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Circuit Split Over Graphic Label Requirement for Tobacco Products (/full-blog/2012/10/circuit-split-over-graphic-label.html)

"Family Smoking Prevention and Tobacco Control Act" (/full-blog?category=%22Family+Smoking+Prevention+and+Tobacco+Control+Act%22), "Food and Drug Administration" (/full-blog?category=%22Food+and+Drug+Administration%22), "graphic warning labels on tobacco products" (/full-blog?category=%22graphic+warning+labels+on+tobacco+products%22)



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Image Source (http://prc.cduffrom.goodinc.com/pat/full_1289414843SmokingWarningLabels.jpg)

By: Joe Schuler, Staff Member

In a recent 2-1 decision, the U.S. Court of Appeals for the D.C. Circuit vacated regulations of the Food and Drug Administration that would require graphic warning labels on tobacco products.[1] The FDA

implemented the warnings in compliance with the Family Smoking Prevention and Tobacco Control Act.[2] The warnings adopted by the FDA are viewable on the agency's website.[3]

The court concluded that the warnings violate the First Amendment. [4] The court reasoned that the graphic warnings went beyond the traditional textual warnings because they are not "purely factual, accurate, or uncontroversial information to consumers." [5] Rather, the court said, the warnings are "unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting." [6]

The ruling creates a circuit split because a panel of the Sixth Circuit upheld the regulations in March, in another 2-1 decision. [7] That means the six circuit judges who have considered the issue are evenly split. Given this, it seems that the matter of the Supreme Court's involvement is a question of when- not if - it will take up the issue. The justices certainly could choose to let other circuits weigh in before it settles the matter, but the fact that it involves regulations of a federal agency mandated by Congress may serve to expedite the Court's review.

Tobacco growers will be watching the development of this issue closely. Naturally, growers will have a keen interest in anything that could impact the market. Given that the aim here is to motivate smokers to quit and discourage others from picking up the habit, success would obviously mean a reduced demand for tobacco.

So what is the likelihood of success? Studies suggest that the graphic warnings are more effective than plain text, at least when it comes to communicating the anti-smoking message. [8] The graphic nature of the label seems to increase a viewer's recall of the message. [9] In other words, more people are likely to notice, and remember, the content of the warning when it is accompanied by the attention-grabbing images.

How that translates to the desired behavior behind the policy- to quit or never begin smoking - is less certain. Ironically, if the Supreme Court adopts the reasoning of the D.C. Circuit, it could prove to be the Achilles' of the statute and regulations. According to the panel, in order to prevail, the government must show that its asserted interest is substantial and that the regulation directly advances its asserted interest. [10] The panel stated that the FDA did not provide a "shred of evidence" that the warnings would lead to a reduction in the number of American smokers. [11] Although many countries have adopted similar warnings, the court found that the FDA had offered no evidence to show that the warnings actually resulted in decreased smoking rates in those countries. [12]

Thus, although the concern of tobacco growers and manufacturers is seemingly that the warnings will decrease demand for their products, they may ultimately prevail because the government cannot prove that very thing.

[1] R.J. Reynolds Tobacco Co. v. Food and Drug Admin., No. 11-5332 Consolidated with No. 12-50632012 U.S. App. LEXIS 12925 (D.C. Cir. Aug. 24, 2012).

[2] *Id.* at *4.

[3] *Cigarette Health Warnings*, FDA, (Aug. 22, 2012) <http://www.fda.gov/TobaccoProducts/Labeling/Labeling/CigaretteWarningLabels/default.htm> (<http://www.fda.gov/TobaccoProducts/Labeling/Labeling/%20CigaretteWarningLabels/default.htm>).

[4] *Reynolds*, 2012 U.S. App. LEXIS 17925, at *45.

[5] *Id.* at *30.

[6] *Id.*

[7] *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 537 (6th Cir. Ky. 2012).

[8] See e.g. Ryan Jaskow, *Study: Graphic Warning Labels More Effective at Delivering Anti-smoking Message*, CBS News, (June 15, 2012) http://www.cbsnews.com/8301-504763_162-57454112-10391704/study-graphic-tobacco-warning-labels-more-effective-at-delivering-anti-smoking-message/.

[9] *Id.*

[10] *Reynolds*, 2012 U.S. App. LEXIS 17925, at *32.

[11] *Id.* at *36.

[12] *Id.*

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