



15-SECOND

## ADVERTISING LAW ALERT

# SOME TOBACCO CONTROL ACT ADVERTISING LIMITATIONS HELD UNCONSTITUTIONAL

Tobacco interests came away with a partial victory recently in their challenge to the constitutionality of the new Family Smoking Prevention and Tobacco Control Act.\*

### BACKGROUND

The FSPTCA was enacted by Congress last year “to curb tobacco use by adolescents.” Among other things, the Act affirmatively requires that (a) advertising and labeling of cigarettes and smokeless tobacco to be only in black text on white background; (b) cigarette packs contain warnings (e.g., “Cigarettes Cause Cancer”) in 17-point type in their top 50 percent, and (c) packs contain color graphics of smoking’s negative consequences

Negatively, among other things, the Act bars cigarette manufacturers from (a) sponsoring sports, social, or cultural events; (b) distributing brand-name promotional items; (c) mentioning that FDA regulates tobacco products or otherwise conveying a claim that could mislead consumers into believing that a

tobacco product was approved in some way by FDA or that it may be safer than other tobacco products because of FDA regulation, and (d) otherwise using color or graphics in advertising or labeling.

Cigarette manufacturers and related interests challenged these requirements as violations of their First Amendment freedom of speech rights, among other grounds. They filed for summary judgment.

### DECISION

Applying the *Central Hudson* test, the court denied all requests for invalidation, except for two, which it found violated the First Amendment.

The Act’s blanket ban on uses of color and images in tobacco labels and advertising was held to be overbroad and to lack the necessary tailoring to a government interest.

The ban on claims in the media implying FDA approval through regulation was held to be overbroad primarily because it would, in effect, extend beyond cigarette interests to journalists, scientists, and others.■

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\* *Commonwealth Brands, Inc. et al. v. U.S., et al.*, No. 1:09-CV-117-M (W.D. Ky.; Jan. 4, 2010).