Legal Opinion Letter

WLF Washington Legal Foundation

Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

Vol. 18 No. 19 September 5, 2008

SUPREME COURT EXAMINES PREEMPTIVE SCOPE OF FEDERAL LABELING STANDARDS

by
Jeffrey A. Lamken, Allyson N. Ho & Elysa M. Dishman

Product labeling plays a critical role in today's increasingly integrated, national economy. Recognizing as much, Congress and federal agencies have established a variety of labeling regimes for goods as diverse as appliances, automobiles, cigarettes, food, and pharmaceuticals. Those federal regulatory programs create uniform standards, promote efficiency, reduce barriers to interstate commerce, and prevent consumer confusion. But federal labeling requirements and testing methods cannot achieve their important goals if they can be contradicted by state tort law or second-guessed by different juries in different States.

In *Altria v. Good*, No. 07-562, the Supreme Court will revisit the extent to which federal law preempts state tort law in the context of cigarette packaging and promotion. Decades ago, Congress imposed standardized health warnings for cigarette packaging—such as the now-familiar "Surgeon General's Warning" that "Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy." 15 U.S.C. § 1333(a). Congress also displaced state efforts to impose additional requirements "based on smoking and health" in cigarette advertising and packaging. 15 U.S.C. § 1334(b). Seeking to provide consumers with useful information under a standardized methodology, the Federal Trade Commission once required cigarette makers to disclose specific tar and nicotine yields for their cigarettes in certain circumstances and mandated a particular testing methodology to determine those yields. In *Altria v. Good*, the First Circuit allowed a state tort suit to challenge descriptors in cigarette labels and advertising—words such as "light" and "lowered tar and nicotine"—as "misleading," even though those descriptions accurately reflected test results under the FTC-mandated test.

The U.S. Supreme Court has agreed to review the First Circuit's ruling and will hear argument on Monday, October 6, 2008. Even apart from its impact on cigarette makers, the decision could be of critical importance, determining the preemptive scope and practical effectiveness of myriad federal labeling regimes and standards. It has the potential to clarify the meaning of one of the Supreme Court's leading express preemption decisions, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). While *Cipollone* is a pathmarking decision, the precise nature of the path it marks has proved somewhat elusive for lower federal courts. And the case offers the Court an opportunity to refine the circumstances under which courts may invoke the presumption that Congress ordinarily does not intend to preempt state tort law.

Background. Plaintiffs are smokers in Maine who claim that Philip Morris USA, the maker of Marlboro Lights and Cambridge Lights, violated Maine's Unfair Trade Practices Act by describing its cigarettes as "light" or having "lowered tar and nicotine." The plaintiffs concede that those descriptions accurately reflect the results of federally mandated tests under which the cigarettes in fact yielded less tar and nicotine. But the plaintiffs claim that the descriptors are nonetheless "deceptive" because the federal tests ignored the "real-world" tendency of smokers, for example, to "compensate" for reduced tar and nicotine yields by smoking more cigarettes or holding the smoke in their lungs longer. The district court dismissed the putative class action, holding that plaintiffs' state-law claims are preempted by 15 U.S.C. § 1333, which prohibits States from imposing additional requirements or prohibitions on cigarette packaging and promotions "based on smoking and health."

Jeffrey A. Lamken is the head of the Supreme Court and appellate practice in the Washington, D.C. office of the law firm Baker Botts L.L.P. **Elysa M. Dishman** is an associate in the firm's Washington, D.C. office. **Allyson N. Ho** is a partner in the Houston, Texas office of the law firm of Morgan, Lewis, and Bockius.

The First Circuit reversed. It acknowledged that the FTC had promoted the use of descriptors such as "light" and "lowered tar and nicotine" to encourage smokers to switch to low-tar and low-nicotine cigarettes. But the First Circuit held that plaintiffs' claims were not expressly preempted by § 1333 because they were based not on "smoking and health," but instead on a more general duty—the duty not to deceive. The First Circuit also rejected the argument that plaintiffs' state-law claims were impliedly preempted. The First Circuit recognized that the FTC had required cigarette makers to use the federally mandated, standardized test for measuring tar and nicotine to facilitate comparative shopping among cigarette brands. But the court focused on the fact that the FTC's longstanding policies had not been the subject of formal rulemaking (even though the Supreme Court has repeatedly made clear that agency activity outside the formal rulemaking process can have preemptive effect). In reaching those conclusions, the First Circuit disagreed with a recent Fifth Circuit decision, *Brown v. Brown & Williamson*, which held that the federal Labeling Act preempted virtually identical state-law claims.

Need for Clarity and Consistency. *Good* presents an excellent opportunity for the Supreme Court to clarify the preemptive scope of the Labeling Act and other, similar statutory provisions. Congress has provided for uniform and mandatory labeling through programs such as the "Energy Star" certification for appliances, "Five Star" crash-test ratings for automobiles, and "Reduced Fat" labels for food. Under the First Circuit's approach to federal preemption, however, virtually *any* federal labeling regime could be challenged and undermined—if not gutted entirely—through state-law tort actions. For example, the FDA's standard for the "Reduced Fat" label could come under assault under a theory indistinguishable from the one endorsed by the plaintiffs in this case. Here, the plaintiffs urge that, while the cigarettes at issue did indeed deliver less tar under the government's testing method, the use of descriptors such as "Light" and "Lowered Nicotine" was misleading because the government's test ignores "real world" conditions such as the fact that consumers may "compensate" for reduced nicotine delivery by, for example, smoking more cigarettes. Under the same theory, however, class-action lawyers could also sue every cookie-maker using the "Reduced Fat" label—even if the use is 100 percent accurate under the FDA's criteria—based on the theory that the FDA failed to account for "real-world" consumer behavior, such as the fact that consumers "compensate" for cookies' lower-fat content by eating more of them. (There are studies suggesting that consumers do indeed eat more cookies if they are labeled "low fat.")

Federal and state law cannot coexist where federal law mandates testing under a certain method, for the purpose of giving consumers access to helpful data, but state law indicts accurate descriptions of the test results as "fraud." To allow such lawsuits would also undermine Congress's goal of promoting nationwide uniformity. Threatened by liability under state law, manufacturers would have little choice but to balkanize their labels with state-specific warnings qualifying or contradicting federally approved labeling—or confront billions of dollars in potential liability merely because they used product labels that are accurate under testing methods imposed by federal law. That would undermine the efficiency that comes from nationally uniform labeling; reintroduce the confusion that would result when an increasingly mobile American public confronts different labels for the same product in different States; and replace the federal judgment about the type and quantity of information to require on labels with the *ad hoc* decisions of different juries in different courts under different state-law standards.

The case also offers the Supreme Court an opportunity to reaffirm that, when Congress writes a statute, it means what it says and says what it means. In the Labeling Act, Congress displaced state laws that seek to impose additional requirements or prohibitions on cigarette labeling and promotion "based on smoking and health." Here, the plaintiffs urge that descriptors such as "light" or "lowered tar" are misleading because they falsely "communicat[e] to consumers that Marlboro Lights were less harmful or safer than regular Marlboro cigarettes." To bar use of such descriptors, or to require additional language to qualify them, unquestionably would constitute an additional requirement or prohibition "based on smoking and health." In reaching the opposite result, the First Circuit relied on the general presumption that Congress does not intend to preempt state law. Given Congress's pervasive intervention in this area, and the clarity of its preemptive intent, such a presumption cannot carry the day here.

ISBN 1056 3059