

Supreme Court Finds in a “Lights” Cigarettes Case That Claims for Violation of a State Statutory Duty Not to Deceive Are Not Preempted by the Federal Cigarette Labeling and Advertising Act

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Yesterday, in *Altria Group, Inc. v. Good*, No. 07-562, the United States Supreme Court held that the Federal Cigarette Labeling and Advertising Act (the “FCLAA”) does not expressly preempt the Plaintiffs’ claims arising under Maine’s Unfair Trade Practices Act (“MUTPA”) because those claims arise from an alleged violation of a duty not to deceive that is not “based on” smoking and health. This ruling adhered to the plurality decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), which has been notoriously difficult for lower courts to interpret and apply, as the dissent in *Good* pointed out. The Court also held that Plaintiffs’ claims, which challenge the Defendant’s use of the descriptors “light” or “low tar,” are not impliedly preempted, rejecting Defendant’s argument that a long-standing policy of the Federal Trade Commission would be undermined by a state court determination that those descriptors are misleading. The decision is a blow to cigarette makers against which many “Lights” actions are pending around the country, including many consumer class actions similar to *Good*.

The opinion is important not only because the Supreme Court resolved a split between the First and Fifth Circuits, but also because state consumer protection statutes are increasingly being utilized to bring class actions against product manufacturers, and because the Supreme Court continues to refine the law of federal preemption. In fact, the Court issued an opinion last June in another preemption case, *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008), and in November the Court heard argument in *Wyeth v. Levine*, No. 06-1249,¹ the decision in which has not yet been handed down. Significantly for future litigation, *Good* addressed the murky issue of the extent to which courts should apply a presumption against preemption when interpreting statutes.

BACKGROUND

Good was brought on behalf of a putative class of purchasers of Marlboro Lights and Cambridge Lights, both manufactured by Altria Group’s subsidiary, Philip Morris USA (“Philip Morris”). Plaintiffs allege that Philip Morris’ description of these cigarettes as “light,” or having “lower tar and nicotine,” constituted a misrepresentation of material fact and therefore violated MUTPA. Plaintiffs claimed that these terms were misleading because, as Philip Morris allegedly was aware at the time, persons smoking light cigarettes unconsciously engage in “compensation” behavior, changing the manner in which they smoke cigarettes so that they unknowingly inhale as much tar and nicotine as do smokers of full-flavor or “regular” cigarettes, and, moreover, due to certain design features of the product, the smoke inhaled from “Lights” is more harmful than that of regular cigarettes.

Philip Morris moved for summary judgment, asserting 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

¹ For a detailed discussion of the argument in *Wyeth*, please click [here](#).

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 “Cambridge Filter Method” specifically prescribed by the FTC for measuring tar and nicotine levels.

The district court found that Plaintiffs’ claims were expressly preempted by the FCLAA, and therefore granted summary judgment. The Court of Appeals for the First Circuit reversed. *Good v. Altria Group, Inc.*, 501 F.3d 29, 58 (1st Cir. 2007). It held that Plaintiffs’ claims were neither expressly nor impliedly preempted by the statute. In doing so, the First Circuit disagreed with the district court below, and with the Court of Appeals for the Fifth Circuit in *Brown v. Brown & Williamson Tobacco Corp.*, 479 F.3d 383 (5th Cir. 2007). Both of those courts had concluded that the challenges to the use of the terms “light” or “low tar” stated “neutralization” claims, *i.e.*, claims that the defendant had neutralized the warnings on cigarette packages that are mandated by federal law. Neutralization claims, along with failure-to-warn claims, were found to be preempted by the FCLAA in *Cipollone*.

During oral argument before the Supreme Court on October 6, 2008, Petitioner/Defendant Philip Morris maintained 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. Philip Morris asked that, even if the Justices did not consider the complaint to assert neutralization claims, they “set aside and restate[]” the plurality decision in *Cipollone*, insofar as it had found that state law claims based upon false statements of material fact were not preempted. Respondents/Plaintiffs argued that, while the FCLAA preempts any state law that is specifically targeted at cigarette advertising, it does not preempt state statutory or common law that prohibits deception generally. As to legislative intent, the Plaintiffs argued that Congress had “no intention whatsoever to immunize cigarette makers for the sales statements that they made in violation of anti-deception [rules].”

The parties did not address during oral argument whether the claims at issue were impliedly preempted. Implied preemption, however, was the only issue discussed by the United States in the *amicus* brief it filed in support of Plaintiffs’ position and in its oral argument. The government’s principal argument was that the FTC’s failure to act against cigarette makers’ use of the words “light” or “low in tar and nicotine” should not be construed as a policy of approving any alleged representations conveyed by the terms.

SUMMARY OF THE DECISION

In the opinion of the Court in *Good*, delivered by Justice Stevens and joined in by Justices Kennedy, Souter, Ginsburg and Breyer, the Supreme Court affirmed the First Circuit’s holding that the FCLAA neither expressly nor impliedly preempted Plaintiffs’ claims.

The Court agreed that the complaint did not state disguised failure-to-warn or neutralization claims, but, instead, stated claims for injury arising out of false statements about the properties of the product being sold. It reasoned that the “duty not to deceive” arising under MUTPA, like the duty not to deceive arising under state common law in *Cipollone*, does not constitute a “requirement or prohibition based on smoking and health,” as that language is used in the FCLAA. The Court

placed weight on the fact that, unlike the regulations that it had found to be preempted by the FCLAA in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), MUTPA's prohibition against deceptive statements was not "targeted" at tobacco advertising.

At the same time, the Court did not credit Plaintiffs' argument that their claims were unrelated to any personal injuries resulting from smoking "Lights." (During oral argument, Plaintiffs' counsel attempted to argue that the fact finder in the case would not be called upon to make any determination about smoking and health, an argument met with skepticism by the Justices at that time and in the majority and dissenting opinions.) Although the majority conceded that the advertising at issue based its appeal on the relationship between smoking and health, and that Plaintiffs' "actual injuries likely encompass harms to health as well as the monetary injuries [Plaintiffs] allege," it reasoned that the text of the FCLAA "does not refer to *harms* related to smoking and health. Rather, it pre-empts only *requirements and prohibitions -i.e., rules-* that are based on smoking and health." (Emphasis in original.) Thus, the Court concluded, MUTPA is not preempted in these circumstances. As Justice Stevens acknowledged, the Court's analysis of Plaintiffs' claims in *Good*, like the plurality's analysis in *Cipollone*, "may lack 'theoretical elegance.'"

The implications of *Good* beyond cases specifically analyzing the scope of FCLAA preemption are found in the Court's discussion of statutory construction, including the "ultimate touchstone" in every preemption case -- Congressional intent. (Quotation omitted.)

The Court conducted some textual analysis, as discussed above. It observed that the FCLAA only bars state law requirements or prohibitions "based on" smoking and health. On this basis, it distinguished *Good* from *American Airlines Inc. v. Wolens*, 513 U.S. 219 (1995), and *Riegel*. The preemption provisions of the statutes involved in those cases bar state laws that "relate to" the subject of the federal legislation ("relating to rates, routes, or services of any air carrier" in the cases of the Airline Deregulation Act at issue in *Wolens*, and "relating to safety or effectiveness" in the case of the Medical Device Amendments of 1976 to the Food, Drug and Cosmetics Act at issue in *Riegel*). The comparatively narrow language of the FCLAA, by contrast, suggested a Congressional intent to limit the preemptive effect of the statute. Litigants wishing to distinguish *Good*, therefore, may be able to do so in cases construing statutes with "relating to" or similarly broader preemption language than the "based on" provision of the FCLAA.

As another component of ascertaining Congressional intent, the Court, quoting its 1947 decision in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, stated that with respect to both express and implied preemption, courts should begin their analysis with the "assumption" that the "historic police powers of the States" are superseded by federal statute only when that was the "clear and manifest purpose of Congress." (Although Justice Stevens' opinion for the majority discussed an "assumption" and did not invoke the word "presumption," courts often equate the two terms.) Such assumption applies with "particular force" when Congress legislates in an area traditionally regulated by the states, *Good* explained. Further, when more than one reading of a federal statute is "plausible," courts ordinarily should adopt the interpretation that disfavors preemption. Consistent with these statements, the Court construed the preemption provision of the FCLAA "fairly but narrowly" (quoting *Cipollone*) and concluded that it did not reach state law prohibitions against making fraudulent statements, a result in keeping with Congress' purpose in enacting the statute.

The Court also found unpersuasive the alternative argument in Philip Morris' briefs that the Plaintiffs' claims were impliedly preempted. Philip Morris asserted that, if allowed to proceed, the action would present an obstacle to a longstanding policy of the FTC, namely, to "promote[] the development and consumption of low tar cigarettes and . . . encourage[] consumers to rely on representations of tar and nicotine content based on Cambridge Filter Method testing in choosing among cigarette brands." The Court found that the FTC did not require tobacco companies to disclose tar and nicotine yields in cigarette advertising; rather, cigarette manufacturers had voluntarily agreed to do so. And although the FTC had endorsed the Cambridge Filter Method as a uniform measurement of tar and nicotine yields, it also had brought enforcement actions on the theory that certain advertisements relying on Cambridge Filter Method testing results for their claims were deceptive. Finally, because agency non-enforcement of a federal statute cannot be equated with a policy of approval of conduct, the Court similarly concluded that the FTC never condoned the specific descriptors "light" or "low tar and nicotine."

Justice Thomas authored the dissenting opinion in which Chief Justice Roberts and Justices Scalia and Alito joined. It demonstrated with its discussion of numerous Supreme Court decisions over the last 16 years that the Court has been less than clear on the role, if any, of a presumption against preemption in express preemption cases. According to the dissenting opinion, since *Cipollone* was decided in 1992, the Court's reliance on such presumption has "waned," the presumption has been invoked only "sporadically," and, finally, in light of the Court's 2008 decision in *Riegel*, "there is no authority for invoking the presumption against preemption in express preemption cases." Lower courts have understandably been somewhat unsure as to the applicability of a presumption in express preemption cases in light of these decisions.

The dissent argued that preemption provisions in federal statutes should be reviewed with standard statutory construction principles. Justice Thomas argued, as had Justice Scalia in *Cipollone*, that by employing the presumption, the Court arrived at "a cramped and unnatural construction of [the FCLAA's preemption provision] that failed to give effect to the statutory text." Justice Thomas recognized that some state law claims based upon false statements in cigarette advertising are not preempted by the FCLAA, for example a false description of cigarettes as "American-made," but he would construe the statute to bar Plaintiffs' claims as arising from advertising claims concerning "smoking and health." Justice Thomas noted that tobacco marketing is subject to heavy regulatory oversight, and concluded, therefore, that consumers would not have been left unprotected by a finding of preemption here.

IMPLICATIONS

In *Good*, a majority of the Court endorsed the logic of the plurality in *Cipollone*, and applied it to a general duty not to deceive found in a state statute to find that Plaintiffs' MUTPA claims are not preempted by the FCLAA. Given the claim-by-claim analysis endorsed by the Court here, and the fact that lower courts have struggled to apply that approach to FCLAA preemption since it was adopted in *Cipollone* (in Justice Thomas' words, they have found it "incapable of implementation"), there likely will be continued uncertainty concerning the extent to which particular claims are preempted by the statute.

Additionally, the Court's decision failed to resolve an apparent inconsistency in recent Supreme Court jurisprudence concerning the role of a presumption against preemption in express preemption

cases, an inconsistency pointedly discussed in the dissenting opinion. The majority opinion characterized textual analysis as “the principal question we must decide,” seemingly placing the wording of a statute over interpretation based upon Congress’ purpose in enacting it. However, it also discussed both a general “assumption” that Congress does not intend to supersede the states’ historic police powers in passing laws, and the specific intent of Congress in passing the FCLAA.

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