consistent and supportive advice, Mr. Curran assisted local governments in developing tobacco control policies and laws.

Mr. Curran has also used his position as a respected State official to voice his support for tobacco control and public health measures. Recognizing the concerns about the State's financial investment in tobacco companies, in 1994, Mr. Curran encouraged the State pension system to divest the fund of tobacco industry investments; even today the debate on this issue continues across the country. Over the years, Mr. Curran has announced his support for legislation banning smoking in public places and workplaces, worked to secure legislation banning the sale of tobacco through the internet, and requested that Time magazine not carry tobacco advertisements.

### ***Partnerships and Awards***

Upon its creation in 1996, Mr. Curran joined the Smoke Free Maryland Coalition, lending his support to the organization's tobacco control work. In 2001, Curran announced a partnership with the University of Maryland School of Law under the umbrella of the Legal Resource Center for Tobacco Regulation, Litigation and Advocacy and we have worked with the Attorney General on various matters over the years.<sup>8</sup> Mr. Curran has also

served on the State's Task Force to Conquer Cancer and the Task Force to End Smoking.

While by no means a comprehensive list, Mr. Curran has been acknowledged for his tobacco control work with the following awards:

- Achievement Award, American Cancer Society (1991, 1995);
- Lawmaker of the Year, American Heart Association (1995-96);
- Advocate of the Year, Smoke Free Maryland (1997);
- Jack Lodge Award, American Lung Association of Maryland (1997);
- Breath of Life Award, American Lung Association of Maryland (1999);
- Public Service Award, American Legacy Foundation (2007).

With this resume of public service focusing on the public health—all while operating an office with hundreds of employees and a plethora of substantive legal responsibilities—Mr. Curran will always be considered a friend to the public health and tobacco control community.

### ***Footnotes***

<sup>1</sup> A biography on Mr. Curran can be found in the Maryland Manual, located online at: <http://www.msa.md.gov/msa/mdmanual/08conoff/attorney/former/html/msa01493.html>

<sup>2</sup> More information on this program can be found online at: <http://www.oag.state.md.us/Tobacco/youthaccess.htm>

<sup>3</sup> That agreement can be found online at: <http://www.oag.state.md.us/Tobacco/KoolMixxSettlement.pdf>

<sup>4</sup> That agreement can be found online at: <http://www.oag.state.md.us/tobacco/flavored.pdf>

<sup>5</sup> Maryland Attorney General Opinion 00-033, can be found online at: <http://www.oag.state.md.us/Opinions/2000/00-033.pdf>

<sup>6</sup> Jurisdictions with local product placement laws: Charles County, Howard County, Kent County, Montgomery County, Prince George's County, Talbot County, Wicomico County, and Baltimore City. Carroll and Garrett Counties also have such prohibitions pursuant to a public local law passed by the Maryland General Assembly. See Senate Bill 791 (2005).

<sup>7</sup> 87 Opinion of the Attorney General 167 (2002) can be found online at: <http://www.oag.state.md.us/Opinions/2002/87oag167.pdf>.

<sup>8</sup> Because of the effectiveness of this relationship, newly elected Attorney General, Douglas Gansler, extended the appointment of Center Director Kathleen Dache as a Special Assistant to the Attorney General on certain tobacco-related matters.



# NATIONAL NEWS

## Maine's Third Largest City Bans Smoking in Vehicles with Children as Passengers

In January 2007, the Bangor City Council boldly voted to protect its children from the dangers of exposure to secondhand smoke while riding in motor vehicles. Bangor police now have the authority to pull over and ticket drivers or passengers who are smoking in cars or trucks with a minor present, regardless of whether the window is down.<sup>1</sup> The Council voted 6-3 to approve the measure, which applies to motor vehicles and smoking materials of any type, on any public road within the city limits. There is a \$50 fine for the infraction, although police are likely to give just warnings to first-time offenders.

Local pediatric health providers, concerned about the adverse health effects of secondhand smoke exposure on children, were the primary drafters and supporters of the bill. A study released in October 2006 found that secondhand smoke in a car can be detrimental even if the windows are rolled down for ventilation.<sup>2</sup> Because children's bodies are still growing and developing, they are more susceptible than adults to the adverse health effects posed by

cigarette smoke. Children inhale 50 percent more air per pound than adults, resulting in more significant damage to their young bodies.<sup>3</sup> This damage includes lower respiratory tract infections, like bronchitis and pneumonia; development or exacerbation of asthma; and middle ear infections.<sup>4</sup>

Arkansas and Louisiana enacted laws prohibiting smoking in cars when a child who is required to be restrained in a car seat is in the vehicle; this means children under six years of age and under sixty pounds.<sup>5</sup> A similar bill failed in the Maryland General Assembly this year.<sup>6</sup> In addition, Arizona, California, Georgia, Illinois, Massachusetts, Michigan, New Jersey, New York, Pennsylvania, Vermont, and West Virginia have considered or are considering similar laws.

Due to the efforts of fifth grader Justin Kvadas from East Hartford, the Connecticut State legislature is considering such a law. For his efforts in getting State Representative Henry Genga to sponsor the legislation, Kvadas was named Person of the Week by ABC News.<sup>7</sup>

Based on the flurry of legislative proposals this year, we can expect future updates on this issue.

### Footnotes

<sup>1</sup> Code of Ordinances, City of Bangor, §§291-70 and 291-71 (2006).

<sup>2</sup> Vaughn Rees & Gregory Connolly, *Measuring Air Quality to Protect*

*Children from Secondhand Smoke in Cars*, American Journal of Preventative Medicine, available at <http://www.ajpm-online.net/webfiles/images/journals/amepre/1751.pdf>.

<sup>3</sup> *Tips on Creating a Healthier Home for Children*, American Lung Association Health House Program and 3M Offer Free Tips Booklet (2002), available at <http://www.lungusa.org/site/pp.asp?c=dvLUK9O0E&b=36058>.

<sup>4</sup> *Respiratory Health Effects of Passive Smoking (Also Known as Exposure to Secondhand Smoke or Environmental Tobacco Smoke – ETS)*, U.S. Environmental Protection Agency, Office of Research and Development, Office of Health and Environmental Assessment, Washington, D.C. (1992), available at <http://www.epa.gov/smokefree/pubs/etsfs.html>

<sup>5</sup> Arkansas Code Annotated §§20-27-1900 *et seq.* (2006); Louisiana Statutes Annotated §32.300.4 (2006).

<sup>6</sup> Senate Bill 629 (2007) received an unfavorable report by the Senate Finance Committee. The bill can be found online at: <http://mlis.state.md.us/2007RS/bills/sb/sb0629f.pdf>.

<sup>7</sup> See <http://abcnews.go.com/WNT/PersonOfWeek/story?id=2864236>.

## The National Zoo in Washington, D.C., Goes Smokefree

Following a national trend, the National Zoo in Washington, D.C., became entirely smokefree on December 1, 2006. The Zoo's previous ban on smoking in its buildings and animal areas now extends to all outdoor areas—and even includes zoo vehicles. One stated reason behind the ban is to prevent cigarette-caused fires on zoo grounds. Approximately two million people visit the National Zoo annually.

## State Farm Properties Go Smokefree in Seven States

Early in 2007, State Farm Insurance Company in Charlottesville, Virginia, announced a complete ban on smoking at all its properties within the company's Mid-Atlantic Zone, which comprises North Carolina, Virginia, West Virginia, Maryland, and Delaware. The ban does away with designated outdoor smoking areas and even applies to smoking in private cars parked on company grounds.

“It's a serious health risk and as a company, we wanted to provide a healthy work environment for everyone,” said spokesman John Hannah.

Annual health care costs and lost productivity from U.S. company employees who smoke are astounding: The American Lung Association estimates such costs to be \$167 billion.

State Farm is headquartered in Bloomington, Illinois.

Other major zoos that have adopted smokefree policies in 2006 and 2007 include:

- Hogle Zoo in Salt Lake City (Jan. 15, 2007)
- North Carolina Zoo (Jan. 1, 2007)
- Philadelphia Zoo (Dec. 1, 2006)
- Topeka Zoo (Nov. 16, 2006)
- Cincinnati Zoo (Sept. 1, 2006)
- Pittsburgh Zoo (May 1, 2006)
- Nashville Zoo (Jan. 1, 2006)



**“Hey - Put That Out!!!”**

## Colorado Smoking Ban Applies to Theatrical Performances

A state district court judge in Denver ruled that Colorado's theater companies are subject to the state's Clean Indoor Air Act and, therefore, cannot stage performances in which actors smoke on stage. The restriction applies to non-tobacco cigarette props as well as cigarettes, cigars, pipes, or other tobacco products. The judge ruled that the act of smoking, even within a performance, does not constitute expressive conduct subject to protection under the First Amendment. Attorneys for the State argued that when enacting the smoking ban, the legislature considered and rejected an exemption for theater performances.

## Ballot Initiatives Reap Results

The November 2006 elections brought Ohio, Arizona and Nevada into the ranks of states that have enacted comprehensive clean indoor air legislation. Ballot initiatives in each of those states passed overwhelmingly in favor of smoke-free workplaces and public places—including restaurants and bars in Ohio and Arizona. In addition, a majority of voters supported a proposal in Florida requiring that tobacco settlement funds be used to pay for tobacco prevention programs. The South Dakota electorate approved

initiatives raising tobacco taxes and increasing funds for health care and tobacco prevention programs. Early childhood development programs in Arizona will also be funded through an increase in tobacco taxes.

Tactics used by the tobacco industry in opposition to these ballot initiatives created additional hurdles for advocates. Perhaps the best example is the situation presented to Ohio voters. In that state, tobacco control and public health advocates successfully petitioned a question to the ballot—Question #5 Smokefree Ohio. That proposal called for a smoking ban in virtually all indoor public places and workplaces and specifically allowed local governments to pass their own equal or more rigorous laws. The tobacco industry, led by R. J. Reynolds Tobacco Company, successfully petitioned Question #4 Smoke Less Ohio to the same ballot. That proposal would have prohibited smoking in most indoor public places and workplaces, with exceptions for bars, restaurants and other entertainment venues, and would have preempted local governments from passing more rigorous public health protections. The preemption would have been retroactive, reversing existing local laws banning smoking in virtually all indoor public places and workplaces. SmokefreeOhio advocates were forced to send not only the message that voters should support Question #5, SmokeFree Ohio, but that voters should vote no on Question #4, Smoke Less Ohio. By its nature as a proposed constitutional amendment, if passed, Question #4 would have superseded

Question #5. Despite Reynolds' more than \$5 million marketing campaign, SmokeFree Ohio prevailed.

Tobacco companies were successful, however, in defeating proposed cigarette tax increases and health care and tobacco prevention funding measures in California and Missouri. The tobacco industry spent over \$65 million in California and over \$5 million in Missouri for advertising campaigns criticizing the measures.

As expected, passage of the new laws spawned various legal attempts to delay their implementation and challenge their constitutionality. In response to one suit, the Ohio Attorney General agreed not to enforce the Smoke Free Indoor Air Act until the Ohio Department of Health develops rules for enforcement. The Department filed draft rules in March; final rules are expected by June. In January, a district court judge upheld the Nevada Clean Indoor Air Act against a constitutional challenge. The ruling let stand the law's civil provisions, which allow for fines and are enforceable by local health districts; the judge removed the law's criminal provisions, however.

## U.S. Supreme Court Vacates Major Punitive Damages Award Against Philip Morris

In a 5-4 decision, the U.S. Supreme Court vacated \$79.5 million in punitive damages awarded against Philip Morris in a suit by the widow of a lifelong Marlboro smoker.<sup>1</sup> The Court did not rule that the award was excessive; rather, it found that the Oregon courts may have violated Philip Morris' due process rights by disallowing a proposed jury instruction that the tobacco company argued was necessary to ensure proper calculation of the punitive damages amount. The case was remanded to the Oregon Supreme Court for a determination of whether there was reversible error in rejecting Philip Morris' proposed jury instruction. Therefore, it is possible that the Oregon Court reconsiders but nevertheless reinstates the judgment.

Jesse Williams smoked about three packs of Marlboro cigarettes every day for 47 years before dying from inoperable lung cancer. His widow sued Philip Morris, claiming negligence and fraud due to the tobacco company's repeated advertisements and studies that made their cigarettes seem less dangerous than they actually were. In 1999, a jury awarded Mayola Williams \$821,000 in compensatory damages, plus \$79.5 million in punitive damages to punish Philip Morris for engaging in wrongful conduct. After the Oregon Supreme Court upheld the award, Philip Morris appealed to the U.S. Supreme Court, arguing that the trial court should have allowed an

instruction stating that the jury was not permitted to punish the defendant for the harm to other persons (i.e., other smokers who suffered smoking-related illness or death), only for the harm to Mr. Williams.<sup>2</sup> Philip Morris also claimed that the award—at nearly 100 times the compensatory damages—was excessive in light of the Court's decision in *State Farm v. Campbell*.<sup>3</sup> Although subject to various interpretations, the *State Farm* decision essentially limits the ratio of punitive damages to compensatory to a single-digit,

suggesting that due process principles forbid exceeding this ratio except in the most extraordinary cases.

The Supreme Court heard oral arguments in the *Williams* case on October 31, 2006, and the Justices' questions revolved solely around the rejected jury instruction. Juries may consider the reprehensibility of a defendant's conduct in calculating a punitive damages award. Evidence of actual harm to others—here, other Oregon smokers of Philip Morris'

### Tobacco Students Get the Inside Scoop

On November 1, 2006, Ned Miltenberg of the Center for Constitutional Litigation in Washington, D.C., visited Center Director Kathleen Dachille's Tobacco and the Law Seminar to give the students a behind-the-scenes debriefing on oral arguments heard in the *Williams* case just the day before. Miltenberg co-wrote the brief submitted to the Court on Mrs. Williams' behalf; his colleague, Robert Peck, argued the case.

Miltenberg underscored his surprise—also felt by many following the case—that the Justices' questions focused entirely on the trial court's propriety in rejecting Philip Morris' proposed jury instruction. Miltenberg and his colleagues believed that the Court had taken the case to clarify or change the law on punitive damages ratios as set out in *State Farm v. Campbell*; however, there was no questioning or argument about the award's claimed excessiveness. Based on the arguments, however, Miltenberg surmised that the Court would remand the case back to the Oregon Court with little direction and no significant, if any, impact on jurisprudence. How prescient—as the Supreme Court decision did just that!

The timeliness of this prominent guest speaker afforded Dachille's students the opportunity to be “in the know” about a major tobacco liability case.



*Continued from page 8*

cigarettes—is useful to show that the actions that harmed the plaintiff also created a substantial risk of harm to the public at large, and were therefore especially reprehensible. The Court explicitly held that while it is permissible for a jury to consider harm to others to determine reprehensibility of the defendant’s conduct, the jury cannot then punish the defendant for that harm. Rather, the jury should impose damages to punish the defendant only for the harm caused to the plaintiff.

The *Williams* Court found that the award would constitute an unconstitutional taking of Philip Morris’ property (i.e., its money) if the jury imposed the damages in order to punish Philip Morris for the harm to other Oregon smokers. While acknowledging that no court can be certain that the jury actually imposed the damages to punish Philip Morris for harming others rather than just Mr. Williams. Nevertheless, the Supreme Court remanded for the Oregon Court to consider whether failing to give the jury instruction proposed by Philip Morris improperly increased the likelihood that the jury wrongly punished for harm to others.

The Court declined to rule on whether the \$79.5 million award was “grossly excessive,” because the Oregon Supreme Court may adjust the award or require a new trial upon reconsideration. Alternatively, Oregon may reinstate the award after determining that the jury did not improperly punish Philip Morris for past conduct. Should that occur, it is questionable whether

the Supreme Court would once again take the case to consider the award’s excessiveness.

Although Philip Morris publicly claimed victory, the tobacco industry had hoped not only for a ruling that the award in question was clearly excessive, but that the Court would adopt a bright-line rule for determining appropriate punitive damages awards in future cases such as this.

#### **Footnotes**

<sup>1</sup> *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007). Justice Breyer wrote the majority opinion in which Chief Justice Roberts and Justices Kennedy, Souter and Alito joined. Justices Stevens and Thomas filed dissenting opinions; Justice Ginsburg also wrote a dissent in which Justices Scalia and Thomas joined.

<sup>2</sup> Specifically, Phillip Morris proposed the following instruction: *The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant’s punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit.*

<sup>3</sup> 538 U.S. 408 (2003).

## **Courthouse Doors Open Again in California**

Californians who suffered smoking-related illness or death were dealt a blow in 2002 when the U.S. Court of Appeals for the Ninth Circuit issued its decision in *Soliman v. Philip Morris*.<sup>1</sup> In that case, the court held that, under California law, a smoker-plaintiff’s statute of limitations for personal injury claims begins to run when the smoker-plaintiff becomes aware or should have become aware that he is addicted to cigarettes. After several earlier successful cases,<sup>2</sup> this decision severely curtailed individual and class action litigation against tobacco companies in California courts. But through its February 2007 decision in *Grisham v. Philip Morris*,<sup>3</sup> the California Supreme Court changed the law so that plaintiffs are not burdened by the overly stringent statute of limitations expressed in *Soliman*.

The court distinguished between claims based on addiction, which must be brought within two years of awareness of the addiction, and personal injury claims, which must be brought within two years of when a plaintiff knew or should have known that an injury or illness suffered was caused by smoking. Interestingly, the case was before the California Supreme Court on a certified question from the Ninth Circuit, the court that had ruled in *Soliman*. Apparently the Ninth Circuit was unsure of whether its interpretation of California law was

*Continued on page 10*

*Continued from page 9*

consistent with how the state's highest court would decide the case; hence, the question was referred to the state court. While the ruling does not address substantive issues nor reduce the difficulty of litigating such a case for a smoker, it does allow the smoker-plaintiff the opportunity to come to court and present his claims. The filing of tobacco cases in California is likely to rise in the aftermath to *Grisham*.

#### Footnotes

<sup>1</sup> 311 F.3d 966 (9<sup>th</sup> Cir. 2002).

<sup>2</sup> Successful trials include *Henley v. Philip Morris*, 5 Cal. Rptr. 3d 42 (2003)(1999 jury verdict of \$50 million punitive award reduced on appeal to \$9 million); *Boeken v. Philip Morris*, 127 Cal. Rptr. 4th 1640 (2005)(2001 jury verdict of \$3 billion in punitive damages reduced to \$50 million); and *Bullock v. Philip Morris*, 42 Cal. Rptr. 3d 140 (2006)(2002 jury verdict of \$28 billion in punitive damages reduced to \$28 million on appeal and further appeal pending outcome of *Williams* case).

<sup>3</sup> 151 P.3d 1151 (Ca. 2007).

### Smoke Drift in Multi-Unit Housing Continues to Plague Residents

Secondhand smoke drift in multi-unit housing continues to be a concern among many residents. A Portland, Oregon Metropolitan Area study showed that one quarter of residents were exposed to secondhand smoke in their units either from adjacent residents

smoking indoors or from residents or visitors smoking in outdoor areas close to a window or entrance.

Three quarters of renters stated that with all other factors being equal they would choose to live in a smokefree community and nearly half would be willing to pay additional rent.<sup>1</sup>

#### *Housing Authorities Taking the Initiative*

Many local housing authorities have recognized the growing health and safety concerns of tenants. In response, several housing authorities have proactively adopted smokefree policies and used smokefree living to attract renters. Housing authorities are local agencies that provide affordable housing for seniors and low-income families. Since 2004, the number of housing authorities in the U.S. with smokefree policies has quadrupled.<sup>2</sup> In Michigan, thirteen housing commissions – 10% of the state housing commissions – have gone smokefree in the last two years.<sup>3</sup> The Livonia Housing Commission, the largest, has three buildings for the elderly totaling 388 apartments. The Marysville Housing Commission, the most recent Michigan housing commission to go smokefree, adopted a policy that creates a smokefree living environment for about 139 residents and went into effect on April 19. The Maine State Housing Authority encourages developers to adopt non-smoking policies by including the adoption of such a policy as a positive criterion for developers seeking certain tax credits.<sup>4</sup> Eleven out of the twenty-nine housing

authorities in Maine have adopted a smokefree policy, making that State a leader in affordable smokefree housing.

#### *Litigation on Smoke Drift in Private Residences*

Desperate tenants and condominium owners have used litigation in an attempt to control secondhand smoke drift from neighbors. While litigation can be costly and slow, existing law does provide solid foundations for a lawsuit in many circumstances. For example in Pittsburg, California, a nonsmoking tenant of a senior living facility won a small claims action against his landlord and neighbor. The tenant complained that his neighbor who smoked on an adjoining balcony caused smoke to enter the tenant's apartment. The successful claim was based on breach of covenant of quiet enjoyment, breach of warranty of habitability and negligence. The judge awarded the tenant \$100 from each defendant plus the costs of making the claim, explaining that the court would have awarded more if the tenant had claimed other money damages and provided receipts. The judge also ordered the neighbor to stop smoking on the adjoining balcony.

Recently in New York City, a judge found that secondhand smoke can give rise to a warranty of habitability and constructive eviction claim. Even though the case was settled before a final judgment on the facts, the judge compared

*Continued on page 11*

*Continued from page 10*

secondhand smoke to other nuisances, such as noxious odors, smoke odors, chemical fumes, excessive noise, water leaks, and extreme dust penetration. The Pittsburg and New York City cases are examples of how courts are becoming more receptive to treating secondhand smoke in the home as a nuisance.

### *Local Laws Go Beyond Restricting Smoking in Public Places*

While hundreds of municipalities have passed legislation banning smoking in enclosed public places and workplaces,<sup>5</sup> some cities are taking more dramatic steps to help those residing in multiunit dwellings. Local bodies, such as the City of Dublin and the City of Calabasas, both in California, have passed legislation that not only prohibits smoking in public places but also includes a provision declaring secondhand smoke a nuisance per se.<sup>6</sup> A nuisance per se provision allows a private citizen to bring legal action to abate secondhand smoke drift without proving that tobacco smoke meets the criteria of a nuisance. Other city councils in California are pursuing similar legislation. Belmont, California is considering an ordinance that would ban smoking in all multi-unit dwellings, including apartments, condominiums, nursing homes and senior citizen housing. The ordinance would permit smoking only in a designated outdoor smoking area. If passed, the Belmont law would be the strongest in the country.

As residents become more vocal about the concern for their health and safety, the trend for smokefree housing grows dramatically. Smokefree housing, like smokefree restaurants, has become a marketing tool for landlords and management companies who recognize that the overwhelming majority of Americans do not smoke and do not want to live in an apartment into which someone else's tobacco smoke is drifting. Local governments and housing authorities along with judges are also responding to the need for healthier living arrangements.

#### *Footnotes*

<sup>1</sup> For the complete survey, visit [http://www.lungoregon.org/Tenant\\_Survey\\_Report.pdf](http://www.lungoregon.org/Tenant_Survey_Report.pdf)

<sup>2</sup> <http://www.preventionnetwork.org/Newsletter%20page/Spring%202007.pdf>

<sup>3</sup> For a complete list of smokefree housing authorities in Michigan, go to [www.miapartment.org](http://www.miapartment.org). A complete list from other states is available from the Center for Tobacco Regulation.

<sup>4</sup> For more information on Maine's Qualified Allocation Plan, go to <http://www.mainehousing.org/>.

<sup>5</sup> For a complete list, visit the Americans for Non-Smokers' Rights webpage at [www.no-smoke.org](http://www.no-smoke.org).

<sup>6</sup> City of Dublin Municipal Code 5.56.160 and City of Calabasas Municipal Code 8.12.070.

## **The Supreme Court Hears *Watson v. Philip Morris***

Soon the Supreme Court may weigh in on the battle over the appropriate forum for state law claims alleging that tobacco companies' marketing of light cigarettes violated state consumer protection and consumer fraud statutes. The Arkansas case, *Watson v. Philip Morris*,<sup>1</sup> is scheduled for oral argument before the Justices on April 25, 2007. In the underlying class action suit filed in state court, the plaintiffs allege that Philip Morris violated the Arkansas Deceptive Trade Practices Act by engaging in "unfair business practices and/or deceptive and unlawful conduct in connection with the manufacture, distribution, promotion, marketing, and sale of Cambridge Lights and Marlboro Lights." The plaintiffs assert that Philip Morris marketed these cigarette brands as being lower in tar and nicotine than they actually were. Philip Morris succeeded in getting the case removed to federal court based on the company's alleged compliance with Federal Trade Commission (FTC) regulation of statements concerning tar and nicotine.

The question presented to the Supreme Court is whether Philip Morris' compliance with a federal regulation makes it a "person acting under a federal officer" within the meaning of 28 U.S.C. §1442(a)(1). That law allows removal from state to federal court of a civil suit brought under state law if certain conditions are met. Tobacco companies and

*Continued on page 12*



Continued from page 11

those who sue tobacco companies agree that typically federal courts are more responsive and favorable to the industry; plaintiffs prefer state court. Finding that Philip Morris met the requirements of §1442(a)(1), the federal district court ordered removal.

The U.S. Court of Appeals for the Eighth Circuit upheld the removal decision. The court found that the plaintiffs' overall claims involved, in part, a challenge to Philip Morris' advertising of light cigarettes. Because the FTC rigorously regulates cigarette advertising with respect to tar and nicotine yield of light cigarettes, the court reasoned that Philip Morris "acted under" the direction of the FTC when creating its light cigarette advertisements. Moreover, because Philip Morris articulated a "colorable federal claim," "federal officer" removal was appropriate.

Whether this decision will withstand Supreme Court review is an interesting question of jurisdiction and jurisprudence to legal scholars. Perhaps more importantly, however, this decision will be watched closely as "lights" class action litigation continues to proceed in state and federal courts around the country. Indeed, the *Watson* decision foreshadowed the Illinois Supreme Court's decision in *Price v. Philip Morris* in which the court found that Philip Morris' alleged deceptive sales and marketing of light cigarettes was exempted from protection by Illinois' consumer protection law because the defendant's conduct was "authorized" by the FTC.<sup>2</sup> At the

same time, however, other state and federal courts have allowed class action litigation concerning light cigarettes to proceed.<sup>3</sup> Because the issue of the FTC's regulation of light cigarette advertising presents both a procedural and substantive issue in these cases, Supreme Court guidance now may prevent years of unnecessary litigation on those issues in cases across the country.

#### Footnotes

<sup>1</sup> 420 F.3d 852 (8<sup>th</sup> Cir. 2005), cert. granted, 127 S. Ct.1055 (2007).

<sup>2</sup> 846 N.E.2d 597 (Ill. 2006).

<sup>3</sup> See *Aspinall v. Philip Morris*, 813 N. E. 2d 476 (Mass. 2004); see also *Schwab v. Philip Morris, et. al.*, (United States District Court for the Eastern District of New York 2006), Memorandum Certifying "Light" Cigarette Class, available at [http://tobacco.neu.edu/litigation/cases/supportdocs/schwab\\_cert\\_order.pdf](http://tobacco.neu.edu/litigation/cases/supportdocs/schwab_cert_order.pdf).

### Update on Florida's *Engle v. Liggett Class Action Case*

In another bizarre twist to a case initially hailed as a decisive blow to tobacco companies, the Florida Supreme Court withdrew its earlier opinion in *Engle v. Liggett Group, Inc.*, and issued a revised opinion on December 21, 2006. The most recent opinion affirms the court's earlier decision to decertify the class and set aside a \$145 billion punitive damages award, but makes two key changes with respect to jury findings of negligence and strict product liability.

First, the court upheld the finding that defendant tobacco companies were liable to the class for breach of express warranty. This means that the defendants were found to have sold or supplied cigarettes that failed to conform to the companies' representations about the products, and that individual plaintiffs will not have to prove this in future trials. However, the court sided with the industry on a second issue, striking down the jury finding that defendants committed fraud and sought to mislead consumers about the negative health effects and addictive nature of their cigarettes. Therefore, individual plaintiffs will have to prove this claim in subsequent suits. The court also refused defendants' request for a rehearing of two major holdings that survived from the July decision: (1) the reinstatement of compensatory damages awards to two plaintiffs, and (2) the upholding of jury findings that smoking cigarettes causes cancer and various other health problems, nicotine is addictive, cigarettes are unreasonably dangerous and defective, and tobacco companies purposely misled the public about all of these facts in order to continue selling cigarettes.

This ruling could still be considered a victory for Florida plaintiffs as those filing individual suits will not need to spend time and resources proving the above mentioned claims. Future plaintiffs in individual suits need only present evidence of their personal smoking

Continued on page 13



Continued from page 12

habits—the brands of cigarettes they smoked, how many, and for how long—and the health consequences they endured as a result of smoking. Individual plaintiffs must file their own lawsuits stemming from decertification of the *Engle* class by January 11, 2008.

### The Weinstein Company's Latest Production: Anti-Smoking Ads

The Weinstein Company, a New York based independent motion picture studio, has voluntarily agreed to include public service announcements (PSAs) in DVDs of movies that depict smoking, beginning with *Clerks II*. The decision was in response to a letter from 41 state Attorneys General requesting that motion picture production companies include anti-smoking ads in DVDs to counter the impact that the depiction of smoking has on young movie watchers.<sup>1</sup>

The PSAs, provided free of charge to the production companies, are from the American Legacy Foundation's innovative, and highly successful truth® campaign. The truth® ad titled "1200" will appear on the *Clerks II* DVD. In it, a young male stands amidst 1200 "dead" bodies with a sign that reads "TOBACCO KILLS 1200 PEOPLE A DAY."

Brothers Bob and Harvey Weinstein hope that the PSAs will make a difference in the movement

to prevent youth smoking and that other studios will get on board. "We are very proud to be the first to sign on to this important initiative. The Attorneys General made a very

The Social Climate Survey of Tobacco Control released the results of a 2006 survey of U.S. adult attitudes about the effects of smoking depicted in movies. Included among the findings are that:

- 80 percent of adults believe that onscreen smoking influences teens to smoke.
- 70 percent of adults—a 10 percent increase from prior years—want to see "R" ratings for movies depicting smoking, unless the smoking is necessary to characterize the actions of an historical figure or the movie clearly communicates the dangers of smoking.
- Two-thirds of adults agree that antismoking ads should be shown before any film that depicts smoking.

The Motion Picture Association of America has thus far ignored repeated calls to include tobacco imagery as a factor in warranting an R rating in films.

sensible request, and we think the concept has a lot of merit." Harvey—who used to smoke heavily himself—adds, "As a former smoker, I feel like it's my responsibility to do everything I can to educate young people about the dangers of smoking."

Inserting the youth-targeted ads is believed to be a vital tool in offsetting the impact that on-screen smoking has on teens' decisions to start the deadly habit. The evidence is overwhelming. About 80 percent of adult smokers began smoking before they were 18. A 2003 cohort study found "strong evidence that viewing smoking in movies promotes smoking initiation among adolescents."<sup>2</sup> A survey of 6,500 youths aged 10 to 14 years, led by Dartmouth Medical School researcher James Sargent, found that "exposure to movie smoking is the primary independent risk factor for smoking initiation in U.S. adolescents in this age group."<sup>3</sup> About 390,000 teens start smoking every year as a direct result of watching movies in which characters smoke.<sup>4</sup> Approximately one-third of those will die from smoking-related illness or disease.<sup>5</sup> With the Weinstein agreement, we hope to see reductions in these numbers.

#### Footnotes

<sup>1</sup> Former Maryland Attorney General Curran initiated this project and was able to celebrate this victory just before his January 2007 retirement. Mr. Curran's press release, with links to relevant documents, can be found at: <http://www.oag.state.md.us/Press/2006/102406.htm>.

<sup>2</sup> See <http://smokefreemovies.ucsf.edu/pdf/Dalton-Lancet.pdf>.

<sup>3</sup> Madeline A. Dalton, et al., *Parental Rules and Monitoring of Children's Movie Viewing Associated with Children's Risk for Smoking and Drinking*, PEDIATRICS, Vol. 118, No. 5, pp. 1932-42 (Nov. 2006).

Continued from page 13

<sup>4</sup> Benjamin Alamar & Stanton A. Glantz, *Tobacco Industry Profits from Smoking Images in the Movies*, PEDIATRICS, Vol. 117, No. 4, p. 1462 (Apr. 2006).

<sup>5</sup> See [www.scenesmoking.org](http://www.scenesmoking.org).

## MARYLAND HAPPENINGS

### Baltimore City Passes Smoking Ban

After introduction more than a year ago, the fight over whether smoking should be allowed in Baltimore City bars and restaurants finally came to a close. On Monday, February 26, 2007, the Baltimore City Council approved a bill banning smoking in nearly all indoor public places by a 9-2 vote, with three council members abstaining. Under the legislation, business owners could face a \$500 fine if they violate the ban, and individuals could face a \$250 fine. Private clubs and tobacconist establishments are exempt from the restrictions. The law also contains a hardship provision, allowing businesses to apply for a waiver to the City Commissioner of Health on a showing of undue financial hardship or other factors rendering compliance unreasonable.<sup>1</sup>

Several council members, including those who favored the smoking bill, sympathized with the concerns of small business owners. But in the end, public health messaging and overwhelming constituent support helped gain

enough momentum to secure passage of the bill. The bill's lead sponsor and Council Vice President, Robert W. Curran, described the vote as a "historic night" for the city of Baltimore. "Very rarely do we get a chance where a single vote can save lives," Curran said.<sup>2</sup> Center Deputy Director Michael Strande met with Mr. Curran, his staff and advocates innumerable times in advance of the hearings and the vote, making suggested changes that would streamline the law and assure its legal sufficiency. Strande also met with Councilmembers to answer their questions and concerns about the bill.<sup>3</sup>

Opponents of the smoking ban, which include the Restaurant Association of Maryland and Baltimore Licensed Beverage Association, testified to their belief that the smoking ban will have a devastating effect on neighborhood bars. But Baltimore City Mayor Shelia Dixon supported the Council's decision, explaining that smoking bans in other jurisdictions have been implemented with little or no effect on bar and restaurant business. Mayor Dixon signed the bill into law two days after the Council vote. The new law will take effect January 1, 2008.

With the signing, Baltimore City becomes the fifth jurisdiction in Maryland to enact a complete ban on smoking in indoor public places and workplaces. Montgomery, Howard, Talbot, and Prince George's counties already have bans. Charles County has a ban in

restaurants, but exempts stand alone bars.

In the months leading up to enactment, the City Health Department will promulgate regulations for accepting and ruling on waiver applications and enforcement of the law. Center staff have been asked to assist in that process. Dr. Joshua Sharfstein, the City's Health Commissioner, expects the process of establishing the waiver regulations to take several months and has vowed to hold hearings during the drafting process to receive public input. "We're committed to it being a fair and transparent process," said Sharfstein, who publicly supported the legislation. He also noted that health departments in other cities have successfully navigated similar waiver provisions without incident.

The Council's support for the smoking ban in a city with working class roots highlights the growing support for such legislation among the general public. The Baltimore City ban also gives new life to efforts to pass a statewide smoking ban during the 2007 General Assembly Session.

#### Footnotes

<sup>1</sup> Ordinance 07-392 is codified in the City of Baltimore Health Code §§12-101 *et seq.*

<sup>2</sup> Councilman Curran is the brother of former Attorney General Curran (see article on page 1).

Continued on page 15

*Continued from page 14*

<sup>3</sup> Interestingly, one of the first assignments for the inaugural class of the Tobacco Control Clinic was to draft a clean indoor air ordinance for

Baltimore City at the request of Smoke Free Maryland and other community organizations; that was in the Spring of 2003. That draft served as the foundation for Ordinance 07-392.

### **Baltimore City Hopes Pilot Program Will Create More “EX<sup>sm</sup>”-Smokers**

In January 2007, the American Legacy Foundation began test-marketing EX<sup>sm</sup>, an innovative smoking cessation program, in Baltimore City. The dynamic program, created by Legacy and the Mayo Clinic’s Nicotine Dependence Center, is described on the EX<sup>sm</sup> website as a “comprehensive approach, one that comes at [tobacco] addiction from all sides: the physical, the behavioral, the psychological and the spiritual.” Chosen for its ability to test the program among differing populations, Baltimore City joined Buffalo, San Antonio, and Grand Rapids as an EX<sup>sm</sup> test site. The campaign’s mass marketing, including stunning television ads, is provided at no cost to the City or the State and will run through June.

More than half of the people who smoke cigarettes would like to quit. Often, however, smokers do not grasp the power of their addiction to tobacco or what it takes to overcome



their dependence. EX<sup>sm</sup> differs from conventional smoking cessation programs by focusing on those who have already decided to quit smoking; therefore, no resource or messaging is wasted on the simple “don’t smoke” mantra of most cessation programs. Rather, EX<sup>sm</sup> provides realistic advice and effective tools to help smokers succeed in quitting. The campaign is hard-hitting and edgy, with no smiling faces or sunny skies that imply quitting is easy. The program includes bilingual, multi-cultural television and radio advertising and provides free resources proven to boost smokers’ chances of effectively kicking the habit. A comprehensive and free EX<sup>sm</sup> Quit Manual is provided to all callers who enroll in the program; this thick, diary-like book requires the smoker to express in writing many aspects of the quit attempt, such as reasons to quit, reasons to continue smoking and triggers for smoking behavior. EX<sup>sm</sup> also utilizes personal coaching, social support systems, and referrals for access to pharmacotherapy (e.g., nicotine replacement therapy (NRT) in the form of gum, patches, and lozenges; and the prescription drug bupropion). Callers to the EX<sup>sm</sup> Quitline (1-800-QUIT-NOW) are patched through to the Maryland

Quitline operators, who can direct smokers to locally available cessation resources, such as free NRT and support group meetings.

During the test period, the Maryland Department of Health and Mental Hygiene suspended its Quitline ads so the impact of the EX<sup>sm</sup> program could be measured without State program interference. Results of the pilot program in all test markets are expected later in 2007. If the program proves successful, Legacy is prepared to launch a national campaign. For more information, consult the EX<sup>sm</sup> website, [www.becomeanex.org/home.aspx](http://www.becomeanex.org/home.aspx).

### **State Cancer Council Hosts Successful Conference**

On November 15, 2006, the Maryland State Council on Cancer Control hosted its 13<sup>th</sup> annual conference on cancer issues and challenges faced in Maryland. While past conferences have focused on various cancers and causes of cancer, the 2006 event focused on lung cancer and the impact of smoking-related illnesses and deaths in Maryland.

Dr. Jon Samet from the Johns Hopkins Bloomberg School of Public Health described for the hundreds of attendees the burden that tobacco and lung cancer impose on society—a mostly preventable burden. Attendees also heard from Joan Stine from the Department of Health and Mental Hygiene and local health

*Continued on page 16*



*Continued from page 15*

officers about how the Cigarette Restitution Fund is used to promote cessation and reduce initiation in various locales across the State. Center Director Kathleen Dachtelle explained for attendees the current status of tobacco control and public health legislation and policy development in Maryland. Dachtelle spoke about the advocacy community's significant work on the statewide clean indoor air campaign as well as on campaigns in local jurisdictions, giving practical advice on how attendees could add their voices to the effort. Because youth tobacco issues are always relevant, Dachtelle discussed the Attorney General's work to reduce cigarette manufacturers' marketing campaigns designed to entice youth to smoke and the Center's work to achieve smokefree living for foster children.

The conference brought together a diverse group—doctors and other health care providers, research scientists, attorneys, and policy advocates—and achieved success as an event interesting and helpful to each group.



Back Row (Left to Right): Alva Wright, Lauren Willis, Chris Bostic

Front Row (Left to Right): Ambassador Juan Martabit (President of the FCTC Conference of the Parties, Chile), Dr. Samuel Ochola (Vice Chair of the first meeting of the Ad Hoc Study Group on Alternatives to Tobacco, Kenya)

## INSIDE THE CENTER

### Exploring Economically Viable Alternatives for Tobacco

By Lauren Willis\*

More than 400,000 Americans die from cigarette smoking each year.<sup>1</sup> Globally, an estimated 4.9 million people die each year as a result of tobacco-related diseases.<sup>2</sup> The most disturbing aspect of the global public health epidemic caused by tobacco use is not the magnitude of the harm, which is extreme, but that the harm is entirely preventable. In 2003, the World Health Organization (WHO) sought to address this epidemic by adopting the Framework Convention on Tobacco Control (FCTC), the first global public health treaty. The FCTC recognizes that tobacco has created a problem that requires international action (not only does tobacco create many transboundary issues, but out of the 1.3 billion smokers in the world, 84% are living

in developing and transitional economy countries).<sup>3</sup> What makes the FCTC so unique, however, is that unlike drug control treaties, the FCTC seeks to address demand reduction strategies as well as supply reduction issues.

Prior to becoming a student-attorney in the Tobacco Control Clinic, I was well aware of some problems caused by tobacco due to my own personal experiences: secondhand smoke in bars and restaurants, a cigarette-ignited fire in my apartment building, and a family member struggling with nicotine addiction. As a Maryland resident, I was also familiar with strategies to reduce the demand for tobacco such as cigarette taxes, advertising bans and restrictions, and anti-smoking campaigns. It was not until I started working in the Tobacco Control Clinic, however, that I came to realize the problems tobacco poses for tobacco workers and growers.

Before embarking on our journey into international tobacco control and public health, Alva Wright, a third year law student, and I researched two issues: tobacco crop conversion and alternative uses for tobacco. Although these are obvious areas of study for economists and public health leaders alike, there is not a great deal of information developed on either issue. In our policy papers we summarized the information that does exist, and described existing studies that are ongoing. We then honed those papers down to a one-page summary of our findings. This process helped Alva and I better understand the issues and the need for additional research.

*Continued on page 17*



*Continued from page 16*

In February 2007, Alva and I traveled to Brasilia, Brazil (the capital of the second largest tobacco producing country in the world) with Chris Bostic, a Clinical Instructor in the Tobacco Control Clinic and counsel to the Framework Convention Alliance (“FCA”). The FCA is a group of 250 organizations created to support the implementation of the FCTC. Together we represented organizations in the FCA at the WHO first meeting of the Ad Hoc Study Group on Alternative Crops to Tobacco. The study group was formed as a result of a supply-side reduction strategy of the FCTC.

Article 17 of the FCTC mandates that parties to the convention “promote, as appropriate, economically viable alternatives for tobacco workers, growers and, as the case may be, individual sellers.” Rather than focusing solely on decreasing the number of smokers in the world to promote public health, the FCTC, among other things, also seeks to encourage tobacco growers to switch to other crops or alternative livelihoods. Tobacco growers should substitute alternative crops for tobacco or engage in alternative livelihoods not only because of market forces (basic economic principles dictate that a decrease in demand for tobacco products should result in a drop in price), but also because of the health and social issues associated with the cultivation of tobacco. Throughout a one day public hearing and two days of meetings in Brazil, I learned that smokers are not the only victims of tobacco.

The first day of the conference was dedicated to a public hearing on agricultural diversification and alternative crops to tobacco. Unlike the ad hoc study group meeting, the hearing was open to the public and was well attended by tobacco growers representing farmers’ groups, civil society, the tobacco industry, and thousands of viewers via a live webcast on the Internet. Although Alva and I believed we would be passive observers of the hearing, we found ourselves taking to the podium to read statements from member organizations of the FCA. With the aid of headphones and simultaneous translation (into Portuguese, English, Spanish, and Chinese), I heard different strategies and opinions regarding diversification and crop substitution.

Although concerns regarding the profitability of alternative crops arose, farmers groups emphasized their desire to develop sustainable livelihoods. Some presenters discussed the health issues that arise from cultivating tobacco caused by pesticides or by Green Tobacco Sickness, a condition that develops when farmers absorb nicotine through their skin from collecting the tobacco leaves. I also learned about women and child labor issues that are a persistent problem on small family farms in developing countries. While some presenters suggested alternative crops that can be substituted for tobacco, others suggested finding alternative uses for tobacco, such as biofuels or pharmaceuticals. Ultimately, there was strong support for research and policy changes aimed at helping growers find alternative crops or

livelihoods. During the next two days of meetings, I was enveloped in an international dialogue that was truly one of my favorite law school experiences.

Due to my time in Brazil, I now have a greater understanding of the issues associated with tobacco cultivation and the inner workings of implementing a global public health treaty. I came to discover that, while economics are inevitably tied to tobacco because of its cash crop status, the main priority of the FCTC is to protect public health, including the health of tobacco growers and workers. Because organizations like the WHO, the FCA and the Tobacco Control Clinic are working to decrease demand for tobacco products, I eagerly await the day when all growers can cease cultivating tobacco. Until then, tobacco may be a profitable crop, but I hope that more people come to realize the true costs of tobacco: healthcare costs, lost productivity, environmental damage, pain and suffering, and, above all, millions of lives lost needlessly every year.

*\*Lauren Willis is a third year law student pursuing a Concentration in Environmental Law.*

#### **Footnotes**

<sup>1</sup> Dept. of Health and Human Services, Centers for Disease Control and Development, Fact Sheet, Cigarette-Smoking Related Mortality, at [http://www.cdc.gov/tobacco/data\\_statistics/Factsheets/cig\\_smoking\\_mort.htm](http://www.cdc.gov/tobacco/data_statistics/Factsheets/cig_smoking_mort.htm).

<sup>2</sup> World Health Organization, Tobacco Free Initiative, Frequently asked questions on the WHO FCTC and the context in which it was negotiated, at <http://www.who.int/tobacco/framework/faq/en/index.html>.

<sup>3</sup> *Id.*

## Training Sessions Help Prepare Organizations for Legislative Session

With a number of tobacco control issues being deemed legislative priorities by prominent State legislators and local governments alike, the 2007 General Assembly Session was quietly earmarked by Maryland's public health community as a make-or-break year. In order to make the most of this burgeoning opportunity, the Center provided a number of advocacy training sessions at the request of organizations, covering Central Maryland to the Eastern Shore.

In the months leading up to the State's frenetic 90-day legislative session, the Center received a number of requests from various organizations interested in receiving advocacy training, in general, and a primer on upcoming tobacco control legislation. Deputy Director Michael Strande traveled around the State, giving a PowerPoint presentation and answering questions to diverse audiences of interested individuals. Groups included CRF coalitions in Carroll, Harford, Montgomery, St. Mary's, and Somerset counties; the Maryland Association of Prevention Professionals and Advocates; and the Maryland STOPS (Students Together Organizing Prevention Strategies) Advisory Board.

In addition to providing updates on previously introduced legislation, the presentation covered specific provisions contained in proposed legislation; permissible

lobbying and public education; the best methods of capturing legislators' attention; how to approach a meeting with your legislators or their staff; how to attract and sustain positive media coverage; and how to work with other state organizations on these important issues. Positive reaction to the presentation and follow-up questioning are strong indications that those present were energized by the realistic possibility of bill passage and guided to make their voices heard. The advocacy strategies and clarification of legal issues covered in the Center's trainings should lead to more effective and efficient grassroots action.

## Center Director Visits Sister Center in Columbus

On October 6, Center Director Kathleen Dachille traveled to Columbus, Ohio, to participate in two events at the invitation of Micah Berman, Executive Director of the Tobacco Public Policy Center at the Capital University Law School. In the morning, Dachille participated in the Wolfe Symposium, a day-long event hosted by OhioHealth's McConnell Heart Health Center, entitled "Making the Business Case for Smoking Cessation and Tobacco Control." Issues raised at the symposium ranged from a thorough discussion of Marriott International's new policy banning smoking in all indoor areas of Marriott hotels to the availability and efficacy of

employer-provided smoking cessation programs and tools for employees.

In her presentation entitled "Employment Policies Based on Smoking Habits", Dachille discussed the provocative and timely questions: May an employer lawfully hire only non-smokers? May an employer lawfully fire employees who smoke? In the last year, employers who have adopted policies designed to eliminate smokers from the payroll garnered national media attention. While the issue typically instigates much debate over the appropriateness of such a policy, employers considering making employment decisions based on an applicant's or employee's smoking status are far more interested in the legal nuts and bolts of their decision. Dachille addressed some of the potential claims that could be brought against an employer, concluding that absent a statute to the contrary or an individual or union contract providing such a right to employees, employers may terminate smoking employees or refuse to hire smokers.

That same afternoon, Dachille participated in "Striking the Rights Balance," a conference hosted by the National Center for Adoption Law and Policy, that examined how government agencies can respect parents' privacy rights while also protecting vulnerable children. Dachille engaged in a spirited debate with Dr. Jeffrey Schaler of American University over whether and when it is appropriate

Continued from page 18

for the state to “enter the home” to protect children from exposure to secondhand smoke. While falling short of suggesting that smoking in enclosed areas with children constitutes child abuse or neglect, Dachille articulated why it is appropriate for the state to regulate smoking in foster homes, impose smoking restrictions in custody, visitation or guardianship proceedings and prohibit smoking in the home when used as a childcare facility. Dr. Schaler vigorously disagreed, arguing that such infringements violate individuals’ right to privacy and to parent autonomously. At the end of the debate, it became clear that Dachille and Dr. Schaler would be forced to agree to disagree as time expired before either party showed any sign of compromise.

Dachille returned to Columbus on October 27 to participate in “Waiting to Exhale,” a full day conference hosted by the Tobacco Public Policy Center for the benefit of Ohio lawyers considering tobacco-related litigation. Presenters addressed traditional product liability cases—how and when plaintiffs have succeeded and what the future holds for such cases—as well as “new” tobacco litigation such as the “lights” consumer protection-based cases and product liability cases for cigarette-caused fires. Dachille presented on the second issue, surveying cigarette-fire cases, exploring the evidence needed to prove a claim and expressing utter frustration that trial attorneys have not “seized the day” on such claims.

The afternoon discussion centered on secondhand smoke exposure in the workplace and in multi-unit dwellings. As the day ended, participants heard from veteran tobacco control attorney, Richard Daynard from the Northeastern University School of Law and Tobacco Products Liability Project. Dr. Daynard explained how and why he and other trailblazers initiated litigation against the tobacco industry and implored each of us to stay the course for the benefit of public health.

### Center Director Joins MDQuit Advisory Board, Presents at Conference

Having launched the Maryland Quitline,<sup>1</sup> the Department of Health and Mental Hygiene (DHMH) helped create and fund a resource center to increase Maryland smokers’ chances of successfully quitting. The Maryland Resource Center for Quitting Use and Initiation of Tobacco (MDQuit) is housed at the University of Maryland, Baltimore County with faculty member, Dr. Carlos DiClemente, serving as Director. During its initial operations, the Center created a helpful website—[www.MDQuit.org](http://www.MDQuit.org)—and materials that can be used by medical professionals assisting their patients with smoking cessation. The multi-disciplinary nature of the center is evident from its mission statement:

*Our mission is to link professionals and providers to state tobacco initiatives, to provide evidence-based, effective resources and tools to local programs, to create and support an extensive, collaborative network of tobacco prevention and cessation professionals, and to provide a forum for sharing best practices.*

Dr. DiClemente and his staff gathered a significant amount of data about Maryland smokers and their desire—or lack of desire—to quit using tobacco. Much of that data is presented in an easy-to-use format on the MDQuit website. This initial research helped the resource center identify variations in the target populations and design cessation plans to accommodate as many smokers as possible.

As a member of the Advisory Board, Center Director Kathleen Dachille has been actively involved with MDQuit since it became operational. In addition to attending Board meetings, reviewing organizational materials and providing feedback, Dachille participated in the inaugural Best Practices Conference hosted by

Continued on page 20

*Continued from page 19*

MDQuit in January. Dachille discussed with the audience of tobacco control advocates and health care workers the upcoming Maryland legislative session.

The day-long conference also included a presentation by Hosanna Asfaw-Means of the American Legacy Foundation about the EX<sup>sm</sup> smoking cessation program; an update by Dawn Berkowitz from the Maryland Department of Health and Mental Hygiene about early data from the Quitline; and talk by Meg Gallogly of the Campaign for Tobacco Free Kids about the impact local tobacco control and prevention can have in small communities. During the afternoon session, participants were provided with detailed information about the “Fax to Assist” program by which medical providers can refer patients for Quitline services. Participants also had the opportunity to examine and better understand the significance of the data collected by the resource center.

Solid turnout for the conference underscores the public health community’s interest in learning more about effective cessation programs. Along with the Quitline, the work of the resource center should contribute to increased cessation attempts and improved chances of successful quit attempts for Marylanders by engaging health care professionals in the effort.

#### **Footnotes**

<sup>1</sup> See *Tobacco Regulation Review*, Vol. 5, Issue 2, at p. 6 (February 2007). The number is 1-800-QUIT NOW (784-8669).



### **MDQuit Advisory Board**

**Kathleen Dachille, J.D.**, Legal Resource Center for Tobacco Regulation, Litigation & Advocacy: University of Maryland School of Law

**Lisa Dixon, M.D.**, Director of the Division of Services Research, University of Maryland, School of Medicine, Department of Psychiatry

**Michaeline Fedder, M.A.**, President, Smoke Free Maryland

**Kevin Ferentz, M.D.**, Director of Clinical Operations, Department of Family Medicine

**Sonia Fierro-Luperini, M.D.**, Morgan State University, School of Public Health & Policy

**Jacquelyn Fried, RDH, MS**, Associate Professor and Director, Division of Dental Hygiene, University of Maryland Dental School

**Meg Gallogly**, The Campaign for Tobacco-Free Kids

**Linda Green, RN**, Worcester County Health Department

**Neil Grunberg, Ph.D.**, Professor of Medical & Clinical Psychology, Professor of Neuroscience, Uniformed Services University of the Health Sciences

**Mildred Morse, JD, CTAS**, Founding Director, National Tobacco Independence Campaign

**Stephen Peregoy**, President & CEO, American Lung Association® of Maryland, Inc.

**Tony Tommasello**, Pharmacist, Ph.D., Director, Office of Substance Abuse Studies