PUBLIC JUSTICE E-LERT
AMERICA'S PUBLIC INTEREST LAW FIRM

January 21, 2009

Last month, I sent you an E-lert about the U.S. Supreme Court's decision in *Altria v. Good* rejecting federal preemption and preserving access to justice. The Supreme Court held 5-to-4 that federal law does NOT preempt -- i.e., wipe out -- lawsuits against tobacco companies for defrauding the public by fraudulently advertising that their "light" cigarettes deliver less tar and nicotine than "regular" cigarettes. Public Justice joined in an *amici* brief by Georgetown Law Professor David Vladeck urging the Court to rule as it did.

I thought you would want to see the article below by Public Justice Staff Attorney Leslie Brueckner analyzing the implications of the U.S. Supreme Court's decision rejecting federal preemption in *Altria v. Good.* Leslie argued and won the unanimous Supreme Court decision rejecting preemption in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). The Court relied on that case in rejecting implied preemption in *Altria*.

To read the Supreme Court's decision in *Altria*, click here.

To read our *amici* brief opposing preemption, filed on behalf of the Tobacco Control Legal Consortium, AARP, and Public Justice, click here.

Our heartfelt congratulations to plaintiffs' counsel David Frederick of Kellogg, Huber, Hansen, Todd & Evans, PLLC, in Washington, DC, for his work in the case. This was a great victory. Leslie's article is below. - Arthur

****

U. S. Supreme Court Refuses to Extinguish Light-Cigarette Fraud Claims Against Tobacco Companies

by Public Justice Staff Attorney Leslie Brueckner

In a decision that has been hailed as a resounding victory for federalism and victims' rights, the U.S. Supreme Court held 5-to-4 in *Altria v. Good*, 129 S. Ct. 538 (2008), that federal law does not preempt lawsuits against tobacco companies for defrauding the public by fraudulently advertising that their "light" cigarettes deliver less tar and nicotine than "regular" cigarettes.

The plaintiffs in the case allege that the cigarette manufacturers, in promotions and advertisements touting Marlboro and Cambridge Lights as "light" and having "lowered tar and nicotine," violated Maine's statutory prohibitions on fraudulent misrepresentation. The defending cigarette companies argued that the plaintiffs' claims were: (1) expressly preempted by the Federal Cigarette Labeling and Advertising Act (the "Act"); and (2) impliedly preempted because "the [Federal Trade Commission ('FTC')] has for decades promoted the development and consumption of low tar cigarettes..." *Id.* at 549.

A majority of the Court rejected the defendants' arguments on all counts. The decision starts by powerfully reaffirming the presumption against preemption of state law. It says: "When addressing questions of express or implied pre-emption, we begin our analysis 'with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and

manifest purpose of Congress.'" *Id.* at 543 (citation omitted). "Thus," the decision continues, "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors preemption.'" *Id.* (citation omitted).

Against this backdrop, the Court rejected the tobacco companies' argument that federal law both expressly and impliedly preempts claims that they violated Maine laws that prohibit fraudulent misrepresentation by promoting and advertising Marlboro and Cambridge Lights as "light" and having "lowered tar and nicotine."

In regard to express preemption, the Court held that the Act does not immunize tobacco companies for making allegedly fraudulent statements. On this point, the tobacco companies relied on a provision of the Act stating 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..." *Id.* at 504 (quoting 15 U.S.C. § 1334(b)). They argued that the plaintiffs' attempt to hold the tobacco companies liable for fraudulently advertising their cigarettes as "light" constituted a "requirement or prohibition based on smoking and health" and thus is expressly preempted by the Act. The plaintiffs countered that success on their claims would not run afoul of the Act because they merely alleged a violation of the "general duty not to deceive" codified in the Maine Unfair Trade Practices Act ("MUPTA"). The Supreme Court agreed, holding that the MUTPA "says nothing about either 'smoking' or 'health.'" Rather, the Court held, it is merely "a general rule that creates a duty not to deceive..." *Id.* at 547.

Regarding implied preemption, the tobacco companies argued that the plaintiffs' claims should be held preempted because they conflict with the FTC's allegedly "long-standing policy" of "promoting the development and consumption of low tar cigarettes..." *Id.* at 549. The Supreme Court rejected this argument without difficulty, noting that "[t]he Government itself disavows any policy authorizing the use of 'light' and 'low tar' descriptors." *Id.* (citing Brief for United States as *Amicus Curiae* at 16-33). Given the United States' position that it "has no long-standing policy authorizing" the advertising of cigarettes as "light," the Court rejected the tobacco companies' implied preemption argument as meritless.

Why *Altria* Matters:

1. Putting Victims First. The first reason why *Altria* matters is that the decision preserves the rights of thousands of consumers to hold tobacco companies liable for their fraudulent and deceptive misuse of the terms "light" and "ultra light" in their advertising and promotion of cigarettes. As one commentator has noted, not only will the *Altria* plaintiffs be allowed their day in court, but some 40 similar lawsuits pending in an array of other states - seeking billions of dollars in damages - also presumably can proceed. *See* http://www.scotuswiki.com/index.php?title=Altria_Group_v._Good.

This could lead to tremendous benefits for consumers of "light" cigarettes. As described in detail in our *amici* brief to the Court, more than 45 million Americans smoke cigarettes, and the vast majority of them - over 80 percent - smoke "light" or "ultra light" cigarettes. *See United States v. Philip Morris*, 449 F. Supp. 2d 1, 508 (D.D.C. 2006), *appeal pending*, No. 06-5267 et al. (D.C. Cir.) . More than half of these smokers believe, because tobacco companies repeatedly told them so, that "light" cigarettes are less dangerous than regular cigarettes and that switching to "light" cigarettes is a healthy alternative to quitting. *Id.* at 467-68, 488-92, 513-29. The scientific evidence, however, is unequivocal: "light" cigarettes are no less deadly than regular cigarettes and offer no health benefit whatsoever. The Supreme Court's decision in *Altria* will not only permit "light" cigarette smokers to seek economic damages, but it may also result in many such smokers quitting cigarettes altogether.

2. The Presumption against Preemption Is Alive and Well. *Altria* also matters because it put to rest, for once and for all, any notion that the long-standing presumption against preemption no longer exists. On this point, Justice John Paul Stevens' decision (which was joined by Justices Stephen G. Breyer, Ruth Bader Ginsburg, Anthony M. Kennedy, and David H. Souter) powerfully reaffirms the presumption, both in cases involving express *and* implied preemption. As noted above, the majority held that, "[w]hen addressing questions of express or implied preemption, we begin our analysis 'with the assumption that

the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* at 543 (citations omitted).

In so ruling, the majority swatted back various conservative forces who have vociferously argued that the presumption against preemption should not be applied in either express or implied preemption cases. *See, e.g., Altria v. Good*, Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Petitioners, 2008 WL 976401 at *4 (arguing that the presumption against preemption "ought to be laid to rest"); *Warner-Lambert v. Kent*, Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioners, 2007 WL 4205141 at *14 (arguing that "there is no basis in the text of the Constitution for a presumption against preemption in any circumstance."). The majority's decision leaves no room for doubt that the presumption against preemption is alive and well in *all* cases involving "the historic police powers of the States..." 129 S. Ct at 543 (citation omitted).

The majority's embrace of the presumption against preemption is also striking in light of the vehement disagreement voiced by Justice Clarence Thomas in dissent (joined by Chief Justice John G. Roberts, Justice Antonin Scalia, and Justice Samuel A. Alito, Jr.). *Id.* at 551-63. In the dissenters' view, the presumption has "waned" in recent years, particularly in cases involving express preemption. *Id.* at 557. According to Justice Thomas, the presumption has only been invoked "sporadically" of late, and was notably absent from the Court's recent decision in *Riegel v. Medtronic*, 128 S. Ct. 999 (2008), which held that federal law expressly preempts state common law claims challenging the safety and effectiveness of a medical device given premarket approval by the Food and Drug Administration. Justice Thomas observed that *Riegel* "interpreted the statute without reference to the presumption or any perceived need to impose a narrow construction on the provision in order to protect the police power of the States." 129 S.Ct. at 557. Based on the absence of any reference to the presumption in *Riegel* (and other recent cases), Justice Thomas vehemently argued that "there is no authority for invoking the presumption against pre-emption in express preemption cases." *Id.* at 558.

Justice Thomas' views on the matter, however, do not make it so. Whatever he and the other dissenting Justices believe about the viability of the presumption against preemption, the five-Justice majority opinion in *Altria* makes crystal clear that the presumption must be applied in all cases involving the historic police powers of the States. And, in the hotly contested area of federal preemption, the presumption can often prove to be the critical deciding factor between victory and defeat.

3. Federal Government Inaction Does Not Exert Preemptive Force. *Altria* also reaffirmed an important principle underlying the Supreme Court's unanimous conclusion in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), that the federal government's inaction does not, standing alone, provide any basis for finding implied conflict preemption. In *Altria*, the tobacco companies pointed to the fact that the FTC had never expressly *prohibited* them from advertising their cigarettes as "light" as evidence that the plaintiffs' claims would conflict with federal regulatory policy. *Id.* at 550. The majority made short shrift of this argument, noting that "agency non-enforcement of a federal statute is not the same as the policy of approval." *Id.* (citing *Sprietsma*, 537 U.S. at 51 (holding that the Coast Guard's decision not to regulate propeller guards did not impliedly preempt the plaintiff's tort claims)). This conclusion is of paramount importance in a day and age when the federal government, even in the best of times, lacks the resources necessary fully to enforce even a small fraction - let alone the full gamut - of consumer protection statutes on the books.

4. *Cipollone* Is Still Good Law: Finally, and arguably most importantly, *Altria* is noteworthy for what it did not do: accept the tobacco companies' invitation to overrule the Court's landmark decision in *Cipollone v. Liggett Group*, 505 U.S. 504 (1992), which affirmed cigarette smokers' rights to bring intentional misrepresentation and other claims against tobacco companies. *See id.* at 531 (holding that the Act "does not pre-empt petitioners' claims based on express warranty, intentional fraud and misrepresentation, or conspiracy."). In arguing in favor of express preemption, the tobacco companies strongly urged the Court to overrule *Cipollone*, arguing that the Court's fractured decision (which has caused some confusion among the lower courts) should be abandoned in favor of Justice Scalia's view that the Act expressly preempts all cigarette-related claims. *See id.* at 547-48. While acknowledging that *Cipollone* analysis may

have lacked "theoretical elegance," the *Altria* majority "remain[ed] persuaded him that [the plurality's ruling] represents 'a fair understanding of Congressional purpose'." 129 S. Ct. at 547 (quoting *Cipollone*, 505 U.S. at 529-30, n.27 (plurality opinion)). Any other conclusion would have been a disaster, both for consumers who had been tricked into buying "light" cigarettes and for the thousands of individuals who have suffered -- and are suffering -- terrible injuries and deaths caused by cigarettes.

* * *

Those are just the most obvious lessons of *Altria*. As with any Supreme Court case, the full implications of the decision remain to be seen. But there is no doubt that the Court's ruling is a tremendous victory for access to justice and for public health and safety.

Arthur Bryant
Executive Director
Public Justice
& the Public Justice Foundation

P.S. Please forward this email to friends and colleagues who'd be interested. (When you do so, delete the information below about unsubscribing, or they could unsubscribe you.) To make a special contribution, renew your membership, or join us, please click here.

email: abryant@publicjustice.net
voice: 510-622-8150
web: http://www.publicjustice.net

Public Justice · 1825 K Street, NW, Suite 200 · Washington · DC · 20006