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Smoker blames cancer related death on manufacturer

By J. David Gorin

In *Grinnell v. American Tobacco Co.*, 883 S.W.2d 791 (Tex. Ct. App. 1994), the Texas Court of Appeals reversed a trial court's decision to dismiss a variety of state and federal claims brought by the survivors of a smoker against a tobacco manufacturer. It found that state law claims against a cigarette manufacturer were not preempted by the Federal Cigarette Labeling and Advertising Act ("Labeling Act"). Furthermore, the court held that a manufacturer was not excused from its duty to warn consumers of dangers associated with cigarette smoking in instances where such dangers and hazards were not common knowledge.

Trial court dismisses all claims

In July 1985, physicians diagnosed Wiley Grinnell, Jr. with lung cancer. In October of that year, he and his wife brought suit against the American Tobacco Company ("ATC") for personal injuries and damages

suffered by Grinnell as a result of smoking cigarettes designed, manufactured, marketed, and sold by the defendant. In April 1986, ATC deposed Grinnell for trial. He subsequently died later that year. Early the following year, Grinnell's wife, parents, and son filed an amended petition and were added as plaintiffs (hereafter collectively referred to as "Grinnell") in the suit. The amended complaint sought actual and punitive damages under the Texas Wrongful Death Act, the Texas Survival Statute, and several additional theories, including strict liability, negligence, and misrepresentation involving relevant state and federal provisions.

In May 1987, the trial court granted ATC partial summary judgment, dismissing Grinnell's claims challenging both the adequacy of a congressional statute pertaining to cigarette packaging and the propriety of ATC's advertising and promotional practices from January 1, 1966. The court granted a second motion for partial summary judgment for ATC in April 1989,

Please see "Court recognizes..." on page 116

Seller failed to disclose cancellation rights

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The court found this language to be insufficient to amount to a proper refund policy.

Contract void

The court held that, notwithstanding Rossi's statutory right to rescind under the PPL, her contract with Royal Prestige was unconscionable because of Royal Prestige's gross misrepresentations and the exorbitant price it charged for the Health System

Seller violated New York's General Business Law

New York's General Business Law Section 349 ("GBL") forbids

business practices which are: (1) materially deceptive or misleading; and (2) the proximate cause of injury to the plaintiff. The GBL does not require the plaintiff to show intent, recklessness, or fraud. Similarly, the plaintiff need not show reliance on the defendant's actions.

The court ruled that Royal Prestige's failure to disclose Rossi's cancellation and refund rights, pursuant to the PPL, constituted an unfair business practice under the GBL. Further, its dubious assertions regarding the nutritional value of food cooked by the Health System and the Health System's ability to fight heart disease and produce healthier babies were misleading and deceptive. Finally, the court held

that the inducements Kieffer used to persuade Rossi to meet with him were also misleading and deceptive. Kieffer never delivered 99 of the 100 free rolls of film he promised. Moreover, the discount vacation did not live up to its billing because of its poor quality and location.

Court awards damages and costs to consumer

The court awarded Rossi the full amount of the contract price, including taxes and shipping costs; \$100 for Royal Prestige's refusal to refund the contract price; \$1000 for Royal Prestige's violation of GBL; and \$344.66 in attorneys fees and costs.

Court recognizes presumption against preemption

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dismissing Grinnell's claims that arose as post-1965 claims. Neither of these partial judgments were final nor appealable. However, in January 1993, the trial court granted the tobacco company's renewed motion for summary judgment, dismissing all of Grinnell's claims. Plaintiffs then appealed the court's grant of full summary judgment to the Court of Appeals of Texas.

Grinnell attributes injuries to ATC

On appeal, Grinnell raised a number of issues related to their federal and state claims. First, they contended that the trial court erred in granting ATC's motions for partial summary judgment against their claims challenging the adequacy of the congressionally-mandated warnings placed on cigarette packages under the Labeling Act as well as the propriety of the tobacco company's promotional practices.

In response, ATC contended that Grinnell's claims regarding ATC's labeling and advertising of its tobacco product were preempted by the Labeling Act. It argued that the federal statute expressly mandated that a particular type of warning must be used on cigarette packages. Furthermore, ATC contended that the states were prohibited from requiring any additional warnings related to the health risks associated with smoking from cigarette manufacturers.

Defendant cites *Cipollone*

ATC relied heavily on *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992), for support of its position. In *Cipollone*, the plaintiff, a smoker of many years, alleged that she developed lung cancer from smoking cigarettes that had been designed, manufactured and sold by three different defendants. The *Cipollone* defendants claimed that they were protected from all liability associated with their products after 1965 by the Labeling Act and its successor, the Public Health and Cigarette Smoking Act of 1969 ("Smoking Act").

On review, the U.S. Supreme Court in *Cipollone* held that the Labeling Act did not preempt state law damages actions. The Court did find that the Smoking Act preempted claims based on a failure to warn and the neutralization of federally mandated warnings if such claims relied on omissions or inclusions in respondents' advertising or promotions. It did not, however, preempt claims based on express warranty, intentional fraud and misrepresentation, or conspiracy.

Appellate court finds federal preemption

Applying the Supreme Court's reasoning in *Cipollone* to the present case, the Court of Appeals of Texas held that the Smoking Act preempted Grinnell's claims involving failure to warn and fraudulent misrepresentation that neutralized federally mandated warnings. However, it held that neither the Labeling Act nor the

Smoking Act preempted Grinnell's claims based on express warranty, intentional fraud and misrepresentation, and conspiracy.

In making this determination, the appellate court recognized the basic presumption against preemption. It suggested that state police powers are not to be superseded by federal legislation unless there exists a clear and manifest purpose for the congressional act. Accordingly, the court concluded that the Labeling Act did not reflect a clear, manifest and unambiguous congressional intent to preempt state common law claims for injuries, damages, or death suffered as a result of smoking cigarettes.

More specifically, the court found that neither federal statute preempted the following causes of action: strict liability claims for defective design and defective manufacture of cigarettes and failure to warn, express warranty and implied warranty claims, and claims based on misrepresentation, negligence, and civil conspiracy. The court recognized that preemption did, however, apply to a limited classes of claims based on the failure to warn. Because such exceptions to federal preemption existed, the appellate court held that the partial summary judgment orders granted by the trial court were erroneous as ATC failed to establish that it was entitled to summary judgment as a matter of law.

Where tobacco products were reasonably safe?

Continued on next page

Cigarette manufacturer is not liable as a matter of law

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Grinnell next argued that the trial court erred in granting ATC summary judgment on a variety of state law issues relating to its manufacture, sale, and distribution of tobacco products. These state-law theories included strict liability, negligence, fraud, civil conspiracy, and ultrahazardous activity. ATC contended that specific products, such as tobacco, were neither defective nor unreasonably dangerous to the consumer as a matter of law. Moreover, the defendant argued that it owed no duty to warn the consumer of ordinary and commonly known dangers associated with its product.

As a result, ATC claimed that it was entitled to summary judgment on these claims. In its review of whether the tobacco products in question were defective or unreasonably dangerous as a matter of law, the appellate court examined various reports, letters, and other evidence from the trial record. Although the court agreed that while good tobacco without any additives or foreign substances may not be unreasonably dangerous, tobacco containing additional carcinogens, additives, or tar may be. It concluded from the evidence that ATC used or experimented with the fumigation of certain Turkish tobaccos, thus raising the issue of whether the cigarette products were reasonably safe and not defective. Moreover, the court also noted that the nicotine contained in cigarettes is highly addictive. Taken together, the appellate court held that ATC had not established that the cigarettes in

question were neither defective nor unreasonably dangerous as a matter of law.

Doctrine of common knowledge does not apply

The court then turned to the issue of whether ATC had a duty to warn its consumers of the dangers associated with smoking its tobacco products. When concluding that these dangers were not common knowledge at the time Grinnell began smoking and developed an addiction to cigarettes, the court first relied on Grinnell's own statement that he had neither seen nor heard anything about any risk of lung cancer associated with smoking cigarettes.

Second, it similarly considered Grinnell's testimony that he had read advertisements by ATC stating that there was no evidence or proof that cigarette smoking caused lung cancer.

Third, the court found that advertisements made by ATC during the period when Grinnell was a consumer suggested that its cigarettes were "friendly to your taste," and thus, created express and implied warranties that the product was harmless.

Finally, the court reviewed evidence suggesting that ATC attempted to discredit the research and warnings of the American Cancer Society regarding the health risks of smoking. Citing in-court testimony, memoranda, and statements from the executives of ATC, it found that ATC was aware that small amounts of arsenic appeared in its

product, recognized its danger, knew of the campaign to make smokers aware of the dangers related with cigarette smoking, and attempted to curtail the fears of consumers by stressing the safety of their product. Further, it found that ATC engaged in a misinformation campaign to assure the public that their products were not dangerous.

Taken together, the court concluded that the evidence demonstrated that Grinnell did not possess the common knowledge as to the dangers of smoking required to excuse ATC from its duty to warn. As a result, it held that the defendant had failed to meet its burden of establishing that no genuine issue of material fact existed as a matter of law.

Cigarette manufacturer is not liable as a matter of law for injuries

Finally, the appellate court addressed the issue of whether ATC, as a manufacturer of cigarettes, was liable as a matter of law for Grinnell's injuries. The plaintiffs contended that ATC should be liable for damages as it was undisputed that cigarettes cause cancer and are unfit for human consumption. The court held, however, that the trial court had not erred by denying Grinnell's motion for summary judgment as the issue was not beyond dispute.

The appellate court thus remanded the case back to the trial court for further consideration on the merits.

Court decides common law claim should survive

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Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard.

The Savings Clause of the Safety Act, however, provides that compliance with the regulation "does not exempt [one] from any liability under common law." The Supreme Court of Arizona stated that the Supremacy Clause allows Congress to promulgate laws and federal regulations that supersede state law. The court noted, however, that there is a presumption that the historic police powers of the States are not preempted by a federal law unless Congress clearly manifests such an intent. The most reliable source of congressional intent is the language of the statute itself. The court found the text of the Safety Act clear and unambiguous. The court concluded that, reading the Preemption and Savings Clauses together as a whole, "state regulation [which] conflicts with the Safety Act is prohibited, but state common law tort claims are saved and survive."

Additionally, the court noted and adopted the test established in *Cipollone v. Liggett Group, Inc.*, which limits the preemptive reach of a federal statute to its express terms and makes it inappropriate for a court to search for unarticulated congressional intent which may result in implied preemption.

Before the *Cipollone* decision, the federal courts ruled that the Safety Act impliedly preempted common law tort claims, even though the preemption clause did not expressly preempt such claims. However, as a result of *Cipollone*, the courts have narrowed the evaluation of a statute's preemptive reach to its express terms. The Supreme Court of Arizona reasoned that the *Cipollone*

test was the best policy because it commands courts to follow the textual path of the statute to determine its preemptive reach and eliminates a search for unexpressed congressional intent. The court further reasoned that if Congress intended to preempt, it would use the language necessary to accomplish that result.

Safety Act does not preempt common law

The Supreme Court of Arizona held that the Safety Act does not preempt state common law actions. The court reasoned that the *Cipollone* test was applicable in this case because the text of the Safety Act's preemption clause only addressed regulatory standards and did not reach or include state common law tort claims. The preemption clause only prohibits states from mandating safety standards which differ from those mandated by the Safety Act. Furthermore, the purpose of the Savings Clause was to ensure that the Safety Act would not preempt state common law. The court construed the Savings and Preemption Clauses together. The court came to the "inescapable conclusion" that Congress considered the preemption of state law causes of action and rejected it. Consequently, an automobile manufacturer can be liable for a state tort action for defective design, even if the design complies with the Safety Act standards.

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