

# Broadening Tobacco Litigation: A Look at *Altria Group, Inc. v. Good*

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In 1992, the Supreme Court faced the issue of whether the Federal Cigarette Labeling and Advertising Act<sup>1</sup> (“The Act”) pre-empted certain state-damages claims against cigarette producers.<sup>2</sup> The Court produced only a plurality opinion, leaving lower courts divided on which state actions The Act pre-empted. However, the Court revisited the issue at the close of 2008, issuing a majority opinion in *Altria Group, Inc. v. Good*.<sup>3</sup> Whether the Court’s analysis allows for consistent interpretation by lower courts remains to be seen.

## The Federal Cigarette Labeling and Advertising Act

In the early to mid-twentieth century, scientific studies began to mount linking a variety of diseases to cigarette smoking.<sup>4</sup> Gradually, in the late 1950s and early 1960s the United States Surgeon General began to take notice. In 1964, the Surgeon General’s advisory committee on the issue declared cigarette smoking a health hazard.<sup>5</sup> One year later, Congress responded by passing the Federal Cigarette Labeling and Advertising Act (1965 Act).<sup>6</sup> The 1965 Act required cigarette manufacturers to place a warning on the cigarette box, alerting consumers of the adverse health effects caused by smoking.<sup>7</sup> Although the 1965 Act created this burden on cigarette manufacturers, it also provided cigarette makers with the protection of uniformity. Section 5 of the 1965 Act pre-empted States from enacting laws requiring stronger or different warning labels.<sup>8</sup> Therefore, manufacturers were required to include only the federal warning and not a variety of state warnings.

Congress amended the Act in 1969 (1969 Act).<sup>9</sup> The 1969 Act required a stronger warning label but also strengthened the pre-emption section.<sup>10</sup> While the 1965 Act prohibited states from requiring *statements* related to smoking and health, the 1969 Act provided, “[n]o *requirement* or *prohibition* based on smoking and health shall be imposed under State law . . .”<sup>11</sup> The 1969 Act’s broader pre-emption section was the central issue in the *Cipollone* and *Altria Group* cases.

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<sup>1</sup> 15 U.S.C. § 1331.

<sup>2</sup> *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

<sup>3</sup> 129 S. Ct. 538 (2008).

<sup>4</sup> U.S. Department of Health and Human Services, *Reducing the Health Consequences of Smoking: 25 Years of Progress, A Report of the Surgeon General*, DHHS Publication No. (CDC) 89-8411 (1989), at 5, available at <[http://profiles.nlm.nih.gov/NN/B/B/X/S/\\_/nnbbxs.pdf](http://profiles.nlm.nih.gov/NN/B/B/X/S/_/nnbbxs.pdf)> (last visited January 15, 2009).

<sup>5</sup> *Id.* at 7.

<sup>6</sup> Pub. L. No. 89-92, 79 Stat. 282 (codified as amended at 15 U.S.C. §§ 1331-1341).

<sup>7</sup> Pub. L. No. 89-92, § 4, 79 Stat. 282 (codified as amended at 15 U.S.C. § 1333).

<sup>8</sup> Pub. L. No. 89-92, § 5, 79 Stat. 282 (codified as amended at 15 U.S.C. § 1334).

<sup>9</sup> Pub. L. No. 91-222, 84 Stat. 87 (codified as amended at 15 U.S.C. § 1331-1341).

<sup>10</sup> Pub. L. No. 91-222, § 2, 84 Stat. 88 (codified as amended at 15 U.S.C. §§ 1333, 1334).

<sup>11</sup> Pub. L. No. 91-222, § 2, 84 Stat. 88 (codified as amended at 15 U.S.C. §§ 1334) (emphasis added).

## The Supreme Court's First Look: *Cipollone v. Liggett Group, Inc.*

Rose Cipollone and her husband filed suit against three cigarette manufacturers alleging that she developed lung cancer due to cigarette smoking. In addition to other claims, the plaintiffs alleged the defendants fraudulently misrepresented their product and failed to warn consumers of the adverse health effects caused by smoking. The defendants, however, contended the 1965 Act and the 1969 Act pre-empted these state-law claims.<sup>12</sup>

The Court examined the two acts separately. Seven Justices reached a majority consensus as to the 1965 Act: the statute's pre-emption section was narrow and applied only to state and federal rulemaking bodies from mandating specific warning statements.<sup>13</sup> The 1965 Act did not pre-empt other state-law damages actions.<sup>14</sup>

As to the 1969 Act, the Court failed to issue a majority opinion. Justice Stevens, joined by Chief Justice Rehnquist and Justices White and O'Connor, authored the plurality opinion. Stevens observed the 1969 Act's pre-emption section was much broader in scope and made no distinction between positive enactments and damages actions.<sup>15</sup> Therefore, Stevens determined certain damages actions were pre-empted by the 1969 Act. Stevens, however, was cautious not to overextend the pre-emption section. He emphasized the strong presumption against pre-emption unless clearly manifested by Congress.<sup>16</sup> With this in mind, Stevens outlined a test: courts were to examine each claim individually and, "ask whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health ... imposed under State law with respect to ... advertising or promotion,' giving that clause a fair but narrow reading."<sup>17</sup>

Utilizing this test, Stevens analyzed the plaintiffs' claims. The failure-to-warn claim alleged the defendants failed to inform consumers about the negative health effects caused by cigarette smoking. The 1969 Act pre-empted this claim. An allegation that the defendants had a duty to include additional or clearer warnings in advertisements was precisely the focus of the 1969 Act's pre-emption section.<sup>18</sup>

As for the fraudulent misrepresentation claim, the plaintiffs advanced two distinct theories. First, the plaintiffs alleged that the defendants neutralized the effect of the federally mandated warning labels through advertising that minimized the health hazards associated with smoking. Stevens saw this claim as a restatement of the failure-to-warn claim.<sup>19</sup> Therefore, the 1969 Act pre-empted it.<sup>20</sup>

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<sup>12</sup> *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 508-09 (1992).

<sup>13</sup> *Id.* at 519-20.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 521.

<sup>16</sup> *Id.* at 523.

<sup>17</sup> *Id.* at 524.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 528

<sup>20</sup> *Id.*

The second theory alleged the defendants made false representations of material facts. This theory, reasoned Stevens, was not “based on smoking and health.” Instead, the theory was predicated on the duty not to deceive. Therefore, this fraudulent misrepresentation theory was not pre-empted.<sup>21</sup>

The remaining Justices aligned behind two alternative opinions. Justice Blackmun, joined by Justices Kennedy and Souter, argued the 1969 Act, like the 1965 Act, pre-empted only specific state enactments and not state-damages actions. Blackmun argued the 1969 Act lacked a clear pre-emption of damages claims.<sup>22</sup> Conversely, Justice Scalia, joined by Justice Thomas, found conclusive evidence of Congressional intent to pre-empt the types of claims brought in this case.<sup>23</sup> Both Blackmun and Scalia feared the test advanced by the plurality would be too difficult for lower courts to uniformly apply.<sup>24</sup>

### **Revisiting Cipollone: Altria Group, Inc. v. Good**

The Supreme Court revisited the issue at the close of 2008 in *Altria Group*.<sup>25</sup> The plaintiffs in *Altria Group* brought a suit against a manufacturer of light cigarettes. Light cigarettes are marketed to consumers as containing less tar and nicotine. The plaintiffs argued, however, that a smoker consumed the same amount of tar and nicotine through “compensatory smoking.” Under this theory, smokers subconsciously take longer or more frequent puffs, hold smoke in their lungs for longer periods of time, or cover the filter ventilation holes with their lips or fingers. This caused smokers of light cigarettes to inhale the same amount of tar and nicotine as smokers of “regular” cigarettes. In addition, the plaintiffs alleged that the cigarette manufacturer was aware of compensatory smoking. Given this information, the plaintiffs argued, marketing the cigarettes as “light” was deceptive.<sup>26</sup> Prohibition against deceptive marketing is codified in the Maine Unfair Trade Practices Act (MUTPA)<sup>27</sup> and in similar laws of most other states.<sup>28</sup>

The defendants advanced three alternative pre-emption arguments. First, the defendants claimed the *Cipollone* plurality test was an improper interpretation of The Act. However, with a five Justice majority, the Court reiterated the test outlined in *Cipollone*. Justice Stevens, writing for the majority, emphasized the presumption against federal pre-emption of state action.<sup>29</sup> Stevens acknowledged the test lacked “theoretical elegance” but stated it was most consistent with congressional purpose.<sup>30</sup>

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<sup>21</sup> *Id.* at 528-29.

<sup>22</sup> *Id.* at 531-44.

<sup>23</sup> *Id.* at 544-56.

<sup>24</sup> *Id.* at 543-44, 55.

<sup>25</sup> Although The Act has been amended since 1969, the pre-emption language remains the same as the 1969 Act. 15 U.S.C. 1334(b).

<sup>26</sup> *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 541-42 (2008).

<sup>27</sup> ME. REV. STAT. ANN. tit. 5, §205-214.

<sup>28</sup> For a complete list of state unfair trade acts, see Mary Dee Pridgen, CONSUMER PROTECTION AND THE LAW ch. 3, app. 3A (2008).

<sup>29</sup> *Altria Group*, 129 S. Ct. at 547-48.

<sup>30</sup> *Id.*

Second, the defendants argued the MUTPA claim resembled a failure-to-warn claim, similar to the claim found pre-empted in *Cipollone*. Stevens, however, disagreed. Here, the plaintiffs alleged that the defendants violated the duty created by MUTPA not to deceive. Like the fraudulent misrepresentation claim in *Cipollone*, the claim here was not “based on smoking on health” but on falsity.<sup>31</sup>

Finally, the defendants suggested that the Federal Trade Commission’s (FTC) longstanding policy on light cigarettes impliedly pre-empted the claim. If the plaintiffs were allowed to continue, the defendants argued, it would undermine the FTC’s longstanding policy of encouraging manufacturers to report to consumers tar and nicotine content. Furthermore, according to the defendants, the FTC encouraged production of low tar and nicotine cigarettes, and by allowing such a suit, this FTC policy would be undermined. Without acknowledging that such an FTC policy would raise pre-emption issues, Stevens found little support for the defendant’s interpretation of the FTC’s policy. The FTC, Stevens argued, endorsed only factual statements regarding the amount of tar and nicotine in a cigarette. Descriptors, such as “light” or “low tar” were not endorsed by the FTC. Further, Stevens noted that the FTC had taken the position that the “light” descriptor may be deceptive. Additionally, the agency has acknowledged the compensatory smoking theory.<sup>32</sup>

With the defendants arguments rejected, the Court concluded the plaintiffs could continue their fraudulent misrepresentation suit.

Justice Thomas, joined by Chief Justice Roberts and Justices Scalia and Alito, dissented. Thomas noted that since the *Cipollone* decision, lower courts have been unsuccessful in applying the plurality test. Instead, Thomas called for a simpler test that more accurately reflected the intentions of Congress. According to Thomas, a more satisfactory reading of the pre-emption section would pre-empt any state action that “imposes an obligation because of the effect of smoking upon health.”<sup>33</sup> If the plaintiffs succeeded in this case, Thomas argued, the cigarette manufacturers would be required to reveal the effects of smoking on health in a particular way in the promotion of light cigarettes. This, argued Thomas, was precisely what The Act sought to pre-empt.<sup>34</sup>

## **Moving Forward**

With the formal adoption of the *Cipollone* plurality test, the tobacco industry can expect more consumer litigation. At the time the Supreme Court decided *Altria Group*, there were almost 40 similar suits filed in more than 20 states against producers of light cigarettes.<sup>35</sup> Whether trial courts will be able to uniformly apply the Court’s test to these actions will unfold in the coming years.

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<sup>31</sup> *Id.* at 545-46.

<sup>32</sup> *Id.* at 549-51.

<sup>33</sup> *Id.* at 552.

<sup>34</sup> *Id.*

<sup>35</sup> Robert Barnes, *Court Allows Suit Against 'Light' Cigarette Makers; Companies Face Huge Liabilities Over Marketing*, WASH. POST, Dec. 16, 2008, A2.