

Recent Court Decisions

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Provisions of Public Health Cigarette Smoking Act Do Not Pre-empt State Law Damage Actions

In *Cipollone v. Liggett Group Inc.* U.S. Supreme Court case no. 90-1038 decided June 24, 1992, the United States Supreme Court examined the Federal Cigarette Labeling and Advertising Act of 1965 and the Public Health Cigarette Smoking Act of 1969. The main issue was whether the 1965 act or the 1969 amendments which required conspicuous warnings on cigarette packages, pre-empted common law claims against the defendant manufacturer.

Suit was filed in August 1983 by Rose Cipollone and her husband. The complaint alleged that Rose Cipollone developed lung cancer because of smoking cigarettes manufactured by the defendants. Mrs. Cipollone died in 1984 and subsequently her husband died. The suit was maintained by their son as executor of both estates.

The complaint was based on several theories of recovery. These included strict liability, negligence, express warranty, and intentional tort. The plaintiffs alleged, among other things, that the defendant's cigarettes were defective because of the failure to use a safer alternative designed for the products and because the social value of the product was outweighed by the dangers it created. The complaint alleged a failure to provide adequate warnings of the health consequences of smoking and that the defendants were negligent in the manner they tested, researched, sold, promoted, and advertised the cigarettes. The plaintiffs alleged that there were express warranties that smoking the cigarettes did not present any significant health consequences and that the defendants willfully, through their advertising, attempted to neutralize federally mandated warning labels. It was also alleged that the defendants possessed, but failed to act upon medical and scientific data indicating cigarettes were hazardous and that there was a conspiracy to deprive the public of such medical and scientific data.

The trial (district court) found the failure to warn, express warranty, fraudulent misrepresentation, and conspiracy claims barred by the 1965 Act to the extent they relied on advertising and promotions after January 1,

1966. It found the design defect claims not pre-empted but barred on other grounds. The jury rejected the fraudulent misrepresentation claims and conspiracy claims but found defendant Liggett had, before 1966, breached its duty to warn and express warranties. The jury found Rose 80 percent at fault and that she voluntarily encountered a known danger. No damages were awarded to her estate but the jury awarded \$400,000 to her husband for losses caused by breach of express warranty.

The Supreme Court considered the issue of the pre-emptive effect of the federal statutes. The Supreme Court found that the 1965 law provided that no statement relating to smoking and health (other than a required conspicuous package label warning of health hazards) shall be required on packages or in the advertising of cigarettes packaged with the required federal warning thus, state agencies could not require additional warnings. However, the 1965 Act was found by the Court not to bar any state law damage claims. The Court then examined the 1969 amendments. Justice Stevens, in his opinion, joined by Justices Ranquist, White, and O'Connor found that certain of the petitioners failure to warn and fraudulent representation claims were barred by the 1969 act but that other such claims or the claims based on express warranty or conspiracy were not pre-empted. The Court found the claim that the respondents were negligent in the manner they tested and that they failed to provide adequate warnings would require showing that post 1969 advertising should have included additional or more clearly stated warnings and thus were pre-empted.

The holding of the Supreme Court was summarized by Justice Stevens as follows: "The 1965 Act did not pre-empt state law damage actions; the 1969 Act pre-empted petitioners claims based on a failure to warn and the neutralization of federally mandated warnings to the extent that those claims rely on omissions or inclusions in respondents advertising or promotions; the 1969 Act does not pre-empt petitioners claims based on express warranty, intentional fraud and misrepresentation, or conspiracy."

An opinion by Justice Blackman joined by Kennedy and Souter found that the 1969 act did not pre-empt any state law claims. An opinion by Justice Scalia joined by Justice Thomas concluded that the 1969 act barred all the post 1969 failure to warn claims and certain fraudulent misrepresentation claims were pre-empted.

Thus, warnings mandated by federal law do not bar damages. The case may be significant to other industries subject to federally-required warnings such as the chemical industry.

Pollution Exclusion Term "Sudden and Accidental" Found Ambiguous

Dimmitt Chevrolet Inc. v. Southeastern Fidelity Insurance Corporation, case no. 78, 293 filed September 3, 1992. (1992 WL 212008[Fla.], West Publishing Co.)

The Florida Supreme Court answered in the negative the following certified question from the United States Court of Appeals for the Eleventh Circuit.

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