



PHAI The Public Health Advocacy Institute



**Fall, 2007
Newsletter**

DEAR READER

This newsletter is new but the Public Health Advocacy Institute (“PHAI”) is not.

Founded in 1979 as a non-profit organization in Massachusetts dedicated to public health, we have undergone changes to our staff, focus, and our name. For many years we were known as “the Tobacco Control Resource Center” (now the name of our tobacco control division) or our tobacco litigation analysis project, “the Tobacco Products Liability Project.”

Until 2006, we were doing mostly tobacco work; we then merged with a smaller organization (the original PHAI) doing obesity and other public health work, and changed our name to properly reflect our broader mission. We focus on legal approaches to tobacco control as well as researching and developing legal approaches to the epidemic of obesity and other critical areas of where public health can be improved through law.

We have long been and continue to be based at Northeastern University School of Law in Boston, Massachusetts and currently have a legal staff of 9.

We seek to provide you with periodic updates on our activities and projects keep you informed. I hope you will consider making a tax-deductible contribution to PHAI (our mailing address is on page 6). Your donations allow us to continue to find innovative ways to use law to create a world with less preventable death and disease.

-Mark Gottlieb, Executive Director (E-mail: mark[at]phaionline.org)

INTERNATIONAL TOBACCO CONTROL WORK

Human Rights-Based Approaches to Tobacco Control

The strategic and programmatic approaches PHAI has initiated in its international programs are unique. First, we will highlight three innovative characteristics of our programs and then share snap shots of our country partnerships to illustrate those points.

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TOBACCO INDUSTRY LAWYERS AS ‘DISEASE VECTORS’

This intriguing headline serves as the title of an article authored by PHAI Senior Staff Attorney **Sara D. Guardino** and our President, **Richard A. Daynard** that appeared in the August, 2007 issue of the BMJ specialty journal, *Tobacco Control*.

The authors observed that, despite their obligation to do so, tobacco companies often failed to conduct product safety research or, when research was conducted, failed to disseminate the results to the medical community and to the public. The tobacco company lawyers' role in these actions was investigated for this article with a focus on their involvement in company scientific research, bogus claims of attor-

ney-client privilege, document concealment, and “scorched earth” litigation tactics.

Guardino and Daynard researched internal tobacco industry documents for the primary data. Additional searches included court transcripts, legal cases and various articles.

The authors found that tobacco company lawyers have been involved in activities having little or nothing to do with the practice of law, including gauging and attempting to influence company

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NCI PROJECT BACKGROUND

Since 2002, PHAI has been working in a research partnership with Northeastern University School of Law on an RO1 National Cancer Institute grant from the National Institutes of Health.

The project's overarching aim has been to untangle the interplay of lawyers, legal doctrine and the client in the tobacco context and the implications of these relationships as they relate to smoking and health.

Five specific aims were pursued: (1) Understanding how rules of evidence suppress disclosure of marketing plans and research; (2) Investigating how liability concerns may have led to the suppression of potentially reduced exposure products; (3) Describing lawyer control of research at each company; (4) Examining ethical issues raised by attorney conduct; and (5) Understanding the role of tobacco industry lawyers in creating laws to protect their clients.

Many peer-reviewed scholarly articles about tobacco industry lawyers have resulted from our research.

TOBACCO INDUSTRY DOCUMENT RESEARCH

Several exciting topics have been explored as part of PHAI's tobacco industry document research recently. Article highlights include:

In “Tobacco Industry Use of Judicial Seminars to Influence Rulings in Products Liability Litigation,” published in 2006 in the BMJ specialty journal *Tobacco Control*, author **Lissy C. Friedman** describes the funding mechanisms by which tobacco companies sponsor judicial seminars in such a way that the attendees do not know that a potential party to litigation was involved. Topics covered in such seminars and the faculty conducting them tended to overlap meaningfully with issues and even expert witnesses the tobacco company sponsors rely upon in litigation.

In “Punishing Tobacco Industry Misconduct: The Case for Exceeding a Single Digit Ratio Between Punitive and Compensatory Damages,” published in 2005 as the lead article in the *University of Pittsburgh Law Review*, authors **Sara D. Guardino** and **Richard A. Daynard** propose that when a smoking and health plaintiff is successful at trial, the tobacco industry should be subject to a high punitive damages award because: (1) the industry's behavior is particularly reprehensible; (2) the industry has used its wealth to engage in litigation tactics that have allowed it to evade capture; and (3) a powerful financial sanction is needed to deter lethal misbehavior when the defendant makes billions of dollars addicting consumers to its deadly product. The article documents an array of litigation tactics described in internal documents that serve little or no purpose other than to create expense for and to intimidate plaintiffs.

In “Applying Lessons from Tobacco Litigation to Obesity Lawsuits,” published in the *American Journal of Preventative Medicine* in 2006, **Richard A. Daynard** and **Jess Alderman** argue that the food industry would likely employ a “scorched earth” litigation strategy similar to that of the tobacco industry in individual injury cases.

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HEALTHY EATING LAW AND POLICY RESEARCH PROJECT

In 2006, the Robert Wood Johnson Foundation (“RWJF”) awarded PHAI a grant under its Healthy Eating Research Program. **Jason Smith**, Associate Executive Director, led the project. PHAI, working with students from Northeastern University School of Law, looked at the way the law affects the foods available in public schools. This analysis of the school food environment was the basis for a policy guide entitled: *Mapping School Food*. It was developed to assist legislators, superintendents and other officials in creating new policies to improve school food.

In addition to *Mapping School Food*, Jason produced a paper drawing a distinction between consumer advocacy and public health and arguing for a public health approach to reforms of federally-reimbursed meal programs. *Mapping School Food* and the paper are available on the PHAI website, www.phaionline.org.

PHAI recently has begun work on another grant issued under the RWJF Healthy Eating Research Program. In this project, we extend the analysis to include the ways law affects the food availability in after-school and similar extra-curricular settings.

Law and policy research to help arrest the epidemic of obesity is a key focus area for PHAI and we expect to continue to expand our efforts in this critically important area.



OUR OBESITY MISSION

The obesity epidemic represents one of the most pressing public health problems facing the United States today and requires consistent and coordinated public health solutions.

In confronting this obesity epidemic, it is essential to explore the law both as policy tool and as a health determinant. Policies that affect food, nutrition, and physical activity are rooted in complex legal systems. PHAI approaches these problems with an environmental and population focus relying on public health practice. PHAI brings together practitioners in public health and law; legal academics; researchers; and advocates to explore the effective use of the law in combating obesity and to craft solutions to complex policy problems.

We have held 4 international conferences focusing on legal approaches to obesity and will continue to convene events to bring together state-of-the-art research and new ideas to help prevent the morbidity and mortality associated with obesity and over-eating.

PHAI CONFERENCES

PHAI has a long history of convening important public health conferences. The Tobacco Products Liability Project has held more than 20 conferences over the years to encourage litigation strategies that advance public health goals.

PHAI has also held four conferences on legal approaches to the obesity epidemic.

Our next conference will focus on setting the agenda in the effort to reduce obesity and overeating.

Tentative topics may include:

- Focusing on childhood obesity vs. obesity generally
- Obesity/overeating vs. nutrition
- Nutrients focus vs. whole foods
- Evidence-based vs. ethically-based interventions
- Public health vs. consumer protection perspectives
- Federal vs. state arenas

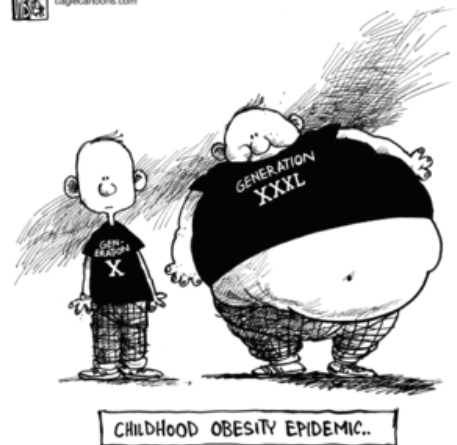
The conference will take place on the campus of Northeastern University. Please visit phaionline.org for “save the date” information.

APPLICATION OF LAW TO THE CHILDHOOD OBESITY EPIDEMIC

PHAI Associate Executive Director, **Jason Smith**, along with Senior Staff Attorney **Jess Alderman**, President **Richard Daynard**, and Ellen Fried from NYU’s Department of Nutrition Food Studies and Public Health co-authored an article entitled “Application of Law to the Childhood Obesity Epidemic” in the *Journal of Law, Medicine, and Ethics* in Spring, 2007.

The article found that childhood obesity is, in important respects, a result of legal policies that influ-

ence both dietary intake and physical activity. The law must shift focus away from individual risk factors alone and seek instead to promote situational and environmental influences that create an atmosphere conducive to health. To attain this goal, advocates should embrace a population-wide model of public health, and policymakers must critically examine the fashionable rhetoric of consumer choice.



AMICUS BRIEFS

PHAI has a long history of contributing its expertise to the courts through amicus briefs. In the past year we have authored 2 briefs in support of a national class action of “light” cigarette consumers.

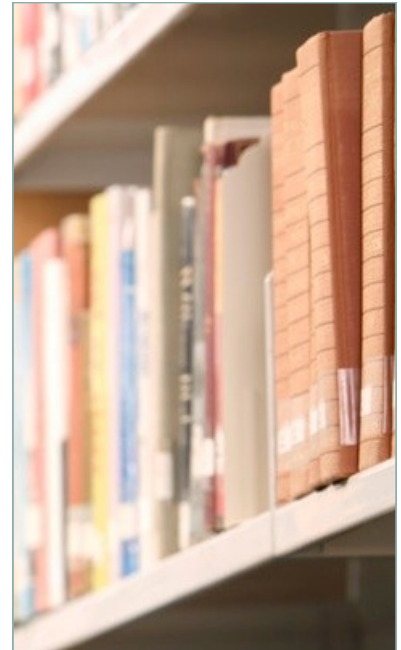
We are currently authoring a brief on behalf of the American Medical Association and other key health groups in the appeal of the federal tobacco racketeering case, *United States v. Philip Morris, et al.*

THE TOBACCO PRODUCTS LIABILITY PROJECT

The Tobacco Products Liability Project (“TPLP”) is the longest-running project of PHAI, starting in 1984. TPLP supports tobacco litigation as a public health and cancer control strategy. Working with a growing network of attorneys, TPLP seeks to inject strong public health values into the way legal actions against tobacco companies are conducted. One way we do this is to work with news media to ensure that a public health perspective is a key part of any reporting on tobacco litigation.



DOCUMENT RESEARCH



" Philip Morris's Website and Television Commercials Use New Language to Mislead the Public Into Believing It Has Changed Its Stance on Smoking and Disease." Dec., 2007 issue of Tobacco Control.

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In another article by **Jess Alderman**, who recently left PHAI for SUNY Buffalo, numerous examples of physician testimony for defense of cigarette manufacturers were found that suggest that the medical profession needs to do more to monitor testimony that raises questions of competence or truthfulness. **"Ethical Implications of Physician Involvement in Lawsuits on Behalf of the Tobacco Industry"** has been accepted for publication in 2007 in the *Journal of Law, Medicine, and Ethics*.

Lissy Friedman found that Philip Morris created and disseminated its website's message that it agreed that smoking causes disease and is addictive in an effort to sway public opinion, while maintaining in a litigation setting its former position that it cannot be proved that smoking causes

disease or is addictive. It is a feature article for the December, 2007 issue of *Tobacco Control* entitled: **"Philip Morris's Website and Television Commercials Use New Language to Mislead the Public Into Believing It Has Changed Its Stance on Smoking and Disease."**

Document research continues to be a key priority for PHAI and provides insight and perspective for successful implementation of public health interventions.

Most of our tobacco industry document research activities are funded by the National Cancer Institute under grant number 5R01CA087571 in partnership with Northeastern University School of Law.



PHAI

The Public Health Advocacy Institute (PHAI) is a public health law research and advocacy organization.

PHAI is dedicated to protecting the health of the public. Our goal is to support and enhance public health understanding and commitment among law teachers and students, legislators and regulators, the courts, and others who shape public policy through the law.

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<http://phaionline.org>

[primary site]

and

<http://tplp.org>

[tobacco litigation site]

This newsletter was created and edited by Mark Gottlieb with contributions from Jason Smith, Christopher Banthin, and Rangita de Silva-de Alwis.



PHAI The Public Health
Advocacy Institute

PHAI HELPS TO ATTRACT EXPERTS TO TOBACCO LITIGATION

PHAI, under the leadership of Tobacco Control Resource Center Division Director **Christopher N. Banthin**, has nearly completed its project to enhance the manner in which tobacco litigation advances public health. With funding and support from the American Legacy Foundation, PHAI prepared a series of booklets for public health scientists who may be interested in becoming expert witnesses in tobacco litigation. Because so few tobacco control scientists serve as expert witnesses, judges and juries may be unable to accurately understand the complex scientific and technical questions in these cases. The booklets contain key excerpts of expert testimony gathered from our review of thousands of pages of tobacco litigation transcripts. Researchers also annotated the excerpted testimony to describe the relevant legal strategies

and issues at play.

PHAI also organized presentations in February 2007 for attorneys who are interested in tobacco litigation. Attorneys who are experienced in tobacco litigation discussed their use of experts and the scientific questions that needed to be answered in the various types of tobacco litigation. Scientists who have served as expert witnesses in tobacco litigation described their research and experiences in serving as expert witnesses. The presentations also highlighted the use of equitable remedies in tobacco litigation. Equitable remedies are important because they directly address industry wrongdoing through court orders. They also provide a potential funding vehicle for tobacco control. Together these initiatives helped refine tobacco litigation as a tool for public health.

MAKING THE MOST OUT OF THE COURT'S DECISION IN *U.S. v. PHILIP MORRIS*

The story of the U.S. government's unlikely lawsuit against its domestic tobacco industry brought under the Racketeer Influenced and Corrupt Organizations Act (RICO) is long, involved, and fascinating. After 9 months of trial proceedings featuring dozens of fact and expert witnesses and millions of pages of documents, the federal court issued a scathing ruling of more than 1,600 pages detailing the fraud and conspiracy undertaken by the tobacco industry. This opinion is extraordinary not only because of its legal finding that the defendants violated the RICO statute, but because of the detailed history of the industry's wrongdoing that cites to volumes of documents and testimony in the trial record. PHAI, led by Senior Staff Attorney **Sara D. Guardino**, has just completed a project to try to maximize the public health impact of this decision by producing three Law Synopses: 1) *Potential Master Settlement Agreement Violations Evidenced in Judge Kessler's Findings*; 2) *A Guide for Plaintiffs' Attorneys: Using Findings and Resources from USA v. Philip Morris USA, Inc., et al.* in Future Claims Against Big Tobacco; and 3) *The Weakening of the RICO Statute's Remedies Provision: Analysis of the Appeals Court's Decision in USA v. Philip Morris USA, Inc., et al.* These will be available at phaionline.org in mid-November, 2007. Funding was provided by the Robert Wood Johnson Foundation's Substance Abuse Policy research Program.

‘DISEASE VECTORS’

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scientists’ beliefs, vetting in-house scientific research, and instructing in-house scientists not to publish potentially damaging results. Additionally, company lawyers have taken steps to manufacture attorney-client and work-product privileges to assist their clients in protecting sensitive documents from disclosure, have been involved in the concealment of such documents, and have employed litigation tactics that have largely prevented successful lawsuits against their client companies.

Guardino and Daynard concluded that tobacco-related diseases have proliferated partly because of tobacco company lawyers. Their tactics have impeded the flow of information about the dangers of smoking to the public and the medical community. Additionally, their aggressive litigation tactics have pushed many plaintiffs into dropping their cases before trial, thus reducing the opportunities for changes to be made to company policy in favor of public health. Stricter professional oversight is needed to ensure that this trend does not continue.

INTERNATIONAL TOBACCO CONTROL WORK

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Stretching the potential of broad alliances and enhancing the participation of different civil society networks

In order to maximize outreach and broaden alliances, PHAI is partnering with well-respected in-country organizations which bring together broad civil society alliances and have critical links both to the State and the community.

Working towards this goal we are linking with human rights groups, women’s rights groups and children’s rights groups. The final goal is to broaden the tobacco control constituencies by building new and important allies and expanding the frontiers of outreach.

Pushing the boundaries of advocacy

Foremost among our innovative advocacy approaches is the human rights- based approach to tobacco control. The international human rights discourse is a universally accepted framework and is a powerful tool to advocate, articulate and monitor tobacco control. Most importantly it provides the tools to enforce, implement and monitor tobacco control. As a universally agreed upon framework, the human rights discourse can be used as a bench mark and a standard setting document in law reform, litigation and advocacy. Framing these issues in rights terms also guarantees the vindication of those rights and ensures remedies for the violation of rights.

Linking the broader range of women’s, children, and social, economic and cultural rights with the WHO Framework Convention on Tobacco Control (FCTC) helps to highlight the ways in which these rights are inextricably interlinked, interrelated and indivisible. By stretching the potential of the mutually reinforcing nature of these norms, we help to fill in the gaps in the FCTC. Linking

these human rights conventions with the FCTC norms provide us with a stronger discourse and sharpens the tools to monitor and implement the FCTC.

Holistic legal and policy reform: Looking at the legal system as a whole

Apart from providing technical assistance to the drafting of tobacco control laws, we look at the whole landscape of laws that affect women and children in any given country. This helps to provide a broader range of potential alternatives and a more sophisticated understanding of multiple strands of law that can be used to address the control of tobacco.

Snap Shots of Country Programs

Viet Nam: In Viet Nam, we have developed a partnership with the Viet Nam Women’s Union (VWU) to address the impact of secondhand smoke on women and children in Viet Nam. Formed in 1930, the VWU is a mass organization and is well positioned to promote women’s and children’s issues within the government and is the focal point for implementing government policies on women and children through a vast network of women all across Viet Nam.

Many of the VWU’s important activities focus on maternal and child health programs and our advocacy program will be a critical part of this effort. We are also hoping to build on the efforts of the VWU to draft a women’s equality law to draw attention to the disparate and disproportionate impact of second hand smoke on women and the girl child. We are also hoping to bring to the table the United Nations Family Planning Association (UNFPA) so as to build critical linkages with the different U.N. agencies and maximize the impact and broaden the out reach of our work.

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INTERNATIONAL TOBACCO CONTROL WORK

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China: We provide technical assistance to the Beijing Children's Legal Aid and Research Centre. The Center operates as a central network to appoint legal aid lawyers in cases concerning violations of children's rights. In 2001, the Center brought suit against the National Bureau of Tobacco Monopoly and the tobacco industries. The National Bureau responded to the litigation by requiring that all websites and stalls selling tobacco display the sign "No Tobacco to Children." Apart from litigation, the center has been actively engaged in legislative advocacy and law drafting. Currently, efforts include drafting the law on the Protection of Street Children, and the law on the Protection of Minors with special reference to the control of tobacco use by minors.

The Centre is making use of the opportunity to revise the Law on the Protection of Minors to address the lack of implementing regulations to the prohibition on sale of tobacco to minors.

Indonesia: In Indonesia we are partnering with the Indonesians Consumer Association (YLKI) together with several other non-government organizations on tobacco control.

In 2002, YLKI with four others NGOs sued several television stations, major tobacco industries, and advertisement agencies for \$ US 55 million for airing advertisements during prime time that projected macho images of smokers. Even though the YLKI lost the case, it created enormous publicity and was an invaluable public education tool.

Our program in Indonesia will include a training program covering comparative advocacy perspectives and human rights- based approaches to tobacco control. The end goal is to support Indonesia's effort to ratify the FCTC.

India: The Lawyers Collective in India is one of the leading cause lawyer organizations in India which also engages in law reform, advocacy and training. The Lawyers Collective, under the leadership of Indira Jaising, has brought pioneering legal challenges against the tobacco industry in India. We continue to provide technical support for their strategic litigation initiatives relating to restrictions on trade in tobacco in India.

Apart from these "high burden" countries facing enormous challenges, we continue to collaborate with a range of partners in the Philippines, Bangladesh, Sri Lanka, and Nepal. These collaborations have been a catalyst for change in very measurable and tangible ways.

We also initiated human rights-based tobacco control efforts in Bangladesh, Nepal, the Philippines, Mexico, and Georgia.

Training Materials

Our training materials are country specific and are developed in partnership with our partners who comment on relevance and substance. The materials are also translated into the indigenous language and made widely available. The training materials examine the laws in each country relating to tobacco control especially in relation to children and women. These materials are rich resources and explore concrete ways in which the human rights framework can be used to control and monitor tobacco use. These training materials ensure that our initiatives remain sustainable.

PHAI's international work is led by **Richard Daynard** and by our Senior International Programs Consultant, **Rangita de Silva-de Alwis**. It is funded through a partnership with Northeastern University School of Law under a William Cahan Distinguished Professor award to Professor Daynard from the Flight Attendants' Medical Research Institute (FAMRI).



Daynard and de Silva-de Alwis working in Tbilisi, Georgia