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## Tobacco Regulation Review

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### FROM THE DIRECTOR

In this issue of *Tobacco Regulation Review*, we report on our recent activities and accomplishments. The Center's April 2007 conference on "safer" tobacco products attracted legal academics, tobacco and public health experts, and scientists from around the country. Presenters debated the legal issues and possible regulatory approaches to dealing with new tobacco products being marketed as safer than traditional products. The conference presenters and attendees took different positions on this controversial topic, generated much discussion, and made clear that the debate must continue on this emerging issue.

Also, last spring, the Maryland Legislature passed the Clean Indoor Air Act, a law that will result in smokefree public places and workplaces across the State as of February 1, 2008. The Center is currently working with the Department of Health and Mental Hygiene to craft regulations that protect the public and workers from exposure to secondhand smoke in accordance with the intent of the General Assembly. The advocates who worked tirelessly for years to gain passage of the Act deserve our thanks and praise. Another success during the legislative session was passage of the Cigarette Fire Safety and Fire Fighter Protection Act. The State will reap the benefits of this law soon after the July 2008 effective date.

Details of the conference and each of the Acts along with other news of the Center's work are included in this issue.

*Kathleen Hoke Dachille*  
Center Director

### Center Hosts Conference on "Safer" Tobacco Products

On April 20, 2007, more than 75 members of the tobacco control community throughout the United States gathered to hear experts and advocates from the fields of public health, science, communications, and law discuss the timely issue of harm reduction. At the day-long conference, "*Safer*" Tobacco Products: *Reducing Harm or Giving False Hope?* speakers presented varying viewpoints on a controversial issue: whether, with respect to protecting individual and public health from the dangers of tobacco, there is a middle ground—in the form of potentially reduced exposure products (PREPs). PREPs are tobacco products marketed by manufacturers as

having fewer harmful health effects than traditional cigarettes. One example is R.J. Reynolds' Eclipse cigarette, which Reynolds claimed "may present less risk of cancer, chronic bronchitis, and possibly emphysema." (See [www.eclipse.rjrt.com](http://www.eclipse.rjrt.com) (requires log-in ID).)

**Mitch Zeller** of Pinney Associates kicked off the day speaking about the historical evolution of the tobacco industry's marketing of ostensibly lower harm products. The industry responded to the first publicly documented health scare about smoking in the same way that it continues to respond today: with a technological innovation the



*Dr. Cheryl Healton, CEO of the American Legacy Foundation, speaks to attendees.*

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manufacturers claim is a good-faith response to health concerns. In the 1950s, it was the Kent Micronite filter, which contained a form of asbestos, a carcinogen that smokers inhaled along with the tobacco smoke, thus negating any reduction in harm. In the 1960s and 1970s, light and lower tar cigarettes were the allegedly healthier alternatives produced and marketed to concerned smokers. The claims about these products were unfounded and possibly led to greater harm, as smokers who otherwise would have quit unsuspectingly switched to brands that were just as bad for them. Zeller emphasized that failures such as these are prime examples of what can happen in an unregulated marketplace where companies are free to make any product modification or health claim in advertising, marketing, and promotion.

**Dr. Peter Shields** of Georgetown University Medical Center explained the science behind risk reduction products. Shields illustrated how past studies on the purported health benefits of light or low tar cigarettes were flawed. He also acknowledged important unanswered questions regarding how PREPs should be studied and evaluated. For example, he asked: How much uncertainty do we accept, in light of tobacco use's huge public health implications? How much reduction in exposure is enough? What are the best methods to measure decreased exposure and to predict decreased risk? Does everyone benefit equally from

switching to a PREP? How do we balance benefits to the individual versus harm to the population?

Conceding that the only true way to gauge the success of PREPs would be to conduct long-term epidemiological studies on human smokers, Shields was quick to dismiss this option, due to impracticality and ethical concerns. Instead, he theorized a tiered system of measures he believes would constitute adequate research before

they need to know about it, and the public health community needs to be telling them about it.”

Godshall took the global public health community to task for its uncompromising stance that smokeless tobacco is not a safer alternative to smoking.

Switching gears, **Micah Berman** of the Tobacco Public Policy Center outlined potential legal responses—in terms of



*Micah Berman discusses enforcement of MSA provisions for new smokeless products.*

a company could make any health claim about a particular tobacco product.

**Bill Godshall** of Smokefree Pennsylvania discussed smokeless tobacco as a harm reduction product. He first noted that there is relatively little risk reduction when combustion of a tobacco product occurs. After presenting historical data on tobacco use, Godshall asserted that, “Smokeless tobacco products are clearly less hazardous than cigarettes, and smokers don’t know about [the reduced harm],

regulation and litigation—to cigarette manufacturers moving into the smokeless tobacco market. Context and motive matter, both in light of these companies’ histories and because their mission is to increase profits, not to advance harm reduction. Berman stressed that there should be consensus within the public health community that any potential harm reduction would be undercut if the product is marketed to youth, never-smokers, or former smokers; is used in addition to, and

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not instead of, smoking; or is not as safe as possible.

Berman highlighted potential enforcement of the Master Settlement Agreement's prohibitions on youth targeting, free giveaways, and health claims, relating to both cigarettes and smokeless tobacco products. So far, signatories have been careful and wise not to make any health claims about their smokeless products. As for litigation options, there hasn't yet been a successful health-related lawsuit regarding smokeless tobacco.

**David Sweanor** of the University of Ottawa presented: *The Basis of a Comprehensive Regulatory Policy for Reduced Harm Tobacco Products*. In Sweanor's view, while it is the job of medical professionals to identify the cause of disease and to seek remedies, it is the responsibility of attorneys, public health leaders, and legislators to adopt and implement public policy that respects individual rights and interests while reducing the societal impact of the disease. Tobacco use and its related health risks fit this pattern.

Sweanor illustrated how Canada's successful tobacco control-public health movement led to the country's 60 percent decline in smoking over the last 25 years. But the fact that millions of Canadians continue to smoke and many will die prematurely from smoking raises the question at the heart of the conference: What should be the focus of our efforts to achieve public health success—eliminating tobacco use or reducing the harm caused by its use?

Accepting the reality that tobacco use will persist requires foregoing the

favored abstinence-only paradigm to tobacco use — "just quit"— and moving to a pragmatic, science-based public health approach that will reduce the risk of harm to the users who cannot or will not quit, and the harm to those around them. Sweanor implored tobacco control and public health advocates to learn from past successes in regulating the safety of food, pharmaceuticals, and automobiles. While it is important to ensure that consumers are given factual information, consumer protection fears and litigation should not be allowed to halt the development of safer products or the creation of effective public health campaigns about reducing harm while still using tobacco.

At lunchtime, attendees were treated to a provocative keynote speech from **Dr. Cheryl Heulton** of the American Legacy Foundation. Heulton focused on reduced harm programs in other areas of public health, such as HIV/AIDS, to demonstrate the fallacy of the all-or-nothing approach.

**Dr. Richard Daynard** of the Public Health Advocacy Institute led off the afternoon with a talk on potential litigation strategies with respect to health claims PREP manufacturers may make. After setting out the current state of tobacco litigation, Daynard distinguished the challenges of future litigation over reduced risk products.

Daynard noted how the current allegedly safer products—light cigarettes—have gotten the

tobacco industry into trouble, with juries finding companies liable for fraud and awarding large amounts of damages to plaintiffs injured by that fraud. Whether new, safer products will spawn similar litigation depends on how the products are marketed and whether they are really safer. If Congress grants the U.S. Food & Drug Administration (FDA) authority to regulate tobacco products, reduced-risk products that are FDA-approved and marketed consistently with FDA requirements could become legally bullet-proof. Manufacturers will be able to use government regulation as a defense against the imposition of punitive damages.

On the other hand, marketing a genuinely safer tobacco product could put at legal risk products that are less safe. It would demonstrate the availability of an alternative design to conventional cigarettes, leading to possible strict product liability suits. It also raises the question why the industry failed to manufacture a safer product earlier and apply it to the whole product line, rather than to select products, resulting in a viable negligence claim.

Daynard predicted that, in general, despite some negative aspects, the FDA bill being considered in Congress at the time (changes have been made to that bill since April) would have very little impact on litigation. Pharmaceutical companies, for example, have been regulated for a century yet still get hit with big verdicts.

**Geoffrey Ferris Wayne** of the Harvard School of Public Health spoke on the role harm reduction

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products play in tobacco industry strategy. He raised a number of questions about this issue:

- What market considerations provide the primary motivation behind development of PREPs—the threat of litigation or anticipated regulation, the need to expand or develop new markets, and/or competition among manufacturers?
- Are PREPs different from other product innovations such as Marlboro Ultra Smooth (MUS)?
- Are PREPs developed in response to the same or different market considerations as other product innovations?

The answers may be found in market/analyst reports and the tobacco industry's own public statements, internal documents, and trial testimony.

Given data gleaned from tobacco industry testimony, Ferris Wayne speculated that products like MUS may simply be intended to blur the line between conventional and reduced harm. Proliferation of new products supports the industry's attitude that consumers are responsible for "choosing" harm reduction. Continued development of alternative tobacco products and technologies supports market expansion through starter products and protects the current market by reducing the impact of use restrictions like indoor smoking bans. Perhaps more insidious, the expansion of variations within a particular class of product enables the industry to perpetuate a

continuum where seemingly "safer" products are placed in the same market as "less safe" or conventional ones.

Lessons learned from the industry's own communications suggest that tobacco control and public health advocates should do away with what Ferris Wayne claims is a "false continuum of safety" and put all products "on the same plane". While it is acceptable to contrast the very different products of smokeless and combustible tobacco, he insists that "there is a problem when we have products that are along a sort of registry of less harmful, slightly less harmful, and full harm" within the same generic class.

Mitch Zeller took the podium a second time to discuss Philip Morris' efforts to counteract its plummeting image in the early 1990s by adopting a social responsibility campaign. Using internal company documents, Zeller outlined a case study of a corporate phoenix rising from the ashes.

**Chris Bostic** of the Framework Convention Alliance, and **Dr. Vera da Costa e Silva** of the PanAmerican Health Organization addressed international perspectives on PREPs. Bostic spoke on the terms of the Framework Convention on Tobacco Control and Dr. Costa e Silva explained the World Health Organization's stance on PREPs.

Articles based on presentations made by several speakers at the conference will be published in an upcoming symposium issue of the

*Journal of Health Care Law & Policy*. To obtain materials from the conference, contact Jackie McNamara at (410) 706-3962 or [jmcnamara@law.umaryland.edu](mailto:jmcnamara@law.umaryland.edu).

## MARYLAND HAPPENINGS

### 2007 General Assembly Session

The 2007 Session of the Maryland General Assembly, running from January 10 through midnight April 9, was the first of a four-year term for the 188 member State legislature, which included 11 new senators and 34 new delegates. The election of so many freshman legislators marked a new start in a number of ways. Significant changes in committee memberships, which allowed for fresh perspectives on previously considered bills, were made to accommodate the new members. For the tobacco control community, these changes created a good opportunity to get lingering tobacco control initiatives passed. The following summarizes each introduced tobacco control bill and its disposition.

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**Senate Bill 91/House Bill 359 – Clean Indoor Air Act (CIA).**

After a few substantive changes from previous incarnations, a bill designed to close the loophole in state law allowing smoking inside enclosed bars and restaurants was introduced for the fifth consecutive year. Senator Rob Garagiola served as the bill's new lead sponsor in the Senate. Senator Garagiola's new assignment to the Finance Committee gave the bill an in-committee sponsor for the first time. Delegate Barbara Frush again served as lead sponsor in the House where the bill was heard by the Economic Matters Committee, a change from the previous years when the bill was heard by the Health and Government Operations Committee.

After Baltimore City passed its own local CIA bill mid-session, the stalled statewide bill gained new momentum in both chambers. For the first time, the cross-filed bills passed out of their respective committees, each with slightly different amendments. Ultimately, the House version passed on a 99-39 vote, and the Senate version passed on a 33-13 vote. With neither chamber willing to concede, the different versions were sent to Conference Committee, where discrepancies were resolved. Representatives Garagiola, Exum, and Astle from the Senate, and Davis, Krysiak, and Vaughn from the House, agreed on a version which prohibits smoking in nearly all indoor public and work places, including private clubs; exempts

retail tobacco shops; allows local public health officers to grant hardship waivers based on state-issued regulations, with all waivers expiring January 31, 2011; and explicitly affirms the ability of local jurisdictions to pass more stringent smoking restrictions. The compromise bill passed both chambers (100-40 House/33-16 Senate) and was signed into law on May 17, 2007. The law will go into effect February 1, 2008.

**Senate Bill 361/House Bill 785 – Cigarette Fire Safety and Fire Fighter Protection Act.**

Following a last-minute procedural delay that opponents used to kill a similar bill in the Senate last year, legislators, fire fighters, and public health advocates introduced cross-filed bills requiring all cigarettes sold in Maryland to meet the same "ignition propensity" standards as

those sold in California, Illinois, Massachusetts, New Hampshire, New York, and Vermont (see related story in *Tobacco Regulation Review*, Volume 4, Issue I, page 10). Delegate Malone and Senator Lenett served as lead sponsors, with 87 legislators co-sponsoring. Some technical changes to the prior year's bill also brought a new advocate to the table: cigarette manufacturer Philip Morris. Despite some rocky moments, the House (136-1) and Senate (47-0) overwhelmingly passed the bills, which were signed into law May 17, 2007. The law will go into effect July 1, 2008, in order to give the State Fire Prevention Commission and Comptroller time to promulgate regulations to ensure compliance. At that time, Maryland retailers will begin selling down the last of their existing inventories, and shortly thereafter, all cigarettes sold



*Clean Indoor Air Act signing.*

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in Maryland will meet fire safety standards, likely reducing unnecessary deaths and property loss from cigarette-caused fires.

**Senate Bill 835/House Bill 807 – Supersedeas Bonds Limitation.** For the third year in a row, cross-filed bills were introduced seeking to cap the amount of a bond a party appealing an adverse civil judgment must post in order to stay (postpone) enforcement of that judgment during appeal. This year’s version sought to cap the maximum bond amount at \$100 million, regardless of the judgment amount in the underlying civil action. The bill was primarily driven and supported by the tobacco industry. Once again, the Center testified in opposition, labeling the bill as largely unnecessary because Maryland law already provides judges with the discretion to limit bonds where appropriate. The House Judiciary Committee gave the bill an unfavorable report after a hearing in which Delegate Simmons rigorously questioned tobacco industry representatives. The defeat maintains Maryland’s status as one of a few states without a cap on appeals bonds.

**Senate Bill 1017 – Tobacco Paraphernalia Distribution to Minors.** In early March, the legislature became aware of a quirk in the law prohibiting the sale of tobacco products and cigarette rolling papers to minors that implicitly authorized the sale of water pipes and other tobacco paraphernalia to minors. Because

the deadline to introduce new legislation had passed, emergency legislation was introduced to close this loophole. The bill sailed through both chambers, passing the Senate (47-0) and House (139-0) unanimously, and was signed into law April 24, 2007. Because this was an emergency bill, it went into effect immediately upon approval.

**House Bill 447 – St. Mary’s Civil Citation for Sale of Tobacco to Minors.** For more than three decades, Maryland law has prohibited the sale of tobacco products to minors. The penalties attached to the state law are criminal in nature, requiring enforcement by a licensed police officer, a criminal trial by the state’s attorney, and result in a criminal record for those convicted. Despite detecting an inordinate number of youth sales, St. Mary’s County judges were reluctant to convict under the state law, finding the penalties overly harsh compared to the offense. Thus, St. Mary’s County sought to join five other Maryland jurisdictions in passing a local civil sales law. Applying only to St. Mary’s County, this bill was substantively identical to current state law except that it provided for civil penalties, freeing up police and judicial resources while providing for meaningful tobacco sales enforcement. The bill passed the House (136-0) and Senate (44-0) in the final hours of the session and was signed into law May 17.

**House Bill 661 – Secondhand Smoke Exposure to Foster Children.** For the second consecutive year, a bill was introduced that would require the

Social Services Administration (SSA) to adopt regulations requiring foster care parents to protect children in their care from exposure to secondhand smoke. Delegate Cardin and fourteen co-sponsors supported the initiative. Despite a positive hearing—including testimony from the Maryland Department of Human Resources in support of the measure—the bill was unable to overcome fears of negatively impacting the already limited quantity of foster homes, and received an unfavorable report by the Judiciary Committee. Notwithstanding the legislative defeat, the SSA, under the new O’Malley Administration, has pledged to take up the issue via regulations, a move applauded by members of the Committee.

**House Bill 288/House Bill 754 – Tobacco Tax for Health Care Initiative.** Several pieces of legislation were introduced in an effort to expand health care coverage to the uninsured. While differing in how the money raised was to be spent, the two most prominent bills sought to increase the state’s current cigarette tax by \$1 in order to fund this expansion. The original proposal - HB 288 – Healthy Maryland Initiative – was driven by the Maryland Health Care For All Coalition. While the Coalition was able to garner significant support for the concept, its specific proposal was not voted on in committee. Instead, the Health and Government Operations Committee passed a similar tobacco tax bill sponsored by Delegate and Committee Chairman Pete Hammon. That bill – HB 754 – Children and Working Families Health Care Act – passed the House (102-37) but died in the Senate where the bill was never

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voted on. The leadership instead decided to include the proposal as part of a broad-based tax package that would address the State's current fiscal crisis without relying solely on a cigarette tax, which is viewed as a declining revenue source.

The tobacco control community greatly cheered the results of the 2007 General Assembly Session. The successful passage of numerous high-profile laws will not only improve the health and safety of all Marylanders, but will free advocates to work on other pressing issues in tobacco control.

### **Report Considers Assessment of PREPs and Center Staff Attend Follow-up Meeting**

**O**n the heels of the Center's symposium (see lead story of this issue), the Life Sciences Research Office (LSRO), a nonprofit organization in Bethesda, Maryland, released its report *Scientific Methods to Evaluate Potential Reduced-Risk Tobacco Products*. The latest in a series by the LSRO's Reduced Risk Review Project, the report outlines a comprehensive, science-based approach for assessing the health effects of potential reduced exposure tobacco products (PREPs) in

individuals who use such products as a substitute for smoking conventional cigarettes.

Some of the LSRO conclusions are: (1) there exist reliable testing and assessment methods for individual risk reduction to conduct pre-market evaluation of PREPs; (2) these methods should focus on lung cancer, chronic obstructive pulmonary disease, and cardiovascular disease, as these health effects are measurable and cause 90 percent of annual smoking-related deaths; (3) preclinical and clinical testing data are needed to evaluate PREP risk reduction in individual smokers; (4) risk assessment can be used to evaluate PREPs; (5) clinical, behavioral, and epidemiologic methods are needed to determine the effects of a PREP on population risk; and (6) post-marketing evaluations of population risk are necessary to obtain sufficient and reliable data to assess potential unintended public health consequences.

Philip Morris USA provided funding for the report. For more information and to view the executive summary, visit [http://www.lsro.org/articles/rrrvw\\_report\\_042407.html](http://www.lsro.org/articles/rrrvw_report_042407.html).

On June 5 and 6, 2007, Center Director Kathleen Dachille and Research Fellow Jackie McNamara attended the LSRO's committee meeting on differentiating health risks for categories of tobacco products, specifically smokeless tobacco. In addition to a briefing on the process

that culminated in the LSRO report, panel experts spoke about the health and biological effects of Swedish snus<sup>1</sup> compared to cigarette smoking, and the chemistry of smokeless versus combustible tobacco products.

The overall objectives of the differentiating health risks project are: (1) to review data on product characteristics, chemistry, biological activity, toxicology, human exposure, and biological effects associated with the risk of disease for smokeless tobacco products; and (2) to identify similarities and differences between smokeless tobacco products that have been demonstrated to pose less risk of harm than conventional cigarettes. Another LSRO report is expected to be published in the second quarter of 2008.

To track the project's progress, refer to the LSRO website at [http://www.lsro.org/dtr/dtr\\_home.html](http://www.lsro.org/dtr/dtr_home.html). For project-specific questions, contact project leader Daniel Byrd, Ph.D. at [byrdd@lsro.org](mailto:byrdd@lsro.org).

#### **(Endnotes)**

<sup>1</sup> Swedish snus is a spitless, noncombustible tobacco product encased in a pouch that the user places between the lip and gum.



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## INSIDE THE CENTER

### Center Hosts Third Annual Tobacco Enforcement Conference

**O**n June 15, 2007, the Center for Tobacco Regulation hosted its third annual tobacco enforcement conference at the University of Maryland School of Law. The conference drew more than 30 attendees, including members of the Attorney General's (AG's) Office, Comptroller's Office, and Department of Health and Mental Hygiene, and representatives from the local health departments and police departments of thirteen jurisdictions, including those from the State's furthest localities (Garrett County to the west and Worcester County to the east). This annual conference focuses on enforcement issues that arise as local jurisdictions develop and implement programs to enforce tobacco control laws, such as laws prohibiting tobacco sales to minors, banning smoking in public places and prohibiting youth use or possession of tobacco products. The conference is designed to facilitate the use of best practices in enforcement across the state.

The conference opened with a review of existing law on entrapment and a discussion of which compliance-check procedures would not violate this legal defense. Essentially, Center Director Kathleen Dachille described when and how a minor hired by the local jurisdiction

may lie when attempting to make a tobacco purchase during a sting operation. Dachille then led a lively Q & A session, allowing participants to flesh out the circumstances giving rise to entrapment claims in two local jurisdictions. Local health department and law enforcement employees are now prepared to consider changes to current compliance-check procedures which may become necessary as programs age and retailers become more aware of current inspection protocols.

Next on the agenda was a review of recent enforcement developments at both the local and state level by Deputy Director Michael Strande. Strande reviewed two local tobacco control laws (a product placement and a civil sales to minors provision) passed by the General Assembly on behalf of three local jurisdictions. Strande discussed the benefits of such laws and their availability to all counties, including those with traditional commissioner forms of government. Participants were provided with copies of those bills and encouraged to contact the Center if they desire to establish a similar local law.

Strande's presentation was followed by a discussion of Maryland's newly enacted clean indoor air law. With a substantial amount of the enforcement responsibility to be delegated to local health departments, representatives were interested in learning as much as they could about the implementation regulations currently being drafted by the Department of Labor, Licensing and

Regulation and the Department of Health and Mental Hygiene. Strande discussed the law's implications for current businesses, specifically focusing on what the new law will mean for the growing phenomenon of hookah bars. Strande received some excellent suggestions for the regulatory drafting committee.

A question about the licensing of tobacco retailers allowed Dachille to segue into a review of license suspension or revocation of a retailer's tobacco license. While the possibility of locals gaining control of tobacco retailer licenses remains "open but murky," as described by Comptroller representatives, Dachille also explained how to use the current system to achieve license suspensions for those stores that repeatedly sell tobacco to kids. Dachille described how the relationship between local tobacco enforcement and the Comptroller has netted numerous license suspensions over the last year. Local health department and law enforcement employees were encouraged to continue working with the Comptroller or to contact the Center for assistance in setting up a referral program.

Continuing with the theme of inter-agency coordination, Dachille turned the floor over to Marlene Trestman, Special Assistant to the Attorney General, who described the AG's current efforts to combat tobacco industry attempts to attract and addict kids. Specifically, Trestman requested the group's assistance in identifying illegal tobacco sales at specific retail

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chains. These retailers had entered into legally binding agreements (assurances of voluntary compliance) with the state. If the AG could prove continued violations, it could then pressure institutional changes or ultimately bring suit. The needed information, which is already acquired during compliance checks, could be tracked and forwarded to the AG, generating greater compliance without increased cost.

After a half day of discussion, the conference concluded with an “open-mic” update, allowing representatives of each county or organization to describe their recent tobacco control work. This not only helped some of the geographically isolated groups understand what was happening across the State, but allowed for a sharing of best practices by those who had worked through similar scenarios.

Based on attendee feedback, the conference succeeded in fostering cooperative relationships among the State’s law enforcement agencies and provided a clear picture of current tobacco control issues. For conference materials, contact Michael Strande at 410-706-1129 or [mstrande@law.umaryland.edu](mailto:mstrande@law.umaryland.edu).

### Center Helps with FCTC Implementation

In its closing minutes on July 6, 2007, the Second Conference of the Parties (COP-II), the governing body of the Framework Convention on Tobacco Control (FCTC), the world’s first public health treaty negotiated by the World

Health Organization (WHO), unanimously approved new guidelines for protecting people worldwide from tobacco smoke. The FCTC is a roadmap to effective global, national, and local tobacco control measures intended to protect people from the consequences of tobacco use and exposure to secondhand smoke. Implementing Article 8 of the FCTC, the guidelines—which were drafted over a fifteen-month period by a panel of experts—call for a total ban on smoking in all indoor public places, workplaces, and public transportation.

Chris Bostic, Tobacco Control Clinic Instructor, and Erin Smith, Center Staff Attorney, attended COP-II in Bangkok, Thailand, from June 30 to July 6. Bostic and Smith served as delegates representing the Framework Convention Alliance (FCA), a confederation of over 250 nongovernmental organizations from over 100 countries. The University of Maryland School of Law is an organizational member of the FCA, whose mission is to advocate for strong development and implementation of the FCTC.

“From the perspective of the FCA and public health in general, COP-II was an enormous success,” said Bostic. “Nearly every decision fell our way, and the influence of the tobacco industry has waned dramatically. In earlier negotiations, some governments literally had tobacco industry representatives in their official delegations. Now, many governments choose members of the FCA as their delegates, because they are widely recognized as the true experts.”

This meeting, attended by nearly

150 representatives from 46 nations, was the first major FCTC negotiation held outside Geneva, Switzerland, where the WHO is headquartered. South Africa has offered to host COP-III in the fall of 2008. Advocates hope that changing the meeting locations will have a strong regional influence on tobacco control policies. There is also increasing support for conducting future meetings in smokefree cities, which would, ironically, exclude Geneva at present.

The Conference also launched negotiations on a protocol addressing international cigarette smuggling and voted on working groups for a variety of other issues addressed in the FCTC, such as product regulation and labeling, advertising, cessation, industry interference, public education, and financial assistance to developing countries.

“The work completed during the interim between COP-I and COP-II made many of the accomplishments of COP-II possible,” said Smith. “It will be interesting to see if the successes of COP-II will be emulated at COP-III.” To learn more about the FCTC and the FCA, go to <http://www.fctc.org>.

## NATIONAL NEWS

### Did You Know?

**T**wenty-two states have enacted comprehensive clean indoor air legislation that includes restaurants and bars. Recently enacted smoking bans in several states will be phased in over the next two years, with the last—Montana's—scheduled to go into effect in October 2009. New Hampshire, New Mexico, Illinois, and Oregon are among the latest states to join the ever-expanding list.

### Jury Awards Damages to Family of Deceased Smoker

**R**.J. Reynolds must pay \$2.75 million in punitive damages to the family of a California smoker who died from lung cancer in 2000.<sup>1</sup> The family of Leslie Whiteley—who variably smoked Camel and Marlboro cigarettes from 1972 at age thirteen until she was diagnosed with lung cancer in 1998—will also receive nearly \$2.5 million in compensatory damages.

The jury in the wrongful death suit unanimously found that both Reynolds and Philip Morris purposefully lied and made false promises to Leslie Whiteley about

the dangers of their cigarettes. The jury also found that the companies intended for Whiteley to rely on these misrepresentations, that she reasonably relied on them, and that this reliance was a substantial factor in causing her harm.

The jury was split on whether defendants were guilty of oppression, malice, or fraud in the conduct that gave rise to the liability findings. With a 9-3 vote in favor, the jury met the legal requirement to assess punitive damages against Reynolds. However, the jury's 8-4 vote in favor of assessing punitive damages against Philip Morris fell one vote short.

The case began with a 2000 trial in which a jury awarded the Whiteleys \$21.7 million in compensatory and \$20 million in punitive damages.<sup>2</sup> Leslie Whiteley died on July 3, 2000, about three months after the initial verdict was rendered. An appeals court reversed the verdict in 2004, however, finding that the trial court erred in failing to instruct the jury that it was prohibited from finding tobacco companies liable for conduct occurring from 1988 through 1997.<sup>3</sup> A California law then in effect (but later repealed) specifically protected tobacco companies against product liability lawsuits brought by individual smokers during that ten-year period.

#### (Endnotes)

<sup>1</sup> *Whiteley v. R.J. Reynolds Tobacco Co.*, No. 303184 (Cal. Super. Ct., May 2, 2007 (verdict on liability) and May 9, 2007 (verdict on punitive damages)). A copy

of the jury's May 2 verdict is available at [http://tobacco.neu.edu/litigation/cases/supportdocs/whiteley\\_verdict\\_2007\\_compensatory.pdf](http://tobacco.neu.edu/litigation/cases/supportdocs/whiteley_verdict_2007_compensatory.pdf).

<sup>2</sup> *Whiteley v. Raysbesto-Manhattan, Inc.*, No. 303184 (Cal. Super. Ct., Mar. 20, 2000 (verdict on liability) and Mar. 27, 2000 (verdict on punitive damages)) (unreported). To view San Francisco Superior Court docket for No. 303184, see <http://www.sftc.org>.

<sup>3</sup> *Whiteley v. Philip Morris Inc.*, 117 Cal.App.4th 635, 11 Cal.Rptr.3d 807 (Cal.App. 1st Dist. Apr. 7, 2004), as modified on denial of rehearing (No. A091444, Apr. 29, 2004).

### Arkansas Plaintiffs May Bring Light Cigarettes Suit in State Court

**T**he U.S. Supreme Court unanimously rejected Philip Morris' claim that it was "acting under a federal officer" within the meaning of 28 U.S.C. § 1442(a)(1) when it tested and marketed Cambridge Lights and Marlboro Lights cigarettes to consumers. *Watson v. Philip Morris*.<sup>1</sup> Consequently, plaintiffs who sued the tobacco company for allegedly violating the Arkansas Deceptive Trade Practices Act may proceed with their lawsuit in Arkansas state court, rather than having to move it to federal court, a typically less plaintiff-friendly venue.

Section 1442(a)(1) allows government officials and those acting directly under them to remove to federal court suits originally filed in state court. In reversing the Eighth Circuit Court of Appeals, the Supreme Court rejected Philip

*Continued from page 11*

Morris' claim that the tobacco industry should receive the same protection from state-court suits as do private parties who act as government contractors. Private contractors do more than comply with the laws that govern their businesses; they assist the government by producing needed items or performing acts that the government itself would have to produce or perform in the absence of a contract with the private entity.

The Federal Trade Commission (FTC) closely regulates the advertising of light cigarettes by requiring manufacturers to perform a certain test to measure the amount of tar and nicotine in those cigarettes before making any claims that they contain lower amounts of these substances. The Court held that Philip Morris' compliance with this scheme amounted to no more than the typical relationship between a regulated entity and regulatory agency. Nor did the FTC "delegate authority" over testing cigarettes for tar and nicotine to the tobacco industry, as Philip Morris claimed. Rather than acting as direct agents of the FTC, Philip Morris and the tobacco industry in general were simply highly regulated entities with respect to the testing and advertising of light cigarettes.

This decision is likely to have a major impact on class-action suits concerning light cigarettes brought under other states' consumer-protection laws.

**(Endnotes)**

<sup>1</sup> 127 S.Ct. 2301 (June 11, 2007). *See also Tobacco Regulation Review*, Vol. 6, Issue 1 (Apr. 2007), at pp. 11-12.

## Smokeless "Snus" Products Test Marketed

Recent moves by R.J. Reynolds and Philip Morris illustrate the cigarette manufacturers' desire to expand into the smokeless tobacco market. On July 1, 2007, Reynolds began test marketing Camel Snus in five cities: Columbus, OH; Indianapolis, IN; Kansas City, MO; Orlando, FL; and Raleigh, NC.<sup>1</sup> Despite receiving mixed results with Taboka—a similar smokeless tobacco product introduced in the Indianapolis area in 2006—Philip Morris began test marketing Marlboro Snus in the Dallas-Fort Worth area in August 2007.

Snus (pronounced "snoose") differs from traditional spit tobacco, commonly known as "dip" or "chew," in that it is encased in a pouch that the user places between the lip and gum for up to 30 minutes and does not require spitting. The products are purportedly aimed at attracting adult smokers who are seeking cigarette alternatives but who do not care for the taste, texture, or spitting associated with dip or chew.<sup>2</sup>

Marlboro Snus contains a "flavor strip," offered in four varieties: Rich, Mild, Mint, and Spice. Similarly, Camel Snus comes in three varieties: Original, Frost, and Spice.

The products are not advertised as an alternative to cigarette smoking in general, though Reynolds specifically markets Camel Snus—

tagged as "Pleasure for Wherever"—as a substitute for cigarettes in areas where smoking is prohibited, such as at concerts, on airplanes, and in bars and restaurants.<sup>3</sup> Both manufacturers are careful not to make health claims about their products,<sup>4</sup> with Philip Morris going so far as to state on its website that smokeless tobacco products are "not a safe alternative to smoking."<sup>5</sup>

Despite these carefully crafted statements, industry watchers have noted a general push to market snus and smokeless tobacco as so-called reduced harm tobacco products. Members of the tobacco control and public health communities are clearly at odds as to whether use of any tobacco product should be promoted as reducing harm, with many arguing that a quit-only approach is the only appropriate public health message.

**(Endnotes)**

1 <http://www.snuscamel.com/CSN/dtcllogin.jsp?brand=CSN> (requires log-in ID).

2 [http://www.philipmorrisusa.com/en/popup\\_marlboro\\_snus\\_fact\\_sheet.asp?source=home\\_link](http://www.philipmorrisusa.com/en/popup_marlboro_snus_fact_sheet.asp?source=home_link).

3 <http://www.snuscamel.com/CSN/dtcllogin.jsp?brand=CSN>.

4 [http://www.snuscamel.com/CSN/dtc\\_faq.jsp?category=912&subject=913&question=964&preview=false#22](http://www.snuscamel.com/CSN/dtc_faq.jsp?category=912&subject=913&question=964&preview=false#22).

5 [http://www.philipmorrisusa.com/en/popupmarlboro\\_snus\\_fact\\_sheet.asp?source=home\\_link](http://www.philipmorrisusa.com/en/popupmarlboro_snus_fact_sheet.asp?source=home_link).