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## D.C. Circuit to Hear Oral Argument in Challenge to Appointment of Biased Advisory Committee Members

*(Lorillard Inc. v. FDA)*

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WASHINGTON, DC—The U.S. Court of Appeals for the District of Columbia Circuit will hear oral arguments tomorrow, Wednesday, October 7, at 9:30 a.m., in *Lorillard, Inc. v. FDA*, a case that will determine whether affected businesses may challenge federal agencies when the agencies appoint advisory committees whose members have financial conflicts of interest. WLF Chief Counsel Richard Samp, who drafted WLF’s *amicus* brief, will be available tomorrow afternoon to discuss what the argument may have revealed about likely outcomes in the matter.

The case involves an FDA advisory committee created by Congress to provide health-related advice regarding whether the use of menthol flavoring in cigarettes ought to be prohibited. Three of FDA’s appointees to the advisory committee were doctors who have been paid substantial sums to testify on a regular basis on behalf of plaintiffs in cigarette product-liability litigation. The advisory committee’s report to FDA concluded that banning menthol cigarettes would benefit public health—a conclusion that the three “expert” witnesses later cited in their paid testimony against tobacco companies.

A D.C. federal district court determined that the three professional witnesses had a financial conflict of interest (*i.e.*, they stood to gain financially by pushing the committee to find fault with menthol cigarettes) and thus FDA should not have appointed them to the advisory committee. In its appeal from that decision, FDA does not seriously contest the finding of a financial conflict. Rather, FDA argues that courts are not permitted to second-guess advisory committee appointments the agency makes under the Federal Advisory Committee Act (FACA).

In advance of oral argument, WLF issued a statement by Chief Counsel Richard Samp: “FDA apparently has lost the ability to distinguish between objective scientists and professional witnesses who earn their livings by testifying for plaintiffs’ lawyers. The courts need to step in to ensure that federal agencies make decisions based on sound science.”

*WLF is a free-market, public-interest law firm and policy center that devotes substantial resources to make administrative agencies adhere to the rule of law and statutes like FACA.*

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