Attorneys Argue FDA Regulation of Tobacco Before Supreme Court

Justice Department attorneys presented their arguments as to whether the US Food and Drug Administration (FDA) can regulate tobacco before a skeptical US Supreme Court in early December. The case, named *FDA versus Brown & Williamson Tobacco* is a major part of the Clinton administration’s attempts to reign in the politically powerful tobacco industry and to promote public health by reducing the number of people who smoke.

The brainchild of former US FDA Commissioner David Kessler, the suit seeks to regulate cigarettes on the theory that the nicotine it contains has drug-like properties, despite the fact that the FDA has turned down chances to regulate tobacco in decades past. At that time, the agency claimed it had no authority to regulate cigarettes. However, the FDA said it has changed its policy because of new revelations found in documents the tobacco companies were forced to release.

Attorneys for the tobacco companies argue that cigarette makers make no claims of health benefit for their product, and therefore, the FDA has no jurisdiction over it.

Forty states backed the FDA’s attempt to regulate tobacco, filing a friend-of-the-court brief that referred to rising rates of teenage smoking and the attempts by the tobacco industry to conceal the deadly nature of its products. Indeed, the FDA attempted with its first regulations to stem the teen smoking tide. It would have required that those who sell cigarettes and other tobacco products check the identification of buyers under the age of 27 and prohibit cigarette vending machines everywhere except places where only adults could go.

The government won its case in federal court, but it was reversed in the 4th Circuit Court of Appeals, which ruled that the agency lacked the regulatory power it had assumed. “In the 60 years following the passage of the act (the act that established the FDA’s authority), the FDA has repeatedly informed Congress that cigarettes marketed without therapeutic claims do not fit within the scope of the act,” the Court noted in its opinion.

US Supreme Court justices seemed no more convinced during the hour-long arguments before it in early December. According to the New York Times, Justice Sandra Day O’Connor said several times that regulating smoking “just doesn’t fit” within the agency’s statutory authority. She also asked Solicitor General Seth Waxman whether under his theory, the FDA should regulate horror movies “because so many people go to them to get scared and get their adrenaline pumping.”

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