



July 30, 2012

COURT DECLINES TO DISMISS U.S. SUIT AGAINST TOBACCO INDUSTRY AS MOOT

(United States v. Philip Morris USA Inc.)

The U.S. Court of Appeals for the District of Columbia Circuit this week rejected requests that it dismiss as moot the federal government's long-running lawsuit against the tobacco industry.

The decision was a setback for the Washington Legal Foundation (WLF), which filed a brief urging dismissal of *United States v. Philip Morris USA Inc.* WLF argued that Congress's 2009 adoption of significant restrictions on the tobacco industry makes it highly unlikely that the industry would continue to engage in the manufacturing and marketing practices complained of in this lawsuit. In the absence of "reasonable likelihood" of future violations of federal law, the case becomes moot because there would be no grounds for maintaining an injunction against future misconduct.

The appeals court disagreed, holding that the district court did not abuse its discretion in concluding that future violations were likely. The appeals court also held that it was appropriate to hold the tobacco industry to the high evidentiary standard applicable to litigants asserting mootness based on their *voluntary* compliance with the law, even though an industry's compliance with federal legislation might not normally be termed "voluntary." The court noted that the obligations imposed on the tobacco industry by RICO (the statute invoked by the federal government in its lawsuit) are in some respect broader than those imposed by the 2009 tobacco legislation – and thus that at least a portion of the industry's present-day compliance with RICO is not absolutely mandated by the 2009 legislation.

"We are disappointed that the court of appeals did not crack down on the district judge and order her to bring this 13-year-old lawsuit to an end," said WLF Chief Counsel Richard Samp in response to the decision. "Under Article III of the U.S. Constitution, federal courts may adjudicate only actual, on-going cases or controversies. If there is no reasonable likelihood of future violations, then there is no federal court jurisdiction to maintain an injunction against future violations. WLF is concerned that a decision upholding a continued injunction here may usher in an era of greatly expanded judicial power, in violation of separation-of-powers principles," Samp said.

The case before the appeals court was filed by the federal government during the Clinton Administration. All of the government's claims for damages were dismissed, but in 2006 the district court issued an injunction against future violations of RICO (the federal anti-racketeering law) by tobacco companies. In 2009, Congress adopted the Family Smoking Prevention and

Tobacco Control Act (the “FDA Act”), which explicitly prohibited many of the marketing techniques of which the federal government had complained in its lawsuit. The FDA Act also empowered FDA to monitor closely the tobacco industry’s compliance with the new restrictions, and provided FDA with \$200 million annually to carry out that function.

The tobacco industry thereafter moved to end the district court’s continuing jurisdiction over the case, on the grounds that the FDA Act rendered the case moot. The district court denied the motion. It held that the defendants had failed to carry their “formidable burden” of showing that it was “absolutely clear” that allegedly wrongful behavior was unlikely to recur. This week’s ruling affirms that district court decision.

In its brief urging reversal of the district court decision, WLF argued that the district court decided the motion on the basis of an inappropriately stringent evidentiary standard. WLF argued that by requiring the defendants to make it “absolutely clear” that no violations would occur in the future, the district court committed clear legal error that requires reversal. The district court should not have placed its thumb on the government’s side of the scale but rather should have made its determination on the basis of whether there was a “reasonable likelihood” of future violations, WLF asserted.

WLF argued further that adoption of the FDA Act makes it highly unlikely that the defendants will engage in the conduct that gave rise to this lawsuit. WLF noted that the defendants are well aware that their every public statement is being closely scrutinized by FDA officials, who have virtually unlimited funds to undertake that scrutiny. Defendants are unlikely to engage in wrongdoing when it is virtually inevitable that any wrongdoing will be uncovered by FDA and made the basis for severe sanctions, WLF argued.

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 free enterprise principles and the proper use of the federal judicial system. WLF frequently appears in federal court proceedings to urge that courts adhere to the rule of law by declining to exercise jurisdiction when they lack authority under Article III of the U.S. Constitution to exercise such jurisdiction.

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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.