

HOW “IMPLIED EXPRESS PREEMPTION” HAPPENED, WHAT IT MEANS TO TRIAL LAWYERS, AND WHY IT MATTERS

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INTRODUCTION

This piece is written from the perspective of a long-time advocate for the use of tobacco products litigation as a public-health strategy. It describes the surprise arrival of preemption as an effective defense in tobacco (and other products) cases, the impact on the ability of plaintiffs’ lawyers to get plaintiffs their day in court, and the consequences for public health of the failure of tobacco litigation in the 1980s.

I.

WHAT HAPPENED?

The current trend of finding that federal regulatory statutes preempt state law causes of action in the absence of any indication that Congress so intended—termed “implied express preemption”—started with the iconic tobacco case of *Cipollone v. Liggett Group*. *Cipollone* was heard in the Third Circuit in 1986¹ and six years later in the Supreme Court in a belated appeal.²

Until the Third Circuit’s decision—following a short and little-noticed opinion in another tobacco case the previous year by a Tennessee district court,³—the law on preemption with respect to torts concerning unsafe products was quite clear. Section 288C of the Restatement (Second) of Torts, adopted in 1965, the same year as the Federal Cigarette Labeling and Advertising Act (FCLAA),⁴ provided that “[c]ompliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where

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1. 789 F.2d 181, 187 (3d Cir. 1986).

2. 505 U.S. 504, 516 (1992).

3. *Roysdon v. R.J. Reynolds Tobacco Co.*, 623 F. Supp. 1189 (E.D. Tenn. 1985).

4. Pub. L. No. 89-92, 79 Stat. 282 (codified at 15 U.S.C. §§ 1331–41 (1965)).

a reasonable man would take additional precautions.”⁵ In other words, regulations set a floor, but not a ceiling, for the duty of care. In the 1984 case *Silkwood v. Kerr-McGee*, the Supreme Court refused to find that the Atomic Energy Act implicitly preempted a state law award of punitive damages despite Congress’s clear intention that the regulation of nuclear energy be centralized in a single federal agency.⁶ The settled law before the Third Circuit acted was well-stated and thoroughly discussed in the district court’s *Cipollone* opinion, which rejected the preemption defense.⁷

There were at least two good reasons for the pre-*Cipollone* preemption law. First, Congress generally passed statutes regulating product safety in response to concerns about the harm caused by the product.⁸ This was certainly true of the FCLAA, passed in 1965 in response to the Surgeon General’s landmark 1964 Report⁹ on the dangers of smoking.¹⁰ Reading such statutes to limit the safety-enhancing effects of product-liability suits, in the absence of explicit statutory language requiring such a reading, is simply perverse.

Second, as the Court has recognized at least since *Erie Railroad v. Tompkins*,¹¹ common law causes of action are matters of state law and policy whereby they carry out their retained power and responsibility to provide for the health and safety of their citizens. Congress intervenes in such matters in a surgical manner, making the changes and additions it thinks appropriate in the context of continuing state responsibility. As *Silkwood* made clear, this is especially true with respect to remedies for personal injuries where Congress has not provided a comprehensive individual remedy¹² or otherwise specifically indicated an intention to address these remedies.¹³ A presumption that ambiguous statutory language does not limit state law causes of action for harmed individuals thus respects the consti-

5. RESTATEMENT (SECOND) OF TORTS § 288C (1965).

6. 464 U.S. 238, 248–58 (1984).

7. 593 F. Supp. 1146, 1154 (D.N.J. 1984).

8. *E.g.*, Food Additives Amendment of 1958, Pub. L. No. 85-929, 72 Stat. 1784 (codified as amended at 21 U.S.C. § 321 (2000)).

9. OFFICE OF SURGEON GEN., SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE, PUBLIC HEALTH SERVICE PUBLICATION NO. 1103 (1964), available at http://profiles.nlm.nih.gov/NN/B/B/M/Q/_/nnbbmq.pdf (last visited Nov. 3, 2009).

10. See H.R. REP. NO. 89-449, at 3 (1965), reprinted in 1965 U.S.C.A.N. 2350, 2351 (discussing “appropriate remedial action . . . as recommended by the Surgeon General’s Advisory Committee”).

11. 304 U.S. 64 (1938).

12. For example, the FCLAA provided no individual remedies at all.

13. *Silkwood v. Kerr-McGee*, 464 U.S. 238, 256 (1984).

tutional division of powers between the federal and state governments in the areas of health and safety.

When the Third Circuit heard *Cipollone*, it ignored existing preemption law and the reasons supporting it. Rather, in an opinion by Judge Robert Hunter, a former tobacco-industry lawyer,¹⁴ the court looked to the statute’s statement of purposes, which mentioned both “adequately” informing the public of the possible hazards of smoking by including a warning and also protecting commerce to the maximum extent possible.¹⁵ The court applied the principle that any state actions that conflict with the purposes of the statute are implicitly preempted.¹⁶ Accordingly, the court decided that any restriction on cigarette manufacturers’ communication to consumers, beyond the bare congressional warnings, impeded the free flow of cigarettes in commerce and hence was preempted.¹⁷ Additionally, the court held that the statute impliedly preempted claims of fraudulent communications.¹⁸ The opinion ignored the fact that statutory immunity for fraudulent conduct by private actors was unprecedented. The court’s holding also ignored the adverse impact of providing such immunity on the public’s health¹⁹ and would certainly have surprised the legislators who voted for the FCLAA, which was publicly understood as protecting the public’s health and not the industry’s profits.²⁰

The Supreme Court approached the issue differently. Seven Justices agreed that since there was an express preemption clause, there was no room for implied preemption.²¹ The FCLAA’s express preemption clause, the language of which had been amended in 1969 from the original 1965 Act, provided that “[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”²² Justice Stevens, who authored the plurality opin-

14. *Cipollone v. Liggett Group*, 802 F.2d 658, 659 (3d Cir. 1986) (refusing to vacate the opinion and order on this basis).

15. *Cipollone v. Liggett Group*, 789 F.2d 181 (3d Cir. 1986).

16. *Id.* at 187.

17. *Id.*

18. *Id.*

19. See *infra* notes 48–50 and accompanying text.

20. “[T]he public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes.” 15 U.S.C. § 1331(1) (1965).

21. This argument has not stood the test of time. Three years later the Court sensibly backed off from the notion that express preemption inevitably ousts implied preemption. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995).

22. 15 U.S.C. § 1335(b) (1965). Public Health Cigarette Smoking Act of 1969, Pub. L. 91-222, § 2, Apr. 1, 1970, 84 Stat. 88 substituted the provision that “no

ion on behalf of himself, Chief Justice Rehnquist, and Justices White and O'Connor, thought the text was self-explanatory—although it is safe to say Congress probably had not predicted how the Court would interpret it. They held that the statute preempted post-1969 claims based on a failure to warn and the neutralization of federally mandated warnings to the extent that such claims are based on omissions or inclusions in advertising and promotional statements. However, the statute did not preempt claims based on express warranties, fraudulent misrepresentations, concealment of facts, conspiracy to commit fraud, and fraudulent concealment.²³

Justice Blackmun, also writing for Justices Kennedy and Souter, found the FCLAA non-preemptive. Blackmun's opinion considered Congress's actual intent in interpreting the text. The evidence showed that while Congress may well have understood that having warnings on the package would give the tobacco companies a good jury argument—that anyone suing them was adequately warned and had only themselves to blame—no one suggested in the hearings or debates that the warning requirement or the pre-emption language would have the legal effect of preventing failure-to-warn claims. As Blackmun concluded:

[N]ot only does the plain language of the 1969 Act fail clearly to require pre-emption of petitioner's state common-law damages claims, but there is no suggestion in the legislative history that Congress intended to expand the scope of the pre-emption provision in the drastic manner that the plurality attributes to it.²⁴

Justice Scalia, along with Justice Thomas, read the words to preempt all claims based on the industry's communicative behavior.²⁵ In effect, they would have granted the industry a license to lie by removing the most effective sanction: the possibility of having to pay for the health and lives lost in reliance on these lies.

requirement or prohibition based on smoking and health should be imposed under State law with respect to the advertising or promotion of any cigarettes which packages are labeled in conformity with the provisions of this chapter" for provision that "no statement relating to smoking and health should be required in the advertising of any cigarettes which packages are labeled in conformity with the provisions of this chapter."

23. *Cipollone v. Liggett Group*, 505 U.S. 504, 525–31 (1992).

24. *Id.* at 542 (Blackmun, J., concurring in the judgment in part, and dissenting in part).

25. *Id.* at 548, 550 (Scalia, J., concurring in part and dissenting in part) (finding petitioner's failure-to-warn claims preempted by the 1965 Act and all of petitioner's common law claims preempted by the 1969 Act).

Thus, Justice Stevens could point to six votes (his four plus Scalia and Thomas) for the series of claims he had found preempted and seven votes (his four plus Blackmun’s three) for not extending preemption beyond those claims. The opinion therefore became the de facto holding of *Cipollone*, but did not become clear precedent until 2008 when a majority of the Court adopted the plurality opinion in *Altria v. Good*.²⁶ The result was not all that the tobacco industry could have hoped for.²⁷ But *Cipollone* made tobacco litigation unnecessarily difficult for plaintiffs, greatly reducing the potential for reining in industry misbehavior, forcing increases in cigarette prices, and thus protecting public health.

II. WHY IT HAPPENED

Why did the courts overturn established preemption doctrine in the cigarette cases? I must shamefully admit some role in this. As the Chair of the Tobacco Products Liability Project, formed in 1984 to encourage litigation against tobacco companies as a public health strategy,²⁸ I promoted tobacco litigation, and publicly—and naively—predicted a flood of tobacco cases that would soon rival or surpass the number of asbestos cases.²⁹ Others made similar predictions.³⁰ At that time, federal judges viewed asbestos cases as a grave crisis, not for the sufferers, but for the courts which were una-

26. See *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 545, 549, 551 (2008).

27. For that see Justice Scalia’s dissent in *Cipollone*, 505 U.S. at 548, and Justice Thomas’ dissent in *Altria v. Good*, 129 S. Ct. at 552, which would have upheld the Third Circuit’s preemption of fraudulent communications claims and might have preempted tobacco litigation entirely.

28. See Tobacco Technical Assistance Consortium, Key Players in Tobacco Control, http://www.ttac.org/resources/key_players.html (last visited Oct. 22, 2009).

29. E.g., *The McNeil/Lehrer NewsHour* (PBS television broadcast Oct. 14, 1985) (transcript # 2621 at 12: Richard Daynard, Tobacco Products Liability Project: “It seems very likely that there would be several thousand cases filed within the next year or two. At that point I think it’s really all over for the tobacco companies.”).

30. E.g., David Margolick, *Antismoking Climate Inspires Suits Among the Dying*, N.Y. TIMES, Mar. 15, 1985, at B1 (“You can use whatever analogy you want—flies to honey, vampires to blood—but we’ve got a glut of lawyers out there just looking for someone to sue,” said John F. Banzhaf 3d, a professor at George Washington University Law School. Mr. Banzhaf, the executive director of Action on Smoking and Health, an antismoking group, said, “Suits against tobacco companies will soon make other toxic tort cases, like Agent Orange, asbestos or DES, look like preliminary bouts before the heavyweight match.”).

ble to clear their clogged dockets.³¹ I believed, as I had learned in law school and in turn taught my students, that courts would apply existing precedents and interpret statutes to promote the principles and policies embodied in them; it did not occur to me that courts could, and would, manipulate doctrine and language to prevent a tsunami of new cases, especially cases in which they might have thought the plaintiffs were more to blame than the defendants. The year after the Third Circuit's 1986 decision, the First,³² Fifth,³³ Sixth,³⁴ and Eleventh³⁵ Circuits all adopted the tobacco industry's preemption argument.

The two state supreme courts to consider the issue did not join the bandwagon, perhaps because the state courts, though they had handled many asbestos cases, had not been the focus of critical commentary for their failure to handle the cases expeditiously.³⁶ In *Forster v. R.J. Reynolds Tobacco Co.*,³⁷ the Minnesota Supreme Court found some, but not all, claims preempted, *a la* the Stevens plurality opinion in *Cipollone*. And in *Dewey v. R.J. Reynolds Tobacco Co.*,³⁸ the New Jersey Supreme Court ruled, for the reasons first stated by the trial court and later by Justice Blackmun in *Cipollone*, that the FCLAA simply did not preempt product liability suits.³⁹

31. See, e.g., Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1, 10 (2001) (asserting that courts employed judicial maneuvers to clear asbestos claims from their dockets without regard to the effect it would have on existing and potential claimants); Michelle J. White, *Understanding the Asbestos Crisis* (2003), available at <http://www.law.yale.edu/documents/pdf/white.pdf> (last visited Jan. 7, 2010).

32. *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 629 (1st Cir. 1987), *rev'd* 633 F. Supp. 1171 (D. Mass. 1986).

33. *Pennington v. Vistrion Corp.*, 876 F.2d 414, 418 (5th Cir. 1989).

34. *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 234–35 (6th Cir. 1988), *aff'd* 623 F. Supp. 1189 (E.D. Tenn. 1985).

35. *Stephen v. Am. Brands, Inc.*, 825 F.2d 312, 313 (11th Cir. 1987).

36. See, e.g., Stephen Labaton, *Judge's Panel, Seeing Court Crisis, Combines 26,000 Asbestos Cases*, N.Y. TIMES, Jul. 30, 1991, at A1 (describing the crisis that federal courts faced in asbestos litigation).

37. 437 N.W.2d 655, 660–62 (Minn. 1989).

38. 577 A.2d 1239, 1247 (N.J. 1990).

39. This was doubtless to the surprise of the tobacco companies, which had requested that the Third Circuit delay issuing its mandate in *Cipollone*, presumably in the hope of having an almost-clean sweep to oppose the inevitable certiorari petition from the plaintiffs.

III. WHAT PREEMPTION MEANS TO TRIAL LAWYERS

Most personal injury cases are filed by solo practitioners or small law firms in state courts.⁴⁰ This was certainly true of tobacco lawsuits in the 1980s. Out of 148 cases listed in the index to the Winter 1989/90 issue of the Tobacco Products Litigation Reporter, 107 (or seventy-two percent of tobacco cases) were filed in state court.⁴¹ Of the sixty-seven lawyers who filed these cases, eighteen were solo practitioners, while only five were associated with firms of twenty lawyers or more.⁴² The tobacco company defendants, on the other hand, always had both local counsel and at least one large national law firm representing them.⁴³ As a result of the string of federal appellate court decisions that preceded the Supreme Court's 1992 *Cipollone* decision, preemption was a plausible defense in every case, regardless of the cause of action. What this meant was that every state and federal case had a substantial, controversial, and rather abstruse federal issue, requiring small plaintiffs' firms to divert substantial time to rebutting these asserted preemption defenses even when they prevailed on the merits. Furthermore, defense counsel generally continued to raise legal issues, even where the judge initially ruled against them on these very issues, and take appeals whenever possible.⁴⁴ As an infamous internal memorandum from a lawyer for the R.J. Reynolds Tobacco company put it, "[t]o paraphrase General Patton, the way we win these cases is not by spending all of [R.J. Reynolds]'s money but by making that other son of a bitch spend all of his."⁴⁵

Even the partial plaintiffs' victory in the Supreme Court's *Cipollone* decision did not help plaintiffs very much. The process by which the lower courts tried to interpret the Court's essentially arbitrary edicts gave the tobacco industry more than the Supreme Court thought it had given them. The tobacco industry's greater legal firepower enabled it to produce confusion even where the Supreme Court tried to be clear, and to obtain preemption rulings on

40. See, e.g., Leslie C. Levin, *Preliminary Reflections on the Professional Development of Solo and Small Law Firm Practitioners*, 70 *FORDHAM L. REV.* 847, 850 (2001).

41. Tobacco Products Litigation Reporter's Reference Lists [hereinafter Reference Lists], 5.4 TPLR 9.1-9.13 (1990).

42. *Id.* 9.18-9.25.

43. See generally Reference Lists, 6.4 TPLR 9.20-9.22.

44. See generally William E. Townsley & Dale K. Hanks, *The Trial Court's Responsibility to Make Cigarette Disease Litigation Affordable and Fair*, 25 *CAL. W. L. REV.* 275 (1989).

45. *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 421 (D.N.J. 1993).

some causes of action that the Supreme Court had probably thought were protected.⁴⁶ It is therefore no wonder that of the almost 150 tobacco litigation cases filed in the 1980s the great majority were dropped or dismissed, and none (including *Cipollone*) produced a penny for plaintiffs or their attorneys.⁴⁷

IV. WHY IT MATTERS

As to the impact on the public, preemption in the cigarette context has been devastating. The 1986 Third Circuit *Cipollone* decision ended the second wave of tobacco litigation, removing any incentive for tobacco companies to cease marketing to young non-smokers or to stop lying about the dangers of smoking. The opinion also eliminated the possibility that the price of cigarettes would rise to include an insurance premium for the harm the cigarettes would cause in the future. The price elasticity of demand for cigarettes among teenagers has been estimated at -1.4 ; thus, a ten percent increase in the price of cigarettes would have produced a fourteen percent drop in the number of teenagers smoking.⁴⁸ The tobacco industry gained one million new smokers—mostly teenagers—each year for the eight years between the Third Circuit decision and the revival of individual tobacco litigation in 1996,⁴⁹ and over 400,000 smokers died of tobacco-related diseases each year during this period.⁵⁰ Thus, had *Cipollone* come out the other way and successful tobacco litigation caused a modest ten percent increase in the price of cigarettes, 140,000 teenagers would not have begun smoking each year, resulting at some future point in 56,000 fewer Americans ($400,000 \times 14\%$) dying annually from tobacco-re-

46. For example, *Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 171 (5th Cir. 1996), *cert. denied*, 519 U.S. 930; *Cantley v. Lorillard Tobacco Co.*, 681 So. 2d 1057, 1061 (Ala. 1996); and *Small v. Lorillard Tobacco Co.*, 679 N.Y.S.2d 593, 603 (N.Y. App. Div. 1998) all rendered the Supreme Court's non-preemption of fraudulent concealment claims useless for plaintiffs.

47. Clifford E. Douglas, Ronald M. Davis & John K. Beasley, *Epidemiology of the Third Wave of Tobacco Litigation in the United States, 1994–2005*, 15 TOBACCO CONTROL iv9 (2006), available at http://tobaccocontrol.bmj.com/content/15/suppl_4/iv9.full.pdf.

48. Andrew Ding, *Youth Are More Sensitive to Price Changes in Cigarettes than Adults*, 76 YALE J. OF BIOLOGY & MED. 115, 119–20 (2003).

49. This resulted from the plaintiff's success in *Carter v. Brown & Williamson Tobacco Co.*, No. 95-00934 (Fla. Cir. Ct. Aug. 9, 1996).

50. Centers for Disease Control and Prevention, Annual Deaths Attributable to Cigarette Smoking—United States, 2000–2004, http://www.cdc.gov/tobacco/data_statistics/tables/health/attrdeaths/ (last visited Nov. 3, 2009).

lated illnesses. Similar calculations may show substantial numbers of injuries, diseases, and deaths from other dangerous products that could have been avoided had preemption not stood in the way of legal accountability for the manufacturers of these products.

V. CONCLUSION

“Implied express preemption” of product liability cases—preemption based on a possible reading of statutory language, but a reading not required by the language and negated by considerations of federalism and actual legislative history—is unnecessary, of questionable constitutionality, disruptive of the orderly remedial processes of state courts, and at least sometimes inimical to the public health. It is unnecessary because Congress could have used unambiguous language to preempt remedial measures had it so desired. It contravenes the constitutional scheme by depriving states of their traditional power to provide private remedies without a clear congressional mandate, much less a strong argument that this preemption is necessary and proper to carry out a federal purpose. It disrupts state remedies for no good reason, leaving individuals who were injured within the meaning of state law with no remedies at all. And it imperils the public health by removing an otherwise effective deterrent to the sale and marketing of unreasonably dangerous products.

