

SMOKESHOP

THE INDUSTRY AUTHORITY ON TOBACCO RETAILING

Official Publication of the International Premium Cigar & Pipe Retailers Association (IPCPR)

JUNE 2012



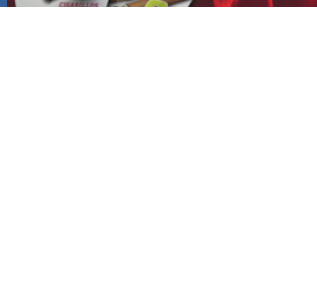
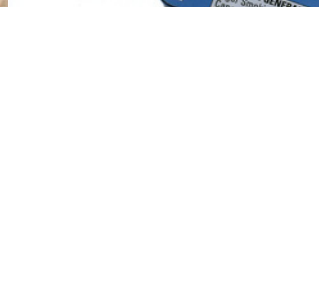
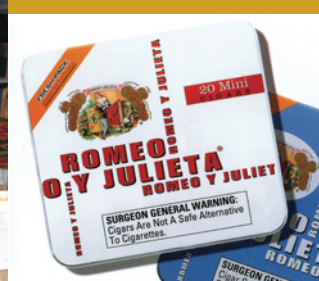
NATO Show 2012

*Second Annual Trade Show
Offered More Exhibitors, Seminars*

➤ Seminar and New Merchandise Reports

PLUS:

- Jameson Cigar's Rising Young Gun, Brad Mayo
- Back to Court for FDA's Graphic Warning Labels





Courts Disagree on Tobacco Warnings

The battle over graphic warning labels rages on: Two federal courts split over the constitutionality of the FDA's warning label requirement, possibly leading to a showdown before the supreme court.

>BY TROUTMAN SANDERS TOBACCO TEAM

In a split decision issued on March 19, 2012, a three judge panel of the United States Court of Appeals for the Sixth Circuit upheld the provisions of the Family Smoking Prevention and Tobacco Control Act (the "Act") requiring graphic warning labels on cigarette packaging and advertisements. The Sixth Circuit's decision differs starkly from the February 29, 2012 ruling of the United States District Court for the District of Columbia, which held that the Food and Drug Administration's nine chosen graphic labels violated the plaintiff-tobacco companies' right of free speech under the First Amendment. The courts' ultimate decisions, however, were not the only differences in these two cases.

The Sixth Circuit addressed only a facial challenge to the constitutionality of the Act's graphic image requirement. This means that the court was tasked with determining whether the Act's graphic image requirement, itself, was allowable under the Constitution, not whether the specific images chosen by FDA were constitutional. The Sixth Circuit ultimately concluded, albeit not unanimously, that the Act's graphic image requirement should be charac-

terized as a commercial-speech disclosure requirement, rather than as compelled commercial speech. The Court found the disclosure requirement was reasonably related to the government's purpose of preventing consumer deception concerning the health risks of tobacco use.

The D.C. District Court, on the other hand, was charged with determining whether FDA's specified nine graphic images on tobacco packaging and advertisements unconstitutionally compelled speech. The D.C. District Court, as discussed below, found that FDA's rule essentially required tobacco companies to be spokesmen for the government's anti-tobacco agenda, which was not only too burdensome for these companies, but also was compelled speech that was not permissible under the Constitution.

NEW WARNING LABELS

In addition to mandating several textual warnings, the Act requires the Secretary of the U.S. Department of Health and Human Services to "issue regulations that require color graphics depicting the negative health consequences of smoking." The Act also requires the new

warnings to occupy the top 50 percent of the front and back panels of all cigarette packages, the top 30 percent of all smokeless tobacco packages, and the top 20 percent of all tobacco advertising.

On June 22, 2011, FDA published its final rule, which revealed the nine graphic images that are to be included on cigarette packaging and advertisements. These graphics included color images of: a man exhaling cigarette smoke through a tracheotomy hole; a plume of cigarette smoke enveloping an infant receiving a kiss from its mother; a pair of diseased lungs next to a pair of healthy lungs; a diseased mouth afflicted with cancerous lesions; a man breathing into an oxygen mask; a bare-chest male cadaver lying on a table; a woman weeping uncontrollably; and a man wearing a t-shirt featuring a "no smoking" symbol and the words "I QUIT."

APPELLATE COURT UPHOLDS WARNING REQUIREMENT

In determining whether the Act's graphic image requirement was constitutional, the Sixth Circuit first examined whether the images could accurately convey factual information and, therefore, permitted as merely a government-mandated disclosure subject to a lesser rational basis review, or whether the images would be considered generally as compelled speech, which is subject to a stricter analysis.

The Court likened the Act's graphic image requirement to the use of pictures and diagrams in text books. Specifically, the Sixth Circuit stated that, "[s]tudents in biology, human anatomy, and medical school courses look at pictures or drawings in textbooks of both healthy and damaged cells, tissues, organs, organ systems, and humans because those pictures convey factual information about medical conditions and biological systems." As such, the Court found that if a picture or drawing can accurately represent a medical condition or body part in a text book, then the graphics required under the Act can also accurately represent a negative health consequence of smoking, such as a cancerous lung. Since it found that the Act's graphic image requirement

could be considered a government-mandated disclosure of accurate information, the requirement is subject to a rational basis review by the courts—a standard that usually survives court review.

Because the court found the Act's graphic image requirement was subject to a rational basis review, the federal government was required to show that the graphic images were reasonably related to a legitimate governmental interest. The Sixth Circuit found that the Act's graphic image requirements survived this standard.

Based on what the Sixth Circuit characterized as the tobacco industry's decades-long practices of knowingly conspiring to deceive the public about the health risks and addictiveness of cigarettes, the Court found that the federal government had a legitimate interest in providing consumers with truthful information as they make decisions about purchasing and using tobacco products. The Sixth Circuit found that the Act's graphic image requirement was reasonably related to this purpose. As support for its holding, the Sixth

inform consumers of the health risks associated with tobacco use.

Notably, the Sixth Circuit's decision was not unanimous. Judge Clay, who dissented with the Court's finding that the graphic image requirement was permissible, stated that "colorful graphic images can evoke a visceral response that subsumes rational decision-making" and "can be seen one way by some smokers, yet another by other smokers." As such, Judge Clay indicated that the graphics could not convey purely factual information and, therefore, could not be considered a permissible disclosure requirement under the Constitution.

D.C. TRIAL COURT REJECTS MANDATED WARNINGS

Judge Clay's analysis was consistent with the D.C. District Court's earlier ruling that the specific images chosen by FDA were unconstitutional. The D.C. District Court acknowledged that narrow exceptions under the First Amendment allow the Government to require certain disclosures to protect

FDA's graphic images were subject to a more difficult standard of review—strict scrutiny. Under a strict scrutiny analysis, the government must demonstrate that its actions are narrowly tailored to achieve a compelling government interest. The D.C. District Court ruled that the government failed to meet both prongs of the strict scrutiny analysis.

First, the D.C. District Court found that FDA's chosen graphic images were representative of the government's actual purpose to encourage smoking cessation and to discourage potential new smokers from starting, rather than its claimed purpose of attempting to convey to consumers "the devastating consequences of smoking and nicotine addiction." The Court acknowledged that an interest in informing or educating the public about the dangers of smoking "might" be compelling, but a government "interest in simply advocating that the public not purchase a legal product is not."

Additionally, the D.C. District Court concluded that FDA's graphic image requirements were not narrowly tailored. Specifically, the Court stated that FDA is requiring tobacco companies to "act as the Government's mouthpiece by dedicating the top 50 percent of the front and back of all cigarette packages manufactured and distributed in the United States to display the Government's anti-smoking message: not to purchase this product." In other words, the D.C. District Court contended that FDA's graphic images would rebrand every single pack of cigarettes in the United States as a "mini-billboard." Such a forced rebranding, according to the D.C. District Court, failed to meet the narrowly tailored requirement of the strict scrutiny analysis. Notably, the Court outlined several other options the government could pursue that would be less burdensome for tobacco companies, but would educate the public about tobacco use. For example, the government could:

- disseminate its anti-smoking message itself by increasing anti-smoking advertisements;
- reduce the space appropriated for the proposed graphic images to 20 percent of the packaging or require

➤ **The D.C. District Court acknowledged that an interest in informing or educating the public about the dangers of smoking "might" be compelling, but a government "interest in simply advocating that the public not purchase a legal product is not."**

Circuit discussed the alleged inadequacy of the existing warnings. For example, the Court stated that existing warnings are easily overlooked because they take up less than 5 percent of packaging and require an individual to be able to read at a relatively high level to understand the warnings.

The Sixth Circuit relied on scientific studies finding that pictures are easier to remember than words to conclude that the Act's new larger and colorful graphic images and warnings rationally address the problems associated with the current tobacco warnings. The Court also found persuasive studies examining the ability of required graphic warning labels to

consumers from confusion or deception. However, the D.C. District Court found that FDA's chosen graphics are "not the type of purely factual and uncontroversial disclosures" that can be permissible under the Constitution. Citing a report issued by the Institute of Medicine, which stated that warnings must be designed to reduce the number of people who use and become addicted to tobacco products, the D.C. District Court concluded that the graphic images are not being required as an effort to disseminate purely factual and uncontroversial information, but rather to discourage the consumption of tobacco products.

The D.C. District Court found that

the images only on the front or back of the packaging;

- select graphic images that convey only purely factual and uncontroversial information rather than gruesome images designed to disgust the consumer;
- increase cigarette taxes; or
- improve efforts to prevent the unlawful sale of cigarettes to minors.

WHAT'S NEXT?

On April 10, 2012, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit held oral arguments in the federal government's appeal challenging the D.C. District Court's decision. During oral arguments, Judge Janice Rogers Brown was troubled by the potential impact that the graphic images could have on the federal government's ability to compel speech for other industries. Specifically, Judge Brown stated: "I don't really understand where this stops. It seems to me that there is nothing that the government can't compel the seller of a dis-

avored product to put on their product if they think it's for the public good." In other words, Judge Brown stated that the government is telling smokers "don't buy this product." Judge A. Raymond Randolph also questioned whether the government could require auto makers to place warning labels containing images of gruesome car accidents to warn people about the risks of speeding. However, Judge Randolph also noted that there is no case holding that a government-mandated disclosure could only provide information rather than attempt to deter a consumer's use of a particular product. Regardless of the D.C. Circuit's decision, it is likely that the case will continue on to the United States Supreme Court for an ultimate decision.

Additionally, it is likely that the tobacco companies will petition the Supreme Court to hear an appeal of the Sixth Circuit decision. The tobacco companies have until mid-June 2012 to file their petition.

Given what looks like a possible

split by the lower courts, the Supreme Court could follow several paths in determining the fate of FDA's chosen graphic images. First, the Court could side with the Sixth Circuit, finding that, on its face, the Act's graphic image requirement is constitutional. If the Court goes this way, it will also have to determine whether the nine images chosen by FDA are acceptable under the Constitution. The Court could also decide that FDA's final rule implementing the Act's graphic image requirement does not pass muster under a strict scrutiny analysis. If this is the case, the Court could, like the D.C. District Court, suggest other less burdensome methods and send FDA back to the drawing board to identify constitutionally-permissible warnings. **S**

*Troutman Sanders Tobacco Team,
Troutman Sanders LLP, 1001 Haxall
Point, Richmond, Va. 23219,
Tel: (804) 697-2206, Fax: (804) 697-1339,
Web: www.troutmansanders.com, Email:
ashley.taylor@troutmansanders.com.*

REFINED. PURE.

XIKAR offers the highest quality fuel we have found: less than 15 parts per million of impurities. Butane of lesser quality filtration or refinement holds impurities which will clog and ruin jet flame lighters. You are careful to put the best fuel in your performance car -- keep your performance lighter functioning well for years with PUROFINE™ Premium butane. Made in the USA

LIGHTER FUNCTION FOR LIFE

