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# Recent Developments: Cipollone v. Liggett Group, Inc.: Federal Cigarette Labeling Laws Do Not Preempt Certain State and Common Law Actions

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where it drew this line. *Id.* Most importantly, the Court noted that, because viability was the point at which a fetus could survive outside the womb, viability also marked the time when a fetus became deserving of state protection. *Id.* at 2818. While recognizing that a woman's right to terminate her pregnancy before viability was the central holding of *Roe*, the Court pointed out that *Roe* also recognized the importance of the state's interest in "potential life." *Id.*

The Court then examined the trimester framework established by *Roe* in light of the state's interest in "potential life." *Id.* at 2819. The Court found that the trimester framework had the effect of contradicting some of the state's permissible powers in the early stages of a woman's pregnancy. *Id.* Because the Court believed the trimester framework undervalued the state's interest in "potential life," the Court rejected the trimester framework adopted in *Roe*. *Id.*

The Court next addressed whether limitations on a woman's right to abort pre-viability fetuses were permissible. *Id.* at 2819. The Court held that if the law was not designed to strike at the abortion right itself and had the incidental effect of making the right more difficult to exercise, then such a law would not be invalidated. *Id.* Only where a law imposed an undue burden on the exercise of the right would the state be held to have interfered with the liberty interest of the woman protected by the Due Process Clause. *Id.* Under the Court's analysis, laws which "do no more than create a structural mechanism by which the state . . . may express a profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Id.* at 2821.

The Court then applied the "undue burden" standard to the provisions of the Act. *Id.* at 2822. The Court first addressed the Act's definition of "medical emergency" and found that it was central to the operation of the other provisions of the Act. *Id.* The Court concluded that limiting abortions in certain situations to medical emergencies, as defined under the Act and as construed by the court of appeals imposed no "undue burden" on a

woman's right to an abortion. *Id.* at 2822.

The Court next addressed the informed consent requirement of the Act. *Id.* The Court concluded that requiring specific information be given to the woman regarding the gestational age of the unborn child, the availability of alternatives to abortion and including a mandatory 24 hour waiting period, did not constitute an "undue burden." *Id.* at 2823-24. The Court reasoned that even if the information given expressed a preference for childbirth over abortion, the giving of truthful, non-misleading information ensured that a woman understood the full impact of her decision. *Id.* at 2823. In so holding, the Court overruled certain portions of *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) ("*Akron I*"), and *Thornbird v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986). *Casey*, 112 S. Ct. at 2823.

Turning to the 24 hour waiting period, the Court overruled its decision in *Akron I* which held that a 24 hour waiting period served no legitimate state concern. *Id.* at 2824. The Court held that an informed decision would be promoted by some period of reflection, particularly where information concerning the abortion decision was given to the woman. *Id.* The Court acknowledged that the waiting period was a substantial obstacle for women who lacked financial resources or were burdened by other considerations such as explaining their whereabouts to employers or family. *Id.* at 2825. Nevertheless, the court concluded that the effect of "increasing the cost and risk of delay of abortions" did not constitute an "undue burden." *Id.*

Addressing the husband notification requirement of the Act, the Court concluded that based on expert testimony and evidence presented to the lower court regarding domestic violence, the husband notification requirement was likely to prevent a significant number of women from obtaining abortions. *Id.* at 2829. The Court concluded that the father's interest in the potential life did not justify permitting a state to empower him with veto power over his wife's decision. *Id.* at 2833.

The Court treated the parental notification requirements of the Act sum-

marily, holding that a state may require consent of the parent or guardian prior to a minor obtaining an abortion so long as there is an adequate judicial bypass. *Id.* at 2832. Finally, the Court found the record keeping requirements of the Act permissible. *Id.* The Court held that the requirements were reasonably related to the "preservation of maternal health and . . . that they properly respected a patient's confidentiality and privacy." *Id.* (quoting *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 80 (1976)).

Thus, the Court upheld all of the provisions of the Act with the exception of the husband notification requirement enunciating an "undue burden" standard by which to assess the constitutionality of laws which restrict a woman's right to choose abortion prior to fetal viability. The opinion was joined by concurring and dissenting opinions from all sides. While accepting its responsibility to "define the freedom guaranteed by the Constitution's . . . promise of liberty," the Court has charted a course which will continue to engender confusion among courts and legislatures and endanger the liberty of women to control their reproductive lives. Thus, it is clear that the Court's decision in *Casey* has not secured for women the constitutional protection of their liberty guaranteed by the Due Process Clause of the Fourteenth Amendment.

- Sue Lawless

***Cipollone v. Liggett Group, Inc.:*  
FEDERAL CIGARETTE LABELING LAWS DO NOT PREEMPT CERTAIN STATE AND COMMON LAW ACTIONS.**

In a controversial case of first impression, the United States Supreme Court held in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992) that the Public Health Cigarette Smoking Act of 1969 ("1969 Act") did not preclude a smoker who developed lung cancer from suing cigarette manufacturers under certain state and common law theories. The smoker's claims for breach of express warranty, intentional fraud and misrepresentation, and conspiracy were upheld despite the 1969 Act's warning

label requirements. The Court indicated, however, that a smoker's right to sue tobacco companies was not absolute. The Court found that the 1969 Act preempted claims based on failure to warn and fraudulent misrepresentation, thereby limiting a smoker's causes of action against tobacco companies.

Rose Cipollone began smoking in 1942. In 1983, after she developed lung cancer, Cipollone and her husband filed a complaint in the United States District Court for the District of New Jersey asserting New Jersey law. The suit was against three cigarette manufacturers and was based on theories of strict liability, negligence, express warranty, and intentional tort. Cipollone died from her illness in 1984 and her husband died shortly thereafter. Their son maintained the action as executor of their estates.

At trial, the cigarette manufacturers argued that the Federal Cigarette Labeling and Advertising Act of 1965 ("1965 Act"), which required a conspicuous label warning of the hazards of cigarette smoking, preempted common law claims against cigarette manufacturers for health injuries received from smoking. The manufacturers also contended that the 1969 Act, which had spurred the famous cautionary label stating "Warning: the Surgeon General Has Determined That Cigarette Smoking Is Hazardous To Your Health," protected cigarette makers from all liability. After first allowing the claims, the district court ultimately ruled that the plaintiff's claims of breach of express warranty, failure to warn, fraudulent misrepresentation, and conspiracy were preempted by the 1965 and 1969 Acts to the extent that these claims relied upon the manufacturers' advertising, promotional, and public relations activities after the effective date of the 1965 Act. The Court of Appeals for the Third Circuit affirmed the district court's ruling on this issue. The United States Supreme Court granted certiorari to consider the preemptive effect of the federal statutes.

The Court began its analysis by examining the 1965 Act. *Cipollone v.*

*Liggett Group, Inc.*, 112 S. Ct. 2608, 2616 (1992). Writing for the majority, Justice Stevens looked to the preemption provision of the 1965 Act which stated that "[n]o statement relating to smoking and health shall be required in the advertising of [properly labeled] cigarettes." *Id.* at 2618 (quoting Pub.L. 89-92, 79 Stat. 282, amended by 15 U.S.C. 1331-40, § 5(b)) (emphasis in the original). The Court found that although the preemption provision did prohibit state and federal rule-making bodies from requiring that certain warning labels be placed on cigarette labels, the preemption provision did not preclude state law remedies. *Cipollone* 112 S. Ct. at 2618. In reaching this conclusion, the Court noted that there was a presumption against the preemption of state police power regulations, including state law damages actions. *Id.* The Court also stated that "[t]here is no general, inherent conflict between federal pre-emption of state warning requirements and the continued validity of state common law damage actions." *Id.* Thus, the Court concluded that the Plaintiff's personal representative could maintain an action for damages incurred by the Plaintiff prior to the enactment of the 1969 Act. *Id.* at 2619.

After finding that the 1965 Act did not preempt state common law claims, Justice Stevens examined the 1969 Act. Writing for a plurality of four justices, Stevens compared the language of the 1969 Act with its predecessor. *Id.* The Court first noted that the amended preemption provision of the 1969 Act was broader than the 1965 Act. *Id.* Section 5 of the 1969 Act provides 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 the packages of which are [lawfully] labeled." *Id.* at 2617 (quoting Pub.L. 91-222, 84 Stat. 87, amended by 15 U.S.C. 1331-40, § 5(b)). This language barring requirements or prohibitions imposed under state law was substantially broader than the 1965 Act's preemption provision which merely pro-

hibited health statements in smoking advertisements. *Cipollone*, 112 S. Ct. at 2619. Because of the modified language, the Court opined that the scope of the preemption provision in the 1969 Act substantially differed from the reach of the 1965 Act. *Id.* at 2619-20.

In analyzing the significance of the changes between the two acts, the Court noted that the phrase "requirement or prohibition" in the 1969 Act suggested no distinction between positive enactments and the common law. *Id.* at 2620. The Court asserted that the plain language of the statute encompassed obligations that take the form of common law rules. *Id.* The Court thus rejected the petitioner's argument that the phrase "requirement or prohibition" limited the 1969 Act's preemptive scope to positive enactments by legislatures and agencies. *Id.*

The Court, however, went on to find that although the preemption provision was not limited to positive enactments, it did not necessarily mean all common law claims were preempted. *Id.* at 2621. The Court determined that because the statute did not indicate which common law claims were preempted, each of the petitioner's claims required individual examination. *Id.* The Court stated that the central inquiry for each of the petitioner's common law claims must be whether the legal duty that predicated the damages action constituted a requirement or prohibition based on smoking and health imposed under State law with respect to advertising or promotion under the 1969 Act. *Id.*

Turning to the petitioner's specific allegations, the Court first examined the petitioner's claims of a failure to warn due to negligence in testing and advertising and lack of adequate warnings of the consequences of smoking. *Id.* The Court found that the failure to warn claims relied on an assumption that the manufacturers should have had additional warnings in their post-1969 advertising. *Id.* Finding that those claims relied upon a state law "requirement or prohibition" related to advertising or promotion, the Court concluded that the

1969 Act preempted the failure to warn actions to the extent they relied on a showing that manufacturers should have had additional warnings. *Id.* at 2621-22. The Court, however, noted that the 1969 Act did not preempt the petitioner's failure to warn claims that relied solely on the manufacturers' research or testing practices or other actions unrelated to advertising. *Id.* at 2622.

The Court next addressed the petitioner's claim for breach of express warranty. *Id.* Noting that an express warranty is not a requirement imposed under state law but is a voluntary undertaking by the manufacturer/warrantor, the Court stated that a claim for breach of warranty was not preempted by the 1969 Act. *Id.* at 2622-23.

Turning to the petitioner's allegations of fraudulent misrepresentation, the Court first analyzed the claim that the manufacturers' advertising counteracted the effect of the federal warning labels. *Id.* at 2623. The Court stated that because section 5 of the 1969 Act preempted state law prohibitions as well as requirements, the petitioner's claims based on state law prohibitions against advertising that minimized the hazards of smoking was preempted by the 1969 Act. *Id.* In addressing the petitioner's second fraudulent misrepresentation claim based on allegations that the manufacturers intentionally concealed material facts about the hazards of smoking, the Court noted that the petitioner's actions were not predicated on a duty under the 1969 Act but rather on a general duty not to deceive. *Id.* at 2624. Thus, the Court found that the petitioner's claims based on fraud in advertising were not preempted by the 1969 Act. *Id.*

Finally, the Court examined the petitioner's claim of conspiracy to misrepresent. *Id.* The Court found that the conspiracy claim was not preempted because the underlying duty in such a claim was a duty not to conspire to commit fraud, rather than a duty imposed by the 1969 Act. *Id.* at 2624-25.

Justice Blackmun, after joining the majority in the opinion regarding the

1965 Act, wrote separately for three justices and concluded that none of the petitioner's claims were preempted by the 1969 Act. *Id.* at 2625-26. Thus, Blackmun concurred only in the judgment that certain claims based on failure to warn, fraudulent misrepresentation, express warranty and conspiracy were not preempted by the 1965 Act. *Id.* Justice Scalia, joined by Justice Thomas, concluded that the 1965 Act preempted petitioner's failure to warn claims and that the 1969 Act preempted all of the petitioner's common law claims under the ordinary meaning of the statutory language. *Id.* at 2632. Consequently, Justice Scalia concurred only in the part of the judgment that held that the petitioner's failure to warn and fraudulent misrepresentation claims were preempted. *Id.* at 2637.

In *Cipollone*, the Supreme Court held that under certain circumstances, cigarette manufacturers can be held liable for the health problems of smokers, notwithstanding the existence of warning labels on cigarette packages. Although the ruling bars claims that advertising and labeling did not adequately warn smokers of the health hazards of smoking, it allows claims alleging misrepresentation, breach of express warranty, conspiracy, and fraud as well as certain failure to warn claims. This decision may provoke thousands of new suits filed by smokers against tobacco companies. More significantly, *Cipollone* may have set a precedent to allow consumers to bring suit in cases involving any product regulated by the federal government, including over-the-counter medications and alcoholic beverages, in which manufacturers may have hidden or misrepresented possible side effects of their products to the public.

-Ellen Ann Marth

## ***Burson v. Freeman*: STATUTE PROHIBITING THE DISPLAY AND DISTRIBUTION OF CAMPAIGN MATERIALS WITHIN 100 FEET OF A POLLING PLACE DOES NOT VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS.**

The Supreme Court affirmed the validity of a longstanding tradition of regulating campaign related speech in the areas surrounding a polling place. In *Burson v. Freeman*, 112 S. Ct. 1846 (1992), a plurality of the Court held that a Tennessee law establishing a 100-foot campaign free zone satisfied a strict scrutiny analysis because it was necessary to serve a compelling state interest and was narrowly drawn to achieve that end. This opinion may prove to be more important because the substance of the statute, which regulated expressive conduct near a polling place, was upheld by only a plurality of the Court.

Respondent, Mary Rebecca Freeman ("Freeman"), filed suit in the Chancery Court while working as treasurer for a political campaign in Tennessee. Freeman alleged that section 2-7-111(b) of the Tennessee Code, which prohibits the solicitation of votes and the display or distribution of campaign material within 100 feet of a polling place, unconstitutionally restricted her ability to communicate with voters in violation of her rights under the First and Fourteenth Amendments to the United States Constitution. The court dismissed her suit, finding that the law was not in violation of either the Tennessee or the United States Constitutions. The Tennessee Supreme Court reversed, reasoning that the State had a compelling interest in banning such activities inside the polling place but not in the area surrounding it. The court concluded that the law was not narrowly drawn and that it did not represent the least restrictive means available to protect the State's interest. The United States Supreme Court granted certiorari, reversed, and upheld the Tennessee statute because it