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Defendants' fraud argument, it did not need to address whether fraudulent intent of the check writer should make a difference in the outcome of this case. Specifically, the court did not decide whether a fraud exception existed or whether such an exception would remove dishonored check collections from the purview of the statute. Nevertheless, the court expressed strong disapproval for a fraud exception as a violation of the spirit of the FDCPA. "The Act's singular focus is on curbing abusive and deceptive collection practices, not abusive and deceptive consumer payment practices." The court noted that current legal redresses sufficiently remedy debtor fraud, and spurned the creation of a judicial exception that "selectively gives a green light to the very abuses proscribed by the Act."

### Judge Bauer Dissented

In his dissent, Judge Bauer was unconvinced that the seller's acceptance of a check constituted a creditor-debtor relationship. In the absence of such a credit relationship, Plaintiff should not enjoy the FDCPA's protections. In addition, Judge Bauer contended that the majority understated the reasoning of *Zimmerman*, stating that a seller who accepts a check in a "goods-for-money" transaction consents to receiving nothing less than money. Judge Bauer explained that the debtor who provided a dishonored check paralleled the thief involved in shoplifting because the debtor removed the consent element from the transaction. Accordingly, a dishonored check should not be afforded the protection of the FDCPA.

### Editor's Note

Recently, in *Charles v. Lundgren & Assoc.*, 119 F.3d 739 (9th Cir. 1997), the Ninth Circuit agreed with the Seventh Circuit that a bad check constitutes a debt under the FDCPA. Citing *Bass v. Stolper, Koritzinsky, Brewster & Neider*, the court stated "we agree with its conclusion that, because 'an offer or extension of credit is not required for payment obligation to constitute a 'debt' under the FDCPA,' the FDCPA governs the collection of dishonored checks."

## *Federal Tobacco Labeling Laws do not Preempt State Law Requiring Additive and Nicotine Disclosure*

by Irene Kowalczyk

In *Philip Morris, Inc. v. Harshbarger*, Nos. 97-8022, 97-8023, 1997 WL 458881 (1st Cir. Aug. 18, 1997), the Court of Appeals for the First Circuit affirmed the district court's ruling that neither the Federal Cigarette Labeling and Advertising Act, as amended (the "FCLAA"), 15 U.S.C. §§ 1331-41, nor the Comprehensive Smokeless Tobacco Health Education Act of 1986 (the "Smokeless

Tobacco Act"), 15 U.S.C. §§ 4401-08, preempts the Massachusetts Disclosure Act (the "Disclosure Act"), MASS. GEN. LAWS CH. 94, § 307B. The court held that the federal statutes do not expressly or impliedly preempt the state statute, which requires cigarette and smokeless tobacco manufacturers to make certain disclosures to the public health department.

Preemption analysis is based on

the Supremacy Clause of the United States Constitution, which invalidates state laws in conflict with federal laws. Generally, federal law does not supersede the states' police powers unless federal preemption is Congress's intent is "clear and manifest." Congressional intent may be either expressed in the federal statute's language or implied in its purpose. If there is no explicit preemption language, the federal act

may preempt the state law if it "actually conflicts" with the federal act. Likewise, "the pervasiveness of a federal scheme, the dominance of the federal interest, or the federal goals and obligations may reasonably permit an inference that Congress intended a federal law to 'occupy a field' of commerce exclusively."

### Origins of the Dispute

On August 2, 1996, Massachusetts enacted the Disclosure Act, the first state law of its kind. The statute requires manufacturers of cigarettes, snuff, and chewing tobacco sold in Massachusetts to provide the public health department with an annual report, listing all additives and the nicotine yield rating for each brand of product sold. The Disclosure Act classifies as public record the nicotine yield ratings and any other information in the manufacturer's reports that the "department determines that there is a reasonable scientific basis for concluding that the availability of such information could reduce risks to public health." However, the statute restricts the state's ability to disclose the information unless "the attorney general advises that such disclosure would not constitute an unconstitutional taking."

On the day of the Massachusetts Disclosure Act's enactment, the cigarette manufacturers and smokeless tobacco manufacturers (the "manufacturers") separately filed complaints in federal district court against the Attorney General of Massachusetts and the Massachusetts Public Health Commissioner (collectively, the "Commonwealth").

In addition to alleging several U.S. Constitutional violations, the manufacturers contended that the FCLAA and the Smokeless Tobacco Act preempted the Disclosure Act under the Supremacy Clause of the U.S. Constitution. The parties cross-moved for summary judgment solely on this issue. The district court granted summary judgment in favor of the Commonwealth and certified the rulings for immediate appeal.

On de novo review, the First Circuit reviewed the text and legislative history of the federal statutes to determine whether the statutes preempted the state law. The court first looked to the preemption language of the 1965 and 1969 versions of the FCLAA and the Smokeless Tobacco Act, and concluded that neither federal statute expressly preempted the Disclosure Act. Next, the court engaged in an implied preemption analysis of the most recent version of the FCLAA, the 1984 version, and the Smokeless Tobacco Act. The First Circuit held that there was no actual conflict between the federal laws and the state statute did not tread upon an exclusive regulatory domain. Therefore, the federal statutes did not supersede the Disclosure Act. The court concluded that neither of the federal laws prevented the state from obtaining information about product additives and nicotine yield rates.

### The FCLAA Does Not Expressly Preempt the Massachusetts Disclosure Act

In analyzing whether the FCLAA preempts the Disclosure Act, the

court heavily relied upon the Supreme Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). In *Cipollone*, Plaintiff sued cigarette manufacturers for injuries stemming from the lung cancer death of Rose Cipollone. The Supreme Court interpreted the language of the preemption clauses of the 1965 and 1969 versions of the FCLAA and specifically addressed whether state common law damages were expressly preempted by the FCLAA.

Congress passed the first version of the FCLAA in 1965 and amended the statute in 1969 and 1984. The *Cipollone* Court, however, only addressed the first two versions of the FCLAA. The Court found that the purposes of the 1965 Act were: "(1) adequately informing the public that cigarette smoking may be hazardous to health, and (2) protecting the national economy from the burden imposed by the diverse, nonuniform, and confusing cigarette labeling and advertising regulations." *Id.* at 514. To implement the first purpose, the statute required manufacturers to include health warning labels on all cigarette packages. To further the second purpose, the statute included an express preemption provision which prohibited states from requiring health warning labels on cigarette packages or in their advertising. The statute included the provision: "No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." 15 U.S.C. § 1334(b) (1966).

The 1969 Act strengthened the

language of the health warning label and prohibited cigarette advertising on television, radio, and other electronic media. The amended statute also replaced the preemption subsection with the current version, which states: "No 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 labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b) (1969).

The *Cipollone* Court held that the 1965 Act did not preempt state common law damages actions. However, a plurality found that the preemption language of the 1969 Act was broader and therefore precluded some common law claims. The plurality formulated a test to determine whether a particular common law claim was preempted: "we ask whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising and promotion,' giving that clause a fair but narrow reading."

The court of appeals in the instant case modified the *Cipollone* test and asked, "whether or not the 'predicate legal duty' created by the Disclosure Act constituted (1) a 'requirement or prohibition . . . imposed under State law,' (2) 'based on smoking and health,' (3) 'with respect to the advertising or promotion of any [properly labeled] cigarettes.'" If the three prongs are satisfied, the state statute is preempted by the federal legislation.

The First Circuit found that the Disclosure Act satisfied the first prong of the modified test based upon the unanimous agreement of the *Cipollone* Court that "positive enactments" by the state legislature are state-imposed "requirements or prohibitions" within the scope of the 1969 FCLAA. The court in the instant case found that the Disclosure Act also satisfied the second prong of the modified test because the Act's stated purpose is "protecting the public health." The court found that the text of the Disclosure Act implied that its goal was to increase public awareness of the additives and nicotine in tobacco products and their potential health effects.

The main dispute in the instant case centered on the third prong of the preemption analysis. The manufacturers argued that the Disclosure Act's obligations were "with respect to" advertising and promotion under the 1969 FCLAA preemption clause and therefore, the federal statute prohibited states from imposing any additional disclosure requirements. The Disclosure Act compelled the manufacturers to communicate information to the public health department, eventually making the information publicly available. The cigarette manufacturers argued that if the Commonwealth could not directly compel public disclosure, it could not indirectly accomplish disclosure through a "public service advertising campaign."

The court looked to the *Cipollone* decision, in which the plurality opinion and a concurring opinion separately defined the phrase "with respect to . . . advertising and

promotion." The plurality found that the FCLAA did not preempt claims that rested solely on actions unrelated to advertising and promotion, including testing and research. For example, fraudulent misrepresentation claims are not preempted by federal law if they rely upon a state-imposed obligation "to disclose such facts through channels of communication other than advertising or promotion." *Cipollone*, at 528. The plurality hypothesized that the FCLAA would not preempt a state law that required manufacturers to disclose facts about smoking and health to an administrative agency. Accordingly, the First Circuit in the instant case found that under the *Cipollone* plurality's definition, the Disclosure Act's requirements are not "with respect to" advertising or promotion because the annual reports and potential public disclosure were not "through" an advertising or promotion channel.

In *Cipollone*, Justice Scalia's concurrence, which Justice Thomas joined, disagreed with the plurality's narrow interpretation of the phrase "with respect to . . . advertising and promotion." Justice Scalia reasoned that the 1969 FCLAA preempted "claims based on duties that can be complied with by taking action either within the advertising and promotional realm or elsewhere." *Id.* at 554. However, Justice Scalia speculated that a hypothetical law mandating disclosure of product-health hazards to a state public health agency would not fall under the scope of the preemption clause. His inquiry focused upon whether the state law "practically compels" the manufacturers to engage in behavior prohibited by the FCLAA.

Justice Scalia reasoned that the FCLAA would not preempt the hypothetical agency-reporting law since its obligations could not possibly be satisfied through advertising and promotion efforts.

The Disclosure Act differs from Justice Scalia's hypothetical law in that the manufacturers' reports could potentially be publicized under the Act. However, the court of appeals in the instant case found that, under Justice Scalia's interpretation, the Disclosure Act would not be preempted by the FCLAA. The Disclosure Act does not "practically compel" the manufacturers to communicate health warnings to the public because the statute's obligations cannot be satisfied by advertising or promotional efforts. Direct communication of the additives and nicotine yield ratings through advertisement could not satisfy the state-imposed requirements, and the Disclosure Act does not suggest alternative methods of compliance. Under both the plurality's and Justice Scalia's interpretations of the FCLAA, the court of appeals in the instant case found that the Disclosure Act does not impose obligations "with respect to . . . advertising and promotion" that are preempted by the federal statute.

### **The Smokeless Tobacco Act Does Not Expressly Preempt the Massachusetts Disclosure Act.**

The First Circuit found that the Smokeless Tobacco Act's preemption clause does not invalidate the Massachusetts Disclosure Act. The federal statute provides that "No statement relating to the use of

smokeless tobacco products and health, other than the statements required by [this act], shall be required by any State or local statute or regulation to be included on any package or in any advertisement (unless the advertisement is an outdoor billboard advertisement of a smokeless tobacco product)." 15 U.S.C. § 4406(b). Unlike the broader FCLAA preemption provision, the Smokeless Tobacco Act narrowly tailors its prohibition to statements "on any package" and "in any advertisements." In comparison, the Disclosure Act only requires the manufacturers to submit reports to the public health department and does not require any statements on tobacco packages or advertisements. Therefore, the court held that the express language of the Smokeless Tobacco Act does not supersede the Disclosure Act's reporting obligations to the public health department.

### **Neither the FCLAA Nor the Smokeless Tobacco Act Impliedly Preempt the Massachusetts Disclosure Act.**

After the First Circuit found that the 1965 and 1969 versions of the FCLAA and the Smokeless Tobacco Act do not expressly preempt the Massachusetts Disclosure Act, the court addressed the manufacturers' implied preemption arguments. Because the *Cipollone* Court held that the preemptive scope of the 1965 and 1969 Acts is governed entirely by the express language of their preemption clauses, the First Circuit engaged in an implied preemption analysis solely on the

1984 amendments of the FCLAA and the Smokeless Tobacco Act.

Both the 1984 FCLAA amendments and the Smokeless Tobacco Act require manufacturers to submit an annual report to the Secretary of Health and Human Services ("Secretary"), listing all ingredients added to tobacco products. However, neither the company nor the brand of tobacco-product must be identified in the listing, and the information may be submitted aggregately by more than one manufacturer. The statutes provide that the information is treated as a trade secret or confidential information, and that the Secretary must ensure the confidentiality of the information through enumerated procedures and safety measures. At certain times, the Secretary provides reports to Congress on research activities regarding the health effects or risks of tobacco additives. Congressional committees and subcommittees may request the ingredient information despite its confidential classification. Based upon the anonymous and aggregate ingredient reporting, the manufacturers made two arguments that the federal statutes impliedly preempt the Disclosure Act: (1) the Disclosure Act conflicts with the preemptive intent of Congress; and (2) Congress intended exclusive federal regulation in the area of tobacco-product sales.

### **The Disclosure Act Does Not "Actually Conflict" With the 1984 Version of the FCLAA.**

The manufacturers contended that Congress intended to strike a balance of national interests by passing the federal statutes: educat-

ing the public about the health effects of using tobacco products, and limiting commercial burdens on the tobacco industry. The manufacturers based this argument on a case decided before the Supreme Court's review of *Cipollone, Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987). In *Palmer*, the court broadly interpreted Congress' purposes underlying the FCLAA as "health protection . . . and trade protection," and applied a "balance of national interests theory" to weigh the state law's effect on the national economy.

The court of appeals in the instant case, however, found that the *Cipollone* Court rejected the *Palmer* theory and narrowly interpreted Congress's intent behind the FCLAA. The *Cipollone* majority expressed the purposes of the FCLAA as: "(1) adequately informing the public [of any adverse health effects of smoking], and (2) protecting the national economy from the burden imposed by diverse, nonuniform, and confusing cigarette labeling and advertising regulations." *Cipollone*, at 514. The First Circuit concluded that, under *Cipollone's* narrower interpretation of Congressional purpose, the Disclosure Act does not actually conflict with the federal statutes. The Court reasoned that the state law does not obstruct the federally-required warning labels and does not impose "diverse, nonuniform, and confusing labeling and advertising regulations."

The First Circuit rejected the manufacturers' second argument that the anonymity and confidentiality protections of the federal statutes demonstrate legislative intent to

preempt state laws without similar protections. The court found that the potential public disclosure of the reported information is not dependent upon enforcement of the Disclosure Act, and does not directly or indirectly conflict with the federal confidentiality provisions. The court looked to the text and legislative history of the federal statutes in determining that Congress primarily intended the reporting provisions to further toxicological research. Without a specific suggestion that Congress intended to preempt additional state obligations or assure uniformity in regulations, the manufacturers' arguments failed to overcome the strong presumption against preemption.

### **Congress Did Not Intend to Exclusively Regulate All Aspects of the Tobacco-Product Field.**

The court also dismissed the manufacturers' second implied preemption argument, that the Disclosure Act impermissibly encroaches upon an exclusive federal realm. While the court acknowledged that the FCLAA and Smokeless Tobacco Act preempt regulation in the area of tobacco-product labeling and warnings, the statutes do not imply an exclusive regulation of the entire tobacco-product field. The main purpose of the federal reporting provisions is to promote toxicological research on the health hazards of tobacco additives. While the federal statutes bear some relation to labeling and advertising, the Disclosure Act would not directly nor substantially affect federal efforts in this area.

Because Congress's intent to supersede state regulation in the area of product ingredient collecting was not "clear and manifest," the court held that neither of the federal statutes preempt the Massachusetts Disclosure Act.

In sum, the FCLAA and the Smokeless Tobacco Act do not preempt the Massachusetts Disclosure Act. The preemption clauses of the 1965 FCLAA, the 1969 FCLAA, and the Smokeless Tobacco Act do not expressly supersede state efforts in the tobacco-product field. Furthermore, the purpose and structure of the 1984 FCLAA and the Smokeless Tobacco Act do not impliedly preempt the Disclosure Act. The state act does not "actually conflict" with federal efforts nor does it impermissibly intrude on a field for which Congress intended exclusive federal regulation. Therefore, the court held that the Disclosure Act, the first state law of its kind, is not superseded by federal law and may properly impose reporting obligations upon cigarette manufacturers.