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WLF Asks D.C. Circuit to Uphold Challenge to FDA's Appointment of Biased Federal Advisory Committee

(Lorillard, Inc. v. FDA)

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WASHINGTON, DC—Washington Legal Foundation (WLF) last evening filed a brief encouraging the U.S. Court of Appeals for the District of Columbia to uphold the ability of affected businesses to challenge federal agencies’ that appoint federal advisory committees with financial conflicts of interest. In a brief filed in *Lorillard, Inc. v. FDA*, WLF argues that the Food and Drug Administration’s (FDA) efforts to prevent such a challenge would effectively end all meaningful judicial enforcement of federal statutes designed to ensure impartial federal decision-making.

The case involves an advisory committee created by Congress to provide health-related advice as to whether menthol flavoring in cigarettes should be prohibited. FDA appointed three doctors to the advisory committee 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 the three doctors later cited in their paid expert witness testimony against tobacco companies.

A federal district court has already 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. 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 FDA advisory committee appointments.

WLF’s brief responds that federal courts are authorized to demand compliance with conflict-of-interest statutes and that the district court acted properly when it enjoined FDA from using a report issued by a committee whose members had financial conflicts. After filing its brief, WLF issued the following statement by Chief Counsel Richard Samp:

“FDA has become so beholden to the plaintiffs’ bar that it apparently can no longer recognize the difference between objective scientists and shills who earn their livings testifying for plaintiffs’ lawyers. The courts need to step in to ensure that government agencies make decisions based on sound science. Self-interested professional witnesses must not be able to influence FDA decisions.”

WLF is a public interest law firm and policy center that regularly litigates in support of civil justice reform, to ensure that unwarranted lawsuits do not drive up costs for all consumers.