

## The Supreme Court Revisits the Preemption of State Law Consumer Protection Claims

October 6, 2008

On the first day of its new term today, the United States Supreme Court heard oral argument in *Altria Group, Inc. v. Good*, No. 07-562, in which it will revisit the circumstances under which state law claims against product manufacturers are preempted by federal law, a subject that the Court has addressed several times in recent years and will face yet again in an appeal to be argued next month, *Wyeth v. Levine*, No. 06-1249.

*Good* involves the preemptive reach of the Federal Cigarette Labeling and Advertising Act (the "FCLAA"). That issue was first addressed by the Supreme Court in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), in which certain state law claims were allowed to proceed, while others were determined to be preempted. The plurality opinion in *Cipollone* has been notoriously difficult to construe, as 15 years of lower court case law demonstrates. The Court's 2001 decision in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), also analyzing FCLAA preemption, provided some guidance, but not enough to avoid a Circuit split over state consumer protection act claims challenging manufacturers' characterizations of certain cigarettes as "light" or low in tar and nicotine, the specific issue in *Good*. Hopefully, the Court will take the opportunity presented by this appeal to clarify the extent of FCLAA preemption of state law.

### BACKGROUND

*Good* was brought on behalf of a putative class of purchasers of Marlboro Lights and Cambridge Lights, both of which were manufactured by Altria Group's subsidiary, Philip Morris USA ("Philip Morris"). Plaintiffs allege that Philip Morris' description of these cigarettes as "Lights," or having "lower tar and nicotine," constituted a misrepresentation of material fact and therefore violated Maine's Unfair Trade Practices Act. They also assert a common law cause of action for unjust enrichment. Plaintiffs claim that these descriptions were misleading because, as Philip Morris was aware at the time, persons smoking light cigarettes engage in "compensation," i.e., they negate the reduction in tar and nicotine intake caused by ventilation holes by unconsciously blocking the holes with their lips or fingers, taking longer, deeper or more frequent puffs, or smoking more cigarettes.

Philip Morris moved for summary judgment. It asserted that Plaintiffs' claims were preempted by the FCLAA, which provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter," and by the Federal Trade Commission's ("FTC") comprehensive national program governing the disclosure of tar and nicotine levels by cigarette manufacturers, including the method specifically prescribed by the FTC for measuring tar and nicotine.<sup>1</sup>

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<sup>1</sup> Philip Morris also argued that Plaintiffs' statutory claim was not sustainable because the Maine Unfair Trade Practices Act does not apply to actions "otherwise permitted under laws as administered by any regulatory board or officer acting under the authority of the . . . United States." Philip Morris maintained the use of "lights" and "lower tar and nicotine" came within

The district court granted summary judgment, finding that Plaintiffs' claims were expressly preempted by the FCLAA. It reasoned, "the law suit is grounded not on the properties of the cigarette itself, but on what the Defendant said about the cigarette-and what they said about the cigarette is substantially intertwined with what the federal government told them to say."

The Court of Appeals for the First Circuit disagreed, holding that Plaintiffs' claims were neither expressly nor impliedly preempted. *Good v. Altria Group, Inc.*, 501 F.3d 29, 58 (1<sup>st</sup> Cir. 2007). It acknowledged that the Fifth Circuit had come to the opposite conclusion in *Brown v. Brown & Williamson Tobacco Corp.*, 479 F.3d 383 (5<sup>th</sup> Cir. 2007). There, the Fifth Circuit held that similar claims were, in effect, premised upon alleged neutralization of federally mandated warnings, and thus barred under *Cipollone*.

"A claim is not preempted," the First Circuit stated in *Good*, "merely because it is 'grounded on' the advertising or promotion of cigarettes with FCLAA-compliant labels." Plaintiffs had elected to pursue a theory of actual misrepresentation of fact in violation of a state law duty not to deceive, rather than of concealment or failure-to-warn, a difference that the Court of Appeals found to be dispositive on the question of express preemption. The Court found that the existence of an express preemption provision in the FCLAA ruled out the possibility of implied preemption under the statute itself, and that in any event a finding in this case that the terms "light" or "lower tar and nicotine" were fraudulent would not frustrate the purposes of the FCLAA. Lastly, the First Circuit rejected the argument that the FTC's exercise of authority in the area impliedly preempted Plaintiffs' state law claims. In addition to questioning whether FTC consent orders, as opposed to formal rulemaking, have preemptive effect, the Court concluded that Plaintiffs' claims "do not pose a threat to any federal regulatory objectives."

#### SUMMARY OF THE ARGUMENT

Before the Supreme Court today, Petitioner Philip Morris argued that Plaintiffs' state law claims are expressly preempted by the FCLAA because they are aimed at the advertising and promotion of cigarettes and impermissibly implicate the relationship between smoking and health.<sup>2</sup> Philip Morris noted that Plaintiffs' complaint uses terms falling squarely within the FCLAA's express preemption provision, such as "promotion" of cigarettes, "safety," and "health."

Justice Ginsburg questioned Philip Morris concerning whether its position would allow state Attorneys General to bring suits based on deceptive advertising, a theme she repeated throughout the argument. Petitioner responded that state Attorneys General would still be able to pursue deceptive advertising, for instance by a manufacturer that falsely stated the number of cigarettes in a

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this exception due to the FTC's regulatory scheme and conduct. However, certiorari was not granted as to that issue by the Supreme Court.

<sup>2</sup> Without waiving the argument that Plaintiffs' claims also were impliedly preempted, counsel for Philip Morris expressed his intention not to spend any time on that theory, to which Justice Scalia responded, "Good idea."

package. Philip Morris emphasized that preemption was limited to only those advertising claims addressed to matters of smoking and health.

In response to Justice Stevens' question as to whether a state law prohibition on false statements about smoking and health would be preempted by the FCLAA, Phillip Morris answered that, if it related to cigarette advertising, it would be. Petitioner asked the Justices to "set aside and restate[]" Cipollone insofar as it had found that state law fraud claims based upon false statements of material fact were not preempted. It noted, however, that even under the plurality opinion in Cipollone, insofar as Plaintiffs' claims are premised upon the theory that statements in advertising and promotion minimized or negated the effect of federally mandated warnings, they are preempted.

Justice Breyer raised Congress' intention in passing the FCLAA, asking, "why Congress would want to get rid of, in this area, the traditional rule that advertising has to tell the truth." Philip Morris explained that the statute was intended to protect consumers without harming commerce by requiring uniform national labeling while avoiding state labeling regulations that could be diverse or confusing. Inconsistent determinations as to whether the terms "light" and "lower in tar and nicotine" were deceptive would make national advertising impossible. Moreover, it reiterated, its argument was not only consistent with Congressional intention, but required by the clear language of FCLAA's preemption provision.

Respondent Plaintiffs argued that, while the FCLAA would preempt any state law that specifically targeted cigarette advertising, it does not preempt generally applicable state statutory or common law that prohibits deception generally.

Justice Alito inquired whether, had the FTC adopted a rule requiring cigarette advertisements to report that brand's tar and nicotine yield as measured by the FTC's testing method, Maine could have then required advertisements to state that such federal tar and nicotine figures were misleading. Plaintiffs agreed that such a requirement would be impermissible under implied conflict preemption. They sought to distinguish that hypothetical situation from their complaint, however, by arguing that the fact finder in *Good* will not be called upon to make any determination about smoking and health. That statement was met with skepticism by the Court.

Chief Justice Roberts questioned how the case could be resolved without considering the effects of smoking on health: "They have an advertisement that says light cigarettes are better for you than regular cigarettes. You have to know what the relationship is between smoking and health to determine whether that's deceptive." Plaintiffs responded that they could establish injury by demonstrating that the tar and nicotine yields of "light" cigarettes and other cigarettes are different, and that damages could be measured by the difference in value between the lower-yield cigarettes that Plaintiffs thought they were buying and the cigarettes they received. Justice Souter asked for an explanation of the difference in value between the two, suggesting that the only real difference was their respective effects on health.

Justice Breyer pressed Plaintiffs on the FCLAA's language, characterizing their argument as, "this language is very absolute but it doesn't mean to cover everything that it literally applies to." The statute, Plaintiffs responded, says nothing about displacing state anti-deception laws. As to intent, they argued, Congress had "no intention whatsoever to immunize cigarette makers for the sales statements that they made in violation of anti-deception [rules]."

The United States appeared as amicus in support of Plaintiffs' position. Its brief had not addressed express preemption, but was instead limited to implied preemption, which neither Philip Morris nor Plaintiffs had raised during their arguments.

The Justices focused upon when the FTC became aware of the phenomenon of "compensation," and what action it has (or has not) not taken since then. The Government argued that the FTC was unaware of compensation—or at least did not know that it was a significant problem—when it issued guidance to cigarette companies in 1966 and 1967 (although the companies allegedly were aware of the problem then), and that the FTC had first began to inquire into the matter in 1983. Its principal position, however, was that the FTC never "approved" the use of "lights" or "low in tar and nicotine." Justices Scalia and Alito were particularly hostile toward the Government's argument, questioning why the FTC did not begin prohibiting the use of those descriptors once it began to suspect they might be misleading. Specifically, Justice Alito inquired whether the FTC had tacitly approved the use of such terms in advertising through its inaction, asking: "Would it be unfair to say that for quite sometime now, nearly 40 years, the FTC has passively approved the placement of these tar and nicotine figures in advertisement?"

#### IMPLICATIONS

In *Good*, the Court is set to clarify the extent to which the FCLAA and FTC regulatory action preempt state law claims. Clarification would be welcome, because in the 15 years since *Cipollone* was handed down, lower courts have struggled to apply the decision. In fact, courts around the country considering numerous similar "lights" class actions have disagreed over whether they are barred under the preemption doctrine. Many of these cases have been stayed pending the Supreme Court's ruling here.

This case marks yet another recent foray by the Supreme Court into the area of federal preemption. For example, last term the Supreme Court handed down *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008), which addressed the preemptive reach of the Medical Device Act.<sup>3</sup> The Court will again consider this issue on November 3, 2008, when it is scheduled to hear oral argument in *Wyeth v. Levine*, No. 06-1249, a case that raises the issue of whether state common law product liability claims are preempted by the Food and Drug Administration's new drug application approval process.

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<sup>3</sup> Last term the Court heard argument in *Warner-Lambert v. Kent*, No. 06-1498, which also involved the Medical Device Act, as well as the Food, Drug and Cosmetic Act, but it issued a summary affirmance due to 4-4 split. (Chief Justice Roberts had recused himself.) See *Warner-Lambert v. Kent*, 128 S. Ct. 1168 (2008).

For further information about this decision, please feel free to contact members of the Firm's Litigation Department, including:

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