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COURT BARS TORT CLAIMS AIMED AGAINST TRUTHFUL ADVERTISING *(In re Tobacco Cases II)*

The California Supreme Court this week upheld the dismissal of tort claims filed against tobacco companies for having run truthful advertising that allegedly overglamorized smoking.

The decision was a victory for the Washington Legal Foundation (WLF), which filed a brief in the case, *In re Tobacco Cases II*, urging that the tort claims be dismissed. WLF argued that such claims are barred both by the First Amendment and by federal law -- regardless of the plaintiffs' claim that glamorous advertisements induce minors to buy cigarettes in violation of California law.

In a unanimous decision, the court agreed with WLF that the Federal Cigarette Labeling and Advertising Act (the "Labeling Act"), adopted by Congress in 1969, imposes significant federal oversight of cigarette advertising, and that Congress made clear that it did not want additional regulations in the form of state-law tort suits. The court noted that its decision still leaves significant regulatory authority in place: the Federal Trade Commission closely monitors cigarette advertising, as do state government regulators (who possess regulatory authority by virtue of the Master Settlement Agreement (MSA) entered into between tobacco companies and State attorneys general).

"The plaintiffs in this lawsuit were all admitted lawbreakers -- they regularly purchased cigarettes before they turned 18, knowing full well that such purchases were illegal. It took tremendous chutzpah for those lawbreakers to come into court and seek a refund of all the money they spent to buy cigarettes," said WLF Chief Counsel Richard Samp after reviewing the court's decision. "In the absence of any evidence that the advertisements were false or directly solicited purchases from minors, there can be no justification for imposing liability on the defendants," Samp said.

The suit was filed by five California residents who regularly purchased cigarettes prior to turning 18. They named four major cigarette manufacturers as defendants. They alleged that the defendants' glamorous advertising enticed them to start smoking. They alleged that although the advertising contained no language directly soliciting purchases by minors, the defendants designed their advertising campaigns for the specific purpose of enticing minors to start smoking. The plaintiffs alleged that by running such

advertisements, the defendants violated California's Unfair Competition Law ("UCL"), because the advertisements induced minors to purchase cigarettes illegally.

The trial court dismissed the complaint on two grounds. First, it held that the UCL claims were preempted by the Labeling Act, which bars States from imposing any "requirements" or "prohibitions" on cigarette advertising "on the basis of smoking and health." Second, the trial court held that the plaintiffs claims were barred by the First Amendment. The Court of Appeal affirmed on the basis of Labeling Act preemption, without reaching the merits of the First Amendment issue. The plaintiffs then sought review in the California Supreme Court, which this week affirmed the Court of Appeal.

The Supreme Court agreed with WLF that the Labeling Act broadly preempts state regulation of cigarette advertising, including regulation that takes the form of tort lawsuits. The court noted that the plaintiffs' claims were designed to protect those under 18 from cigarette smoking; the court held that such claims are preempted by the Labeling Act because the Act bars all State advertising restrictions "based on smoking and health," and the U.S. Supreme Court has determined that all laws that seek to prevent smoking by minors must be deemed to be laws "based on smoking and health."

WLF also argued that the First Amendment does not permit the types of restrictions on truthful commercial speech that the plaintiffs sought to impose. In particular, WLF argued that the First Amendment prohibits restrictions on commercial speech unless the government can demonstrate that the restrictions directly advance some governmental interest. WLF argued that enriching admitted lawbreakers would have the opposite effect; by allowing juveniles to recover the amount they spent to buy cigarettes illegally, the courts would encourage additional juvenile smoking, WLF argued. The California Supreme Court did not reach those First Amendment issues.

WLF is a public interest law and policy center with supporters in all 50 states, including many in California. WLF devotes a substantial portion of its resources to protecting the right of commercial free speech.

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For further information, contact WLF Chief Counsel Richard A. Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.