

# ANNALS OF HEALTH LAW

## ADVANCE DIRECTIVE

---

VOLUME 18

SPRING 2009

PAGES 159-164

---

### *Altria Group, Inc. v. Good:* A Battle over the Preemption Argument

*Victor J. Allen* \*

Over forty-five million Americans smoke cigarettes.<sup>1</sup> In the 1950's, cigarette manufacturers introduced filtered cigarettes and began what they called the "Tar Derby" in response to smoking-related health concerns.<sup>2</sup> Cigarette manufacturers sought to encourage health conscious smokers to use these so-called "healthier" and "less dangerous" cigarettes.<sup>3</sup> As a result, many smokers switched to "light" cigarettes.<sup>4</sup> Today, nearly eighty-five percent of all American smokers buy "light" cigarettes that are advertised as having lower tar and nicotine content than regular cigarettes because they believe that these cigarettes are less dangerous.<sup>5</sup> However, medical studies have demonstrated that this belief is incorrect.<sup>6</sup> While tests conducted using machines show that light cigarettes emit less tar when burned, actual smokers

---

\* Juris Doctor Candidate, Loyola University Chicago School of Law, Class of 2010. Mr. Allen is a staff member of *Annals of Health Law*.

<sup>1</sup> David G. Savage, *Suits Over 'Light' Cigarettes Get Supreme Court Airing; Tobacco Firms Tell the Justices They're Shielded by the Federal Warning Label Law*, L.A. TIMES, Oct. 7, 2008, at A12.

<sup>2</sup> L. T. Kozlowski & R. J. O'Connor, *Cigarette Filter Ventilation is a Defective Design Because of Misleading Taste, Bigger Puffs, and Blocked Vents*, 11 TOBACCO CONTROL i40, i40 (2002), available at [http://tobaccocontrol.bmj.com/cgi/reprint/11/suppl\\_1/i40](http://tobaccocontrol.bmj.com/cgi/reprint/11/suppl_1/i40).

<sup>3</sup> *Id.*

<sup>4</sup> *Good v. Altria Group, Inc.*, 501 F.3d 29, 31 (1st Cir. 2007).

<sup>5</sup> Savage, *supra* note 1, at A12.

<sup>6</sup> Lynn T. Kozlowski et al., *Smokers' Misperceptions of Light and Ultra-Light Cigarettes May Keep Them Smoking*, 15 AM. J. PREV. MED. 9, 9 (1998).

inhale about the same amount of tar because they tend to take larger and more frequent puffs when smoking light cigarettes.<sup>7</sup>

Smokers and ex-smokers who believe they were misled by light and low-tar cigarette advertisements are currently involved in more than thirty class action lawsuits against tobacco manufacturers.<sup>8</sup> In December 2008, consumers celebrated a major win when the United States Supreme Court issued its 5-4 opinion in *Altria Group, Inc. v. Good*.<sup>9</sup> In that case, the Supreme Court ruled that the Federal Cigarette Labeling and Advertising Act (Labeling Act) did not preempt a false advertising claim brought under the state consumer protection law.<sup>10</sup>

Under the Labeling Act “[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.”<sup>11</sup> Since Congress decided that no additional warning statement is needed to attain the goal of informing the public of the health consequences of smoking,<sup>12</sup> states may not intrude on federal regulation by imposing stronger restrictions.<sup>13</sup>

In *Altria Group*, a group of Maine residents sued Richmond, Virginia-based Altria Group, Inc., the parent company of Philip Morris USA, alleging that Altria Group violated the Maine Unfair Trade Practices Act (MUTPA) by fraudulently advertising that their “light” cigarettes delivered less tar and nicotine than regular brands.<sup>14</sup> The District Court granted summary judgment for Altria Group, finding that the state law claim was pre-empted by the

---

<sup>7</sup> *Id.*; Stephen S. Hecht et al., *Similar Uptake of Lung Carcinogens by Smokers of Regular, Light, and Ultralight Cigarettes*, *CANCER EPIDEMIOLOGY, BIOMARKERS & PREVENTION* 693, 693 (2005).

<sup>8</sup> Savage, *supra* note 1, at A12.

<sup>9</sup> *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 541 (U.S. 2008).

<sup>10</sup> *Id.*

<sup>11</sup> 15 U.S.C. § 1334(b) (2009).

<sup>12</sup> 15 U.S.C. § 1334(a).

<sup>13</sup> *Altria Group*, 129 S. Ct. at 544.

<sup>14</sup> *Id.* at 541, 542.

Labeling Act.<sup>15</sup> The Court of Appeals for the First Circuit reversed that decision, holding that the Labeling Act neither expressly nor impliedly preempted respondents' fraud claim.<sup>16</sup> Thereafter, Altria Group appealed to the U.S. Supreme Court, which granted certiorari in order to resolve this conflict.<sup>17</sup>

Justice Stevens delivered the opinion of the Court with which Justices Kennedy, Souter, Ginsburg, and Breyer joined.<sup>18</sup> The Supreme Court reasoned that the phrase "based on smoking and health" in the Labeling Act did not preempt the state fraud rule because the state law merely codified a common law duty not to deceive.<sup>19</sup> Justice Stevens relied on the Court's 1992 ruling in *Cipollone v. Liggett Group Inc.*,<sup>20</sup> where the petitioner alleged that the cigarette manufacturers were liable for his mother's death because they fraudulently misrepresented the hazards of smoking.<sup>21</sup> In its plurality opinion, the *Cipollone* Court held that the plaintiff's claim that cigarette manufacturers had fraudulently misrepresented and concealed a material fact was not pre-empted.<sup>22</sup> Similarly, the *Altria Group* Court found that claim of Maine smokers was not preempted.<sup>23</sup> The Supreme Court held that the duty codified in MUTPA, like the manufacturers' duty not to deceive imposed by the state common law rule in *Cipollone*, had nothing to do with "smoking and health."<sup>24</sup> Furthermore, Justice Stevens rejected Altria's argument that the respondents' claim was impliedly pre-empted.<sup>25</sup>

Justice Thomas wrote a dissenting opinion with which Chief Justice Roberts, Justice Scalia, and Justice Alito joined.<sup>26</sup> Justice Thomas criticized the majority opinion for adopting the methodology of the *Cipollone* plurality as

---

<sup>15</sup> *Id.* at 542.

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

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

<sup>18</sup> *Id.* at 540.

<sup>19</sup> *Altria Group*, 129 S. Ct. at 545.

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

<sup>21</sup> *Cipollone v. Liggett Group Inc.*, 505 U.S. 504, 508-09 (1992) (plurality opinion).

<sup>22</sup> *Id.* at 521.

<sup>23</sup> *Altria Group*, 129 S. Ct. at 545.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 551.

<sup>26</sup> *Id.* (Thomas, J., dissenting).

governing law.<sup>27</sup> He concluded that the majority erroneously held that state law liability for deceiving consumers about the health effects of smoking light cigarettes was not a “requirement or prohibition based on smoking and health” under the Labeling Act.<sup>28</sup> Justice Thomas emphasized that the majority's ruling defeated an “express congressional purpose, opening the door to an untold number of deceptive-practices lawsuits across the country.”<sup>29</sup>

The *Altria Group* decision has not become an automatic win for plaintiffs, as they still would need to prevail on the underlying merits of the case in state court.<sup>30</sup> However, after *Altria Group*, companies whose products or advertisements are allegedly fraudulent can no longer depend solely on the preemption argument. The *Altria Group* decision presents a great challenge for the lawyers who represent business groups and companies in product liability lawsuits because it takes away the preemption argument-- a formerly powerful weapon for the dismissal of these types of claims.<sup>31</sup> Whether this decision will cause a flood of litigation is uncertain at this point.<sup>32</sup> However, it is apparent that the court's decision may encourage plaintiffs to file consumer fraud complaints in cases that might otherwise be product liability actions.

---

<sup>27</sup> *Id.* at 552.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 561.

<sup>30</sup> *Altria Group*, 129 S. Ct. at 551 (majority opinion) (“Respondents still must prove that petitioners’ use of ‘light’ and ‘lowered tar’ descriptors in fact violated the state deceptive practices statute, but neither the Labeling Act’s pre-emption provision nor the FTC’s actions in this field prevent a jury from considering that claim.”).

<sup>31</sup> See Jess Bravin, *Altria Case Deals Blow to Efforts Reining in Lawsuits*, WALL ST. J., Dec. 16, 2008, at A1 (“Robin Conrad, executive vice president of the chamber's litigation arm, said the decision ‘doesn't provide the kind of predictability that the business community has been looking for.’”); see also Adam Liptak, *Top Court Lets Smokers Sue for Fraud*, N.Y. TIMES, Dec. 16, 2008, at B1 (“Alan E. Untereiner, the author of a book on the pre-emption defense and a lawyer who often represents business groups and companies arguing for pre-emption, said Monday's decision was ‘a step backward in the recent trend of making pre-emption law more coherent.’”).

<sup>32</sup> Mark A. Hofmann, *State Fraud Law Survives Pre-emption Challenge; Supreme Court Ruling in 'Light' Cigarette Case May Have Wider Effect*, BUS. INS., Dec. 22, 2008, at 3.

The *Altria Group* decision is a threat, not only to the tobacco industry, but also to other federally regulated industries.<sup>33</sup> Cases where advertising and testing are permitted by federal authorities, but are deemed misleading under state law, are especially susceptible to this threat.<sup>34</sup> Indeed, the *Altria Group* decision “may open the door for similar claims against other companies, such as pharmaceutical companies, which had previously assumed their compliance with federal regulations established by the Food and Drug Administration would preempt state personal injury laws.”<sup>35</sup>

The absence of uniformity in regulation of cigarette advertising is potentially one of the most undesirable consequences of the *Altria Group* decision. Since *Altria Group*, states can impose additional restrictions on cigarette advertising, conflicting situations may arise where “light” cigarettes sold in some states might be considered “full-flavor” cigarettes in other states.<sup>36</sup> As a result, smokers from one state may become confused by product naming conventions in other states, leading to unintended purchases of cigarettes with higher or lower tar and nicotine content than the smoker desires.<sup>37</sup>

Finally, the *Altria Group* decision could create incentives for tobacco companies to change their advertising to avoid fraud claims under various state laws.<sup>38</sup> Consequently, the companies will warn consumers that their “light” cigarettes might be just as unhealthy and dangerous as the “full-flavor”

---

<sup>33</sup> See Brief for Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioners at 7–8, *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008) (No. 07-562), 2008 U.S. LEXIS 9127 [hereinafter Brief Supporting Petitioners].

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

<sup>35</sup> Isabel Cowles, *Supreme Court Rules That “Light” Cigarette Lawsuit Is Not Preempted by Federal Law*, FINDINGDULCINEA.COM, Dec. 16, 2008, <http://www.findingdulcinea.com/news/Americas/2008/December/Supreme-Court-Rules-Against-Big-Tobacco-in-Light-Cigarette-Lawsuit.html>.

<sup>36</sup> See Brief Supporting Petitioners, *supra* note 33, at 20.

<sup>37</sup> *Id.* (“The important interests of avoiding consumer confusion and ensuring national uniformity are ill-served by giving the exact same products different names based on the happenstance of location. That is no less true for cigarettes than for any other product that regularly travels in interstate commerce.”).

<sup>38</sup> See Liptak, *supra* note 31, at B1 (“It would be appropriate for the tobacco companies to take a very hard look at how they market their products, because they have for decades been making deceptive claims about their products.”).

cigarettes.<sup>39</sup> Although the change in advertising will hardly cause a decrease in the number of smokers, at the very least, these consumers would be made fully aware of the gravity of their choice. While it is hard to predict the full effect of the *Altria Group* decision, there is a great possibility that it will influence cigarette advertising and litigation strategies for both consumers and tobacco companies.

---

<sup>39</sup> *Id.*