Washington Legal Foundation in Philip Morris Litigation

Washington Legal Foundation (WLF) routinely files amicus briefs on the side of tobacco companies, specifically Philip Morris. WLF provides details on some of their tobacco litigation on their website at http://www.wlf.org/Litigating/. Some of those descriptions have been used below.

1. Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996). Washington Legal Foundation filed an amicus brief in this class action suit of nicotine addicted plaintiffs against various tobacco companies. The United States Court of Appeals for the Fifth Circuit decertified the class of plaintiffs calling it "the largest class action ever attempted in federal court." The Court decertified the class because of variations in state law and the particulars of how the case would be tried against numerous tobacco defendants.

2. Brown & Williamson Tobacco Corp. v. FDA, 153 F.3d 155 (4th Cir. 1998). Manufacturers, retailers and advertisers filed consolidated actions to challenge the FDA's jurisdiction to regulate the sale and distribution of tobacco products to minors and to limit advertising and promotion of tobacco products. The district court found that the FDA had the authority to regulate tobacco products but that authority did not extend to the restrictions on advertising. On appeal, the court held that the FDA did not have the authority to regulate tobacco. The appeals court held, and the Supreme Court later restated, that Congress did not intend for the FDA to have regulatory authority over tobacco, as FDA regulations would require tobacco be pulled from the market entirely. WLF filed a brief supporting the tobacco companies' position at both the circuit court and Supreme Court level. See also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

3. Consolidated Cigar Corp. v. Reilly, 218 F.3d 30 (1st Cir. 2000). Plaintiff tobacco companies sued the Attorney General of Massachusetts over regulations restricting the sale, promotion and labeling of tobacco products in an effort to reduce the use of such products by minors. The tobacco companies appealed from the decision of the U.S. District Court of Massachusetts, which held that the regulations did not violate the companies' first amendment rights, were not preempted by federal law and did not violate the commerce clause. The First Circuit determined that there was no first amendment violation, but that there were parts of the regulations that unduly burdened interstate commerce. Accordingly, the court affirmed in part and reversed in part.

4. Philip Morris Inc. v. Reilly, 267 F.3d 45 (1st Cir. 2001). Plaintiff tobacco companies sued Massachusetts state officials, claiming that the Massachusetts Tobacco Ingredients and Nicotine Yield Act violated the Takings Clause and the Commerce Clause by requiring tobacco companies to annually report the ingredient list and nicotine yield rating of products sold in state. WLF submitted

a brief arguing that the law amounted to a taking because "trade secrets" would be revealed, costing the companies "billions of dollars."

5. Philip Morris Inc., et. al. v. Glendening, 349 Md. 660 (2001). The Attorney General of Maryland filed a $16 billion lawsuit against several tobacco manufacturers for the costs of tobacco-related illnesses. The Attorney General hired a private law firm on a contingency fee basis to represent the state in the tobacco litigation. The tobacco companies brought suit alleging that the contingency fee contract was illegal. WLF filed a brief in March 1997, urging the court to strike down the arrangement. In its brief, WLF argued that such an arrangement violated traditional notions of due process by allowing the State to pursue a multi-billion dollar civil case through contingency fee counsel. The trial court determined that the agreement was legal and fully within the scope of the Attorney General's authority. This determination was upheld on appeal.

6. Flue-Cured Tobacco Coop. Stabilization Corp. v. United States EPA, 313 F.3d 852 (4th Cir. 2002). Plaintiff tobacco companies sued the U.S. E.P.A. over a report that classified secondhand tobacco smoke as a known carcinogen under the Radon Act. The tobacco companies claimed their representatives were excluded from the advisory committee that created the report and that such exclusion violated the Administrative Procedure Act (APA). District Court Judge Osteen found that the EPA's process of selecting the advisory committee violated the Radon Act. The Fourth Circuit overturned this ruling, finding that the advisory committee had no regulatory authority. Washington Legal Foundation filed a brief in support of the tobacco companies, including Philip Morris. WLF also participated in this case at the District Court level (*Flue-Cured Tobacco Coop. Stabilization Corp. v. United States EPA*, 4 F.Supp. 2d 435 (M.D. N.C. 1998).

7. Simon II Litig. v. Philip Morris USA Inc. (In re Simon II Litig.), 407 F.3d 125 (2nd Cir. 2003). Defendant tobacco companies appealed from an order that certified a nationwide non-opt-out class of plaintiff smokers seeking only punitive damages under state law for the tobacco companies' fraudulent denial and concealment of the health risks posed by cigarettes. The appeals court overturned the class determination because the universe of potential plaintiffs was too large to calculate the financial liability required for a litigation fund to be established. WLF filed a brief arguing that the suit would be wholly unmanageable if it proceeded as a class action on behalf of millions of smokers. WLF also argued that certification violated the constitutional rights of the defendants, but the appeals court did not reach that issue. WLF filed its brief on behalf of itself and the National Association of Manufacturers.

8. In re Tobacco Cases II, awaiting oral argument, not yet decided, prior proceeding at Tobacco Cases II, JCCP 4042, 2005 Cal. LEXIS 11057 (Cal. Sept. 23, 2005). WLF filed a brief in the California Supreme Court in this case urging the court to dismiss claims filed against tobacco companies for advertising that targeted minors by glamorizing smoking. WLF claimed that the defendants'

advertisements targeting minors were protected under the First Amendment and that cigarette advertising is already heavily regulated and that tort law suits would create another layer of regulation.

9. Price v. Philip Morris, Inc., 2005 Ill. LEXIS 2071 (Ill. Dec. 15, 2005). On December 15, 2005, the Illinois Supreme Court overturned a $10.1 billion award against Philip Morris, Inc., on the ground that the conduct complained of by the plaintiffs – the labeling of some cigarette brands as "light" or "low tar" – was authorized by the Federal Trade Commission. WLF had filed a brief on December 10, 2003, on behalf of itself and the Illinois Civil Justice League in the Illinois Supreme Court opposing the lawsuit.

10. Boeken v. Philip Morris USA Inc., 126 S. Ct. 1567 (2006). The Supreme Court declined to review a California punitive damage award against Philip Morris for the extreme reprehensibility of the cigarette manufacturer's increasing addictiveness by manipulating additives, gaining smokers by fraud, and marketing a product (the "light cigarette") that was more dangerous than ordinary consumers expected, knowing that serious physical injury and death would result in many smokers. WLF argued that the punitive damage award should be overturned because cigarette manufacturers already display all the health and safety warnings mandated by the federal government. The prior case is available at *Boeken v. Philip Morris, Inc.*, 127 Cal. App. 4th 1640 (2005).