

**March 21, 2006**

COURT DECLINES REVIEW OF AWARD AGAINST "LIGHT" CIGARETTE MAKER

(Philip Morris USA v. Boeken, No. 05-594)

The U.S. Supreme Court yesterday issued a one-sentence order declining to review a California court decision that imposed a massive tort liability award against the manufacturer of a "light" cigarette on the ground that the public believes that "light" cigarettes pose less of a health risk than they actually do.

The order, issued without comment, was a setback for the Washington Legal Foundation (WLF), which filed a brief urging the Court to review the case, *Philip Morris USA v. Boeken*. WLF argued that such tort claims are preempted by federal law because cigarette manufacturers already display all the health and safety warnings mandated by the federal government.

WLF argued that Congress already determined, when it adopted the Federal Cigarette Labeling and Advertising Act (FCLAA), the health warnings that manufacturers must include in advertising and on their labeling. WLF argued that States should not be permitted to second-guess that congressional determination by allowing tort suits that would require manufacturers to impose additional warning requirements. WLF argued that Congress has passed a series of laws designed to allow companies to advertise nationwide by imposing a uniform advertising standard and barring States from adopting conflicting standards. WLF argued that the decision below could have the effect of undermining all such laws.

The Supreme Court's order allows this one California judgment to stand but sets no precedent for future cases. WLF has pledged to raise its preemption argument in upcoming cases that raise similar issues.

"Consumers have long recognized that smoking is bad for one's health, a recognition that is regularly reinforced by the federal government-mandated health warning on every cigarette label," said WLF Chief Counsel Richard A. Samp after reviewing the Court's order. "The courts should not permit plaintiffs' lawyers, in their quest for large fees, to pretend otherwise. If the plaintiffs' bar thinks more warning requirements are warranted, they should address their concerns to Congress," Samp said.

The case involves an ex-heroin addict, Richard Boeken, who died of lung cancer after smoking Marlboro Lights for several decades. Boeken's tort suit against Philip Morris USA ("PM USA"), the maker of Marlboro Lights, claimed that although "light" cigarettes produce less "tar" than ordinary cigarettes, they are no safer. The suit alleged that smokers of "light" cigarettes tend to "compensate": they draw more smoke into their lungs and keep it there longer. The suit alleged PM USA should be held liable under a product liability theory (known as the "consumer expectations test") because Marlboro Lights were more dangerous than consumers realized -- despite the dire health warnings stamped on every label.

The California Court of Appeal upheld a \$56 million judgment against PM USA. Although recognizing that the FCLAA preempted any failure-to-warn claim that Boeken might have brought, the court held that a tort action based on the consumer expectations test was an altogether different cause of action and was *not* preempted. The U.S. Supreme Court's order yesterday allows that decision to stand.

In its brief urging the Supreme Court to grant review, WLF had argued that the California decision is contrary to numerous Supreme Court precedents, which establish that federal preemption statutes bar conflicting State common-law causes of action, without regard to the name that the State applies to its cause of action. WLF noted that the lower courts are in disarray regarding whether federal preemption statutes apply to causes of action proceeding under the "consumer expectations test." WLF argued that the decision below threatens to undermine a broad array of federal preemption statutes - - including statutes addressing such diverse fields as insecticides, medical devices, airlines, and railroads -- by undermining the uniformity of regulation that Congress sought to achieve.

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 and promoting free enterprise, individual rights, and a limited and accountable government. In particular, WLF has appeared in numerous federal and State courts in cases raising issues related to federal preemption of State common-law tort actions.

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For further information, contact WLF Chief Counsel Richard Samp, 202-588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.