

QUESTIONS & ANSWERS ON PREEMPTION

Q: Aren't you claiming total immunity from tort suits? Are there any claims which injured consumers can make that are not preempted?

A: No. It is evident that not all tort claims are preempted because over 100 cases are still pending against tobacco companies, including the well publicized Cipollone case now in its fourth month of trial. That case, by the way, is a continuation of the proceeding which resulted in the first Court of Appeals decision finding that preemption exists. The lower court in Cipollone found that several claims relating, for example, to pre-1966 warnings and advertising were not preempted as well as a claim that a safer cigarette should have been designed and marketed, although the latter claim has been dismissed on state law grounds.

Q: Are you claiming the Labeling Act preempts design defect claims [risk-utility/negligent design/research and testing claims, etc.]?

A: Whether a particular design defect claim is preempted will turn on the character of the particular claim at issue and on the state law governing the claim. If the claim in effect challenges the adequacy of Congress' warning or would effectively impose additional warning requirements on cigarette labeling or advertising, it is preempted.

Q: I understand that in his oral argument in front of the United States Court of Appeals for the 3rd Circuit, Professor Bator, arguing on behalf of several cigarette companies, made clear that a design defect claim would not be preempted. Are the cigarette companies now telling Congress and the courts something different?

A: I have inquired about that. I am told that Professor Bator did make that argument. Brown & Williamson doesn't necessarily agree. Whatever Professor Bator meant depends on the facts of the case and the particular state law at issue. In addition, Professor Bator made his argument before many of the preemption rulings were handed down. What is binding is what the courts have said since Professor Bator's argument and that is what we rely on.

Q: Are you saying that the cigarette companies are free to put cyanide in their cigarettes, either deliberately to improve taste or inadvertently to try to control pests, without liability?

A: It is absurd to suggest that manufacturers are going to try to injure their customers by introducing some acutely toxic substance into the product; but, obviously, if that did happen inadvertently, a tort claim based on contamination of the product would not be preempted. In addition, the Department of Health and Human Services is provided information on a yearly basis of all ingredients of cigarettes. If the information provided to HHS had shown a problem, it surely would have informed Congress.

Q: Are you saying that the companies may suppress unfavorable publicity or undercut the Surgeon General or by making public statements without liability?

A: As long as the companies do not exceed the limits of the First Amendment, there can be no liability. Congress has not yet attempted to deprive cigarette manufacturers of their First Amendment rights to disagree publicly with the Surgeon General.

Q: Can't cigarette companies now escape liability for deceptive advertising as a result of recent court cases?

A: No company, including a tobacco company, is immunized by the 1965 Act or any other law if it issues false or deceptive ads. The Federal Trade Commission has ample authority to challenge ads that it considers to be false or deceptive and has been extremely attentive to the content of cigarette advertising for decades. The FTC reports to Congress annually on the content of cigarette advertising. Congress itself has been directly involved in the regulation of cigarette ads and there are few products sold which must operate under as many restrictions regarding advertising as cigarettes.

Q: Doesn't the principle of federalism require more specific language of preemption before we cripple state tort systems?

A: Congress has in this case taken the unusual step of enacting an express preemption provision addressed to all "state law." There is no reason to believe that it meant to exclude common law. Otherwise, it could not have achieved its purpose of protecting the national health, as well as commerce in cigarettes, through a uniform warning.

Q: Can companies add warnings on their packages or in their advertising?

A: The Act is clear that the companies can't change "the" warning. Congress decided on a specific warning. I question whether it would be good to expand on that and that is how I understand the law. If Congress wants to change the warning it can do so. In fact, it has changed the warnings on two separate occasions.

Q: Are you saying that the states have no power to protect the health and welfare of its citizens with regard to smoking? Surely, state age restrictions and place prohibitions impact on commerce in cigarettes and, yet, under your broad view, are these preempted?

A: We do not contend that reasonable state restrictions on the age at which persons may buy cigarettes or the places where they may be smoked are preempted by the Labeling Act.

Q: Don't your arguments hinge on the assumption that state tort liability is really equivalent to prohibition or regulation? Aren't you completely free to comply with the Act while still remaining liable to injured parties under the theories we discussed?

A: The First Circuit dismissed such an argument as "disingenuous" and noted that a seller's choice of reaction to the imposition of tort liability is "akin to the free choice of coming up for air after being held under water." The Supreme Court and leading legal scholars have long recognized that damage awards have a regulatory impact and that tort awards may not be used to regulate activities in a manner which conflicts with federal statutory or regulatory objectives.

Q: Won't you simply raise prices to compensate your injured customers, thereby spreading the risk?

A: The tobacco companies are not insurance companies. We haven't gotten to the point yet where we have actuaries determine what we charge for our products.

Q: Why should not the Congress simply change its mind in this area?

A: Congress has that right. From a tort law standpoint, we respectfully submit that the case is one -- to quote a fellow native of Georgia -- of "If it ain't broke, don't fix it." In this regard, the proposals to reduce or eliminate the preemptive results that the courts have held to flow from the Labeling Act come not from legal scholars or insurance experts, but instead from critics and opponents of smoking. These proposals are not ones to fix or improve the tort law system. Rather, this effort is designed to regulate (in the mind of some advocates, even to the point of prohibiting) the practice of cigarette smoking. What the proponents are urging is the use of the tort system as a tool for social engineering -- a purpose for which it is ill-suited. Moreover, you are in effect destroying the uniform warning system mandated by Congress at the same time.

Q: Why should your industry enjoy this immunity when virtually all others do not?

A: The courts have not found that the industry enjoys an immunity based on the preemptive effect of the Labeling Act. Congress has decided, in light of the Surgeon General's Report of 1964, to require national health warnings on cigarettes. In doing so, it wisely recognized that 50 different state standards for health warnings, advertising and promotion would confuse the consumer and would not lead to the uniformity Congress sought. A necessary consequence of a federal standard in this area is preemption of state law, including state tort law which would force companies to adopt different standards for each state in which it markets. You cannot have a comprehensive, uniform, exclusive federal standard without preemption.

Q: Why shouldn't your product bear its full costs? Why should the rest of us pay for the harm caused by your product?

A: Liability under our system is based on fault. No jury has ever found that the tobacco companies are liable for an injury to a smoker. If there are such findings in the future, then we'll have to pay the judgment. Moreover, many products sold to the public are alleged to cause harm. For example, alcohol and red meat. Yet, no one suggests that red meat sellers pay for health care of persons with high blood pressure or the beer and whiskey manufacturers pay for the care of persons with liver disease. If the courts or Congress impose liability on tobacco companies, then the alcohol and cholesterol cases will be next.

Q: How can you claim that people are aware of the risks of smoking when you are busy telling everyone that there is no connection between smoking and cancer or the other diseases caused by smoking?

A: We do not claim there is no connection. We simply state that the connection has not been scientifically established. I have relatives who died of lung cancer and of emphysema who never smoked a day in their lives. The fact that causation has not been scientifically established does not mean that people are unaware that there are risks associated with smoking. The Surgeon General is constantly reminding the public of these risks. Only recently, he issued a report equating cigarettes with heroin. I think the Surgeon General has done a great disservice to this country by equating a behavior altering drug like heroin with cigarettes.

Q: Aren't you leaving victims of your product with no remedy for the injuries they receive from its use?

A: No. It is evident that not all tort claims are preempted because over 100 cases are still pending against tobacco companies, including the well publicized Cipollone case now in its fourth month of trial. That case, by the way, is a continuation of the proceeding which resulted in the first Court of Appeals decision finding that preemption exists. The lower court in Cipollone found that several claims relating, for example, to pre-1966 warnings and advertising were not preempted as well as a claim that a safer cigarette should have been designed and marketed, although the latter claim has been dismissed on state law grounds.

Q: You claim consumers are aware of the risks of smoking, but won't they be led to believe that new cigarettes, such as Reynolds' new, non-burning version, are safe?

A: I know nothing about the new Reynolds cigarette.

Q: Assuming that the Congress disagrees that preemption of the scope you describe was either provided by it or, if it is there, should continue, would the cigarette companies rather there be a single federal standard of liability or fifty state laws?

A: I personally believe in the ability of states to deal with legal issues where Congress has not occupied the field.

Q: Isn't H.R. 4543 inconsistent with the product liability bills otherwise pending in Congress?

A: I am not familiar with this bill.

Q: In 1986, the Congress decided not to preempt state-law-based liability claims in connection with smokeless tobacco products. Why should we differentiate between smokeless tobacco and cigarettes as far as preemption is concerned?

A: Without assessing whatever differences in the competing considerations may have been before the Congress at the two different times it considered the different products, it still makes little sense to add to the amount of litigation in our courts by eliminating preemption for cigarettes. If consistency is the overriding goal, for all the reasons advanced here, it makes more sense to rethink the decision with regard to smokeless tobacco.

Q: In light of what we have learned in the Cipollone trial about tobacco company misconduct, in particular their unlawfully holding safer cigarettes from the market, how can we trust these same companies to develop safer products when they have no legal liability for failure to do so?

A: I do not believe that the evidence in the Cipollone case shows that any company unlawfully withheld safer cigarettes from the market. In our market-based economy, companies develop and bring to market products when they determine that there is a demand for these products. Given all of the adverse publicity that surrounds the use of cigarettes, I have great confidence that in the highly competitive tobacco industry, the companies will scramble to bring to market any product which they believe will be widely accepted by the consumer.

Q: In light of what we have learned in the Cipollone trial about tobacco company misconduct, why should this Congress give any consideration at all to the well-being of the tobacco companies?

A: I was not aware that Congress was giving any consideration to the well-being of the tobacco companies.

Congress has decided that cigarettes are a lawful product and has drawn a balance between the sale of cigarettes and the information the public should have in deciding whether or not to smoke. Hundreds of thousands of jobs throughout the United States are in some way or another dependent on tobacco. Tobacco is a very important cash crop for many struggling farmers throughout the South. This Congress should be concerned about jobs in the tobacco industry just as it should be concerned about jobs in the steel or auto industries. Until Congress decides to prohibit the use and sale of cigarettes, it should work to ensure that the industry remains economically healthy.

Q: In light of the Surgeon General's Report issued on May 16, 1988 which determined that nicotine is just as addictive as heroin and other drugs, what is your position on new stronger cigarette labels?

A: To equate nicotine with heroin is outrageous. It does a great disservice to the people fighting the terrible drug problem in this country. The Surgeon General's Report trivializes the use of heroin and other hard drugs by comparing them to nicotine. For the Surgeon General to intimate that nicotine is so addictive that once "hooked," people cannot quit smoking flies in the face of the millions of former smokers who voluntarily and without assistance decided, for whatever reason, to quit smoking. I do not think the label should be changed to reflect the Surgeon General's recent report.