The Federal Cigarette Labeling and Advertising Act and Preemption Revisited: An Analysis of the Supreme Court Case *Altria Group, Inc. v. Good* and Current Legislation

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Summary

The Supreme Court issued its decision in *Altria Group., Inc. v. Good* on December 15, 2008. The Court, by a vote of 5-4, held that the Federal Cigarette Labeling and Advertising Act (FCLAA) neither expressly nor impliedly preempted state law claims of fraud. In this decision the Court examined the preemptive effect of section 5(b) of the act (15 U.S.C. §1334(b)) with regard to the claim that light or low-tar nicotine descriptors in cigarette advertising violated the Maine Unfair Trade Practices Act. The decision resolved a split between the circuits—the First Circuit Court of Appeals had ruled that the FCLAA did not preempt the plaintiffs' claim and the Fifth Circuit Court of Appeals, hearing a similar case, ruled that the FCLAA preempted such state-law claims.

This report provides an overview of section 5 of the FCLAA and how it was amended in 1969; additionally, it examines the previous Supreme Court cases, *Cipollone v. Liggett Group, Inc.* and *Lorillard Tobacco Co. v. Reilly*, that interpreted the preemptive scope of section 5. Both parties in *Good* relied on these cases to argue that the FCLAA either preempts or does not preempt state law claims of fraud. This report also discusses the lower court decisions that were issued prior to examining the Court's decision in *Good*. Finally, there is a discussion of potential issues that may arise out of the Court's decision, such as its impact on future litigation and preemption jurisprudence, in addition to the effect that H.R. 1256, the Family Smoking Prevention and Tobacco Control Act, may have upon the Court's ruling.

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Introduction

In *Altria Group, Inc. v. Good*,[1] the Supreme Court agreed to resolve a split that developed in the circuit courts with regard to whether the Federal Cigarette Labeling and Advertising Act (FCLAA) expressly or impliedly preempted state law claims regarding light or low-tar nicotine descriptors in cigarette advertisements. On December 15, 2008, the Court in *Good*, by a vote of 5-4, affirmed the First Circuit Court of Appeals' holding that the FCLAA neither expressly nor impliedly preempted the respondents' state common law fraud claim.

The Supreme Court has discussed the preemptive effect of the FCLAA in two previous cases, *Cipollone v. Liggett Group, Inc.* and *Lorillard Tobacco Co. v. Reilly*. A plurality in *Cipollone* created a test to determine which common law claims were preempted by the FCLAA; the application of this test was further elucidated in *Reilly* and became an issue once more in *Good*.

This report first provides an overview of the doctrine of preemption, the history of the FCLAA, and the major Supreme Court decisions that have interpreted the preemption provision (§5) of the act. It then discusses the relevant lower court decisions and the split that arose between the circuit courts. This report examines the Supreme Court's decision in *Altria Group, Inc. v. Good* and the effect this decision could have on future tobacco litigation and preemption jurisprudence, in addition to the effect of H.R. 1256, the Family Smoking Prevention and Tobacco Control Act.

Background: The Federal Cigarette Labeling and Advertising Act and Past Supreme Court Decisions

This section examines the development of the preemption provisions in the FCLAA, the preemption doctrine, as well the two Supreme Court cases, *Cipollone* and *Reilly*, that have discussed the preemptive effect of the FCLAA.

FCLAA Preemption Provisions

Congress enacted the FCLAA in 1965 (1965 Act)[2] to establish "a comprehensive Federal Program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, [so that]:

> (1) the public may be adequately informed cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> (2) commerce and the national economy may be: (A) protected to the maximum extent consistent with this declared policy and, (B) not impeded by diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health."[3]

[1] 129 S. Ct. 538 (2008).

[2] P.L. 89-92, 79 Stat. 282 (1965).

[3] Section 2 of 1965 Act. When the FCLAA was amended in 1969, no amendments were made to §2. However, in 1984, subparagraph (1) was amended to read: "the public may be adequately informed *about any adverse health effects of* (continued...)

To meet these purposes, the 1965 Act mandated a warning on cigarette packages but temporarily (through June 1969) barred the Federal Trade Commission (FTC) from requiring such a warning in cigarette advertising. The act's preemption provisions in §5 provided:

> (a) ADDITIONAL STATEMENTS: No statement relating to smoking and health, other than the statement required by section 4 of this Act,[4] shall be required on any cigarette package.
>
> (b) STATE REGULATIONS: No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.[5]

In May 1969, as the congressionally imposed moratorium on including a warning in cigarette advertising was about to expire, the FTC proposed such a warning. Shortly thereafter, Congress enacted the Public Health Cigarette Smoking Act of 1969, which amended the FCLAA by strengthening the health warning on packages,[6] further prohibiting the FTC (through June 1971) from requiring a warning in advertising, and modifying the preemption language in §5(b) to read:

> (b) STATE REGULATIONS: No 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 Act.

It was the scope and effect of these preemption provisions that were at issue in *Cipollone*, *Reilly*, and *Good*. In all three cases, the Court explored the questions that are raised when state statutes or common law causes of action impose requirements that conflict with federal laws.

Federal Preemption of State Law

The preemption doctrine is derived from the Supremacy Clause of the United States Constitution, which establishes that the laws of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary, notwithstanding."[7] When considering issues that arise under the Supremacy Clause, the Court "starts with the assumption that the historic police powers of the States [are] not to be superseded by the ... Federal Act unless that [is] the clear and manifest purpose of Congress."[8] In other words, the Court begins a preemption analysis with a presumption against

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(...continued)

cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes." 15 U.S.C. §1331(1) (emphasis added).

[4] Section 4 of the 1965 Act required the packaging of cigarettes marketed in the United States to bear a conspicuous label stating: "CAUTION: CIGARETTE SMOKING MAY BE HAZARDOUS TO YOUR HEALTH."

[5] The FCLAA is codified in title 15 of the United States Code. Section 5 of the FCLAA is codified at 15 U.S.C. §1334.

[6] The Public Health Cigarette Smoking Act of 1969 revised the warning to read: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." The FCLAA was subsequently amended in 1984 to require one of the following four rotating Surgeon Genera's health warnings on all cigarette advertising and packaging: (1) "Smoking Causes Lung Cancer, Hearth Disease, Emphysema, and May Complicate Pregnancy"; (2) "Quitting Smoking Now Greatly Reduces Serious Risks To Your Health"; (3) "Smoking by Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight"; and (4) "Cigarette Smoke Contains Carbon Monoxide." 15 U.S.C. §1333.

[7] U.S. Const. art VI, cl. 2.

[8] *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

preemption. Traditionally, the Court has recognized both express and implied forms of preemption, which are "compelled whether Congress' command is explicitly stated in the statute's language, or implicitly contained in its structure and purpose."[9] Both types of preemption may apply to state legislation, regulations, and common law. Accordingly, the Supreme Court has held that "whether a certain state action is preempted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone. To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute."[10]

In the express preemption context, a federal statute will be deemed to supplant existing state law to the extent that it contains an explicit provision to that effect, the scope of which is determined by interpreting the language of the provision and analyzing the legislative history as necessary. Absent explicit preemptive language, federal law may preempt state law implicitly. The Court has identified three different categories of implied preemption: (1) where the scheme of the federal law is "so pervasive so as to make reasonable the inference that Congress left no room for the States to supplant it,"[11] also known as "field preemption"; (2) where compliance with both federal and state law regulations is a physical impossibility,[12] also known as "conflict preemption"; and (3) where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"[13] also known as "frustration of purpose."

Predicting how the courts will apply these standards is highly speculative. The Supreme Court itself has noted that "none of these expressions provide an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula."[14] Thus, cases involving federal preemption often hinge on the particular factual circumstances of a given case.

Cipollone v. Liggett Group, Inc.[15]

In 1992, the Supreme Court issued its decision in *Cipollone v. Liggett Group, Inc.*,[16] where a plurality declared that the FCLAA preempts certain types of tort actions that are brought against cigarette manufacturers under state common law. Among other things, the plaintiff claimed that the defendant cigarette manufacturers had: (1) failed to provide adequate warnings on health consequences; (2) breached express warranties that their cigarettes did not present any significant health consequences; (3) fraudulently attempted to neutralize the federally mandated warning labels through advertising; (4) fraudulently concealed medical and scientific data; and (5) conspired to deprive the public of such medical and scientific data. The defendants argued that the FCLAA preempted these state law claims (*i.e.*, federal law prevented these types of state law claims from being brought in court).

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[9] *Gade v. Nat'l Solid Wastes Mgmt Ass'n*, 505 U.S. 88, 97 (1992) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

[10] *Id.* at 96 (internal quotation marks and case citations omitted).

[11] *Rice*, 331 U.S. at 230.

[12] *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

[13] *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

[14] *Id.* at 67.

[15] This summary of *Cipollone* was written by (name redacted), Legislative Attorney, *Supreme Court Allows Cigarette Manufacturers To Be Sued*, CRS Supreme Court Review: 1991-1992 Term, at 19-20 (hard copy available from author).

[16] 505 U.S. 504 (1992).

Because the FCLAA contained express preemptive language in §5 (see above), the Court had to analyze whether these provisions prevented a state from awarding damages on claims for torts, such as failure to warn and fraudulent misrepresentation. To determine the domain expressly preempted, the Court compared the 1965 and the 1969 Acts, as it felt that the language of the two substantially differed.

The Court first analyzed the preemption provision of the 1965 Act, determining that neither preemption provision of §5 preempted state damages actions, but "merely prohibited state and federal rulemaking bodies from mandating particular cautionary statements on cigarette labels (§5(a)) or in cigarette advertising (§5(b))."[17] In supporting this interpretation, the Court emphasized that "there is no general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state common law damages actions."[18] With respect to the 1965 Act, the Court determined that "§5 is best read as having superseded only positive enactments by legislatures or administrative agencies that mandate particular warning labels."[19]

The Court then analyzed the 1969 Act, stating that the plain language of the preemption provision in §5(b) was much broader than the one in the 1965 Act. The Court treated the two preemption provisions separately. Having concluded that §5(a), which was not amended by the 1969 Act, superseded only positive enactments, it found that §5(a) continued to not preempt state courts from awarding damages that, in effect, could require additional warnings labels on cigarette packages. However, in parts of the opinion to which only a plurality joined, [20] the Court construed §5(b), which prohibits states from imposing any requirement or prohibition with respect to cigarette advertising or promotion, as broader and as intended to preempt some common law claims.

The plurality stated that preemption under §5(b) could not be limited to positive enactments of law, and it extended the subsection's preemptive reach to include common law claims, emphasizing that the Court had long recognized "the phrase 'State law' to include common law as well as statutes and regulations." In accordance with this broader reading of "State law" in the 1969 Act to include common law claims, the plurality noted that "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be ... a potent method of governing conduct and controlling policy."[21]

The plurality developed the "predicate duty" test to determine when a particular common law claim is preempted.

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[17] *Id.* at 518.

[18] *Id.*

[19] *Id.* at 518-19.

[20] The interpretation of §5(b) of the 1969 Act was discussed in parts V and VI of the opinion. These parts were joined by only a plurality of the justices. The opinion was authored by Justice Stevens and joined by Chief Justice Rehnquist and Justices White and O'Connor.

[21] *Cipollone*, 505 U.S. at 521. Justice Blackmun, dissenting, noted that the Court had previously "declined on several occasions to find the regulatory effects of state tort law direct or substantial enough to warrant pre-emption." In *English v. General Electric*, 496 U.S. 72, 86 (1990), the Court concluded that "although awards to former employees ... would attach 'additional consequences' ... and lead employers to alter the underlying conditions about which employees were complaining, such an effect would be 'neither direct nor substantial enough' to warrant preemption." *Cipollone*, 505 U.S. at 538 (Blackmun, J., dissenting).

Cipollone Plurality: The Predicate Duty Test

This test asks "whether the legal duty that is the predicate of the common law damages action constitutes a 'requirement or prohibition based on smoking and health ... with respect to ... advertising or promotion,' [thus] giving that clause a fair but narrow reading."[22]

Under this test, the court held that §5(b) preempted state law claims for failure to warn and fraudulent misrepresentation with regard to advertising, but did not preempt state law claims for fraudulent misrepresentation and concealment of material fact, breach of express warranty, or conspiracy.

The *Cipollone* plurality concluded that the following claims were preempted by the FCLAA:

- Failure-to-warn claims insofar as they claim that advertisements "should have included additional, or more clearly stated, warnings."[23] However, failure-to-warn claims are not preempted to the extent they rely solely on the defendants' "testing or research practices or *other* actions unrelated to advertising or promotion."[24]
- Fraudulent misrepresentation claims to the extent that they are predicated on a "state law prohibition against statements in advertising and promotional materials that tend to *minimize* the health hazards associated with smoking."[25] This is also known as a "warning neutralization" claim.[26]

The plurality concluded that the following claims were not preempted by the FCLAA:

- Claims of fraudulent misrepresentation by *false representation* of material fact that arise in the context of advertisements and promotions because they are based on a more general obligation—the duty not to deceive.[27]
- Claims of fraudulent misrepresentation through *concealment* of material fact insofar as they rely on a state law duty to disclose such facts through channels of communication *other* than advertising or promotion, such as a duty to disclose to an administrative agency.[28]
- Breach of express warranty claims because express warranties are not imposed by the state but arise from the manufacturer's voluntary statements.

[22] *Id.* at 524. Justice Blackmun, dissenting, commented that this test "create[s] a crazy quilt of pre-emption from among common-law claims implicated in this case." *Id*. at 542-43. He pointed out the plurality's analysis frequently shifts in the level of generality at which it examined the individual claims and speculated that lower courts could have difficulty in implementing this test *Id*. at 543-44.

[23] *Id.*

[24] *Id.* at 524-25 (emphasis in the original). Justice Blackmun, dissenting, critiqued this stating that failure-to-warn claims could "just as easily be described as based on a 'more general obligation' to inform consumers of known risks." *Id*. at 543.

[25] *Id.* at 527.

[26] The plurality reasoned that warning neutralization claims were preempted because "such a *prohibition* [on ads that minimize the health hazards] is merely the converse of a state-law *requirement* that warnings be included in advertising and promotional materials." *Id.*

[27] *Id.* at 528.

[28] *Id.*

- Claims of conspiracy to misrepresent or conceal material facts as these claims rest on a predicate duty to not conspire to commit fraud.

Two dissents were authored in *Cipollone*. Justices Blackmun, Kennedy, and Souter, dissenting, concluded that common law claims could be brought against tobacco companies. [29] On the other hand, Justices Scalia and Thomas concluded that all of the common law claims were preempted. Although Justice Scalia agreed with the plurality that the term "State law" in §5(b) of the 1969 Act "reaches beyond [positive] enactments" to also encompass state common law, he advocated for a test of "practical compulsion" or "proximate application" to determine whether state law claims were preempted by the FCLAA.[30]

Cipollone Dissent: Proximate Application Test

This test asks, whether, regardless the source of the duty, "the law practically compels the manufacturers to engage in behavior that Congress has barred the States from prescribing directly."[31] If so, then the claim would be preempted.

In other words, if a judgment in favor of a plaintiff would result in a requirement or obligation that cigarette manufacturers represent the effects of smoking on health in their advertising and/or promotion of light cigarettes, then such a claim would be preempted.

Lorillard Tobacco Co. v. Reilly

The Supreme Court also addressed the FCLAA's preemptive effect in *Lorillard Tobacco Co. v. Reilly*.[32] There, the Court invalidated cigarette regulations that were promulgated by the Massachusetts Attorney General pursuant to his authority under state law to "prevent unfair or deceptive practices in trade."[33] The Attorney General's regulations were comprehensive in nature and prohibited outdoor advertising for cigarettes, such as billboards, within 1,000 feet of a playground or school.[34] The Attorney General maintained that while a state law that required tobacco retailers to remove the word "tobacco" would be preempted, a complete ban on all cigarette advertising would not be preempted because Congress did not intend to invade local control over zoning.[35] The Court countered this argument in its opinion, stating that "the

[29] Justice Blackmun noted that the Senate Report that explained what the revised preemption provision was intended to apply to did not include any reference to common-law damages actions. He distinguished the FCLAA from statutes like ERISA, which defines "any and all State laws" to include "all laws, *decisions*, rules, regulations or *other State action* having the effect of law" (emphasis added). *Cipollone*, 505 U.S. at 540.

[30] *Id.* at 553 (Scalia, J., dissenting). Critiquing the plurality's determination that certain common law claims were not preempted if based on a more general obligation, Justice Scalia noted, "*Each* duty transcends the relationship between the cigarette companies and cigarette smokers; *neither* duty was specifically crafted with an eye toward 'smoking and health.'" *Id.* at 552-53 (emphasis in the original).

[31] *Id.* at 555. Justice Scalia's dissent also criticized the plurality for announcing a new rule that the enactment of an express preemption clause eliminates any consideration of implied preemption. This was later commented upon in subsequent cases. *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995).

[32] 533 U.S. 525 (2001).

[33] *Id.* at 533 (referring to Mass. Gen. Laws. ch. 93A, §2 (1997)).

[34] *Id.* at 533-34 (citing 940 Code of Mass. Regs. §21.04 (2000)). The Court invalidated the State's outdoor and point-of-sale advertising regulations under the FCLAA's preemption provision. Also at issue were regulations that placed similar restrictions on advertising for cigars and smokeless tobacco. The Court found that the FCLAA did not apply to these types of regulations but held that they violate the First Amendment. *Id.* at 553-71.

[35] *Id.* at 549 (citations omitted).

FCLAA's comprehensive warnings, advertising restrictions, and pre-emption provision would make little sense if a State or locality could simply target and ban all cigarette advertising."[36]

Accordingly, the Court concluded that the FCLAA preempted the regulations because it determined that "[t]he context in which Congress crafted the ... pre-emption provision [led the Court] to conclude that Congress prohibited state cigarette advertising regulations motivated by concerns about smoking and health."[37] It, therefore, found that, although the regulations were targeted at youth exposure to cigarette advertising, they were "based on smoking and health" within the meaning of the FCLAA because "concern about youth exposure to cigarette advertising is intertwined with the concern about ... smoking and health."[38] The fact that the regulations governed location rather than content of advertising did not remove them from the preemption language, which covers "all requirements and prohibitions imposed under state law."[39] While *Reilly* arguably broadened the preemptive reach of §5(b),[40] the Court clarified that states still retain the authority to regulate other aspects of tobacco use and sales or to enact restrictions on the location and size of advertisements that apply to cigarettes on equal terms with other products. The FCLAA, for example, does not preempt state laws or regulations that prohibit sales to minors or restrict smoking in public places.[41]

History of *Altria Group, Inc. v. Good*

The Supreme Court examined the preemptive scope of the FCLAA once again in *Altria Group, Inc. v. Good*.[42] Prior to the Supreme Court granting *certiorari*, a split developed in the circuit courts regarding whether the FCLAA preempted a claim for deceptive practices under a state statute.

Summary of Lower Court Decisions in *Altria Group, Inc. v. Good*

- In *Good v. Altria Group, Inc.*, the Court of Appeals for the First Circuit held that the plaintiffs' claims were neither expressly nor impliedly preempted by the FCLAA or by the Federal Trade Commission's (FTC) oversight of tar and nicotine claims in cigarette advertisements.
- The Court of Appeals for the Fifth Circuit, which heard *Brown v. Brown & Williamson Tobacco Corp*,[43] held the opposite of the First Circuit, finding that the FCLAA preempted the plaintiffs' state-law claims for fraudulent misrepresentation and concealment as well as a claim for breach of express warranty arising solely out of the use of descriptors based on the FTC Method.

[36] *Id.* at 550.

[37] *Id.* at 548.

[38] *Id.*

[39] *Id.*

[40] Justice Stevens, dissenting, highlighted that although §5(b) as amended by the 1969 Act could theoretically be read as a breathtaking expansion of the limitations imposed by the 1965 Act, the amended test, viewed in the context of history, structure, and purpose of the regulatory scheme, makes "clear that the 1969 amendments intended to expand the provision to capture a narrow set of content regulations that would have escaped under the prior provision." *Id.* at 595.

[41] *Id.* at 552.

[42] 129 S. Ct. 538 (2008).

[43] 479 F.3d 383 (5th Cir. 2007).

Under the FCLAA, the Federal Trade Commission (FTC) has the power to regulate and proscribe unfair or deceptive acts or practices in the advertising of cigarettes.[44] In 1966, the FTC proposed a standardized method for measuring tar and nicotine levels. This became known as the FTC or Cambridge Method, in which a machine smokes each cigarette the same way to the same length and the particular matter is collected on a pad and measured for tar and nicotine content. The FTC was aware of certain limitations on the FTC test, including that it could not accurately measure how much tar and nicotine a human smoker would receive from any particular cigarette; furthermore, some smokers of light cigarettes often engage in compensatory behavior, changing the way they smoked to ensure no actual reduction of tar and nicotine.[45]

First Circuit Court of Appeals: *Good v. Altria Group, Inc.*

In 2006, long-time smokers of Marlboro Lights Cigarettes filed a class action suit in District Court for the District of Maine against Altria Group (hereinafter referred to by its subsidiary Philip Morris (PMUSA)) claiming that the cigarette company "deliberately deceived them about the true and harmful nature of light cigarettes, thereby violating the Maine Unfair Trade Practices Act (MUTPA)."[46] The plaintiffs did not seek damages for personal health-related injuries, but rather they sought other relief, including the return of sums paid to purchase the light cigarettes, and the attorney's fees authorized under the MUTPA. PMUSA moved for summary judgment on the ground that federal law (the FCLAA) preempts the plaintiffs' state causes of action. The District Court for the District of Maine ruled in favor of the defendant's motion for summary judgment.

The MUTPA makes it unlawful to use "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."[47] Specifically, the plaintiffs claimed that "defendants engaged in a course of unfair and/or deceptive business practices in connection with the design, manufacture, distribution, promotion, marketing, and sale of Marlboro Lights cigarettes," and, more generally, that PMUSA "engaged in acts of fraudulent concealment" in contravention to the MUTPA.[48]

The district court highlighted a few occasions when cigarette companies voluntarily agreed to disclose the nicotine content in their cigarettes as measured by the FTC Method in lieu of regulations that would have been imposed by the FTC.[49] With respect to light and low-tar descriptors, the court found that although the FTC has not imposed any actual regulation covering use of the terms, the FTC has indicated that such descriptors are not forbidden and are not unfair or deceptive.[50]

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[44] 15 U.S.C. §1336.

[45] *Good v. Altria Group Inc.*, 436 F. Supp. 132, 137 (D. Me. 2006) (citing Defendant's Statement of Undisputed Facts at 45-7, 62-4). For more information on the FTC Method, *see* CRS Report RS22944, *Federal Trade Commission Guidance Regarding Tar and Nicotine Yields in Cigarettes*, by (name redacted).

[46] *Good v. Altria Group, Inc.*, 436 F. Supp. 132, 133 (D. Me. 2006).

[47] Me. Rev. Stat. Ann., Tit. 5 §207 (Supp. 2008).

[48] *Good*, 436 F. Supp. at 144.

[49] *Id.* at 135-139. At present, it appears that cigarette companies continue to comply voluntarily with the FTC Method. *Id*. at 137.

[50] *Id.* at 138.

The district court stated that "the question is whether the Plaintiffs' claims would impose a requirement or prohibition under Maine law 'with respect to the advertising or promotion of any cigarettes.'"[51] Here, the court declared that to respond to plaintiffs' concerns, "Philip Morris would have to tell the public that the FTC Method though accurate in the laboratory, was inaccurate in real life."[52] The court reasoned that if PMUSA were to convey this information through a form of advertising, this "would run head first into ... the 'comprehensive federal scheme governing the advertising and promotion of cigarettes.'"[53] Ultimately, the district court ruled that the plaintiffs' claims, like the Massachusetts regulations in *Reilly*, were "intertwined with the concern about cigarette smoking and health," and as such are expressly preempted by the FCLAA.[54] In reaching this conclusion, the district court did not address PMUSA's other argument that the claims were impliedly preempted.

The Court of Appeals for the First Circuit reversed and held that the plaintiffs' claim were not: (1) expressly preempted by the FCLAA, (2) implicitly preempted, either by the FCLAA or by the FTC's oversight of tar and nicotine claims in cigarette advertising, or (3) barred by the act's exemption for "transactions or actions otherwise permitted."[55]

The court of appeals, like the district court, discussed the FTC's history as related to tobacco advertising and the predicate duty test. The court proceeded to apply its reading of the "*Cipollone* taxonomy" to the plaintiffs' claims. Disagreeing with the district court, the court of appeals said that "the FCLAA preempts only those claims based on a '*requirement or prohibition*' based on smoking and health under State law ... [i]t does not preempt claims because *they* are "based on smoking and health."[56] Therefore, the court of appeals found that the plaintiffs' allegations against PMUSA amounted to a claim for fraudulent misrepresentation, a type of claim *not* preempted by the FCLAA.[57]

Although PMUSA argued that the plaintiffs' claims amounted to a preempted failure-to-warn claim because any alleged false misrepresentation could have been eliminated if PMUSA provided additional warnings on compensatory behavior in its advertising, the court squarely rejected this. Instead, the court stated that "[a]ccepting Philip Morris's argument ... would extend the preemptive reach of the FCLAA to virtually all fraudulent misrepresentation claims, doing violence to *Cipollone's* explicit holding that those claims survive preemption."[58] The court also pointed out that because *Cipollone* requires those alleging a failure-to-warn claim to show that "advertising or promotions should have included additional, or more clearly stated warnings,"

[51] *Id.* at 151. Relying on its interpretation of *Reilly*, the court stated that it must "look beyond the characterization and assess the claim's actual impact." *Id.*

[52] *Id.* at 152.

[53] *Id.*

[54] *Id.* at 153.

[55] 501 F.3d 29, 58 (1st Cir. 2007).

[56] *Id.* at 38. The court highlighted in note 11 the difference between the *Cipollone* plurality's predicate duty test and Scalia's proximate application test stating that "this exchange [between Scalia and the plurality] solidifies our view that the FCLAA pre-empts claims predicated on state-law duty, with respect to advertising and promotion, which itself is based on smoking and health – not 'claims based on smoking and health.'" *Id.*

[57] The court reasoned that, unlike the district court, it saw the plaintiffs' claims arising out of what PMUSA did in fact say (*i.e.*, their cigarettes are light and have lower tar, rather than what PMUSA "should have said"). *Id.* at 42.

[58] *Id.*

plaintiffs, here, could not be asserting such a claim because their chosen theory of recovery requires no such showing.[59]

After refuting PMUSA's express preemption arguments, and in holding that the district court ruled in error, the court pointed out:

> [T]hat is the central teaching of *Cipollone*: the same alleged conduct by a cigarette manufacturer can give rise to a number of claims, some of them preempted and some of them not. (citations omitted) Though ... plaintiffs cannot dodge §1334(b) [§5(b)] by slapping a non-preempted label on a preempted theory, they otherwise remain free to choose from among these potential claims in framing their complaints.[60]

On appeal, the court examined PMUSA's implied preemption argument, which rested on the "frustration of purpose" theory. PMUSA maintained that the "plaintiffs' claims conflict with the FTC's 40-year history of regulation and control over the development, testing and marketing of low-tar cigarettes, as well as the reporting of tar and nicotine measurements pursuant to the FTC Method and the use of descriptors substantiated by those measurements."[61] Of its many implied preemption arguments, PMUSA argued that "State-law actions like this one would create a different standard of deceptiveness that would plainly conflict" with the Congress' goals of uniform standards for cigarette advertising. In rejecting this argument, the court said that Congress made no indication that cigarette manufacturers were to be insulated from longstanding rules governing fraud. [62]

From here, the court stated that it was not at liberty to address any implied preemption theories premised on the FCLAA as it was bound by the *Cipollone* majority's holding that §5(b) governs the preemptive scope of the act.[63] The court, however, addressed PMUSA's implied preemption arguments based on the authority the FTC Act grants the FTC to oversee cigarette advertising.[64] Although the court acknowledged that the FTC has jurisdiction to define and enforce "unfair or deceptive acts or practices in or affecting commerce," it rejected the idea that "the degree of federal regulation over a particular industry, no matter how 'comprehensive' or 'detailed,' [could] itself displace state law."[65] If so, this would be "tantamount to saying that whenever a federal agency decides to step into a field, its regulation will be exclusive."[66]

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[59] *Id.* at 43. In rejecting that the plaintiffs claim was a failure-to-warn claim, the court reiterated that "[the plaintiffs] allege that Philip Morris made a fraudulent misrepresentations in derogation 'of a more general obligation—the duty not to deceive'" (citations omitted). Using similar reasoning, the court also rejected PMUSA's argument that the plaintiffs' claims amounted to "warning neutralization," a type of claim also preempted under *Cipollone*.

[60] *Id.*

[61] *Id.* at 47.

[62] *Id.* at 47. Again, the court reiterated that the plaintiffs here seek to enforce state-law prohibitions on fraud, not ones on cigarette advertising based on smoking and health. *Id.* at 48.

[63] *Id.* at 48. This was in light of the fact that the *Cipollone* Court indicated that an express preemption clause foreclosed an implied preemption analysis. The court noted that the Supreme Court subsequently clarified that, while *Cipollone* supports this inference, it did not establish a rule. (*See e.g., Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000); *Sprietmsa v. Mercury Marine*, 537 U.S. 51 (2002)). *Good*, 501 F.3d at 49.

[64] The court found that this argument was not barred because past tobacco cases (*Cipollone*, 505 U.S. 504 (1992); *Philip Morris v. Harshbarger*, 122 F.3d 58 (1997)) "considered the preemptive effect of only the FCLAA, which did not ... otherwise affect the authority of the [FTC]." *Good*, 501 F.3d at 49.

[65] *Id.* at 50. *See also* 15 U.S.C. §§45, 45(a), 57a.

[66] *Id.*

The court held that it had to determine whether the FTC's oversight of tar and nicotine claims manifests a federal policy intended to displace conflicting state law. Overall, the court found that the FTC arguably has authority to displace state law through its formal rulemaking authority, but that thus far cigarette manufacturers have voluntarily agreed to disclose tar and nicotine levels, or that the FTC has only entered into consent orders, or filed cease and desist orders, on a case-by-case basis. The court went on to hold that, even if it believed that FTC action "short of formal rulemaking—including consent orders—[could] implicitly preempt state law in some cases," it did not think that this was one of those instances, because "the plaintiffs' state-law claims do not pose a threat to any federal regulatory objectives in the FTC's approach to tar and nicotine claims in cigarette advertising."[67] The court said it could not "discern a coherent federal policy on low-tar claims, let alone one driven by the sort of 'important means-related federal objectives' necessary to preempt conflicting state law." Thus, the court determined that the plaintiffs' claims were not impliedly preempted.

Lastly, the court of appeals rejected PMUSA's argument "that its challenged advertising practices constitute '[t]ransactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under the statutory authority of the United States,' and, as such, are excepted from the [MUTPA]."[68] The court disagreed and found that the consent orders the FTC used with particular tobacco companies were not "an across-the-board approval." [69] Further, the court pointed out that, had the FTC intended to "authorize" these kinds of advertisements, it needed only to exercise its rulemaking authority.

Fifth Circuit Court of Appeals: *Brown v. Brown & Williamson Tobacco Corp.*

At about the same time, the Court of Appeals for the Fifth Circuit issued its opinion in *Brown v. Brown & Williamson Tobacco Corp*, which also considered the preemptive scope of the FCLAA.[70] The plaintiffs in *Brown* asserted their claims under the Louisiana Unfair Trade Practices and Consumer Protection Act (LUTPA). They alleged that they were deceived by the tobacco company's marketing into believing that smokers of light cigarettes consume lower tar and nicotine, and that light cigarettes are safer than regular cigarettes.[71] The court of appeals held that the district court erred in applying the predicate duty test when it ruled that the FCLAA did not expressly preempt any of the plaintiffs' state law claims for redhibition,[72] breach of express and implied warranties,[73] and fraudulent misrepresentation and concealment.[74]

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[67] *Id.* at 53.

[68] *Id.* at 55. PMUSA rested this argument on its characterization that the FTC *allowed* the use of light and low-tar descriptors when supported by testing under the FTC Method.

[69] *Id.* at 56.

[70] 479 F.3d 383 (5th Cir. 2007).

[71] *Id.* at 388.

[72] Redhibition is a "civil law action brought on account of some defect in a thing sold, seeking to void the sale on grounds that the defect renders the thing either useless or so imperfect that the buyer would not have originally purchased it." *Id.* at 390 (citations omitted). The court of appeals dismissed this claim based on its conclusion that the plaintiffs introduced no evidence in support of this claim sufficient to create a material issue of fact. *Id.*

[73] The court held that an express warranty claim arising solely out of the use of descriptors based on the FTC method is preempted, because, given that FTC-approved descriptors cannot be inherently deceptive, to conclude otherwise, "would be to hold the Manufacturers liable for the inadequacies of the federal testing method, an outcome other courts (continued...)

Like the First Circuit, the Fifth Circuit also examined the FTC Method and the FTC's involvement in regulating cigarette advertising.[75] In this discussion, the court found that following an investigation in 1992, the FTC had reaffirmed its position that "descriptors were not deceptive if substantiated by FTC method results," and that despite knowledge of the weakness in the FTC Method, it "remains the federal mandated standard for cigarette testing."[76]

Although the court acknowledged that claims based on fraud and intentional misstatement are not preempted under *Cipollone*, it declared that the use of "FTC-approved descriptors cannot constitute fraud." In the court's view, "[m]anufacturers are essentially forbidden from making any representations as to the tar and nicotine levels in their marketing about tar that are not based on the FTC method." Therefore, the terms "light" and "lowered tar and nicotine" cannot be inherently deceptive or untrue.[77] The court stated that "to impose state liability on the basis of the Manufacturers' use of the FTC mandated terms is necessarily to impose a state requirement or prohibition on cigarette advertising," because it also found that in order to respond to the plaintiffs' claims, the manufacturers would have to tell the public that the FTC Method was inaccurate.[78] The court therefore held that these fraudulent misrepresentation claims based on the use of FTC-approved descriptors were expressly preempted under §5(b) and the predicate duty test.[79]

The court went on to address whether the plaintiffs' claims based on fraudulent concealment of material fact: a) could not be preempted because it relies on a state law duty to disclose facts through channels of communication *other than* advertising and marketing, or b) could be preempted because it was based on failure to disclose *through* advertising and marketing.[80] The court found that because concealment claims, by their nature, rely "on an unfulfilled duty to disclose additional information, it [seems] unavoidabl[e] to impose a state law requirement as to marketing and advertising related to smoking and health."[81]

The court rejected the holding of a Ninth Circuit case, *Rivera v. Philip Morris*, upon which plaintiffs relied. [82] In *Rivera,* the court held that the plaintiffs' failure-to-warn and fraudulent concealment claims were not preempted by the FCLAA because it determined that Nevada's common law duty that requires manufacturers to advise consumers of their products' dangers "does not specify that those disclosures be made through marketing and advertising."[83] The court in *Brown* disagreed, stating that it "could not accept that the Congress meant to create a system in which cigarette manufacturers have the duty both to conform their advertising and marketing to

(...continued)

have declined to accept." The court declined to address plaintiffs' implied warranty claim. *Id*. at 395-6.

[74] *Id*. at 386.

[75] *Id*. at 386-88.

[76] *Id*. at 388.

[77] *Id*. at 392.

[78] *Id*. at 393. (The Court of Appeals in *Good* discussed its opinion that the *Brown* court essentially used Scalia's proximate application test from *Cipollone* and that the Fifth Circuit's determination that the terms "light" and "low-tar" are not inherently deceptive or untrue, "put the cart before the horse." see *Good*, 501 F.3d at 45).

[79] *Id*.

[80] *Id*.

[81] *Id*. at 394.

[82] *Id*.

[83] *Id*. (referring *Rivera v. Philip Morris*, 395 F.3d 1142 (9th Cir. 2005)).

strict federal standards and simultaneously undercut these representations through other 'means,' as yet undefined."[84] Thus, it held that the FCLAA preempts any state law claim that would require additional communication between companies and consumers; the court, however, affirmed its support that a concealment claim based on the duty to disclose to a state agency or other trade organization may not be preempted.

U.S. Supreme Court Review: *Altria Group, Inc. v. Good*[85]

Issue and Holding of the Supreme Court Decision

Issue: The question presented before the Supreme Court by the petitioner, PMUSA, was "whether state-law challenges to FTC-authorized statements regarding tar and nicotine yields in cigarette advertising are expressly or impliedly preempted by federal law."

Holding: The Court affirmed the judgment of the First Circuit Court of Appeals holding that the FCLAA does not preempt state-law claims such as the respondents' because they are predicated on the duty not to deceive. The Court further held that the respondents' claims were not impliedly preempted based on the FTC's various decisions and actions with respect to statements on tar and nicotine.[86]

Majority Opinion[87]

The U.S. Supreme Court affirmed the First Circuit Court of Appeals' opinion that the FCLAA does not expressly or impliedly preempt the respondents' state-law claims. As it had done in *Cipollone* and *Reilly*, the Court emphasized that a preemption analysis begins "with the assumption that the historic police power of the State [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[88] Therefore, "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'"[89] The Court also discussed the purposes of the FCLAA, noting that "neither [purpose] would be served by limiting the States' authority to prohibit deceptive statements in cigarette advertising."[90] It stated that, although the FCLAA's purposes do

[84] *Id.*

[85] 129 S. Ct. 538 (2008).

[86] *Good*, 129 S. Ct. at 551.

[87] Justice Stevens delivered the opinion of the Court, which Justices Breyer, Ginsberg, Kennedy, and Souter, joined. It is interesting to note that Justices Kennedy and Souter had joined Justice Blackmun's dissent earlier in *Cipollone*, which had criticized the plurality framework.

[88] *Id.* at 543.

[89] *Id.* (citing *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)).

[90] *Id.* at 544. The Court rejected PMUSA's argument that Congress could not have intended to allow enforcement of *state* fraud rules because it would defeat the FCLAA's purpose of preventing non-uniform state warning requirements. The Court, in note 6, further rejected PMUSA's claim that Congress gave the FTC exclusive authority to police deceptive health related claims in cigarette advertising in the FCLAA's "savings clause," which states that nothing in the act "shall be construed to limit, restrict expand or otherwise affect the authority of the [FTC] with respect to unfair or deceptive acts or practices in the advertising of cigarettes." 15 U.S.C. §1336. The Court explained that when the FCLAA was amended in 1969, "it was not even clear that the FTC possessed rulemaking authority (citation omitted) (continued...)

not demand the preemption of state fraud rules, the Court would have to decide whether the text of §5(b) requires that result.[91]

Express Preemption Analysis

The Court stated that the predicate duty test must be used to determine whether the common law claim is preempted. The test essentially looks at whether the basis of the statute or common law claim is one of general applicability. If so, then the claim is not preempted. Here, the Court held that the respondents' claims alleged a violation of the duty not to deceive, which happens to be codified in the MUTPA, and has nothing to do with smoking and health.[92]

The Court dismissed PMUSA's contention that the respondents' claim is like the "preempted warning neutralization claims because it is based on statements that 'might create a false impression' rather than statements that are 'inherently false.'"[93] The Court stated that there is nothing to suggest "that whether a claim is pre-empted turns in any way on the distinction between misleading and inherently false statements."[94] According to the Court, the extent of the falsehood alleged may be a factor in the respondents' ability to prove its fraud claim, but the merits of the suit are not at issue.

PMUSA argued that the *Cipollone* plurality framework is inconsistent with subsequent Supreme Court cases. Turning to *Reilly*, the Court distinguished the respondents' claims from the Massachusetts regulations that had been preempted. Although the Attorney General derived his power to create the regulations from a deceptive practices statute like the MUTPA, the prohibitions that *Reilly* found to be preempted were the regulations themselves, not the deceptive practices statute. Thus, the Court concluded that the FCLAA "pre-empts only *requirements and prohibitions*—i.e., rules—that are based on smoking and health. The MUPTA says nothing about either 'smoking' or 'health.' It is a general rule that creates a duty not to deceive and is therefore unlike the regulations at issue in *Reilly*."[95]

Furthermore, the Court dismissed PMUSA's argument that the plurality opinion in *Cipollone* is inconsistent with the Court's decisions in *American Airlines, Inc. v. Wolens*,[96] and, more recently, *Riegel v. Medtronic*.[97] The Court declared that "both cases are inapposite—the first because it involved a pre-emption provision much broader than the Labeling Act's, and the second because it involved precisely the type of state rule that Congress had intended to pre-empt."[98] In *Wolens*,

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making it highly unlikely that Congress would have intended to assign exclusively to the FTC the substantial task of overseeing deceptive practices in cigarette advertisements." *Id.*

[91] *Id.* at 545.

[92] *Id.*

[93] PMUSA argued that statements that are "inherently misleading" may be prohibited entirely, while "potentially misleading information" warrants "not necessarily a prohibition but preferably a requirement of disclaimers or explanation." Brief of Petitioner-Appellant at 40 (citing *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

[94] 129 S. Ct. at 546.

[95] *Id.* at 547.

[96] 513 U.S. 219 (1995).

[97] 128 S. Ct. 999 (2008).

[98] *Good*, 129 S. Ct. at 548. PMUSA argued that *Riegel* and *Wolens* conflicted with the *Cipollone* plurality's analysis because in these subsequent cases the Court held "that federal law preempts a court's application of a general state-law (continued...)

the preemption provision prohibited states from enacting or enforcing any law "relating to rates, routes, or services of any air carrier." The Court in *Wolens* concluded that the phrase "'relating to' indicates Congress' intent to pre-empt a large area of state law to further its purpose of deregulating the airline industry."[99] Thus, the Court concluded that *Cipollone* is not inconsistent because the phrase "based on" describes a more direct, but-for causal relationship than "relating to," which is broader and synonymous with "having a connection with."[100]

The Court in *Riegel* held that the Medical Device Amendments of 1976 (MDA) preempts certain suits under state tort law.[101] According to the Court, the plaintiffs' products liability claims fell within the core of the MDA preemption provision, which provides that no state "'may establish or continue in effect with respect to a device ... any requirement' relating to safety or effectiveness that is different from, or in addition to, federal requirements."[102] The Court found that the *Riegel* plaintiffs' common law products liability claims "unquestionably sought to enforce 'requirement[s] relating to safety or effectiveness' under the MDA," whereas in *Cipollone* the plaintiffs' fraud claim was outside the FCLAA's preemptive reach because it did not seek to impose a prohibition based on smoking and health.[103] Accordingly, the Court in *Good* was able to hold that the respondents' claims here, like those in *Cipollone*, are not preempted because "the phrase 'based on smoking and health' fairly but narrowly does not encompass the more general duty not to make fraudulent statements."[104]

Implied Preemption Analysis

The Court then addressed PMUSA's implied preemption argument that, if respondents were allowed to proceed on their claims, "it would present an obstacle to a longstanding policy of the FTC." According to PMUSA:

> The FTC has for decades promoted the development and consumption of low tar cigarettes and has encouraged consumers to rely on the representations of tar and nicotine content based on Cambridge Filter (FTC) Method testing in choosing among cigarette brands.[105]

Contrary to PMUSA's characterization, the Court found that "the Government itself disavows any policy authorizing the use of 'light' and 'low tar' descriptors."[106] PMUSA based its argument on its assertion that "the FTC has *required* tobacco companies to disclose tar and nicotine yields in cigarette advertising using a government-mandated testing methodology and has *authorized* them to use descriptors as shorthand references to those numerical test results."[107] The Court, however,

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(...continued)

obligation to a specific set of facts encompassed by an express preemption provision." Brief of Petitioner-Appellant at 44.

[99] *Good*, 129 S. Ct. at 548 (citing *Morales v. Trans World Airlines*, 504 U.S. 374, 383-84 (1992)).

[100] *Id.*

[101] For more information on *Riegel v. Medtronic, Inc.* see CRS Report R40534, *Riegel v. Medtronic, Inc.: Federal Preemption of State Tort Law Regarding Medical Devices with FDA Premarket Approval*, by (name redacted).

[102] *Good*, 129 S. Ct. at 548 (citing *Riegel*, 128 S. Ct. at 1014).

[103] *Id.* at 549.

[104] *Id.*

[105] Brief for Petitioners-Appellant at 45-48.

[106] *Good*, 129 S. Ct. at 549.

[107] *Id.* at 550 (citing Brief for Petitioners 2 (emphasis in the original)).

found that "the FTC has in fact never required that cigarette manufacturers disclose tar and nicotine yields, nor has it condoned representations of those yields" through the use of such descriptors.[108] Furthermore, the Court stated that although the FTC failed to require petitioners to correct their descriptors, this omission was not the same as a policy of approval.[109]

In sum, the Court held that respondents' claims were not impliedly preempted as "neither the handful of industry guidances and consent orders on which petitioners rely nor the FTC's inaction with regard to 'light' descriptors even arguably justifies the pre-emption of state deceptive practices rules like the MUPTA."[110] The majority, however, noted that despite these claims surviving preemption, respondents still must prove that PMUSA's use of the descriptors did in fact violate the state deceptive practices statute.

The Dissenting Opinion

Justice Thomas wrote the dissenting opinion, which Chief Justice Roberts and Justices Scalia and Alito joined. He began by critiquing the Court's fidelity to *Cipollone* as unwise, and declared that the Court should "instead provide the lower courts with a clear test that advances Congress' stated goals."[111] He advocated that, instead of relying in *Cipollone*, the Court adopt the proximate application test and abandon the plurality's predicate duty test because it is "unworkable; it has been overtaken by more recent decisions of this Court; and it cannot be reconciled with a commonsense reading of the text of § 5(b)."[112]

The dissent cited various lower courts that have expressed frustration with the *Cipollone* framework and stated that "[w]e owe far more to lower courts, which depend on this Court's guidance, and to litigants, who must conform their actions to the Court's interpretation of federal law."[113] On this point, Justice Thomas concluded "the *Cipollone* plurality's test for pre-emption under § 5(b) should be abandoned for this reason alone."[114]

To further support this argument, the dissent then wrote that since *Cipollone*, the Court has changed its doctrinal approach to express preemption, specifically its reliance on the presumption against preemption. Justice Thomas highlighted several post-*Cipollone* cases that did not consider or address this presumption in order to reach its decision. Although the majority relied on *Bates v. Dow Agrosciences*, which mentioned presumption, the dissent countered that, although the Court has treated the presumption unevenly, the Court's use of it has waned since *Cipollone*.[115] Turning to the Court's recent decision in *Riegel*, Justice Thomas considered it notable that the majority led by Justice Scalia, decided against invoking it so as "to bend the text of the statute to meet the perceived purpose of Congress."[116] He interpreted this as a necessary "rejection of any role for the

[108] *Id.* The Court found that the FTC "has endeavored to inform consumers of the comparative tar and nicotine content of different cigarette brands and has in some instances prevented misleading representations of Cambridge Filter Method Test results." *See id.*

[109] *Id.*

[110] *Id.* at 551.

[111] *Id.* at 552 (Thomas, J., dissenting).

[112] *Id.* at 555.

[113] *Id.*

[114] *Id.*

[115] *Id* at 557.

[116] *Id.* at 558. Justice Thomas noted Justice Ginsberg, the loan dissenter in *Riegel*, called for the use of the presumption.

presumption in construing the statute." The dissent further emphasized *Riegel's* role in undermining *Cipollone* in that the *Riegel* Court "conclusively decided that a common-law cause of action imposes a state-law 'requirement' that may be pre-empted by federal law."[117]

Justice Thomas added that *Reilly* also undermined the *Cipollone* plurality's reading of §5(b) because it did not use the *Cipollone* plurality's analysis when it analyzed the regulations enacted by the Attorney General. The dissent noted that the Court in *Reilly* concluded that the regulations were preempted "because they were 'motivated by' and 'intertwined with' the concerns about smoking and health,"[118] thereby expanding the preemptive reach of §5(b). Therefore, *Reilly* "is better understood as establishing that even a general duty can impose requirements or prohibitions based on smoking and health. *Reilly* weakened the force of the ... 'predicate-duty' approach to the pre-emptive effect of § 5(b) and cast[s] doubt on its continuing utility."[119]

Justice Thomas concluded the opinion by applying the proximate application test. Here, he determined that the respondents' claim would be preempted because "liability in this case ... is premised on the effect of smoking on health," and that "a judgment in respondents' favor will ... result in a 'requirement' that petitioners represent the effects of smoking ... in their advertising and promotion of light cigarettes."[120] According to the dissent, this is the kind of lawsuit that the FCLAA preempts.

However, the dissent had pointed out that under the text of §5(b), Congress preempted only those claims that would impose requirements or prohibitions based on smoking and health. Thus, in the dissent's view, if a cigarette manufacturer were to falsely advertise its products as "American-made," or "the official cigarette of the Major League Baseball," such state-law claims arising from this kind of wrongful behavior would not be preempted.[121]

Future Issues

After the Court's decision in *Good*, it remains to be seen whether even more suits will be initiated against cigarette manufacturers under state fraud statutes with regard to light and low-tar descriptors.[122] According to the Court's decision, Congress had no intent to preempt these types of claims. Although it appears that plaintiffs who assert claims under states' unfair trade and deceptive practices statutes seek to recover sums spent on the purchase of light cigarettes, rather than health-related injuries, only future litigation will reveal if, as the dissent predicted, jury verdicts that are favorable to plaintiffs ultimately result in a requirement that manufacturers

[117] *Id.*

[118] *Id.* at 559 (citing *Reilly*, 553 U.S. at 547-48).

[119] *Id.* at 560.

[120] *Id.* at 552. In response, the majority stated that the dissent "mischaracterizes the relief respondents seek. If respondents prevail at trial, petitioners will not be prohibited from selling as 'light' or 'low tar' only those cigarettes that are not actually light and do not actually deliver less tar and nicotine. Barring intervening federal regulation, petitioners would remain free to make non-fraudulent use of 'light' and 'low tar' descriptors." *Id.* at 547 (note 10).

[121] *Id.* at 560.

[122] *See e.g.*, *Aspinall v. Philip Morris, Inc.*, 902 N.E.2d 421 (Mass. 2009), *remanded*, (holding that in light of [the *Good*] decision, there was no preemption of plaintiffs' claim by Federal law). As of the *Good* in December 2008, there were at least 16 lawsuits pending in 14 other states that raised similar claims. *See* Warren Richey, "Supreme Court rules smokers can sue over 'light' cigarette claims," *Christian Science Monitor*, December 16, 2008.

represent the effects of smoking in their advertising and promotion. If so, such requirements could be considered inconsistent with the purposes of the FCLAA. Additionally, should the FTC issue formal rules that authorize light and low-tar descriptors, it is possible that this action by the agency could ultimately preempt state-law claims for deceptive practices or fraud as the First Circuit suggested.[123] If H.R. 1256, the Family Smoking Prevention and Tobacco Control Act, discussed *infra*, becomes law, the FTC may lack the authority to use its rulemaking to regulate light and low-tar descriptors in cigarette advertising.

Furthermore, even though the Court clarified the FCLAA's preemptive effect with regard to state common law fraud claims for light and low-tar descriptors, and adopted the methodology of the *Cipollone* plurality as governing law, lower courts may continue to have difficulty using the predicate duty test in determining whether other state common law claims are preempted. The Court rejected PMUSA's argument that the respondents' claims amounted to a failure-to-warn claim stating that such an analysis was not applicable to the claim.[124] However, the Court acknowledged that "respondents' allegations ... could also support a warning neutralization claim. But respondents did not bring such a claim."[125] Thus, it would appear, as the First Circuit pointed out, that "Plaintiffs suing tobacco companies must assert a broad range of causes of action in order to avoid the pitfalls of preemption."[126] This could have the effect, as PMUSA had argued, of "elevating form over substance and allow parties to evade the preemptive scope of a statute simply by relabeling their ... claims."[127]

There is also the possibility that the Court's decision will affect preemption jurisprudence. In reaching its decision, the Court relied on the doctrine of "presumption against preemption," stating that "when the test of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'"[128] However, as the dissent emphasized, the Court's reliance on this doctrine has waned in recent preemption cases, citing decisions such as *Rowe v. New Hampshire Motor Transp. Ass'n.*,[129] *Engine Mfs. Ass'n v. South Coast Air Quality Management Dist.*,[130] *Buckman Co. v. Plaintiffs' Legal Comm.*,[131] *United States v. Locke*,[132] and *Geier v. American Honda Motor Corp*.[133] Although it appears that the

[123] *See* note 68 *supra* and accompanying text. It is also worth noting that in *Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009), the Court stated that absent authorization from Congress for an agency to preempt state law, the Court may give some weight as to an agency's views about the impact of tort law on federal objectives, but it will not give complete deference as to an agency's conclusion that state law is preempted. Although it appears that FTC has authority to define and enforce unfair or deceptive acts or practices in or affecting commerce in the advertising of cigarettes, the authority is not explicitly worded like the Federal Communications Commission, 47 U.S.C. §253(d), which the Court gave as an example. Therefore, if and when the FTC uses its formal rulemaking authority with respect to cigarette advertisements, it appears to be uncertain whether such an action could preempt claims under state law.

[124] *Good*, 129 S. Ct. 546.

[125] *Id.* (note 9).

[126] *Good*, 501 F.3d at 45.

[127] Brief of Petitioner-Appellant at 42 (citing *Aetna Health Inc. v. Davila*, 542 U.S. 200, 214 (2004)). The Court dismissed this argument stating "the fact that [respondents] could have [brought a warning neutralization claim] does not ... elevate form over substance. There is nothing new in the recognition that the same conduct might violate multiple proscriptions." *Good*, 129 S. Ct. at 546 (note 9).

[128] *Id.* at 543 (citing *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)).

[129] 128 S. Ct. 989 (2008).

[130] 541 U.S. 246 (2004).

[131] 531 U.S. 341 (2001).

[132] 529 U.S. 89 (2000).

Court is choosing to apply this presumption on a case-by-case basis, such as in *Good* and *Wyeth v. Levine*,[134] this could have the effect of raising issues within other regulated industries as to "whether there is a presumption against preemption, and, if so, when it applies and how strong it is, and how much deference courts should give to the federal agency's decision."[135]

H.R. 1256, the Family Smoking Prevention and Tobacco Control Act

On April 2, 2009, the House passed H.R. 1256, the Family Smoking Prevention and Tobacco Control Act.[136] The bill would give the Food and Drug Administration (FDA) the authority to regulate the production and marketing of tobacco products. Although it would not amend §5(b) of the FCLAA, it includes other provisions that may affect the kinds of lawsuits that are allowed to be initiated in the aftermath of the *Good* decision.

Among its many provisions, the Family Smoking Prevention and Tobacco Control Act would:

- require manufacturers to obtain FDA approval in order to market "modified risk" tobacco products, i.e., products that the manufacturer claims, explicitly or implicitly, will reduce the risk of tobacco-related disease or reduce exposure to potentially harmful substances (including products using descriptors such as "light," "mild," and "low");[137]
- require that the advertising and labeling of modified risk tobacco products enable the public to comprehend the product's risk in the context of all tobacco-related health risks;
- preempt any state or locality from establishing or continuing any requirement which is different from, or in addition to, the act's modified risk tobacco product provisions; and
- amend FCLAA Section 5 by creating a new exception that allows states and localities to regulate the time, place, and manner, but not the content of cigarette advertising and promotion.

First, H.R. 1256 appears to address *Reilly's* finding that the FCLAA preempted Massachusetts regulations that prohibited outdoor advertising for cigarettes in certain locations because they were based on smoking and health. By creating an exception to §5(b) that would allow states to enact statutes and/or promulgate regulations, based on smoking and health, that regulate the time, place, and manner, but not content of any tobacco advertising, subject to any First Amendment

(...continued)

[133] 529 U.S. 861 (2000).

[134] 129 S. Ct. 1187, 1194-95 (2009) (holding that federal law does not preempt the plaintiff's failure-to-warn claim).

[135] Marcia Coyle, "Justices to Look at Right to Pre-empt," *The National Law Journal*, November 30, 2007.

[136] For more on H.R. 1256, see CRS Report R40475, *FDA Tobacco Regulation: The Family Smoking Prevention and Tobacco Control Act of 2009*, by (name redacted) and (name redacted). *See also* S. 982, the "Family Smoking Prevention and Tobacco Act."

[137] For those products whose label, labeling, or advertising uses the light, low-tar, or mild descriptors, the provisions of the act would go into effect 12 months after the date of enactment, i.e., manufacturers, distributors, and retailers could continue to sell their current products as long as the cigarettes were manufactured before the effective date. However, at least 30 days after the 12 month mark, manufacturers would not be able to introduce into the stream of commerce any product that would need to be approved by the FDA as a "modified risk tobacco product."

challenge, H.R. 1256 seems to preserve the narrow preemptive effect of §5(b) and framework of the *Cipollone* plurality while giving states the authority to regulate in other aspects of tobacco advertising.

Second, the new general preemption provision and framework for approving modified tobacco risk products of H.R. 1256 might affect future cases where plaintiffs wish to assert a common law claim that low-tar or light descriptors fraudulently conveyed the message that such cigarettes deliver less tar and nicotine than do regular brands. Although *Good* established that such claims were not preempted under §5(b), future claims regarding light cigarettes may be preempted under this new general preemption provision because cigarettes that use such descriptors in their label, labeling, or advertising would be considered "modified tobacco risk products." H.R. 1256's general preemption provision would prevent states from establishing or continuing any "requirement which is different from, or in addition to" the requirements in the statute relating to, among other things, modified risk tobacco products.[138] As the Court in *Riegel v. Medtronic, Inc.* determined, "[a]bsent other indication, [statutory] reference to a State's 'requirements' includes its common law duties."[139] Accordingly, "requirements" in this general preemption provision could include common law claims. Therefore, persons who eventually purchase and smoke products that have been approved as modified risk tobacco products may be preempted from asserting common law claims involving light or low-tar descriptors.

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[redacted]@crs.loc.gov, 7-....

[138] It does not seem that the general preemption provision, however, would have an effect on other common law claims that could be asserted under the *Cipollone* framework.

[139] *Riegel*, 128 S. Ct. at 1008.