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COURT STRIKES DOWN A PORTION OF NEW COMMERCIAL SPEECH RESTRICTIONS

(Discount Tobacco City & Lottery, Inc. v. United States)

The U.S. Court of Appeals for the Sixth Circuit yesterday struck down a portion of the new federal law that imposes a near-total ban on all tobacco advertising and labeling, but rejected challenges to the remainder of the law. Citing First Amendment rights, the court struck down: (1) the ban on use of color and graphics in advertising/ labeling; and (2) the ban on “continuity programs,” under which consumers are rewarded by a manufacturer for continuing to use the same brand of tobacco.

The decision in *Discount Tobacco City & Lottery, Inc. v. United States* was a partial victory for the Washington Legal Foundation (WLF), which filed a brief in support of the plaintiffs. WLF argued that while the federal government has a strong interest in reducing use of tobacco products, the First Amendment does not permit the government to use speech restrictions as its primary means of achieving that goal.

It is likely that both sides will seek further review, either before the entire Sixth Circuit sitting *en banc* or before the U.S. Supreme Court. WLF has pledged to continue its support for the plaintiffs in any further proceedings.

Provisions upheld by the appeals court included a ban on brand-name event sponsorships, a ban on merchandise bearing brand names, a ban on “modified risk” claims (i.e., claims that a product is less dangerous than other tobacco products), a ban on free samples, and a provision requiring that 50% of all product labels be set aside for government-mandated warnings.

The warning requirement is perhaps the most controversial; it requires all cigarette packaging to display graphic pictures designed to shock consumers, as a means of reinforcing the government’s message that smoking is hazardous to health. A federal district court in Washington, D.C. last month struck down the warning requirement, finding that it violated the First Amendment rights of manufacturers. An appeal from that decision is pending in the U.S. Court of Appeals for the District of Columbia Circuit. The Sixth Circuit voted 2-1 to uphold the warning requirement, concluding that it was a narrowly tailored effort to ensure that teenagers are fully informed regarding the risks of smoking. If the D.C. Circuit affirms the district court decision striking down the warning requirement, the U.S. Supreme Court will almost surely grant review to resolve the conflict between the D.C. and Sixth Circuits.

“Rather than imposing direct restrictions on sale and use of tobacco products, Congress has chosen to focus its restrictions on speech-related activities,” said WLF Chief Counsel Richard Samp after reviewing the Sixth Circuit decision. “The appeals court largely ignores Supreme Court precedent that prohibits the government from imposing speech restrictions as a first resort. The Supreme Court has stated unequivocally that the Constitution requires government to turn to restrictions on truthful speech as a *last* resort, not – as here – as a first resort,” Samp said.

Congress adopted the Family Smoking Prevention and Tobacco Control Act in 2009. The Act purports to cut off virtually all means by which tobacco companies can communicate with potential customers and the public at large. The new restrictions, when combined with the pre-existing ban on television and radio advertising, essentially silences tobacco companies.

WLF’s brief argued that the Act’s speech restrictions do not comply with the Supreme Court’s requirement that restrictions on commercial speech be “narrowly tailored.” WLF asserted that there are any number of non-speech marketing restrictions and law enforcement initiatives that Congress could have adopted that would have been just as effective in preventing underage tobacco use. WLF further argued that Congress does not have a legitimate interest in controlling truthful speech based on a fear that adults might make bad decisions based on the information conveyed to them. If the government has reason to believe that consumers may be misled by truthful information, it has the right to insist that the speaker add disclaimers designed to minimize that possibility, WLF said. Alternatively, the government is free to discourage smoking by increasing its own warnings regarding the health effects of smoking or by imposing restrictions on the sale of tobacco products. But it may not completely prohibit truthful commercial speech about a legal product, WLF asserted.

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a significant portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

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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.