

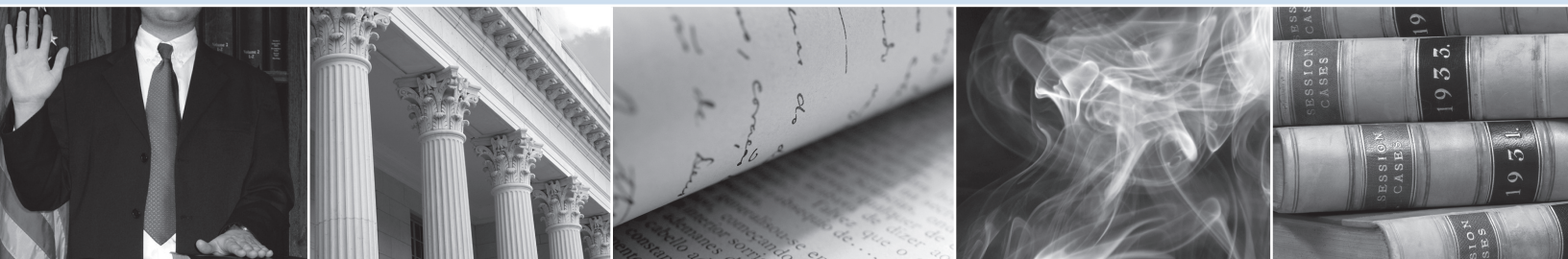
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Light Cigarette Lawsuits in the United States: 2007

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Tobacco Control
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Introduction

Many smokers and potential smokers believe that light cigarette brands* are less hazardous to their health than standard brands.¹ As a result, millions of smokers have switched to light cigarettes instead of attempting to quit.² For the same reason, light cigarettes are popular among new smokers, particularly youth.³ The truth, however, is that light cigarettes are not safer than other brands and are just as addictive.⁴

Have these smokers been misled? In 2001, the National Cancer Institute published an analysis of internal industry documents that appeared to show that the cigarette industry knew the truth about light cigarettes, but kept it secret.⁵ Further evidence of wrongdoing was revealed by the United States Department of Justice's lawsuit against the leading cigarette manufacturers.⁶ Federal District Court Judge Gladys Kessler, who presided over the case, made the following key findings in August of 2006:

For several decades, Defendants have marketed and promoted their low tar brands as being less harmful than conventional cigarettes. That claim is false. . . . By making these false claims, Defendants have given smokers an acceptable alternative to quitting smoking, as well as an excuse for not quitting.⁷

...

Defendants' conduct relating to low tar cigarettes was intended to further their overarching economic goal: to keep smokers smoking; to stop smokers from quitting; to encourage people, especially young people, to start smoking; and to maintain or increase corporate profits.⁸

Believing they were misled, light cigarette smokers have begun to bring lawsuits against cigarette manufacturers. The manufacturers deny any wrongdoing and are vigorously defending themselves in court.

This law synopsis examines light cigarette litigation. Section I provides a brief history of light cigarettes and their marketing. Section II provides an introduction to the ways tobacco litigation advances public health goals. Sections III and IV focus respectively on light cigarette class actions and individual light cigarette lawsuits. Section V discusses some key federalism issues at play in the litigation. Section VI touches on some of Judge Kessler's findings of fact about the cigarette industry's marketing of light cigarettes.

* For purposes of this synopsis, the term "light cigarette" includes "light," "ultra light," "low tar," "low nicotine" and similar descriptors.

Key Points

- Cigarettes branded as "light," "ultra light," "low tar," and the like are not designed to deliver less tar or nicotine to the smoker or otherwise reduce harmful exposure to the many toxic chemical compounds in cigarette smoke.
- Internal industry documents show that cigarette manufacturers have been aware for many years that light cigarettes expose smokers to just as much tar and nicotine as other brands, but still misled smokers and potential smokers into believing otherwise.
- Class action lawsuits alleging that cigarette manufacturers fraudulently misled consumers into believing light cigarettes are less harmful than other brands have been filed in over two dozen states, but only a few of the class actions have been allowed to proceed to trial.
- The only light cigarette class action lawsuit to reach trial resulted in a multibillion dollar judgment against Philip Morris, but was overturned by the Illinois Supreme Court.
- In 2006, a federal judge ruled that leading cigarette manufacturers violated the federal Racketeer Influenced and Corrupt Organizations Act — in part because of their light cigarette marketing.

Section I – A Brief History of Light Cigarettes and Their Marketing

In 2001, the National Cancer Institute released its landmark Monograph 13 on light cigarettes (“NCI Monograph”). Entitled *Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine*, the NCI Monograph examined scientific research on the health effects of smoking light cigarettes, and reviewed many internal industry documents. The NCI Monograph removed any doubt that light cigarettes are just as harmful as other brands.⁹ It also concluded that many smokers had tragically switched to light cigarettes instead of quitting because they believed that light cigarettes are less harmful than other brands.¹⁰ The most startling conclusion reached in the NCI Monograph was that manufacturers marketed light cigarettes in a manner that exploited people’s health concerns about cigarettes by offering them a choice to switch to what appeared to be a less harmful cigarette.¹¹

Cigarette manufacturers started producing light cigarettes in the late 1960s.¹² By that time, scientific studies had demonstrated that smoking rates correlated with an increase in lung cancer rates, and physicians had begun to recognize that the two were linked.¹³ Cigarette manufacturers viewed these findings as a threat to their profitability and, in response, started marketing light and ultra light cigarettes.¹⁴ Using machine measurements, manufacturers compared tar and nicotine yields of their light cigarettes to those of other brands, and then touted the lower readings in advertising and on packaging for light cigarettes.¹⁵

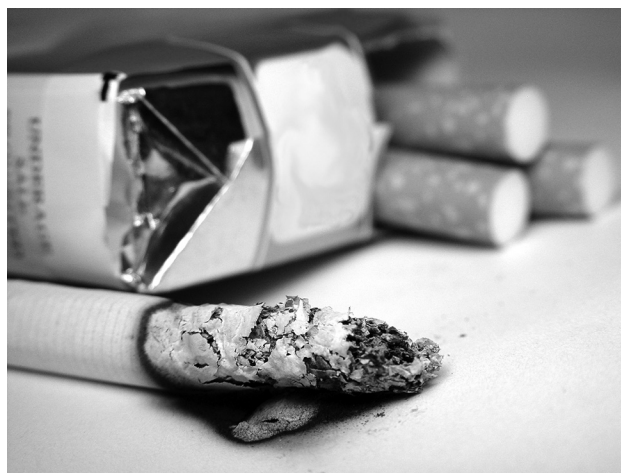
One reason light cigarettes are not safer than other brands is that the machines the industry commonly uses to measure tar and nicotine yields produce inaccurately low readings. Smokers alter the depth and frequency of their inhalation largely as a result of their nicotine addiction.¹⁶ To satisfy their addiction, light cigarette smokers often draw smoke deeper into their lungs and with greater frequency than smokers of other brands.¹⁷ As a result, actual exposure levels can be much higher than machine tests indicate.¹⁸

Moreover, a design characteristic in some light cigarettes has led to even lower machine readings. Several light cigarette brands have small ventilation

holes in the paper near the filter.¹⁹ When measured by a machine, air is drawn through the vents, diluting the smoke.²⁰ When these cigarettes are smoked under natural conditions, however, the smokers’ fingers or lips cover some or most of the vents.²¹ This design characteristic further skews machine-measurements to underreport actual tar and nicotine in the smoke.²²

Analyses of industry documents reveal that cigarette manufacturers have known about these measurement and exposure issues for some time. An R.J. Reynolds Tobacco Company planning memo written in 1972 states, “Given a cigarette that delivers less nicotine than he desires, the smoker will subconsciously adjust his puff volume and frequency, and smoking frequency, so as to obtain and maintain his per hour and per day requirement for nicotine. . . .”²³ Industry documents show that “advertisements of filtered and low-tar cigarettes were intended to reassure smokers (who were worried about the health risks of smoking) and were meant to prevent smokers from quitting based on those same concerns,” according to the NCI Monograph.²⁴ The NCI Monograph goes on to conclude that “cigarette manufacturers recognized the inherent deception of advertising that offered cigarettes as light [and] . . . as having the lowest tar and nicotine yields. . . .”²⁵

Tragically for the public’s health, the light cigarette advertisements have worked. Light cigarettes have become very popular. They make up the vast majority of cigarettes now sold in the United States,²⁶ and, despite scientific evidence to the contrary, the vast majority of smokers and nonsmokers continue to believe that they are less harmful.²⁷



Section II – The Role of Litigation in Tobacco Control

Litigation against the tobacco industry has advanced tobacco control. Litigation has led to the disclosure of millions of internal tobacco industry documents.²⁸ These documents “reveal an amazing variety and geographical range of tobacco industry misconduct, including targeting children, deliberately misleading scientists, politicians and customers about the lethality and addictiveness of their products, and conspiring with smugglers and money launderers around the world.”²⁹ In many cases, industry documents also help tobacco control advocates and lawmakers craft effective public health policies.³⁰

Large damage verdicts can help focus the public’s attention on tobacco-related issues. Advocates can leverage this attention into support for tobacco control policies, and use it to communicate new information about the target of industry marketing and tobacco-caused diseases.

Litigation also compensates individuals harmed by industry conduct and funds tobacco control efforts. For example, the Flight Attendants Medical Research Institute, which was established in the mid-1990s as part of the settlement of *Broin v. Philip Morris Companies*, is spending hundreds of millions of dollars on research of secondhand smoke.³¹ Another example is the 1998 Master Settlement Agreement, which resulted from lawsuits filed by the states to recover money they spent on caring for sick and dying smokers.³² While the Agreement will eventually return over \$300 billion dollars to the states, the states, to the detriment of public health, have spent very little of this money on tobacco control programs.³³

Section III – Light Cigarette Class Action Litigation

The principal allegation in light cigarette lawsuits is that cigarette manufacturers have misled consumers by marketing light and low tar cigarettes as having less tar and nicotine than other brands, even though actual exposure levels are no different. Those who smoked (and continue to smoke) light cigarettes, reasonably believing they were being exposed to less tar or nicotine, are seeking court-ordered damages for their losses.

Most light cigarette lawsuits are class actions. The legal basis for these class actions largely relies on Unfair Trade and Deceptive Business Practices statutes (referred to below as “Unfair Trade statutes”), which every state has enacted. The intent of Unfair Trade statutes is to give consumers broad-based protection against abusive business practices.³⁴ Since their enactment, consumers have relied on these statutes to seek redress, even in the face of unforeseen or complex abusive business schemes.³⁵

In light cigarette class actions, plaintiffs argue that Unfair Trade statutes allow them to recover a full or partial refund for the money spent to purchase the light cigarettes.³⁶ In addition, Unfair Trade statutes typically allow for the recovery of three times the damages incurred.³⁷ At this time, the plaintiffs in class action litigation are not seeking to recover for their health-related injuries. Such damages are being sought in individual lawsuits, as discussed in Section IV of this synopsis.

Attorneys have filed class actions with the intent of benefiting large numbers of consumers who were similarly defrauded as a result of the marketing of light cigarettes. As a practical matter, in fraud cases, such as light cigarette lawsuits brought under an Unfair Trade statute, where the individual economic losses are relatively small and quantifiable, plaintiff attorneys argue that class actions are warranted. Plaintiff attorneys point out that if their clients are made to litigate individually, courts would essentially hear the same facts and decide the same points of law over and over again, thus wasting the judiciary’s resources. Proceeding as a class, according to plaintiff attorneys, is a much more economical and fair approach for courts to follow.

Cigarette manufacturers have sought to stop class certification. Their primary argument appears to be that individual issues predominate over similarities among the plaintiffs. In the cases discussed in this section, the manufacturers often argue that they are entitled to an opportunity to challenge each plaintiff as to whether he or she was actually misled by light cigarette advertising and whether the related purchases were motivated by health concerns. Some people have argued that industry opposition to class certification is actually designed to stop all light cigarette litigation under the Unfair Trade statutes because pursuing such claims individually is prohibitively expensive.³⁸

In any event, to qualify as a class action, a lawsuit brought on behalf of many individuals must meet the following key requirements: (1) the class is so large that trying each class member's claim individually is impractical, (2) there are common questions of law or fact, (3) the claims and defenses of the representative class members are typical of those of the class, and (4) the representative attorneys are competent to protect the interests of the class.³⁹ Courts across the U.S. have split on whether light cigarette lawsuits meet these requirements and can be certified as class actions. The following sections provide an overview of the decisions and rationales of the courts hearing these cases.

Certification of the Light Cigarette Class Actions

Several courts have allowed light cigarette lawsuits to proceed as class actions. Certification of a class action in Massachusetts against Philip Morris on behalf of those who purchased Marlboro Lights was upheld in August 2004 and is moving towards trial.⁴⁰ Known as *Aspinall v. Philip Morris*, the class is likely to include thousands of members.

The complaint alleges that Philip Morris's placement of the words "light" and "lowered tar and nicotine" on cigarette packaging and in advertising has been false and deceptive. The complaint also states:

[that Philip Morris has] omitted and suppressed the fact that they manipulate the tar and nicotine deliveries of their light cigarettes through a variety of design parameters, including but not limited to: the inclusion of microscopic ventilation holes in or around cigarette filters; the modification of tobacco blend and weight; the modification of tobacco rod length and circumference; the use of reconstituted tobacco sheets and/or expanded tobacco; and the increase of smoke pH level through the use of chemical additives and processes such as ammoniation [, which essentially means the manufacturer has used ammonia-related compounds in its tobacco].⁴¹

A key consideration for Philip Morris, according to the plaintiffs' complaint, was "to ensure that smoking light cigarettes would not make it easier for smokers to quit, and that smokers of light cigarettes would receive the nicotine 'satisfaction' of a regular

cigarette."⁴²

In support of these allegations, attorneys for the class cite a study by the Massachusetts Department of Public Health that found manufacturers have published inaccurate information on the nicotine and tar levels in the smoke emitted by their light cigarettes. This finding is based in part on the use of vents in cigarette paper. As described in Section I of this synopsis, smokers block with their fingers or lips some or most of the vents found in many brands of light cigarettes. During machine tests, however, these vents stay open and dilute the smoke. The machine measurements, as opposed to actual exposure levels, are communicated to the public.

A similar result was reached by a Missouri court in late 2003 in two cases: *Craft v. Philip Morris*⁴³ and *Collora v. R.J. Reynolds Tobacco Co.*⁴⁴ The defendants argued the class was not entitled to any refund because the price the plaintiffs paid for their cigarettes represents the value that the product would have had even if it had truly been, as represented, a low-tar and low-nicotine cigarette.⁴⁵ The court disagreed and found that Missouri law does not allow for this assumption. The court concluded that the plaintiffs in both of these cases "have a very plausible chance of proving such ascertainable losses and damages."⁴⁶ In August 2005, a court of appeals in Missouri affirmed the class certification in the *Craft* case.⁴⁷ R.J. Reynolds successfully removed *Collora* to federal court only to have it remanded back to the Missouri state courts in 2007.⁴⁸

In *Schwab v. Philip Morris USA, Inc.*, the plaintiffs brought a class action in federal court under the civil provisions of the federal Racketeer Influenced and Corrupt Organizations Act (RICO).⁴⁹ They accused the major cigarette manufacturers of carrying out an illegal enterprise "to defraud the public into believing that light cigarettes were a healthy alternative to regular cigarettes . . . in order to maximize sales and profits."⁵⁰

In 2005, just months after the federal court in *United States v. Philip Morris USA, Inc.* found that the leading domestic cigarette manufacturers were racketeers under the civil provisions of RICO, Judge Jack Weinstein certified the *Schwab* class for trial.⁵¹ Judge Weinstein noted the similarities between *Schwab* and the United States Department of Justice's lawsuit. He

concluded that:

Given that the United States government was precluded from seeking a disgorgement remedy in their RICO case against the cigarette industry, the instant action, or one like it, is likely to be the only way defendants, if they are responsible for the alleged massive fraudulent scheme, can be forced to account monetarily to “light” cigarette smokers in federal court and be deterred from continuing such fraudulent conduct in the future.⁵²

The defendants had argued that there are too many factual questions regarding each individual’s belief about light cigarettes and damages, but Judge Weinstein disagreed and found that the plaintiffs could use “fluid recovery” in seeking damages.⁵³ Fluid recovery allows for damages to be collected from the defendants and used to reimburse victims through a simplified, but accurate assessment of individual claims, as well as for general public efforts to remediate the effects of the fraud.

The class in *Schwab* includes the largest class of all of the light cigarette class actions. The members would include all of the light cigarette smokers in the United States, not just those residing in a particular state. Members whose rights were adjudicated in other cases would be excluded. The tobacco industry, however, has appealed the certification to the United States Court of Appeals for the Second Circuit. The appellate court agreed to hear the appeal and temporarily stayed the trial court from proceeding.

Decertification of the Light Cigarette Class Actions

Some lawsuits seeking class action status are not certified as class actions. The primary reason courts tend to give for denying certification is that smokers have different motives for purchasing light cigarettes. Some examples of denials of class certification are discussed in this section.

After a trial court granted certification to a class in February 2002, the Court of Appeal of Florida, Fourth District, reversed the order on December 31, 2003.⁵⁴ The trial court had determined that “neither the individual purchasers’ subjective motivation, nor their smoking habits are relevant to the central issues in this case.”⁵⁵ The appellate court decided otherwise and reversed the lower court ruling, finding that the

individual smoking behavior of each class member is relevant to such an extent that the common questions of law and fact in the case would not predominate over individual issues. An appeal to the Florida Supreme Court is pending.

In *Pearson v. Philip Morris, Inc.*, plaintiffs filed a lawsuit alleging that Philip Morris violated Oregon’s Unfair Trade statute by using the terms “light” and the phrase “lowered tar and nicotine” in its packaging and advertising in Oregon.⁵⁶ The judge refused to certify the proposed class action for the same reasons cited by the appellate court in Florida. The Oregon Court stated that “[i]t is not self-evident as plaintiffs contend that every purchaser of Marlboro Lights was motivated substantially by health concerns and acted because he or she was misled by the name ‘light’ or the statement ‘lowered tar and nicotine.’”⁵⁷ In October 2006, the plaintiff’s application for interlocutory appeal was denied by the Court of Appeals of Oregon. The plaintiffs will have another chance to appeal at the conclusion of the trial, if they are able to proceed to trial.



Similarly, in *Davies v. Philip Morris USA, Inc.*, a state court judge in Washington ruled that, while plaintiffs satisfied some of the requirements for class certification, they failed to meet the requirement that the common legal and factual issues predominate over any individual issues.⁵⁸ The court found that Philip Morris “would be entitled to challenge each and every class member as to causation” as well “as to his or her reasons for buying light cigarettes.”⁵⁹ In essence, Philip Morris convinced the court that it should have the opportunity to challenge the smokers regarding whether health concerns motivated them to purchase light cigarettes and whether they relied on the health-related information in Philip Morris’s light cigarette advertising and marketing.

Class actions in Kansas and New Mexico were not certified for largely the same reasons. In March 2007, a United States Magistrate ruled that, under Kansas’s Unfair Trade statute, the plaintiff must show reliance on the defendants’ alleged misrepresentation and that each class member suffered a loss as a result of the defendants’ allegedly deceptive practice.⁶⁰ That same month, a United States District Court Judge ruling on a light cigarette lawsuit in New Mexico found that “individual issues predominate such that a class action is not warranted.”⁶¹

Light cigarette class actions in Ohio, though ultimately unsuccessful, followed a slightly different route than some of the other cases. Class certification was upheld in September 2003 in two Ohio cases: *Marrone v. Philip Morris USA, Inc.* and *Phillips v. Philip Morris USA, Inc.*⁶² The trial court ruled in both cases that there are common questions of law among class members, the claims of the class representatives are typical of the class, and questions of law common to the class predominate over any questions affecting individual members. In September 2004, the Court of Appeals of Ohio, Ninth Appellate District, Medina County, affirmed the judgment of the trial court.⁶³

In June 2006, however, the Ohio Supreme Court ruled that a consumer may qualify for class-action certification “only if the defendant’s alleged violation of the Act is substantially similar to an act or practice previously declared to be deceptive” when a supplier acted in the face of prior notice that its conduct was deceptive or unconscionable.⁶⁴ That prior notice may be in the form of a rule adopted by the Attorney General or a court decision made available for public

inspection by the Attorney General, according to the court. The court ruled that Philip Morris had never received such prior notice.

In a dissent from the majority opinion, Justice Paul Pfeifer concluded that Philip Morris had received notification. Referring to a previous ruling where an Ohio court determined that selling gasoline from one underground tank as two distinct gasoline products with different costs per gallon and octane ratings is a deceptive practice, Justice Pfeifer asked “[d]oes anyone seriously doubt whether this published opinion put [Philip Morris] on notice that it could not characterize cigarettes as ‘light’ and sell them as such when it knew that the cigarettes were not light?”

Decertification of the Class in Price v. Philip Morris USA, Inc.

Only one light cigarette class action has been certified and also resulted in a full trial. On March 21, 2003, after a two-month trial of a light cigarette class action in Illinois, Judge Nicholas Byron issued his verdict of over \$7 billion in compensatory damages and \$3 billion in punitive damages.⁶⁵ The entire amount of punitive damages was awarded to the State of Illinois. Judge Byron concluded that:

Philip Morris internal documents and the testimony offered at trial demonstrate that Philip Morris, prior to the launch of Marlboro Lights and Cambridge Lights, knew that smokers adjusted their smoking behavior through largely unconscious means so as to receive the same dose of nicotine and tar from a Light cigarette as from a regular cigarette. In fact, the testimony and evidence clearly establish that Marlboro Lights and Cambridge Lights were specifically designed in such a way as to reduce the machine-measured tar and nicotine delivery while at the same time allowing consumers to extract the same levels of tar and nicotine from these products as they would extract from their regular Marlboro and Cambridge counterparts.⁶⁶

This and other evidence at trial, according to Judge Byron, showed that Philip Morris’s practices with regard to light and low tar cigarettes “are immoral, unethical, oppressive and unscrupulous and that this course of conduct caused a substantial injury to the Class members in this case.”⁶⁷

Philip Morris appealed the decision, which led to a ruling by the Illinois Supreme Court in December 2005 overturning the trial court and the \$10.1 billion damage award.⁶⁸ The Illinois Supreme Court held that Philip Morris's sales and marketing of "light" and "lowered tar and nicotine" cigarettes did not violate the Illinois Consumer Fraud Act. The rationale was that the United States Federal Trade Commission had authorized Philip Morris's conduct. The Illinois Consumer Fraud Act, the statute under which the lawsuit was brought, instructs courts to interpret it in a manner that is consistent with conduct "specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States," if such authorization exists.⁶⁹ The court agreed with Philip Morris that a voluntary agreement between the Federal Trade Commission and American Brands in 1971 constituted sufficient authorization, and therefore, overturned the trial court ruling.

It is worth noting the dissent in the Illinois Supreme Court decision. Justice Charles Freeman dissented that the "court's action . . . is predicated upon an erroneous and irresponsible interpretation of our Consumer Fraud Act." Justice Freeman cited evidence that the Federal Trade Commission had not authorized Philip Morris to use the descriptors "light" and "lowered tar and nicotine," noting that the Commission "did not enact or adopt any trade regulation rule with respect to cigarette advertising." Indeed, Philip Morris's own expert witness, Dr. John Peterman, testified at trial "that there has never been a [Federal Trade Commission] trade regulation rule governing cigarette advertising that has been put into effect."

The 1971 Consent Order relied upon by the court's majority opinion did not mention the descriptor "lights," did not define the descriptor "low tar" and did not have Philip Morris as a party to the proceeding. Philip Morris never signed the consent order and there "is no evidence in the record that [Philip Morris] ever complied with this consent order." Furthermore, in 2002, Philip Morris petitioned the Federal Trade Commission to issue a rule to allow tobacco companies to continue using terms such as "light" and "low tar." The Commission has never issued such a rule.

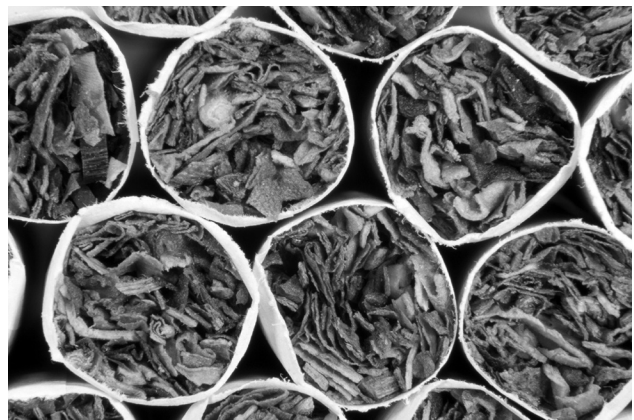
In November 2006, the United States Supreme Court declined to consider the plaintiffs' appeal from the Illinois Supreme Court decision. Although the

case was dismissed in favor of Philip Morris, the plaintiffs filed a motion in January 2007 seeking an order vacating the dismissal. On August 22, 2007, the Illinois Supreme Court, in *Philip Morris USA, Inc. v. Byron*, ordered the circuit court to enter an order dismissing the plaintiffs' motion to vacate the dismissal of the case.⁷⁰

Section IV – Light Cigarette Individual Lawsuits

Not all light cigarette litigation involves class actions. Since, for some years, light cigarettes have dominated the domestic cigarette market, it is no surprise that smokers of light cigarettes are falling ill and dying. In many ways, these individual lawsuits are similar in nature to other individual lawsuits against tobacco manufacturers, except that light cigarettes are involved. An important difference between individual light cigarette lawsuits and class action light cigarette lawsuits is that plaintiffs in individual lawsuits seek damages for health-related injuries. Plaintiffs in light cigarette class action lawsuits seek only a full or partial refund for the amount paid to purchase the cigarettes, at least at this time.

A good example of individual lawsuits involving light cigarettes is the case of *Schwarz v. Philip Morris*.⁷¹ The family of Michelle Schwarz brought a wrongful death action against Philip Morris after her death in 1999 from lung cancer at 53 years of age. She had smoked Merit cigarettes for approximately 23 years after having smoked another brand in 1964 as a young nursing student. Her family had urged her to quit smoking, and she tried to do so on several occasions without success. Eventually she switched to Merits because she believed that smoking this "lower tar" brand would make it easier for her to quit.



After her death, her widower, Richard Schwarz, filed a lawsuit in Oregon based on product liability, negligence and fraud. The complaint was later amended and stated that the cigarettes sold to Michelle Schwarz were “defective and unreasonably dangerous” in the following respects:

- a. The cigarettes contained added ammonia to increase the effects of nicotine;
- b. The cigarettes or their smoke contained altered pH so as to increase the effects of nicotine;
- c. At the time defendant’s light cigarettes were sold, the product was dangerous and in a condition not contemplated by the ultimate consumer in that it was manufactured, marketed, and sold as a less harmful alternative to ordinary cigarettes.⁷²

After a 25-day trial in 2002, the jury returned a verdict of \$168,000 in compensatory damages and \$150 million in punitive damages, which the trial judge lowered to \$100 million. In May 2006, an appellate court upheld the compensatory award, but overturned the punitive damages because, according to the court, the jury had been given improper instructions.⁷³ The appellate court concluded that the jury should not have considered conduct by Philip Morris that occurred outside of Oregon. Unless that ruling is reversed by the Oregon Supreme Court, a new trial will be held exclusively to determine the amount of punitive damages to assess against Philip Morris for its reprehensible misconduct.

Section V – Federalism Issues in Light Cigarette Litigation

The term “federalism” refers to the division of power between the federal government and the states. In the context of light cigarette litigation, federalism includes instances where a federal law may trump or supersede a state law through a principle known as preemption. It also includes efforts by cigarette industry defendants to move cases from state to federal courts where, historically, they have fared well.

Preemption of Claims

In *Dahl v. R.J. Reynolds Tobacco Co.*, the plaintiffs alleged the defendant advertised that its light

cigarettes “confer[red] a health benefit to consumers” even though this was untrue.⁷⁴ The plaintiffs stated that their lawsuit was not based on a standard for advertising health-related information on cigarettes, which is exclusively regulated by the Federal Cigarette Labeling and Advertising Act (“FCLAA”).⁷⁵ Instead, the plaintiffs claimed the advertising at issue violated the Minnesota Deceptive Trade Practices Act, which prohibits “lying” in advertising. Nevertheless, the court concluded that because the claims in *Dahl* touched on health-related issues, it was preempted by FCLAA.

In May 2006, a United States District Court Judge in *Good v. Altria Group, Inc.* ruled that the plaintiffs’ lawsuit was similarly blocked by FCLAA.⁷⁶ In *Good*, the plaintiffs alleged that Altria (Philip Morris) engaged in unfair and deceptive business practices in connection with the design, manufacture, distribution, promotion, marketing and sale of Marlboro Lights cigarettes in the State of Maine by:

- a. Falsely . . . representing that their product is light . . .;
- b. Describing the product as light when the so-called lowered tar and nicotine deliveries depended on deceptive changes in cigarette design and composition that dilute the tar and nicotine content of smoke per puff as measured by the industry standard testing apparatus, but not when used by the consumer;
- c. Intentionally manipulating the design and content of . . . [the product] in order to maximize nicotine delivery while falsely and/or deceptively claiming lowered tar and nicotine; and
- d. Employing techniques that purportedly reduce machine-measured levels of tar and nicotine . . . [their product] while actually increasing the harmful biological effects, including mutagenicity.⁷⁷

The court interpreted these claims simply as failure-to-warn claims, which the United States Supreme Court ruled were preempted in the landmark personal injury case, *Cipollone v. Liggett Group*.⁷⁸ On August 31, 2007, the U.S. Court of Appeals for the First Circuit, adhering to the U.S. Supreme Court’s seminal ruling in *Cipollone*, reversed the lower court’s

dismissal of the case.⁷⁹ The First Circuit held that the FCLAA preempts “only those claims based on a ‘requirement or prohibition based on smoking and health under State law with respect to the advertising or promotion’ . . . of cigarettes.”⁸⁰ The plaintiffs’ claims “allege that Philip Morris made fraudulent misrepresentations in derogation of ‘a more general obligation – the duty not to deceive,’” which would constitute a violation of the Maine Unfair Trade Practices Act.⁸¹ The First Circuit ruled that the plaintiffs’ claims are not expressly preempted by the FCLAA or impliedly preempted either by the FCLAA or by the FTC’s oversight of tar and nicotine claims in cigarette advertising.⁸²

Some courts have ruled that the FCLAA does not preempt lawsuits that are based on light cigarettes. In August 2006, in the light cigarette class action *Aspinall*, a Massachusetts Superior Court ruled that the “predicate legal duty” at issue in this case is “the [d]efendant’s obligation not to make false statements of material fact.”⁸³ That the health of the smoker is intrinsically involved in virtually any private lawsuit dealing with cigarettes does not mean that this is the sole issue before a court. According to the court, a cigarette manufacturer’s duty not to mislead smokers and potential smokers is also at issue, and the FCLAA does not insulate this aspect of industry conduct from judicial scrutiny.

Removal from State Court to Federal Court

Cigarette manufacturers also have employed a strategy to try to move lawsuits from state courts into federal court, which is known as “removal.”⁸⁴ This strategy has several benefits for manufacturers. First, federal courts, by and large, have been less apt than state courts to grant class action status in tobacco cases. Second, if the premise for removing the case to federal court is accepted — the premise being Federal Trade Commission oversight is an issue to be considered — it influences how the court applies the Unfair Trade statutes. Courts are generally required to apply such state statutes in a manner consistent with any applicable federal laws. Third, the additional proceedings created by arguing over venue drain the plaintiff attorneys’ resources, leaving them with less to commit to actual litigation.

Industry efforts to remove light cigarette lawsuits to federal court have encountered mixed results. Plaintiffs filing a light cigarette class action in

Arkansas sought to have their case transferred back to state court after it had been removed to federal court.⁸⁵ Philip Morris had removed the lawsuit pursuant to a statute that permits removal where a person is sued for actions taken under the direction of a federal officer. Philip Morris had claimed it was acting under the direct control of the Federal Trade Commission when it used light cigarette descriptors and advertised tar and nicotine yields.

The case eventually reached the United States Supreme Court, which remanded it to state court on June 11, 2007. The decision was not surprising. The Solicitor General, Paul Clement, filed a brief on behalf of the federal government stating that the “conclusion that the [Federal Trade Commission] has exercised comprehensive control over [defendant’s] advertising of light cigarettes is incorrect . . . and [t]he conclusion that this case is removable under the federal officer removal statute is substantially wide of the mark.”⁸⁶ Justice Stephen Breyer ruled that, assuming for the sake of argument that Philip Morris had complied with federal regulation, a “private firm’s compliance (or noncompliance) with federal laws, rules and regulations does not by itself fall within the scope of the statutory phrase ‘acting under’ a federal ‘official.’”⁸⁷ A ruling to the contrary would have allowed businesses in many regulated industries, including those that are far more heavily regulated than the tobacco industry, to remove state-court lawsuits to federal court automatically.

A federal court sitting in Wisconsin previously reached the same conclusion.⁸⁸ That court noted that the Federal Trade Commission “did not direct Philip Morris on how to design or manufacture Marlboro Lights . . . [a]nd, although it may have regulated Philip Morris’s advertising concerning tar and nicotine content, such regulation involved an insufficient degree of control to enable one to reasonably characterize Philip Morris as a *de facto* government employee.”⁸⁹ Similar results were reached in cases in New Hampshire,⁹⁰ West Virginia⁹¹ and Missouri.⁹²

Section V – The United States Department of Justice’s Racketeering Lawsuit Against the Cigarette Manufacturers

The recent decision by Federal District Court

Judge Gladys Kessler provides perhaps the most comprehensive examination of the facts on industry conduct with regard to light cigarette design and marketing.⁹³ The decision stems from a lawsuit by the United States Department of Justice against the cigarette industry. The suit was filed in 1999, went to trial in September 2004 and concluded in June 2005. On August 17, 2006, Judge Kessler issued her 1,652-page final opinion⁹⁴ and concluded that the cigarette manufacturers' racketeering enterprise was an "intricate, interlocking and overlapping web of national, international organizations, committees, affiliations, conferences, research laboratories, funding mechanisms, and repositories for smoking and health information which Defendants established, staffed and funded."⁹⁵ Judge Kessler concluded that part of that racketeering enterprise involved light cigarettes, as follows:

For several decades, Defendants have marketed and promoted their low tar brands as being less harmful than conventional cigarettes. That claim is false, as these Findings of Fact demonstrate. By making these false claims, Defendants have given smokers an acceptable alternative to quitting smoking, as well as an excuse for not quitting. . . .⁹⁶

Even as they engaged in a campaign to market and promote filtered and low tar cigarettes as less harmful than conventional ones, Defendants either lacked evidence to substantiate their claims or knew them to be false. . . .⁹⁷

Defendants did not disclose the full extent and depth of their knowledge and understanding of smoker compensation to the public health community or to government regulators. . . .⁹⁸

Defendants' conduct related to low tar cigarettes was intended to further their overarching economic goal: to keep smokers smoking; to stop smokers from quitting; to encourage people, especially young people, to start smoking; and to maintain or increase corporate profits. . . .⁹⁹

In sum, there is an overwhelming consensus in the public health and scientific community,

both here and abroad, that low tar cigarettes offer no health benefit to smokers, have not reduced the risk of lung cancer and heart disease for smokers using them, and have not produced any decrease in the incidence of lung cancer. Moreover, because of the misleading nature of the advertising for low tar cigarettes, smokers who might have quit have refrained from doing so in the belief that such cigarettes reduced their health risks.¹⁰⁰

Judge Kessler banned the Defendant cigarette companies "from using any descriptors indicating lower tar delivery – including, but not limited to, 'low-tar,' 'light,' 'mild,' 'medium,' and 'ultra light' – which convey the false impression that such cigarettes are less harmful to smokers." The cigarette manufacturers asked Judge Kessler to limit her order to just the United States so that they might continue the same conduct in Switzerland, Japan, Finland, Germany, Sweden, Thailand, Argentina, Brazil, Australia, England and elsewhere. Judge Kessler rejected the industry's motion in 2007, noting that it would "allow the [d]efendants to spread fraudulent and misleading health messages and descriptors about their products throughout the world, even though they are prohibited from doing so in the United States." Nevertheless, shortly after, the remedy was stayed, pending an appeal.¹⁰¹

Conclusion

Light cigarette litigation has had a mixed record in state and federal courts across the United States. The widespread harm caused by the tobacco industry's light cigarette-related actions, combined with the huge number of victims, suggests this category of litigation against the tobacco industry will continue.

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Endnotes

- 1 See Lynn Kozlowski, Janine Pillitteri, *Beliefs about "Light" and "Ultra Light" Cigarettes and Efforts to Change Those Beliefs: An Overview of Early Efforts and Published Research*, 10 (Supp. I) *TOBACCO CONTROL* i12 (2001).
- 2 See Saul Shiffman, et al., *Effects of Health Messages about "Light" and "Ultra Light" Cigarettes on Beliefs and Quitting Intent*, 10 (Supp. I) *TOBACCO CONTROL* i24 (2001).
- 3 See Rhonda Kropp, Bonnie Halpern-Felsher, *Adolescents' Beliefs about the Risks Involved in Smoking "Light" Cigarettes*, 114(4) *PEDIATRICS* e445 (2004).
- 4 See Michael J. Thun, David M. Burns, *Health Impact of "Reduced Yield" Cigarettes: A Critical Assessment of the Epidemiological Evidence*, 10 (Supp. I) *TOBACCO CONTROL* i4 (2002).
- 5 See Nat'l Cancer Inst., *Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine*, Smoking and Tobacco Control Monograph 13, NAT'L INST. OF HEALTH (Donald Shopland, David Burns, et al., eds., 2001) [hereinafter "NCI Monograph"].
- 6 See *U.S. v. Philip Morris USA, Inc., et al.*, 449 F. Supp. 2d 1 (D.D.C. 2006).
- 7 *Id.* at 430.
- 8 *Id.* at 431.
- 9 See Neal Benowitz, *Compensatory Smoking of Low-Yield Cigarettes*, in NCI Monograph 39.
- 10 See Neil Weinstein, *Public Understanding of Risk and Reasons for Smoking Low-Yield Products*, in NCI Monograph 193.
- 11 Richard Pollay, et al., *Marketing Cigarettes with Low Machine Measured Yields*, in NCI Monograph 199.
- 12 See Richard Pollay, Richard Dewhirst, *The Dark Side of Marketing Seemingly "Light" Cigarettes: Successful Images and Failed Fact*, 11 (Supp. I) *TOBACCO CONTROL* i18 (2002).
- 13 See *id.*
- 14 See *id.*
- 15 See *id.*
- 16 See Benowitz, *supra* note 9.
- 17 See *id.*
- 18 See *id.*
- 19 See Lynn Kozlowski, et al., *Cigarette Design*, in NCI Monograph 13.
- 20 See *id.*
- 21 See *id.*
- 22 See *id.*
- 23 Claude E. Teague, Jr., *Research Planning Memorandum on A New Type of Cigarette Delivering A Satisfying Amount of Nicotine with A Reduced 'Tar'-to-Nicotine Ratio* (Mar. 28, 1972), Bates: 500915670-500915679, available at <http://tobaccodocuments.org/rjr/500915670-5679.html> (last visited Oct. 2007).
- 24 Kozlowski, *supra* note 19.
- 25 *Id.*
- 26 See Federal Trade Commission, *Cigarette report for 2004 and 2005* (2007), available at <http://www.ftc.gov/reports/tobacco/2007cigarette2004-2005.pdf> (last visited Oct. 2007).
- 27 See Saul Shiffman, et al., *Smokers' beliefs about "Light" and "Ultra Light" cigarettes*, 10 (Supp. I) *TOBACCO CONTROL* i17 (2001).
- 28 See Jon Vernick, et al., *Public Health Benefits of Recent Litigation against the Tobacco Industry*, 289 *JAMA* 86 (2007).
- 29 See Richard Daynard, *Why Tobacco Litigation?*, 12 *TOBACCO CONTROL* 1 (2003).
- 30 See *id.*
- 31 See <http://www.famri.org/core/> (last visited Oct. 2007).
- 32 Many have criticized the merits of the Agreement. See Richard Daynard, et al., *Implications for Tobacco Control of the Multistate Tobacco Settlement*, 91 *AM. J. PUB. HEALTH* 1967 (2001).
- 33 See Campaign for Tobacco Free Kids, *A Broken Promise to Our Children: The 1998 State Tobacco Settlement Eight Years Later*, (2006) available at <http://tobaccofreekids.org/reports/settlements/2007/fullreport.pdf> (last visited Oct. 2007).
- 34 Jonathan Sheldon, et al., *Unfair and Deceptive Acts and Practices* § 1.1 (6th ed. 2004).
- 35 See *id.*
- 36 See, e.g., Mass Gen. Laws ch. 93A, § 9 (2006).

37 See *id.*
38 See Brief for Tobacco Control Resource Center Division of the Public Health Advocacy Institute, Inc. and the Tobacco Control Legal Consortium as *Amici Curiae* Supporting Respondents, *Schwab v. Philip Morris USA, Inc.* 449 F.Supp.2d 992 (2nd Cir. Filed Oct. 20, 2006) (No. 04-CV-1945) available at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/tobacco/schwabpm92506opn.pdf> (last visited Oct. 2007).
39 See Fed. R. Civ. P. 23(a).
40 See *Aspinall v. Philip Morris*, 813 N.E.2d 476, 476 (Mass. 2004).
41 *Aspinall Compl. 22* available at http://www.tobacco.neu.edu/litigation/cases/supportdocs/Aspinall_complaint.pdf (last visited Oct. 2007).
42 *Id.* at 13.
43 No. 002-00406A, 2003 WL 23139381, at *9 (Mo.Cir. Dec. 31, 2003).
44 No. 002-00732, 2003 WL 23139377, at *1 (Mo.Cir. Dec. 31, 2003).
45 *Collora*, 2003 WL 23139377 at *2.
46 *Craft*, 2003 WL 23139381 at *9.
47 *Craft v. Philip Morris Companies, Inc.*, 190 S.W.3d 368 (Mo. Ct. App. 2005).
48 *Collora v. R.J. Reynolds Tobacco Co.*, 428 F.Supp.2d 1018 (E.D.Mo 2006).
49 *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 992 (E.D.N.Y. 2006).
50 *Id.* at 1252.
51 See *id.*
52 *Id.* at 1112.
53 See *id.* at 1056.
54 See *Philip Morris USA, Inc. v. Hines*, 883 So.2d 292 (Fla. Dist. Ct. App. 2003).
55 *Id.* at 295.
56 See *Pearson v. Philip Morris, Inc.*, No. 0211-11819, 2006 WL 663004 (Or.Cir. Feb. 23, 2006).
57 *Id.* at 10.
58 *Davies v. Philip Morris USA, Inc.*, No. 04-2-08174-2 SEA, 2006 WL 1600067 (Wash.Super. May 26, 2006).
59 *Id.* at 3.
60 *Benedict v. Altria Group, Inc.*, 241 F.R.D. 668, 678 (D. Kan. 2007).
61 *Mulford v. Altria Group, Inc.*, 242 F.R.D. 615, 630 (D.N.M. 2007).
62 *Marrone & Phillips v. Philip Morris, USA, Inc.*, No. 99-CIV-0954, 01-CIV-413, 2003 WL 22925081 at *1 (Ohio Com.Pl. Sep. 23, 2003).
63 *Marrone & Phillips v. Philip Morris, USA, Inc.*, No. 03CA0120-M, 2004 WL 2050485 at *9 (Ohio Ct. App. Sept. 15, 2004).
64 *Marrone & Phillips v. Philip Morris, USA, Inc.*, 850 N.E.2d 31, 37 (Ohio 2006).
65 *Price v. Philip Morris USA, Inc.*, No. 00-L-112, 2003 WL 22597608 *29 (Ill. Cir. March 21, 2003).
66 *Id.*
67 *Id.*
68 *Price v. Philip Morris, Inc.*, 848 N.E.2d 1 (Ill. 2005).
69 *Id.* at 38.
70 No. 104657, 2007 WL at *1 (Ill. Aug. 22, 2007).
71 *Schwarz v. Philip Morris, Inc.*, 135 P.3d 409 (Or. Ct. App. 2006); see also <http://tobacco.neu.edu/litigation/cases/Backgrounders/schwarz.htm> (last visited Oct. 2007) (providing background on the case).
72 *Schwarz*, 135 P.3d at 436.
73 See *id.*
74 *Dahl v. R.J. Reynolds Tobacco Co.*, No. MP 03-5582 2005 WL 1172019 at *10 (Minn. May 11, 2005).
75 See 15 U.S.C. §1331-40 (2007). FCLAA is the federal law that mandates publication of the Surgeon General's warnings on cigarettes and cigarette advertising. FCLAA specifically precludes states from imposing any health-related warning on cigarette packaging or advertising.
76 See *Good v. Altria Group, Inc.*, 436 F. Supp. 2d 132 (D. Me. 2006). The same rationale was applied in stopping the plaintiffs in a Michigan case entitled *Flanagan v. Altria Group, Inc.*, No. 05-71697 2005 WL 2769010 (D. Mich. Oct. 25, 2005). In February 2007, a panel of the United States Court of Appeals for the Fifth Circuit ruled FCLAA preempts "fraudulent misrepresentation claims" based on product descriptors such as "light" and "low tar," which the court concluded were approved by the Federal Trade Commission. See *Brown v. Brown & Williamson Tobacco, Co.*, 479 F.3d 383 (5th Cir. 2007).
77 *Good*, 436 F. Supp.2d at 144.

78 See 505 U.S. 504, 511 (1992). In *Cipollone*, Liggett convinced the appellate courts involved to apply the preemption doctrine to a products liability case for the first time, making it much more difficult for plaintiffs to prevail against tobacco companies. Although the United States Supreme Court declined to join the appellate court in finding that nearly all tobacco litigation was preempted, it upheld the preemption of some failure-to-warn claims.

79 *Good v. Altria Group, Inc.*, No. 06-1965, 2007 WL 2460039, at * 26 (1st Cir. Aug. 31, 2007).

80 *Id.* at *8.

81 *Id.* at *11.

82 *Id.* at *26.

83 *Aspinall v. Phillip Morris Co., Inc.*, No. Civ.A. 98-6002 2006 WL 2971490 at *11 (Mass. Super. Aug. 09, 2006).

84 See 28 USCA § 1441(2007).

85 See *Watson v. Philip Morris Co., Inc.*, 127 S. Ct. 2301 (2007).

86 Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Watson v. Philip Morris Companies, Inc.*, 127 S.Ct. 2301 (2007) (No 05-1284).

87 *Watson*, 127 S. Ct. at 2308.

88 See *Paldrmic v. Altria Corporate Services, Inc.*, 327 F. Supp. 2d 959 (E.D.Wis. 2004).

89 *Id.* at 967.

90 See *Tremblay v. Philip Morris, Inc.*, 231 F. Supp. 2d 411 (D.N.H. 2002).

91 See *Viriden v. Altria Group, Inc.*, 304 F. Supp. 2d 832 (N.D.W.Va. 2004).

92 See *Craft v. Philip Morris Co.*, No. 4:05CV01531 ERW 2006 WL 744415 at *1 (E.D. Mo. March 17, 2006).

93 See Sara Guardino et al., *USA v. Philip Morris USA, Inc., et al., Analysis of Judge Kessler's Final Opinion and Order*, Public Health Advocacy Institute, Inc. (2007), available at http://tobacco.neu.edu/litigation/cases/DOJ/doj_opinion_summary.pdf (last visited Oct. 2007).

94 See *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006).

95 *Id.* at 34.

96 *Id.* at 430.

97 *Id.*

98 *Id.* at 741.

99 *Id.* at 431

100 *Id.* at 456.

101 See *United States v. Philip Morris USA, Inc.*, No. 06-5267 2006 WL 4608645, at *1 (App. D.C. Nov. 01, 2006).

About the Tobacco Control Legal Consortium

The Tobacco Control Legal Consortium is a network of legal programs supporting tobacco control policy change throughout the United States. Drawing on the expertise of its collaborating legal centers, the Consortium works to assist communities with urgent legal needs and to increase the legal resources available to the tobacco control movement. The Consortium's coordinating office, located at William Mitchell College of Law in St. Paul, Minnesota, fields requests for legal technical assistance and coordinates the delivery of services by the collaborating legal resource centers. Our legal technical assistance includes help with legislative drafting; legal research, analysis and strategy; training and presentations; preparation of friend-of-the-court legal briefs; and litigation support.



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