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COURT PERMITS STATES TO SECOND-GUESS FTC CIGARETTE ADVERTISING RULES

***(Altria Group, Inc. v. Good*, No. 07-562)**

The U.S. Supreme Court this week upheld an appeals court decision that permits plaintiffs' lawyers to bring state-law tort suits against tobacco companies for advertising that their cigarettes are low in tar and nicotine, even though such promotions were encouraged by the Federal Trade Commission (FTC) and used data developed by the FTC.

The 5-4 decision in *Altria Group, Inc. v. Good* was a setback for the Washington Legal Foundation (WLF), which filed a brief urging that the appeals court decision be overturned. WLF argued that any common law tort suit that seeks to regulate cigarette advertising based on the health-related effects of smoking is preempted by federal law. WLF argued that Congress intended to make the FTC the sole regulator of such advertising. The Court disagreed, holding that the federal law in question preempts only *some* advertising-related suits against cigarette manufacturers. It held that suits alleging fraud by cigarette manufacturers (by allegedly misleading smokers into thinking that they would be exposed to less tar and nicotine if they smoked "light" cigarettes) are not preempted.

"The Court's decision allows state courts to second-guess FTC regulatory authority over cigarette promotion," said WLF Chief Counsel Richard Samp. "Congress decided that it is up to the FTC to determine how cigarettes should be promoted. The FTC later developed the method for determining the amount of tar and nicotine delivered by a given cigarette brand, and encouraged manufacturers to list those amounts on their labels. But individual juries are now being permitted to second-guess that methodology," Samp said.

The case involves a suit filed against the manufacturer of Marlboro Light and Cambridge Light cigarettes, by several long-time smokers living in Maine. Under the "FTC Method," those cigarette brands have been determined, on average, to deliver lower levels of tar and nicotine when tested by machines. The manufacturer accurately listed those tar and nicotine levels in all its product promotions, and it promoted those two brands as "low-tar" and "light." It has long been recognized, however, that individual smokers may "compensate" for a cigarette brand's reduced tar and nicotine by inhaling for a longer period of time or taking more puffs on each cigarette; for such smokers, there is no reduction in tar and nicotine as compared to other brands.

The plaintiffs' suit alleged that by promoting its products as "light" and "low-tar," the manufacturer was engaging in unfair and deceptive practices in violation of Maine law. A federal district court dismissed the case, ruling that the plaintiffs' claims were preempted by the Federal Cigarette Labeling and Advertising Act (the "Labeling Act"). The Labeling Act includes a provision that explicitly preempts all state regulation of cigarette labeling and advertising that is "based on smoking and health." The district court held that the plaintiffs' suit sought to impose just such a regulation. The federal appeals court in Boston reversed, and the Supreme Court this week upheld the appeals court's decision. It held that a state-law fraud suit (alleging that a manufacturer defrauds consumers by labeling cigarettes that test low on the FTC Method as "light" cigarettes) is not a means of regulating advertising/labeling "based on smoking and health," but rather is regulation based on an independent duty to be truthful to consumers.

WLF focused much of its brief on a rule of construction that the Supreme Court has applied occasionally -- a presumption against preemption. The presumption posits that a federal preemption statute should be presumed not to preempt state law unless that was "the clear and manifest purpose" of Congress. The presumption has proven to be outcome-determinative in a number of major cases. Its legitimacy has been questioned frequently, both by individual Supreme Court justices and by legal commentators. WLF's brief urged the Court to abandon the presumption. It argued instead that courts seeking to interpret the scope of a federal preemption statute ought to apply normal rules of statutory construction in determining congressional intent. Without commenting on WLF's and the four dissenters' reasons for urging abandonment of the presumption, the majority off-handedly cited the presumption in support of its decision that Congress had not intended to preempt the Maine lawsuit.

There is one silver lining in the Court's decision from WLF's perspective: the Court went out of its way to note that it was not suggesting that the plaintiffs ought to prevail in their fraud claims -- only that federal law does not prohibit them from trying.

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. In particular, WLF has appeared in numerous federal and state courts in cases raising issues regarding federal preemption of state tort law.

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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.