

A05-1359

STATE OF MINNESOTA  
IN COURT OF APPEALS

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Michael S. Dahl and David Scott Huber, Individually,  
and on Behalf of All Others Similarly Situated,

Appellants,

v.

R.J. Reynolds Tobacco Company and  
R.J. Reynolds Tobacco Holdings, Inc.,

Respondents.

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**BRIEF AND APPENDIX OF APPELLANTS**

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## STATEMENT OF THE ISSUE

DOES THE FEDERAL CIGARETTE LABELING AND ADVERTISING ACT, 15 U.S.C. §§ 1331-1339 PREEMPT APPELLANTS' STATE LAW CLAIMS WHICH SEEK RESTITUTION FOR RESPONDENTS' DECEPTIVE AND MISLEADING REPRESENTATIONS MADE TO MINNESOTA CONSUMERS IN THE SALE OF RESPONDENTS' "LIGHT" CIGARETTES?

The trial court held all of Appellants' claims under Minnesota's consumer protection statutes, as well as their claims of common law fraud and unjust enrichment, were expressly preempted.

15 U.S.C. § 1334

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992)

Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655 (Minn. 1989)

## STATEMENT OF THE CASE AND FACTS

The trial court, the Honorable Diana S. Eagon, ruled that Minnesota's consumer protection statutes cannot be employed to protect Minnesota consumers from tobacco companies' misrepresentations/deceit in the sale of "light" cigarettes because such actions are preempted by federal law. (Appellants' Appendix [A.] 1.) After purportedly holding each count of Plaintiffs' amended complaint "up to scrutiny," the trial court holds that "all of Plaintiffs' claims must be dismissed as pre-empted by the federal Labeling Act, 15 U.S.C. 1334." (A. 23.) Appellants challenge that ruling on appeal. (A. 67.) The material facts are as follows.

### **A. R.J. Reynolds Engaged in Deceptive Conduct.**

Respondents/Defendants R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco Holdings, Inc. (collectively referred to as R.J. Reynolds) manufacture, market and sell Camel Lights and Winston Lights "lowered tar" filtered cigarettes. (A. 26.) Appellants/Plaintiffs Michael S. Dahl and David Scott Huber (Plaintiffs) are Minnesota consumers who purchased these "light" cigarettes. (A. 25, 28.)

R.J. Reynolds has engaged in practices prohibited by Minnesota's consumer protection statutes. (A. 1.) The gravamen of Plaintiffs' lawsuit is that "[R.J. Reynolds'] representations that Camel Lights and Winston Lights cigarettes are 'light' (lowered tar and nicotine) [in relation to] regular cigarettes are deceptive and misleading and constitute unfair business practices." (A. 26-27.) R.J. Reynolds misled Minnesota

consumers into believing their light cigarettes would deliver lower levels of tar and/or nicotine, when R.J. Reynolds knew the truth to be otherwise. (A. 26-28.) In fact, R.J. Reynolds intentionally designed their products so that most smokers of their light cigarettes would receive as much, or more, tar and nicotine than if they had smoked regular cigarettes. (A. 26-28.) R.J. Reynolds' deceit was directed at and was designed to influence the public at large and smokers in particular to purchase its "light" product, which they did. (A. 32.)

Plaintiffs specifically assert in each count of their complaint that R.J. Reynolds has engaged in deceptive conduct by:

- Falsely and/or misleadingly representing that their product is "light" and/or delivers lowered tar and nicotine in comparison to regular cigarettes;
- Describing their product as "light" when the so-called lowered tar and nicotine deliveries depended on deceptive changes in cigarettes design and composition that dilute the tar and nicotine content of smoke per puff as measured by the industry standard testing apparatus, but not when used by the consumer;
- Intentionally manipulating the design and content of Camel Lights and Winston Lights cigarettes in order to maximize nicotine delivery while falsely and/or deceptively claiming lowered tar and nicotine. These manipulations resulted in the delivery of greater amounts of tar and nicotine when smoked under actual conditions than R.J. Reynolds present by use of the "light" description;
- Employing techniques that purportedly reduce machine measured levels of tar and nicotine in Camel Lights

and Winston Lights cigarettes while actually increasing the harmful biological effects, including mutagenicity (genetic and chromosomal damage) caused by the tar ingested by the consumer per milligram of nicotine.<sup>1</sup>

(A. 27-28.) The above-stated conduct of R.J. Reynolds violates Minnesota's Consumer Fraud Act, Minn. Stat. §§ 325F.68-.70 (A. 31); Minnesota's Unlawful Trade Practices Act, Minn. Stat. §§ 325D.09-.16 (A. 34); Minnesota's Deceptive Trade Practices Act, Minn. Stat. §§ 325D.43-.48 (A. 36); and Minnesota's False Statement in Advertisement Act, Minn. Stat. § 325F.67 (A. 37) (collectively Minnesota's Consumer Protection Statutes). It also constitutes common law fraud. (A. 38.)

Plaintiffs, as private attorney generals under Minn. Stat. § 8.31, subd. 3a, seek to recover as restitution the amounts paid under false pretenses to R.J. Reynolds by themselves and others similarly situated. (A. 34, 37, 40, 42.) Restitution, under Minnesota law, is a traditional equitable remedy which is awarded to plaintiffs to prevent unjust enrichment of the defendant and is an available remedy under Minnesota's Consumer Protection Statutes. (Id.; A. 40-41.)

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<sup>1</sup> Despite the above-stated allegations, the trial court nonetheless states that Plaintiffs "drafted their complaint as a failure by Reynolds to do certain things -- to warn or to disclose -- rather than accusing Reynolds of performing certain positive acts." (A. 22.)

**B. R.J. Reynolds Asserts Plaintiffs' Claims Are Federally Preempted and Plaintiffs' Response.**

In response, R.J. Reynolds asserts, among other things, that Plaintiffs' claims are preempted "by federal law and barred in whole or in part by the Supremacy Clause, Article VI, Section 2, of the United States Constitution and the Cigarette Labeling and Advertising Act, codified as amended at 15 U.S.C. § 1331 et seq. (Labeling Act)."

(A. 60.)

When Plaintiffs moved for class certification, R.J. Reynolds sought dismissal on federal preemption grounds. (A. 64.) R.J. Reynolds asserted Plaintiffs' claims are preempted in two ways. To the "extent they are based on claims of omission, non-disclosure and 'neutralization,'" they are expressly preempted by the Labeling Act. Plaintiffs' claims, according to R.J. Reynolds, are all impliedly preempted by Federal Trade Commission (FTC) regulations. (Defendant R.J. Reynolds Tobacco Company's Memorandum of Law in Support of Its Motion to Dismiss Based on Federal Preemption, p. 1.)

In response, Plaintiffs asserted that R.J. Reynolds' preemption defense is legally unfounded. (Plaintiffs' Response to Defendant's Motion of Dismissal Based on Federal Preemption.) Plaintiffs contend that the language of the Labeling Act and its interpretation by the United States Supreme Court does not support R.J. Reynolds' preemption defense. The preemptive scope of the Labeling Act has been defined by the United States Supreme Court in Cipollone v. Liggett Group, Inc., 505 U.S. 504, 523

(1992), and the Minnesota Supreme Court in Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655 (Minn. 1989) (although decided before Cipollone it utilizes the same analysis as Cipollone). As the United States Supreme Court has held, there is no indication that in passing and later amending the Labeling Act, Congress intended to eliminate the ability of the states to provide a remedy for false and deceptive statements on cigarette labels and in cigarette advertising. Both Cipollone and Forster recognized that claims relating to such misrepresentations are not preempted. As the United States Supreme Court said in Cipollone, these claims are not predicated on a duty based on smoking and health but on “the duty not to deceive.” Id. at 528-29. Cipollone also found “a duty not to conspire to commit fraud.” Id. at 530. Similarly, the Minnesota Supreme Court found tobacco claims relating to “a duty to tell the truth” were not preempted, since the Labeling Act was not intended “to be a license to lie.” Forster, 437 N.W.2d at 662.

Nor are Plaintiffs’ claims impliedly preempted by FTC regulations. The FTC has never regulated the conduct at issue in this case -- the deceptive use of the word “lights” or the phrase “lower tar” used in connection with the term “lights” and did not have the authority to do so.

**C. Trial Court Concludes All Claims Expressly Preempted.**

The trial court ruled that “[t]he presumption against pre-emption and the express pre-emption language in the statute together define the parameters of the permissible pre-emption.” (A. 10.) The question, according to the trial court, “is merely whether a

particular cause of action actually does impede on the Labeling Act and is, therefore, pre-empted.” (A. 11.) The trial court reasoned that “a lawsuit based on tobacco smoking which alleges it avoids pre-emption by not being about ‘smoking and health’ has a tough row to hoe.” (A. 12.) Based on the trial court’s interpretation of the express preemption language in the Labeling Act as applied to the allegations of Plaintiffs’ complaint, the trial court dismissed Plaintiffs’ lawsuit on federal preemption grounds. The trial court, in so holding, concludes:

[T]he underlying actions -- or omissions -- of which Plaintiffs complain substantively violate the pre-emption provision of the Labeling Act by seeking to impose liability on Reynolds for, in effect, advertising the health benefits of their “Light” cigarettes or not labeling their cigarette packages with more information about the health consequences of smoking those cigarettes. The Labeling Act spells out what health-related language must be on packages of cigarettes, “Lights” and regulars, and forbids a state, by positive enactment or a finding of liability for an omission, from imposing further requirements. Therefore all of Plaintiffs’ claims must be dismissed as pre-empted by the federal Labeling Act, 15 U.S.C. § 1334.

(A. 22-23.)

Plaintiffs’ motion for class certification was not reached as moot. (A. 2.)

Judgment of dismissal was entered on May 17, 2005. (A. 2.) Plaintiffs have brought this appeal, seeking reversal and reinstatement of their action. (A. 67.)

## ARGUMENT

### **PLAINTIFFS' CAUSES OF ACTION ARE NOT PREEMPTED UNDER FEDERAL LAW.**

#### **A. Standard of Review.**

Whether federal law preempts Plaintiffs' claims is a question of law. Martin ex rel. Hoff v. City of Rochester, 642 N.W.2d 1, 9 (Minn. 2002), cert. denied, 539 U.S. 957 (2003); In re Speed Limit for Union Pac. R.R. Through City of Shakopee, 610 N.W.2d 677, 682 (Minn. Ct. App. 2000). This question of law turns on the scope of 15 U.S.C. § 1334, the preemption provision of the Labeling Act. This Court owes no deference to the trial court's interpretation of the Labeling Act and its application to the facts of this case. Matter of Blilie, 494 N.W.2d 877, 881 (Minn. 1993).

#### **B. Procedural Posture Before the Trial Court.**

In seeking dismissal on preemption grounds, R.J. Reynolds' motion to dismiss did not cite to any rule of civil procedure and cryptically asserted that Plaintiffs "fail to state a claim upon which relief can be granted and that the moving defendant is entitled to judgment as a matter of law, there being no genuine issue of any material fact." (A. 65.)

In seeking dismissal, R.J. Reynolds did present materials outside the proceeding, which would make their motion one of summary judgment. Antone v. Mirviss, 694 N.W.2d 564, 568 (Minn. Ct. App. 2005). In an appeal from summary judgment, this Court determines whether there is a genuine issue of material fact for trial and whether the district court erred in its interpretation or application of the law. State by Cooper v.

French, 460 N.W.2d 2, 4 (Minn. 1990). In deciding whether to grant summary judgment, the trial court must view the facts in a light most favorable to the nonmoving party, and all doubts and factual inferences must be resolved against the moving party. Hopkins by LaFontaine v. Empire Fire and Marine Ins. Co., 474 N.W.2d 209, 212 (Minn. Ct. App. 1991).

However, the trial court treated R.J. Reynolds' motion as a Rule 12.02(e) motion to dismiss for failure to state a claim upon which relief can be granted. (A. 5-6.) It did so because R.J. Reynolds' assertions that this action is expressly preempted were bottomed on the allegations of Plaintiffs' amended complaint. In such circumstances, the dismissal motion is, in essence, made pursuant to Minn. R. Civ. P. 12.02. Johnson v. Urie, 405 N.W.2d 887, 891 (Minn. 1987). When the defendant's motion to dismiss is based on the allegations in plaintiff's complaint, this Court must treat the allegations in the complaint as true and must be viewed most favorably to the plaintiff. Wiegand v. Walser Automotive Groups, Inc., 683 N.W.2d 807, 811 (Minn. 2004); Abbariao v. Hamline Univ. School of Law, 258 N.W.2d 108, 111 (Minn. 1977). The general standard is that to survive a Rule 12 motion, a plaintiff need only set forth in the complaint "a legally sufficient claim for relief." Wiegand, 683 N.W.2d at 811. This Court will not uphold the dismissal "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." Id.

**C. The Labeling Act.**

Any discussion of preemption must begin with the language of the Labeling Act. In 1965 Congress enacted the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331-1339 (Supp. V 1965-69). The declaration of policy in the Labeling Act proclaims the legislation's purpose: "to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health[.]" According to the Labeling Act, the federal program was established so:

- (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
- (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331. Section 1333 of the Labeling Act makes it unlawful to manufacture or sell cigarettes which do not have conspicuously printed on the package the warning label:

"Caution: Cigarette Smoking May be Hazardous to Your Health."

In 1970 Congress amended the Labeling Act to change the mandated label to:

"Warning: The Surgeon General Has Determined that Cigarette Smoking is Dangerous to

Your Health."<sup>2</sup> In 1984, the message on the warning label was changed. Cigarette manufacturers were required to rotate four different warning labels on their packages of cigarettes. The four warnings were:

**SURGEON GENERAL'S WARNING:** Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

**SURGEON GENERAL'S WARNING:** Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

**SURGEON GENERAL'S WARNING:** Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.

**SURGEON GENERAL'S WARNING:** Cigarette Smoke Contains Carbon Monoxide.

15 U.S.C. § 1333(a)(1) (Supp. 1984). R.J. Reynolds placed these warnings on its cigarette packages.

Section 1334, the section of the 1965 Labeling Act entitled "Preemption," stated:

(a) Additional statements

No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(b) State regulations

No statement relating to smoking and health shall be required in the advertising of any cigarettes the

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<sup>2</sup> 15 U.S.C. § 1333 (1970). The 1970 amendment also gave the Federal Trade Commission authority to require the same warning label in cigarette advertising after July 1, 1971. See 15 U.S.C. § 1336 (1982).

packages of which are labeled in conformity with the provisions of this chapter.

- (c) Except as is otherwise provided in subsections (a) and (b) of this section, nothing in this chapter shall be construed to limit, restrict, expand, or otherwise affect, the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes. . .

15 U.S.C. § 1334 (1965) (amended 1984). In 1970, subparagraph (b) was amended to read:

- (b) State regulations

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) (1970) (emphasis added).

“[T]he pre-emptive scope of the 1965 [Cigarette Labeling and Advertising] Act and the 1969 Act is governed entirely by the express language in § 5 of each Act.”

Cipollone, 505 U.S. at 517. Based on this language, the United States Supreme Court ruled that “on their face, these provisions merely prohibited state and federal rulemaking bodies from mandating particular cautionary statements on cigarette advertisements.” Id. at 518.

**D. No Governmental Authority Has Ever Approved, Authorized or Required R.J. Reynolds' Use of Light or Low Tar Descriptors.**

No governmental authority has ever authorized the fraudulent use of descriptive terms such as "light," "low tar" or "lowered tar and nicotine" in the sale of cigarettes. The FTC's jurisdiction over advertising and testing of tar and nicotine content of cigarettes arises from the Federal Trade Commission Act. 15 U.S.C. § 45(a) declares unlawful "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce[.]" Section 45(a) also grants the FTC broad authority to prevent unfair and deceptive acts, including unfair and deceptive advertisements for products such as tobacco. See F.T.C. v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 40 n.2 (D.C. Cir. 1985). The Labeling Act plays no role in either limiting or expanding the FTC's authority to regulate unfair or deceptive cigarette advertising pursuant to § 5(a) of the FTC Act. See 15 U.S.C. § 1336.

In 1970, the FTC proposed a trade regulation rule that would have required disclosure of tar and nicotine ratings in cigarette advertising. See Federal Trade Commission, Report to Congress, p. 388 (Dec. 31, 1970). (A. 130.) In response, R. J. Reynolds and other tobacco companies voluntarily agreed to disclose tar and nicotine levels as determined by the Cambridge Filter Method. Because the tobacco companies voluntarily agreed to such disclosure, the FTC indefinitely suspended its rulemaking

proceeding.<sup>3</sup> See Federal Trade Commission, Report to Congress, pp. 388-89 (Dec. 31, 1970). (A. 130-31.) See also F.T.C. v. Brown & Williamson, 778 F.2d 35, 37 (D.C. Cir. 1985):

In 1970, the FTC proposed a formal rulemaking in order to promulgate a Trade Regulation Rule requiring disclosure of FTC tar and nicotine ratings in cigarette advertising. Immediately following this proposal, five leading cigarette companies, including B & W, agreed among themselves to a voluntary disclosure plan (the "1970 agreement"). This plan provided that the cigarette manufacturers would disclose the tar and nicotine figures in all advertising for their cigarettes according to the most recently published Commission test results. Upon accepting the 1970 agreement, the FTC indefinitely suspended its rulemaking proceeding.

Id. Following the voluntary agreement, the FTC never enacted any rule requiring tobacco companies to disclose tar and nicotine levels in advertising. Nor has the FTC adopted any regulation defining "lights" or any other "low tar" descriptors. (Cigarette Testing: Request for Public Comment, 62 Fed. Reg. 48158, 48163 (Sept. 12, 1997)) ("[T]here are no official definitions for these terms.") Any such disclosures were and are the result of the tobacco companies' voluntary agreements -- agreements which are not enforced by the FTC.

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<sup>3</sup> As the FTC more recently stated, the tobacco companies' voluntary agreement "remains in effect today, and it forms the basis for current disclosure of tar and nicotine yield." See Cigarette Testing: Request for Public Comment, Federal Trade Commission, 62 Fed. Reg. 48158 (Sept. 12, 1997).

**E. There Is Presumption Against Preemption.**

A party seeking federal preemption bears a heavy burden. The basic presumption is that Congress did not intend to displace state law, which presumption is even stronger in the traditional state-law field of consumer protection.

**1. The Presumption Against Preemption.**

The federal preemption doctrine originates in the Supremacy Clause, Article VI, Clause 2 of the United States' Constitution:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Supremacy Clause provides constitutional authority for the proposition that federal and state conflicts of law are resolved in favor of federal law. See M'Culloch v. State of Maryland, 17 U.S. 316, 427 (1819); Cipollone, 505 U.S. at 516. Preemption is said to be "express" if a federal statute explicitly addresses the domain of state law that is preempted, and "implied" if the structure and purpose of federal law, but not its actual words, preempt state law. See id. at 516.

The Supremacy Clause is restricted by other principles implicit and explicit in the constitutional plan. In particular, the Tenth Amendment provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

In light of this constitutional imperative of federalism, a party seeking preemption of state law bears a heavy burden. There is a strong presumption against preemption that may be overcome only by “clear and manifest” contrary congressional intent. Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 471 U.S. 707, 715 (1985); see also Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252 (1994); Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 605, 611 (1991).

Thus, “[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.” Maryland v. Louisiana, 451 U.S. 725, 746 (1981). Put differently, “[p]re-emption of state law by federal . . . regulation is not favored ‘in the absence of persuasive reasons -- either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.’” Chicago and N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981), (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963), reh’g denied).

Moreover, the presumption against preemption is even stronger where “Congress [has] legislated . . . in a field which the States have traditionally occupied, [involving] the historic police powers of the States.” Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). In other words, the presumption is that state and local regulation of health and safety matters can constitutionally coexist with federal regulation because “the regulation of health and safety matters is primarily, and historically, a matter of local concern.”

Hillsborough County, 471 U.S. at 719. The presumption against preemption is at its strongest when the question is, as here, whether Congress intended to prohibit the states from protecting their citizens through the exercise of traditional and core police powers. Cipollone, 505 U.S. at 516, 518. See also Hawaiian Airlines, 512 U.S. at 252; CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993). See also, Medtronic, Inc. v. Lohr, 518 U.S. 470, 484-86 (1996).

Thus, in considering questions of federal preemption of state law, courts must adhere to two critical presumptions. See Medtronic, Inc., 518 U.S. at 485. A preemption analysis “start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.” Rice, 331 U.S. at 230.

The United States Supreme Court has “long presumed that Congress does not cavalierly pre-empt state-law causes of action,” especially where “Congress has ‘legislated . . . in a field which the States have traditionally occupied.’” Medtronic, 518 U.S. at 485 (quoting Rice, 331 U.S. at 230). Consumer protection is plainly such a “traditional” state-law field. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984), reh’g denied (“Congress intended to stand by both concepts [of federal regulation and state damage liability] and to tolerate whatever tension there was between them. We can do no less”). See also, e.g., New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654-55 (1995) (in areas of traditional state

regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention “clear and manifest” (quoting Rice, 331 U.S. at 230)); see also Medtronic, 518 U.S. at 485; Hillsborough County, 471 U.S. at 719; Metropolitan Life Ins. Co. v. Massachusetts Travelers Ins. Co., 471 U.S. 724, 740 (1985).

Any doubt about congressional intent in construing the scope of § 1334 must be resolved against preemption. As the Supreme Court noted in its most recent federal preemption discussion in Bates v. Dow Agrosiences LLC, \_\_\_ U.S. \_\_\_, 125 S.Ct. 1788, 1801 (2005), courts “have a duty to accept [a] reading that disfavors pre-emption.”<sup>4</sup> “[B]ecause the States are independent sovereigns in [the] federal system,” the Supreme Court has “long presumed that Congress does not cavalierly pre-empt state-law causes of action.” Id. (quoting Medtronic, 518 U.S. at 485).

Second, courts deciding preemption issues must be mindful that the scope of a statute's preemption provision rests primarily on a fair understanding of congressional purpose, inasmuch as “the purpose of Congress is the ultimate touchstone of pre-emption analysis.” Cipollone, 505 U.S. at 516 (citation omitted). These presumptions, considered together, make it clear that where Congress has provided an express preemption clause, courts must construe it narrowly to effectuate congressional purpose, especially if the harm alleged relates to areas traditionally within states' remedial purview. See Cipollone,

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<sup>4</sup> Bates was decided the day before oral argument and to Plaintiffs' recollection the case was not brought to the trial court's attention.

505 U.S. at 518. When federal laws do preempt conflicting state laws, state laws are preempted only to the extent they are in conflict with federal law. Dalton v. Little Rock Family Planning Services, 516 U.S. 474, 476 (1996); DeCanas v. Bica, 424 U.S. 351, 357-58 n.5 (1976).

Further, in this case, where the allegedly preemptive federal regulatory scheme does not itself provide a damages remedy, preemption would leave injured individuals without any state or federal remedy. In similar circumstances, the Supreme Court has ascribed preemptive intent to Congress only in the most compelling circumstances. See Medtronic, 518 U.S. at 487 (argument that “Congress effectively precluded state courts from affording state consumers any protection from injuries resulting from defective medical device” would be “implausible”); English v. General Elec. Co., 496 U.S. 72, 87-90 (1990); Silkwood, 464 U.S. at 251.

## **2. Preemption and the Federal-State Balance.**

The presumption against preemption is not based on mere precedential idiosyncrasies. Rather, it arises directly from the “federal-state balance” fundamental to the constitutional plan. Hillsborough County, 471 U.S. 707; Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977), reh’g denied; see also P. Corboy & T. Smith, Federal Preemption of Product Liability Law: Federalism and the Theory of Implied Preemption, 15 Am. J. Trial Advoc. 435, 444-57 (1992) (detailed analysis placing the presumption against preemption in the context of the Tenth Amendment and federalist principles).

Thus, the Supreme Court's Supremacy Clause jurisprudence is "an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." Gregory v. Ashcroft, 501 U.S. 452, 461 (1991).

The presumption against preemption works in tandem with another aspect of the Supreme Court's federalism jurisprudence: the Eleventh Amendment. That Amendment provides that states, and state officers in certain circumstances, are immune from suit in federal court. See Edelman v. Jordan, 415 U.S. 651 (1974), reh'g denied. Congress may override that judgment pursuant to its legislative powers under the Fourteenth Amendment. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). However, the Supreme Court has insisted that Congress do so in unmistakably clear terms (referred to as the "plain-statement rule") and has enforced that edict very strictly. See, e.g., Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238-46 (1985), reh'g denied.

Because the same principles of federalism supporting Eleventh Amendment jurisprudence also undergird Supremacy Clause jurisprudence, the plain-statement rule should be as stringently enforced in the preemption context as in the Eleventh Amendment context. See Gregory, 501 U.S. at 460-67<sup>5</sup>; Wisconsin Public Intervenor,

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<sup>5</sup> As the Court noted in Gregory, 501 U.S. at 464, "[T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which Garcia relied to protect states' interests" (quoting L. Tribe, American Constitutional Law § 6-25, p. 480 (2d ed. 1988)).

501 U.S. at 607-09; accord Cipollone, 505 U.S. at 533 n.1 (Blackmun, J., joined by Kennedy and Souter, JJ., concurring in part, concurring in the judgment in part, and dissenting in part) (suggesting identity of Eleventh Amendment plain-statement rule and “clear and manifest” preemption standard). A genuine plain-statement rule not only honors principles of federalism, but helps the legislative branch and the judicial branch maintain their appropriate roles by requiring Congress to say precisely what it means:

Congress gains little from writing ambiguous statutes. Particularly when it legislates in an area affected by state tort law, Congress has much to gain by making explicit its intent to preempt state law. Namely, clarity achieves certainty in statutory application and helps to avoid litigation over legislative meaning. Even more fundamentally, requiring that Congress speak clearly will help ensure that its decision to preempt is the product of a deliberate policy choice. Our system of federalism demands that interference with states’ policy decisions to give their citizens tort remedies should be the product of judgment and careful balancing, rather than an unintended result of congressional inattention or imprecision.

Moreover, unlike judicial interpretations of constitutional principles that can be overturned only by the Supreme Court or constitutional amendment, Congress can overrule judicial preemption decisions. Thus, if Congress disagrees with a judicial refusal to find preemption, it can rewrite the statute to make preemption explicit. This may increase pressure on Congress to respond to the current “tort reform” campaign, as special interest groups may seek to ensure that express preemption clauses are incorporated into regulatory legislation. Nonetheless, the legislature is precisely where decisions regarding state versus federal policy should lie in the first instance.

Betsy J. Grey, Make Congress Speak Clearly: Federal Preemption of State Tort Remedies, 77 B.U. L. Rev. 559, 627 (1997); see also Jones, 430 U.S. at 525 (presumption against preemption “provides assurance that the ‘federal-state balance’ will not be disturbed unintentionally by Congress or unnecessarily by the courts”) (quoting United States v. Bass, 404 U.S. 336, 349 (1971)).

Accordingly, to the extent there is ambiguity as to whether the Labeling Act preempts the claims at issue here, that ambiguity is to be and must be resolved in Plaintiffs’ favor.

**F. Plaintiffs’ State-Law Claims Are Not Preempted By the Labeling Act.**

**1. The Text of the Labeling Act Does Not Compel Preemption of Plaintiffs’ Claims.**

As with any statute, “analysis of the scope of the preemption statute must begin with its text.” Medtronic, 518 U.S. at 484. Analysis “must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress’ pre-emptive intent,” CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993). Again, § 5(b) of the Labeling Act 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). Although the Labeling Act says nothing about R.J. Reynolds’ “Lights” labeling statement, for R.J. Reynolds to prevail on its preemption defense,

Congress would have to have intended the Labeling Act's preemption provision to bar Plaintiffs' state-law consumer protection misrepresentation and fraud-type claims. The plain language of § 5(b) and the two United States Supreme Court cases construing it mandate reversal of the trial court's decision.

To begin with, by its plain language, § 5(b) applies only to state-law requirements or prohibitions with respect to advertising and promotion of cigarettes. It does not preempt any state-law requirements with respect to false or fraudulent package labels. The Labeling Act addresses cigarette packages in § 5(a), which has a much narrower reach than § 5(b): "No statement relating to smoking and health, other than the statement required by § 1333 of this Title shall be required on any cigarette package." 15 U.S.C. § 1334(a). This provision, unchanged since 1965, "merely prohibit[s] state and federal rulemaking bodies from mandating particular cautionary statements on cigarette labels . . . ." Cipollone, 505 U.S. at 518. Plaintiffs do not claim that statements in addition to those required by federal law should have appeared on R.J. Reynolds' cigarette labels. Thus, the Court need look no further to conclude that the Labeling Act does not preempt Plaintiffs' consumer protection claims with respect to use of such terms as "Lights," "low tar," and "lowered tar and nicotine" on cigarette package labels.

**2. United States Supreme Court Has Held Misrepresentation Claims Are Not Preempted.**

Moreover, the United States Supreme Court has already considered the preemptive effect of § 5(b) on state-law claims and held that misrepresentation claims

indistinguishable from those at issue here are not preempted. In Cipollone v. Liggett Group, Justice Stevens' plurality opinion held that the Labeling Act preempted the plaintiff's state-law duty-to-warn claims, but not the fraud claims. In arriving at this conclusion, the plurality construed § 5(b) by looking to the language of the preemption provision, the statute as a whole, and the purposes of the Labeling Act.

Cipollone, unlike the case before this Court, was a personal injury case. Rose Cipollone developed lung cancer because she smoked cigarettes. 505 U.S. at 509. Her complaint relied on theories of strict liability, negligence, express warranty and intentional tort which were divided into five categories.

Cipollone's "design defect" claims alleged that the cigarettes were defective because the manufacturers failed to use a safer alternative design. The "failure to warn" claims alleged the cigarettes were "defective as a result of the [cigarette manufacturers'] failure to provide adequate warnings of the health consequences of cigarette smoking" and that they were "negligent in the manner [that] they tested, researched, sold, promoted and advertised their cigarettes." It was asserted that the cigarette manufacturers had "expressly warranted that smoking the cigarettes which they manufactured and sold did not present any significant health consequences," thereby breaching an express warranty. The "fraudulent misrepresentation" claims alleged that the cigarette manufacturers had willfully "through their advertising, attempted to neutralize the [federally mandated] warnin[g]" labels and that they possessed, but had "ignored and failed to act upon,"

medical and scientific data, indicating that “cigarettes were hazardous to the health of consumers.” Plaintiff’s “conspiracy to defraud” claims alleged that the cigarette manufacturers conspired to deprive the public of medical and scientific data. Id. at 509-10. Defendants contended all these claims were preempted by the Labeling Act.

The Supreme Court considered each of the claims at issue and held the nature of the inquiry must be

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 or promotion,” giving that clause a fair but narrow reading. . . . Each phrase within that clause limits the universe of common-law claims preempted by the statute.

Id. at 524. The Supreme Court found preemption only where the claims would have “require[d] a showing that [the tobacco company’s] post-1969 advertising or promotions should have included additional, or more clearly stated, warnings.” 505 U.S. at 524.<sup>6</sup> Thus, Cipollone’s failure to warn claims were preempted by § 5 of the Labeling Act because they would require additional statements on cigarette packages. 505 U.S. at 524.

In Cipollone, however, the United States Supreme Court specifically held that claims involving a defendant’s voluntary dissemination of additional information --

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<sup>6</sup> That Congress did not include a savings clause in the Labeling Act as it had in other statutes meant only that “Congress was neither pre-empting nor saving common law as a whole -- it was simply pre-empting particular common-law claims, while saving others.” Id. at 524 n.22. (emphasis added).

including those based on fraudulent misrepresentations -- were not preempted. Id. Under Cipollone a state may impose liability, even with respect to advertising or promotion of cigarettes, for violations of duties arising under “more general obligation[s].” Id. at 528-29.

[P]etitioner’s fraudulent-misrepresentation claims that do arise with respect to advertising and promotions (most notably claims based on allegedly false statements of material fact made in advertisements) are not pre-empted by § 5(b). Such claims are predicated not on a duty “based on smoking and health” but rather on a more general obligation -- the duty not to deceive.

Id. at 528-29.

In declining to preempt plaintiff’s fraud-based claims, the Supreme Court also found its reading of the Labeling Act’s phrase “based on smoking and health” to be wholly consistent with the purposes of the 1969 Labeling Act:

State-law prohibitions on false statements of material fact do not create “diverse, nonuniform, and confusing” standards. Unlike state-law obligations concerning the warning necessary to render a product “reasonably safe,” state-law proscriptions on intentional fraud rely only on a single, uniform standard: falsity. Thus, we conclude that the phrase “based on smoking and health” fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements. Accordingly, petitioner’s claim based on allegedly fraudulent statements made in respondents’ advertisements is not pre-empted by § 5(b) of the 1969 Act.

Id. at 529.

Using the same reasoning, the Supreme Court held plaintiffs' claims of a cigarette manufacturer's conspiracy to misrepresent material facts concerning the health hazards of smoking were not preempted because they were predicated on "a duty not to conspire to commit fraud." Id. at 530. The Supreme Court referenced in a footnote the district court's description of the evidence of conspiracy. Id. at 530 n.28. The district court states:

Evidence presented by [Cipollone], particularly that contained in the documents of defendants themselves, indicates . . . that the industry of which these defendants were and are a part entered into a sophisticated conspiracy. The conspiracy was organized to refute, undermine, and neutralize information coming from the scientific and medical community and, at the same time, to confuse and mislead the consuming public in an effort to encourage existing smokers to continue and new persons to commence smoking.

Cipollone v. Liggett Group, Inc., 683 F. Supp. 1487, 1490 (D. N.J. 1988).

With two exceptions, courts since Cipollone have consistently applied the decision to preclude federal preemption defenses in fraud/misrepresentation tobacco cases. See In re Simon II Litig., 211 F.R.D. 86, 137-44 (E.D.N.Y. 2002), reconsideration denied (fraud and misrepresentation based claims not preempted); Burton v. R.J. Reynolds Tobacco Co., 884 F. Supp. 1515, 1521 (D.Kan. 1995) (holding plaintiff's misrepresentation and fraudulent concealment claims were not preempted under Cipollone); Castano v. American Tobacco Co., 870 F. Supp. 1425, 1432-33 (E.D. La. 1994), reconsideration denied (holding that claims based on affirmative misrepresentations are not preempted);

Whiteley v. Philip Morris Inc., 117 Cal. App. 4th 635, 674-77 (2004) (same);  
Chamberlain v. American Tobacco, 1999 Lexis 22636 \*15-20 (N.D. Ohio 1999) (same)  
(A. 83). See also Filkin v. Brown & Williamson Tobacco Corp., 1999 Lexis 12469 \*2  
(N.D. Ill 1999) (finding plaintiff's fraudulent concealment claim was not preempted  
because it "does not derive from a 'duty based on smoking and health' but rather on a  
more general obligation -- the duty not to deceive") (A. 136); Miles v. Philip Morris, No:  
00 L 0112 (3rd Judicial Cir., Ill, 2003) (denying cigarette manufacturer's federal  
preemption defense in "lights" cigarette class action based on violation of Illinois  
consumer fraud statutes) (A. 107); Scott v. American Tobacco Co., 959 F. Supp. 340, 344  
(E.D. La. 1996) (plaintiffs' conspiracy claim in this antitrust count is similarly not  
preempted by the 1969 Act). See also, Wright v. Brooke Group Ltd., 114 F. Supp. 2d 797  
(N.D. Iowa 2000). As the court noted there:

Although the court does not understand defendants to be arguing that the Labeling Act preempts plaintiffs' fraudulent misrepresentation claims, which are based on allegations that defendants included false statements in their advertising and promotional materials, assuming defendants did make this argument, preemption would not apply to these claims because, as indicated previously, the Supreme Court clearly stated that "such claims are predicated not on a duty 'based on smoking and health' but rather on a more general obligation -- the duty not to deceive" and that the Labeling Act "does not encompass the more general duty not to make fraudulent statements."

Id. at 826 (quoting Cipollone, 505 U.S. at 529).

**3. Under the Law As established in Cipollone and Forster and Under the Facts of This Case, None of Plaintiffs' Claims Are Preempted.**

**a. Plaintiffs' Claims Are All Based On the General Duty Not to Deceive.**

Plaintiffs do not challenge the federal warnings, do not allege R.J. Reynolds' labels should have provided additional or different warnings, and do not complain that R.J. Reynolds' affirmative statements neutralized or undercut the federal warnings. Simply put, Plaintiffs' complaint is unrelated to the congressionally mandated warnings. Rather, their complaint is that R.J. Reynolds' description of their cigarettes as "Lights" or "low tar," like the non-preempted fraud and misrepresentation claims in Cipollone, were intended to deceive -- and did deceive -- Plaintiffs to believe "light" products were less harmful than other cigarettes to induce their purchase.

Plaintiffs do not allege R.J. Reynolds' misrepresentations caused them to believe their products were safe or that the federal warnings were not applicable, only that "Lights" cigarettes were less likely than other cigarettes to cause adverse health effects which induced their purchase. Plaintiffs seek to proceed under Minnesota's private attorney general statute whose very purpose is to encourage private parties to police unlawful trade practices affecting the public interest. Ly v. Nystrom, 615 N.W.2d 302, 313-14 (Minn. 2000). The Labeling Act does not preempt Plaintiffs' consumer protection claims, all based on the general "duty not to deceive." Accord Forster, 437 N.W.2d at 662 ( "If the cigarette manufacturer chooses to provide further information on smoking as it

relates to health, these statements, if they meet the requirements for a common law misrepresentation action, would be actionable”). Under Cipollone, Plaintiffs’ claims are not preempted.

If the trial court’s ruling is allowed to stand, cigarette manufacturers are free to represent their products to be of a certain quality or to contain certain attributes that they do not, and the State of Minnesota can do nothing in response. Under the trial court’s ruling, cigarette manufacturers are given license to lie. As the trial court would have it, as long as a tobacco manufacturer puts the surgeon general’s warning on its packages, it is under no obligation not to make other deceptive statements on its packages. So while a petroleum company which represents to consumers that it is selling two different grades of gasoline when in fact all its gas is the same is subject to Minnesota’s Consumer Protection Statutes, a cigarette manufacturer that represents that its light cigarettes are significantly different from its regular cigarettes when they are not is not subject to Minnesota’s Consumer Protection Statutes. That simply is not and cannot be the law.

The gravamen of Plaintiffs’ action rests on voluntarily made nonmandated representations R.J. Reynolds placed on its cigarette packages in addition to the congressionally mandated package warnings. By voluntarily placing additional, nonmandated words on their cigarette packages, R.J. Reynolds made specific, false representations to “lights” purchasers. R.J. Reynolds promised purchasers that its cigarettes were “lights.” Plaintiffs’ claims impose no additional or different labeling

requirements on R.J. Reynolds. They would merely punish R.J. Reynolds for their misrepresentations. A judgment for Plaintiffs would require R.J. Reynolds to provide restitution to Minnesota consumers. It would not require R.J. Reynolds to take any action inconsistent with federal requirements. Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 185-86 (1988) (“the effects of direct regulation on the operation of federal projects are significantly more intrusive than the incidental regulatory effects of such an additional award provision. Appellant may choose to disregard Ohio’s safety regulations and simply pay an additional workers’ compensation award if an employee’s injury is caused by a safety violation”).

**b. The Trial Court’s Analysis Is Contrary to United States Supreme Court Precedent.**

**i. The Trial Court Mistakenly Relied on Lacey v. Lorillard Tobacco Company.**

It appears that the trial court based its decision, in part, on R.J. Reynolds’ argument that Plaintiffs’ claims were preempted because a decision ultimately in Plaintiffs’ favor would induce R.J. Reynolds to delete the offending language it voluntarily placed on its packaging. (A. 9.) Relying on a federal district court case -- Lacey v. Lorillard Tobacco Co., Inc., 956 F. Supp. 956, 962 (N.D. Ala. 1997) (A. 9, 11, 13) -- and not on United States Supreme Court authority, the trial court mistakenly ruled:

A requirement that Reynolds take certain actions so as not to be in violation of [Minn. Stat. § 325F.69] would amount to state imposition of a de facto labeling requirement. If, as alleged, the use of the word “Lights” in the cigarette

packaging creates the “false” or “misleading” impression that leads to liability under the statute, then Reynolds’ only recourse would be to modify their advertising, promotion or labeling in some way.

(A. 15; emphasis in the original.)

In Lacey, plaintiff’s claim was based on the fact that the defendant should have disclosed cigarette ingredients and is clearly distinguishable to the case at hand. However, the federal district court specifically noted that “false misstatements of fact do not appear to be preempted.” 956 F. Supp. at 962. In Lacey, no duty other than “a duty based on smoking and health” was alleged, no duty voluntarily undertaken was alleged and no conduct unrelated to advertising or promotion was alleged.

**ii. The Trial Court’s Analysis In This Case is Contrary to Cipollone.**

The trial court’s analysis in the instant case ultimately cannot be squared with the United States Supreme Court’s analysis in Cipollone. The trial court fundamentally ignored, in undertaking its analysis, the United States Supreme Court’s teaching that the proper analysis focuses on the legal duty underlying each state law claim, and not on the open ended inquiry into whether the state remedy might somehow induce a tobacco company to make changes to the parts of its label which are not congressionally mandated. See Cipollone, 550 U.S. at 523-30 (plurality opinion); Medtronic, 518 U.S. at 492-502. But the trial court states that “[t]he inquiry is not what the statute under which Plaintiff chooses to sue is ‘about’ but whether avoiding liability under the statute would

impose such duty to act in violation of the Labeling Act.” (A. 17.) In Cipollone, the United States Supreme Court analyzed each cause of action to determine its state law duty predicate. The trial court rejects this analysis stating, “[t]he Court must determine whether the duty the cigarette manufacturers are alleged to have violated ‘relates to’ advertisement or promotion of smoking and health, regardless of the language of the statute under which the duty is found.” (A. 17.)

If one were to apply the trial court’s “inquiry” to the Cipollone claims, the trial court would reach a result different from that of the Supreme Court. For example, the Supreme Court holds that a claim alleging a conspiracy among cigarette manufacturers to misrepresent or conceal material facts concerning the health hazards of smoking is not preempted because “the predicate duty underlying this claim is a duty not to conspire to commit fraud.” 505 U.S. at 530. But the trial court would apparently find such a claim preempted based on its analysis that these allegations are in the end “health-based claims” and if found liable, “Reynolds’ only recourse would be to modify their advertising, promotion, or labeling in some way” because any “communication by a cigarette manufacturer with the public constitutes ‘advertising or promotion.’” (A. 12, 14, 15.)

The trial court cites Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001). (A. 12.) But Lorillard Tobacco Co., which is the other United States Supreme Court case defining the preemptive scope of the Labeling Act, does not support this conclusion.

In Lorillard, the United States Supreme Court considered a Massachusetts regulation specifically intended to address youth smoking and directed solely at cigarette advertising and promotion. Although the Supreme Court held that § 5(b) of the Labeling Act preempted the Massachusetts law, it reiterated that generally applicable laws -- laws not aimed specifically at tobacco products -- are not preempted by § 5(b). Id. at 552 (advertising restrictions “that apply to cigarettes on equal terms with other products appear to be outside the ambit of the pre-emption provision”).

Consistent with Cipollone’s holding with respect to state-law claims based on a “duty not to deceive,” Lorillard held such state laws were not “based on smoking and health,” and thus were outside the scope of § 5(b) and not preempted. Id. Here, Plaintiffs’ claims are based on Minnesota’s Consumer Protection Statutes -- generally applicable laws “that apply to cigarettes on equal terms with other products.” Id. Accordingly, they are not preempted.

**c. Minnesota’s Consumer Protection Statutes Concern Deceptive Practices Generally and Do Not Target Cigarette Companies.**

The trial court suggests that the concern underlying the duty not to deceive in this case is a concern based on smoking and health. (A. 12.) But Minnesota’s Consumer Protection Statutes concern deceptive practices generally and do not target cigarette companies, nor are the statutes’ duties and responsibilities based on smoking and health. The distinction made in Cipollone is that a law regulating conduct involving a duty not to

deceive by misstating the nature and use of a product is fundamentally different than a law or regulation specifically predicated on a duty based on smoking and health.

Minnesota's Consumer Protection Statutes certainly do not target cigarette advertising. Minnesota's Consumer Protection Statutes were enacted to protect Minnesota consumers from unlawful and fraudulent business practices without regard to the type of product at issue. See Church of the Nativity of Our Lord v. WatPro, Inc., 491 N.W.2d 1, 10 (Minn. 1992), overruled on other grounds (Simonett, J., concurring in part and dissenting in part) (stating that Consumer Fraud Act is aimed "at deceptive practices to which the consumer public is prey"). The Minnesota Consumer Protection Statutes are remedial statutes and are to be broadly construed to protect the consuming public. State by Humphrey v. Philip Morris Inc., 551 N.W.2d 490, 496 (Minn. 1996) (stating that consumer protection statutes "are generally very broadly construed to enhance consumer protection"); State by Humphrey v. Alpine Air Products, Inc., 490 N.W.2d 888, 892 (Minn. Ct. App. 1992), aff'd, 500 N.W.2d 788 (1993) (holding "consumer protection statutes are remedial in nature and are to be construed liberally in favor of protecting consumers").

Therefore, under Cipollone, the state's consumer protection statutes may be applied to cigarette advertising. See also Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore, 63 F.3d 1318, 1324 (4th Cir. 1995), vacated and remanded, 518 U.S. 1030 (1996), aff'd on remand, 101 F.3d 332 (4th Cir. 1996) (noting

that if preemption provision were “to be interpreted so broadly, the Supreme Court in Cipollone could not have allowed the continued prosecution of common law claims for breach of express warranty, misrepresentation, intentional fraud, and conspiracy -- all of which relate generally to the effects on health of promoting the sale of cigarettes”) (citation omitted).

**d. The Heart of This Lawsuit is R.J. Reynolds’ Representations That “Camel Lights and Winston Lights Cigarettes Are ‘Light’ (Lowered Tar and Nicotine) [in Relation to] Regular Cigarettes, Are Deceptive and Misleading and Constitute Unfair Business Practices.”**

R.J. Reynolds had argued that “[t]he heart of this lawsuit is plaintiffs’ contention that they were unaware of the true health risks posed by Reynolds’ ‘lights’ cigarettes and that Reynolds should have warned them of these health risks.” (Defendant R.J. Reynolds Tobacco Company’s Memorandum of Law in Support of Its Motion to Dismiss Based on Federal Preemption, p. 25.) In granting preemption the trial court relies on Johnson v. Brown & Williamson Tobacco Corp., 122 F. Supp. 2d 194, 198 (D. Mass. 2000), which was a smoker’s injury/tobacco products liability case in which the plaintiff had charged that the cigarette manufacturer was negligent by breaching its duty to warn decedent of the health risks of smoking. (A. 15.)

Unlike Johnson, the case before this Court concerns claims that R.J. Reynolds’ false and deceptive misrepresentations violated Minnesota Consumer Protection Statutes. As previously stated, the heart of Plaintiffs’ lawsuit is found in paragraph 13 of Plaintiffs’

second amended complaint -- a paragraph incorporated by reference into each of Plaintiffs' other counts. (A. 26-27, 31, 34, 36, 37, 38, 40.) That is: "[R.J. Reynolds'] representations that Camel Lights and Winston Lights cigarettes are 'light' (lowered tar and nicotine) [in relation to] regular cigarettes are deceptive and misleading and constitute unfair business practices." (A. 26-27.) The "heart" of Plaintiffs' suit is discussed more fully at paragraphs 15 and 16 of Plaintiffs' second amended complaint which is also incorporated into every count of Plaintiffs' amended complaint. (A. 27-28, 31, 34, 36, 37, 38, 40.) Based on the above-stated conduct, R.J. Reynolds violated Minn. Stat. § 325F.69; Minn. Stat. § 325D.13, subd. 1; Minn. Stat. § 325D.44 and Minn. Stat. § 325F.67. All of these statutes impose duties not to commit fraud, not to lie and not to deceive.<sup>7</sup>

Minnesota's consumer fraud statute specifically provides that the "act, use or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement, or deceptive practice, with the intent that others rely thereon in connection with the sale of merchandise" is an unlawful practice. (A. 31-32.) Minn. Stat.

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<sup>7</sup> The same is obviously true of Plaintiffs' common law fraud/misrepresentation claim which cause of action requires a plaintiff to show that the defendant falsely or misleadingly represented a material fact with the intent to induce plaintiff's conduct. Specialized Tours, Inc. v. Hagen, 392 N.W.2d 520, 532 (Minn. 1986). Moreover, in discussing unjust enrichment the trial court fails to acknowledge that unjust enrichment may be founded on fraud or "situations where it would be morally wrong for one party to enrich himself at the expense of another." Mon-Ray, Inc. v. Granite Re, Inc., 677 N.W.2d 434, 440 (Minn. Ct. App. 2004).

§ 325F.69, subd. 1. In other words, a claim under this Act requires: (1) a fraudulent act or misrepresentation; (2) intent for others to rely on that fraudulent act or misrepresentation and (3) a connection with the sale of merchandise.

Likewise, R.J. Reynolds violated Minn. Stat. § 325D.13 of Minnesota's Unlawful Trade Practices Act which states:

No person shall, in connection with the sale of merchandise, knowingly misrepresent, directly or indirectly the true quality, ingredients or origin of such merchandise.

(See A. 34.) Again, the predicate duty is the duty not to deceive Minnesota consumers in the sale of merchandise.

Minn. Stat. § 325D.44, subd. 1(7)(13) prohibits deceptive representations concerning the quality of goods or services or misrepresentations causing the likelihood of confusion or misunderstanding as to true quality or nature of the product. (A. 36.) Section 325D.45 authorizes “[a] person likely to be damaged by a deceptive trade practice of another” to sue for injunctive relief in addition to remedies under the common law or other statutes.

Minnesota's false statement in advertising statute, Minn. Stat. § 325F.67, prohibits a representation in advertising that is untrue, deceptive or misleading. (A. 37.) The elements required under this statute are (1) intent; (2) publication; (3) a false or misleading advertisement; and (4) damage. LensCrafters, Inc. v. Vision World, Inc., 943 F. Supp. 1481, 1491 (D. Minn. 1996).

**e. The Minnesota Supreme Court in Forster Has Rejected R.J. Reynolds' Assertions.**

Underlying all of the above Minnesota Consumer Protection Statutes is the prohibition against misleading the consuming public. The essence of Plaintiffs' claims is that the "light" representation is false and/or misleading and should not have been made at all. Plaintiffs' claims are not that R.J. Reynolds has omitted necessary warnings about additional health risks or should have warned of health risks more clearly.

In Forster, the Minnesota Supreme Court articulated the difference between preempted failure to warn claims and claims based on fraud or misrepresentation which are not preempted. Misrepresentation actions are based on a duty to tell the truth, not on a duty to warn.<sup>8</sup> Forster, 437 N.W.2d at 662. Misrepresentation concerns a truthfulness of what one says; the duty to warn assumes truthfulness and is concerned with how much of what is truthful must be disseminated. Id. at 662. The Minnesota Supreme Court has explained:

Concededly, a false representation (e.g. "smoking will not cause emphysema") conflicts with the federal warning label. But the cause of action, in a preemption sense, does not lie in challenging the adequacy of the federal warning nor in claiming a dilution of that warning, but only in asserting the falsity of what the cigarette manufacturer has chosen to say. To the extent there is a "conflict," it is indirect and self-imposed by the cigarette manufacturer.

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<sup>8</sup> The trial court suggests that Forster is in conflict with Cipollone but does not explain why it believes that to be the case. (A. 18-19.) Plaintiffs assert there is no such conflict.

Id.

The Minnesota Supreme Court specifically rejected in Forster Reynolds' assertion that false advertising claims were preempted: "An affirmative misrepresentation with respect to smoking and health which occurs in advertising or promotion would not necessarily implicate the federal label and, therefore, would not be preempted." Id. at 660 n.6. The Supreme Court reasoned that "the action is based on a duty to tell the truth, not on a duty to warn." Id. at 662. To hold otherwise, the Minnesota Supreme Court declared:

[W]e would have to assume that Congress intended the Act to be a license to lie, an assumption both uncharitable to Congress and violative of this state's deep concern for honesty as well as health. . . . Congress did not intend cigarette advertisers to be free to engage in deceitful advertising practices.

Id.

Moreover, misrepresentations by "half truths" is a species of affirmative misrepresentation and fraud, and is also not preempted. Simonsen v. BTH Properties, 410 N.W.2d 458, 461 (Minn. Ct. App. 1987), rev. denied. As Minnesota has recognized, a statement may be false if it is either literally false or if it is misleading because it conveys a false impression through implication, innuendo and ambiguity. W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 106 at 738 (5th ed. 1984). See also Goeb v. Tharaldson, 615 N.W.2d 800, 818-19 (Minn. 2000) (claims

of negligent misrepresentation and negligent testing are not preempted by FIFRA but claim of inadequate warning was preempted).

Under Minnesota law, dismissal is improper if it is possible to grant relief on any evidence that might be produced, consistent with the pleader's theory. Wiegand, 683 N.W.2d at 811. Plaintiffs, not R.J. Reynolds, were entitled to have all assumptions and inferences viewed in their favor. Id. The trial court lost sight of that standard.

Plaintiffs concede that in four of the 73 paragraphs of their second amended complaint they have referenced examples of R.J. Reynolds' failure to disclose certain evidence. (A. 32-33; see also A. 35.) These references to R.J. Reynolds' failure to inform are simply examples, among many other examples, of R.J. Reynolds' "deceptive acts and/or practices" in "misrepresentations, unlawful schemes and courses of conduct intended to induce Plaintiffs and members of the Class to purchase Defendants' Camel Lights and Winston Lights cigarettes in violation of Minnesota law . . . ." (A. 32.) Moreover, like the misrepresentation claims which the Minnesota Supreme Court found were not preempted, Plaintiffs' claims are "concerned with the truthfulness of what [R.J. Reynolds] says." Forster, 437 N.W.2d at 662. R.J. Reynolds' cigarettes were neither "light" nor were they lower in tar. Those facts provide the basis for Plaintiffs' claims -- claims which are not preempted.

**f. Trial Court's Ruling is Contrary to the Ruling by the Trial Court in State v. Philip Morris.**

The trial court cites to and quotes from Lacey v. Lorillard, 956 F. Supp. at 962-63 and Johnson v. Brown & Williamson Corp., 122 F. Supp. 2d at 201. (A. 9, 13, 15.) The two federal district court's decisions on which the trial court relies were no more binding on the trial court than the state district court decision in State v. Philip Morris, a decision the trial court ignored. Jendro v. Honeywell, Inc., 392 N.W.2d 688, 691 n.1 (Minn. Ct. App. 1986) (noting that although statutory construction of federal law by federal courts is entitled to due respect, this Court is bound to follow only the statutory interpretation of the Minnesota Supreme Court and the United States Supreme Court), rev. denied. Applying the preemption analysis to the same Minnesota Consumer Protection Statutes at issue in this case, the Honorable Kenneth Fitzpatrick denied the federal preemption motion brought by tobacco manufacturers in State v. Philip Morris. (A. 75.)

Denying defendants' motion, Judge Fitzpatrick found plaintiffs based their claims upon asserted voluntary, self-imposed duties undertaken by defendants and not upon requirements imposed by law. Id. at 2. (A. 76.) As such, they were not requirements "imposed under state law" which would support preemption. Id. at 2-3. (A. 76-77.) Judge Fitzpatrick also noted that Cipollone allowed states to impose remedies for voluntarily assumed duties -- including fraudulent and deceptive statements -- even if they occurred in tobacco advertising and promotions. Id. at 4. (A. 78.) That is because "such

claims are predicated not on a duty ‘based on smoking and health’ but rather on a more general obligation -- the duty not to deceive.” Id. (citing Cipollone).

Judge Fitzpatrick denied defendants’ federal preemption motion after finding defendants violated Minnesota’s Consumer Protection Statutes -- statutes which impose “the duty not to commit fraud, the duty not to lie, and the duty not to deceive.” Id. at 5.

(A. 79.) Significantly, in denying defendants’ preemption motion, Judge Fitzpatrick made other findings applicable to this case, including:

- [N]othing in the Labeling Act indicates that Congress intended to exempt cigarette manufacturers from longstanding rules governing fraud. Id. at 7.
- [S]tate law prohibitions on false statements of material fact, fraud, and deceptive trade practices do not create diverse, nonuniform, and confusing standards in violation of the stated purpose of the Labeling Act. Id. (“To the contrary, they ‘rely only on a single, uniform standard: falsity,’” quoting Cipollone.)

(A. 81.)

Plaintiffs, like the State of Minnesota in State v. Philip Morris, are entitled to proceed with their state law claims. The Labeling Act was not intended “to be a license to lie.” Forster, 437 N.W.2d at 662. To uphold the trial court’s ruling would grant R.J. Reynolds such a license.

**CONCLUSION**

Appellants respectfully request that the trial court's dismissal of this action be reversed. As a matter of law, Appellants' claims are not preempted. Appellants therefore request that the case be ordered reinstated to proceed to a trial on its merits.

Dated: August 22, 2005

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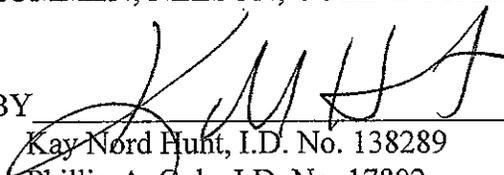
**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 10,376 words. This brief was prepared using Word Perfect 10.

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