



November 9, 2011

COURT BLOCKS FDA'S EFFORT TO COMPEL COMMERCIAL SPEECH

(R.J. Reynolds Tobacco Co. v. FDA)

U.S. District Court for the District of Columbia

The U.S. District Court for the District of Columbia this week issued a preliminary injunction that prevents the federal government from forcing tobacco manufacturers to surrender 50% of the front and back panels of each cigarette package and the top 20% of all printed advertising for the purpose of displaying nine new graphic warnings containing anti-smoking advocacy.

The decision was a victory for the Washington Legal Foundation (WLF), which filed a brief in *R.J. Reynolds Tobacco Co. v. FDA* urging that the injunction be issued. WLF argued that the First Amendment protects not only the right to speak but also the right not to speak, and that forcing a business to convey and associate with speech with which it disagrees violates the free speech protections of the U.S. Constitution.

The district court agreed with WLF that while the government is permitted to mandate warning labels on packaging in order to ensure that consumers are not misled, it may not require manufacturers to include government speech (including graphics) whose sole purpose is to advocate for the government's policy views. The court said that if the government were entitled to include advocacy on cigarette packages, it would be similarly free to include it on any product's packaging, including, for example, "various food packages (*i.e.*, fast food and snack food items)."

"Restrictions on compelled speech should not be relaxed simply because, as here, the speaker being compelled is a commercial entity," said WLF Senior Litigation Counsel Cory Andrews following the court's decision. "If the government wishes to convey a message, it should do so by using its own property and resources, not by commandeering the private property of others who disagree with that message," Andrews said.

The case involves a challenge to the Food and Drug Administration's (FDA) Final Rule implementing the Family Smoking Prevention and Tobacco Control Act of 2009. The FDA's new regulatory regime would require all tobacco manufactures to include graphic, anti-smoking warnings on all cigarette packages and advertising. Five tobacco

manufacturers filed suit challenging the warnings, which urge consumers not to use tobacco products. Each graphic label includes warnings about the various adverse effects of tobacco use and the directive “QUIT-NOW,” as well as one of nine shocking, color images depicting the potential effects of tobacco use: e.g., decaying teeth and gums, diseased lungs, and even a dead body on an autopsy table.

In its brief urging the Court to grant a preliminary injunction, WLF argued that the First Amendment fully protects the right to refuse to speak, and that forcing someone to convey the government’s message using his own private property is constitutionally suspect. The Court agreed with WLF a heightened First Amendment standard should apply to the imposed warnings. It also agreed that the new graphic warnings the FDA seeks to impose are not ordinary disclosure requirements of the kind previously upheld by the Supreme Court. Rather, they are the sort of controversial, nonfactual disclosures of which the Supreme Court very clearly does not approve. Because such ideological messages have nothing to do with protecting consumers from being misled, the court held, the FDA’s new Rule was unlikely to survive First Amendment scrutiny.

The court also agreed with WLF that no credible evidence exists that the proposed graphic warnings would accomplish the Government’s stated goal of reducing smoking rates among adults and children. Indeed, FDA’s own regulatory impact analysis concluded that the estimated impact the new warnings will have on smoking rates is “not statistically distinguishable from zero.”

The district court has directed the parties to file motions for summary judgment. Also, FDA is likely to appeal from this week’s decision. As the case progresses, WLF has pledged to file additional briefs in the case in support of the plaintiffs’ First Amendment rights.

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 speech rights, both of individuals and of the business community.

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For further information, contact WLF Senior Litigation Counsel Cory Andrews, (202) 588-0302. A copy of WLF’s brief is posted on its web site, www.wlf.org.