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## **COURT HOLDS SECOND-HAND SMOKE STUDY NOT SUBJECT TO JUDICIAL REVIEW** *(Flue-Cured Tobacco Cooperative v. EPA)*

The U. S. Court of Appeals for the Fourth Circuit ruled this week that companies adversely affected by the Environmental Protection Agency's (EPA) designation of second-hand smoke as a Group A ("known human") carcinogen do not have the right to seek judicial review of that designation. The court held that EPA's designation was not "final agency action" subject to judicial review under the Administrative Procedure Act (APA).

The decision was a setback for the Washington Legal Foundation (WLF), which filed a brief in the case, *Flue-Cured Tobacco Cooperative v. EPA*, in support of the plaintiffs. WLF argued that individuals and businesses can be severely damaged by a federal government designation that their product causes cancer and thus ought to be permitted judicial review of the propriety of such designations.

The lawsuit challenging EPA's designation of second-hand smoke as a known human carcinogen was filed in June 1993 in federal district court in North Carolina by a group of tobacco growers and cigarette manufacturers. The suit alleged that EPA lacks statutory authority to issue such a designation and that it was based on scientific conclusions that EPA knows to be false and/or without foundation.

The trial judge agreed with the plaintiffs and struck down the designation of second-hand smoke as a Group A carcinogen. The judge was extremely critical of EPA's methodology, stating that he was "faced with the ugly possibility that EPA adopted a methodology for each chapter [of its study], without explanation, based on the outcome sought in that chapter." The judge found that EPA "disregarded information and made findings on selective information"; "failed to disclose important findings and reasoning"; and "left substantial questions without answers."

Nearly five years later, the court of appeals has vacated the district court ruling on jurisdictional grounds, without addressing the district court's conclusions that EPA's findings amounted to "junk science." The appeals court held that EPA's Group A classification is not

subject to judicial review because it does not impose any legally binding regulations on the plaintiffs.

In its brief, WLF did not take a position on the accuracy of the trial court's severe criticisms of EPA. Rather, WLF's brief was devoted to asserting that the courts should exercise jurisdiction over the case. WLF noted that as a result of EPA's official pronouncement in 1993 that second-hand smoke causes cancer, thousands of businesses (presumably fearful that continuing to permit smoking on their premises would expose them to liability litigation) have banned smoking on their premises. WLF argued that the financial impact on tobacco companies of such smoking bans is sufficient cause to permit them to seek review of the EPA designation -- regardless that EPA itself did not order any of the smoking bans.

Moreover, WLF noted, EPA's Group A designation is not subject to any further administrative review within the federal government. Accordingly, WLF argued, permitting judicial review of EPA's Group A designation would not result in the courts interfering in any ongoing government proceedings.

The appeals court disagreed with WLF's argument. It held that no judicial challenge was permitted because "no direct and appreciable legal consequences" flowed from EPA's determination. The court said that any harms suffered by the plaintiffs stemmed from independent actions taken by third parties, not by EPA itself.

"' Junk science' of the type found here by the trial court is, unfortunately, becoming all too common in our courts and administrative agencies. We must not place roadblocks in the path of those who turn to the courts in an effort to expose the government's reliance on junk science," said WLF Chief Counsel Richard Samp after reviewing the court's decision. "Regardless of how one feels about the government's efforts to cut down on cigarette smoking, a free society cannot tolerate a government that will resort to any means -- including resorting to junk science -- to achieve its desired ends," Samp said.

The appeals court agreed to stay its decision for 30 days to allow the plaintiffs to seek relief in the Supreme Court. WLF has pledged to assist in any such appeal.

The Washington Legal Foundation is a public interest law and policy center with supporters nationwide. It devotes a substantial portion of its resources to defending the rights of individuals and businesses to go about their affairs without undue interference from government regulators.

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