

No. A05-1359

STATE OF MINNESOTA

IN COURT OF APPEALS

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

Appellants,

vs.

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

Respondents.

BRIEF OF AMICUS CURIAE STATE OF MINNESOTA

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STATEMENT OF LEGAL ISSUE

Does the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1339, preempt Appellants' statutory and common-law claims seeking restitution for alleged deceptive and misleading representations made to Minnesota consumers by Defendants in the sale of their products?

The trial court held that all of Appellants' claims were preempted by the federal statute.

Apposite statute

15 U.S.C. § 1334

Apposite cases

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

Bates v. Dow Agrosciences, LLC, ___ U.S. ___, 125 S. Ct. 1788 (2005).

STATEMENT OF THE CASE AND FACTS

In this appeal Appellants challenge the decision of the trial court, the Honorable Diana S. Eagon, that Appellants' claims based upon Minnesota consumer protection statutes and Appellants' common law causes of action are preempted by the Federal Cigarette Labeling and Advertising Act (the "Act"). The State of Minnesota has been granted leave to file an amicus curiae brief in support of Appellants' position.¹

INTEREST OF THE STATE OF MINNESOTA

The State has several interests in the federal preemption issue that is the subject of this appeal. The State wants to ensure that the Court is made aware of the important federalism principles underlying the strong presumption against federal preemption. States have a compelling interest in the potential erosion of their sovereignty by the unwarranted application of federal preemption. The State seeks to prevent the inappropriate recognition of a federal preemption defense in cases such as this that can only contribute to the erosion of states' rights in areas of traditional state concern. In addition, the State has a strong general interest in protecting the legal rights of its citizens, like the Appellants here, and to ensure that the Appellants and the State's other citizens are not precluded, on the grounds of an alleged and legally improper

¹ Pursuant to Minn. R. Civ. App. P. 129.03 amicus State of Minnesota certifies that no counsel for any party in this matter authored any portion of this brief. No person or entity other than the State of Minnesota made any monetary contribution to the preparation or submission of this brief.

federal preemption defense, from being able to seek redress for injuries caused by the tortious conduct of others.

ARGUMENT

The issues in this case are questions of law. Therefore, this Court “is not bound by the lower court's conclusions.” *Sherek v. Independent Sch. Dist. No. 699, Gilbert*, 449 N.W.2d 434, 436 (Minn. 1990).

I. MINNESOTA’S CONSUMER PROTECTION STATUTES ARE VITALLY IMPORTANT IN THE PROTECTION OF MINNESOTA CITIZENS.

Four of the six causes of action declared preempted by the district court involve Minnesota consumer protection statutes. These statutes have been protecting Minnesota consumers for decades: Prevention of Consumer Fraud Act, Minn. Stat. §§ 325F.68-.70 (initially enacted in 1963); Unlawful Trade Practices Act, Minn. Stat. §§ 325D.09-.16 (initially enacted in 1943); Uniform Deceptive Trade Practices Act, Minn. Stat. §§ 325D.43-.48 (initially enacted in 1973); and the False Statement in Advertisement Act, Minn. Stat. § 325F.67 (initially enacted in 1913).

Minnesota courts have recognized in a variety of ways the vital importance of strong consumer protection laws in their interpretation of these and other Minnesota consumer laws. First, consumer statutes are generally “very broadly construed” to enhance consumer protection. *State by Humphrey v. Philip Morris, Inc.*, 551 N.W.2d 490, 496 (Minn. 1996) (citing *State v. Alpine Air Products, Inc.*, 500 N.W.2d 788, 790 (Minn. 1993)). The Consumer Fraud Act has been held to provide more protection to citizens than does the common law fraud doctrine. *Alpine Air Products*, 500 N.W.2d

at 790. Second, the jurisdictional limits of the consumer protection statutes have been interpreted broadly. *See, e.g., State by Humphrey v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715, 721 (Minn. Ct. App. 1997) (State's interest in providing forum to enforce consumer protection laws and protect citizens from unregulated gambling weigh in favor of asserting state court jurisdiction over non-Minnesotan defendants). Finally, Minnesota consumer protection statutes have been interpreted to protect citizens even in areas in which there is otherwise comprehensive state regulation. *See, e.g., State by Hatch v. American Family Mutual Ins. Co.*, 609 N.W.2d 1, 4 (Minn. Ct. App. 2000) (Attorney general's authority to bring consumer protection actions in insurance areas not restricted by statutory authority granted commissioner of commerce to regulate insurance).

The importance of the State's consumer protection laws is also revealed by decisions in other areas denying preemptive effect to federal law. Very recently, the United States District Court in Minnesota rejected a challenge to a failure-to-warn consumer action based upon alleged preemption by federal statutes and administrative law. *Witczak v. Pfizer, Inc.*, 377 F.Supp.2d 726 (D. Minn. 2005). The *Witczak* court refused to find that Congress "intended to obviate the very state laws that provide remedies to consumers harmed by dangerous products and deceptive marketing.... in the absence of a clear and compelling Congressional statement." *Id.* at 732 (citing and quoting from *Bates v. Dow Agrosciences, LLC*, ___ U.S. ___, 125 S.Ct. 1788, 1802 (2005) ("if Congress had intended to deprive injured parties of a long available form of

compensation, it surely would have expressed that intent more clearly.”) *See also State v. Fleet Mortgage Corp.*, 158 F.Supp.2d 962, 966 (D. Minn. 2001) (State’s consumer action brought against national bank not preempted by Office of the Comptroller of the Currency jurisdiction since the alleged deceptive practices at issue “do not directly concern a banking practice and the alleged illegal actions are not banking industry specific”); *State v. Directory Publishing Services, Inc.*, 1996 WL 12674 at *3 (Minn. Ct. App., Jan. 16, 1996) (Consumer Protection Action not preempted by Lanham Act, which regulates federal trademark law, because that Act permits state law to provide additional trademark protection).²

II. THE PRIVATE ATTORNEY GENERAL STATUTE IS OF CRITICAL IMPORTANCE IN THE OVERALL FRAMEWORK OF CONSUMER PROTECTION IN MINNESOTA.

Plaintiffs have brought this action pursuant to Minn. Stat. § 8.31, subd. 3a (2004), the “private attorney general” statute. In relevant part, that subdivision provides:

In addition to the remedies otherwise provided by law, any person injured by a violation of any of the laws referred to in subdivision 1 may bring a civil action and recover damages, together with costs and disbursements, including costs of investigate and reasonable attorney’s fees, and receive other equitable relief as determined by the court.³

This statute plays an extremely important role in enforcement of consumer protection statutes in Minnesota, in large part because the Minnesota Attorney General does not

² A copy of this unpublished case is included in the addendum to this brief.

³ Minn. Stat. § 8.31, subd. 1 (2004) lists a number of specific consumer protection statutes, as well as “other laws against false or fraudulent advertising.”

have sufficient resources to protect every consumer in Minnesota in every conceivable consumer transaction or situation.

The purpose of § 8.31, subd. 3a, is “the protection of public rights and the preservation of the interests of the state.” *Ly v. Nystrom*, 615 N.W.2d 302, 313 (Minn. 2000). The statute is intended to prevent fraudulent and deceptive practices with respect to consumer products “by offering an incentive for defrauded consumers to bring claims in lieu of the attorney general.” *Id.* at 311.

In *Group Health Plan, Inc., v. Philip Morris, Inc.*, 621 N.W.2d 2 (Minn. 2001), the Supreme Court once again emphasized the importance of the private attorney general statute. The court held that the term “any person” in the statute was intended to be interpreted in “the broadest terms.” *Id.* at 8. The court held that § 8.31, subd. 3a did not limit potential plaintiffs to purchasers of defendants’ goods, and therefore plaintiff HMO could bring an action under the statute. *Id.* The court noted that its interpretation of the term “any person” was “consistent with the overall tenor of the statutes at issue to maximize the tools available to stop the prohibited conduct.” *Id.* at 9.

This case is a particularly appropriate one to be brought under the “private attorney general” statute. The allegations in the Complaint state that a large number of Minnesota citizens have been defrauded over a significant period of time. Presumably, the total amount of money sought in restitution is very substantial. This is precisely the type of situation in which section 8.31 should be used.

III. THERE IS A VERY STRONG PRESUMPTION AGAINST PREEMPTION OF STATE LAW.

There is a long-standing presumption against preemption that properly influences any preemption analysis. This presumption is derived from important federalism concerns which continue to exist today.

A. Courts Should Not Find Federal Preemption Absent A Clear Statement Of Congress's Intent To Preempt The Applicable State Law.

As courts have made clear, the preemption analysis “start[s] with the assumption that the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *City of Columbus v. Ours Garage and Wrecker Serv.*, 536 U.S. 424, 432-33 (2002) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *Hillsborough County v. Automated Med. Labs, Inc.*, 471 US 707, 715 (1985); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). This requirement that preemption be the “clear and manifest purpose of Congress” is known as the “presumption against preemption.” It is also sometimes referred to as the plain or “clear statement rule,”⁴ meaning that state laws should be presumed not preempted unless Congress makes a clear statement that they are.⁵

⁴ In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Supreme Court noted that the intention of Congress to preempt must actually be “unmistakably clear” in the language of the federal law. *Id.* at 453.

⁵ This clear statement rule is based on the logic that when Congress intends to preempt state law, it has the power to say so, and, since Congress presumably is aware of state (Footnote Continued on Next Page)

Precluding state regulation in an area of state sovereignty is a grave act that should not be attributed to Congress absent clear evidence that this was, in fact, Congress's intent. As Professor Laurence Tribe has explained, the presumption:

further[s] the spirit of *Garcia* [*v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)] by requiring that decisions restricting state sovereignty be made in a deliberate manner by Congress, through explicit exercise of its lawmaking power to that end. . . . [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.

Laurence H. Tribe, *American Constitutional Law* §6-28, at 1175-76 (3d ed. 2000).

Courts interpret express preemption statutes in light of the presumption against preemption. *Cipollone*, at 523 (holding that “in light of the strong presumption against preemption,” statutory preemption statute should be read narrowly); *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996) (rejecting dissenting Justices' argument that presumption against preemption only applies to question whether Congress intended any preemption at all, as opposed to question concerning the *scope* of its intended invalidation of state law.”) (emphasis in original). If there are two plausible alternative readings of a federal statute, one permitting preemption and one disallowing preemption, courts “have a duty to accept the reading that disfavors preemption.” *Bates*, 125 S.Ct. at 1801. Preemptive effect is not given to statutes which are vague or ambiguous. *Medtronic*, 518 U.S. at 489; *Forster v. R.J. Reynolds*

(Footnote Continued From Previous Page)

regulations in areas it is considering, the likelihood is that Congress will, in fact, say so if that is indeed what it truly intends.

Tobacco Co., 437 N.W. 2d. 655, 658 (Minn. 1989) (holding phrase “requirement or prohibition... based on state law” in Federal Cigarette Labeling and Advertising Act too vague to conclude that Congress intended to preempt state laws).

In this case there is no “clear and manifest purpose of Congress” expressed in 15 U.S.C. § 1334 that state consumer protection statutes should be preempted. The cases interpreting the preemption clause at issue in this case show that the presumption against preemption is fully applicable. See, e.g., *Cipollone*, 505 U.S. at 529 (holding “Congress offered no sign that it wished to insulate cigarette manufacturers from longstanding rules governing fraud”).

B. The Recent Supreme Court Decision In *Bates* Strongly Supports The Conclusion That The Court Disfavors Preemption Of State Law Absent A Very Clear Intention To Do So From Congress.

Bates v. Dow Agrosciences LLC, ___ U.S. ___, 125 S.Ct. 1788 (2005) was decided by the Supreme Court in late April of this year. In this decision, the Court made it clear that federal courts were to do more than pay lip service to the presumption against preemption and should find preemption only when Congress clearly and unmistakably intended it. *Bates* involved the interpretation of a preemption clause under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), but the issues in *Bates* have substantial similarity to the issues in this case.

In *Bates*, farmers sued, alleging that Dow’s newly marketed pesticide damaged their crops and that Dow knew that its product would stunt the growth of peanuts in certain soils. *Bates*, 125 S.Ct. at 1793. Plaintiffs’ claims included common-law

claims in strict liability, negligence, fraud and breach of warranty, and also violation of the Texas Deceptive Trade Practices Act. *Id.* The district court granted summary judgment for Dow on its preemption claim and the court of appeals affirmed.

FIFRA's preemption statute provides that states "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C. § 136v (b) In upholding the preemption defense, the Fifth Circuit Court of Appeals reasoned that FIFRA's preemption statute barred any state law claim in which "a judgment against Dow would induce it to alter its product label." *Dow Agrosciences, LLC v. Bates*, 332 F.3d 323, 331 (5th Cir. 2003).⁶

The *Bates* Court noted that it was only after the *Cipollone* decision in 1992 that many lower courts held that section 136v(b) preempted common-law claims. *Id.* at 1796-97. By reversing the lower courts, the Court indicated that those courts had read *Cipollone* as permitting a more significant scope of preemption than had been intended.

The most significant holding of *Bates* relates to the definition of "requirements" in section 136v(b). The Court explicitly rejected the court of appeals' reasoning that "any event, such as a jury verdict, that might 'induce' a pesticide manufacturer to

⁶ Similarly, the district court in this case held that plaintiffs' causes of action were preempted because a judgment for plaintiffs would require defendant to take certain actions so as not to be in violation of the Consumer Protection laws, thus amounting to state imposition of a *de facto* cigarette labeling requirement. D.Ct. Order, at 15.

change its label, should be viewed as a requirement.” *Id.* at 1798. Specifically, the Court held that “[a]n occurrence that merely motivates an optional decision does not qualify as a requirement.” *Id.* Even if a finding of liability would “induce Dow to alter [its] label,” that would not constitute a “requirement” within the meaning of the preemption clause. “Requirements” cannot be determined based upon any effects-based test; instead:

a requirement is a rule of law that must be obeyed; an event, such as a jury verdict, that merely motivates an optional decision is not a requirement. The proper inquiry calls for an examination of the elements of the common-law duty at issue, see *Cipollone*, 505 U.S. at 524, 112 S.Ct. 2608; it does not call for speculation as to whether a jury verdict will prompt the manufacturer to take any particular action (a question in any event, that will depend on a variety of cost/benefit calculations best left to the manufacturers’ accountants).” *Id.* at 1799.

The *Bates* Court stated that its narrow interpretation of section 136v(b) still gave the preemption clause an important role. Its purpose was to “preempt competing state labeling standards -- imagine 50 different labeling regimes prescribing the color, font size, and wording of warnings -- that would create significant inefficiencies for manufacturers.” *Id.* at 1803 (footnote omitted). Similarly, the causes of action in this case also do not frustrate the purposes of the Federal Cigarette Labeling and Advertising Act. *Infra* at 17.

C. The Strong Presumption Against Preemption Serves Important Interests Of Federalism And Sovereignty.

The strong presumption against preemption is grounded in important federalism principles. The United States Supreme Court explained the many benefits of federalism underlying the presumption against preemption in *Gregory v. Ashcroft*.

The federalist structure of joint sovereigns: (1) assures a more decentralized government that is more sensitive to the needs of a heterogeneous society; (2) increases opportunity for citizen involvement in democratic processes; (3) allows for more government experimentation and innovation; (4) makes government more accountable by making states compete for a mobile citizenry; and (5) provides an important check on abuses of government power.⁷ 501 U.S. at 458-59. As Professor Tribe also observed, the presumption against preemption should result in more thoughtful deliberation in the federal lawmaking process as Congress must carefully consider any potential preemptive effect of its laws. *Supra* at 8.

This strong presumption against preemption is consistent with the recent resurgence, over the last decade, of judicial recognition of the principles of federalism in other related legal areas. For example, the once largely dormant Tenth Amendment has been revitalized in recent years. The Supreme Court has struck down several federal laws as violating federalism principles embodied in the Tenth Amendment.⁸ Likewise, the Supreme Court has recently resurrected the notion that the Commerce

⁷ As the Court explained, the “twin powers” of the federal and state governments will act as mutual restraints against the abuse of power only if both are credible: “In the tension between federal and state power lies the promise of liberty.” 501 U.S. at 459.

⁸ For example, the Court in *Printz v. United States*, 521 U.S. 898, 935 (1997), held that Congress could not mandate that state officials conduct background checks on handgun purchasers under the Brady Violence Protection Act. In *New York v. United States*, 505 U.S. 144, 174-77 (1992), the Court held that Congress may not force states to enact legislation providing for the disposal of radioactive waste generated within their borders or take title to the waste. As the Court noted in *New York*, the Tenth Amendment has morphed from a mere “tautology” to a revitalized state shield against federal authority. *Id.* at 157, 178.

Clause does not grant unlimited power to the federal government.⁹ These developments demonstrate the increasing breadth of the presumption against federal preemption.

D. The Presumption Against Preemption Applies With Particular Strength In The Area Of Consumer Protection.

The presumption against preemption is strongest where the federal regulatory scheme intrudes upon a “field which the States have traditionally occupied,” such as any field involving the “historic police powers of the States.” *Santa Fe Elevator Corp. v. Illinois Commerce Comm’n*, 331 U.S. 218, 230 (1947). These historic police powers include laws protecting consumers from fraud, deception, and unfair business practices. *See, e.g., California v. ARC American Corp.*, 490 U.S. 93, 101 (1989) (stating preemption not favored, given “long history of state common-law and statutory remedies against monopolies and unfair business practices”); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963) (state law “designed to prevent the deception of consumers” is “well within” the scope of the state’s police powers); *McElhone v. Geror*, 207 Minn. 580, 586, 292 N.W. 414, 418 (1940) (holding state’s police power extends to protection of consumers from economic harm through statutes regulating unfair trade practices).

⁹ In *United States v. Lopez*, 514 U.S. 549 (1995), the Court struck down the federal Gun-Free School Zones Act of 1990 as beyond the enumerated powers of Congress, discussing at length the federalism principles underlying its decision. 514 U.S. at 558-61. Similarly, five years later in *United States v. Morrison*, 529 U.S. 598 (2000), the Court held that a section of the Violence Against Women Act exceeded Congress’s power under the Commerce Clause.

Minnesota's consumer protection statutes and the state's common law tort system, which impose duties and standards of care on manufacturers and others, form an integral part of the state regulation of fraud, deception, and unfair business practices. As such, there is a strong presumption that they are not to be preempted by federal regulations but to coexist with them. Preemption of consumer protection laws would produce "a serious intrusion into state sovereignty." *Medtronic*, 518 U.S. at 488. Moreover, because consumer protection laws compensate citizens injured by breaches of statutory and common law duties and standards of care, preemption would effectively strip citizens of state remedies for violations of consumer protection laws. *Id.* at 488-89. Courts will not presume that Congress intended legislation to have such draconian consequences. *See, e.g., Bates*, 125 S.Ct. at 1801; *Medtronic*, 518 U.S. at 491 (noting that, if Congress intended to preempt "most, let alone all, general common-law duties enforced by damages actions," "its failure even to hint at it is spectacularly odd"); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002) (stating it would be "perfectly rational for Congress not to preempt common-law claims, which - - unlike most administrative and legislative regulations -- necessarily perform an important remedial role in compensating accident victims").

It is unlikely that Congress would intend to take away all remedies for a particular type of injury. If section 1334 preempts the causes of action in this case, any Minnesota consumers defrauded by defendants' statements as to the health benefits from "light" cigarettes will have no recourse.

IV. THE SUPREME COURT HOLDING IN CIPOLLONE INDICATES THAT NONE OF THE CAUSES OF ACTION IN THIS MATTER SHOULD BE PREEMPTED.

Cipollone was the first, and most significant, Supreme Court decision interpreting the preemptive effect of the preemption clause in the Act. The preemption clause, as it existed after amendments in 1969, provided:

(a) no statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

(b) 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 Act.

15 U.S.C. § 1334; *Cipollone* at 514-15. In *Cipollone*, the Supreme Court held that section 5(b) claims based on failure to warn and alleged neutralization of federally mandated warnings were preempted to the extent that those claims relied on omissions or inclusions in manufacturers' advertising or promotion, but that claims based on breach of express warranty, intentional fraud and misrepresentation, and conspiracy to commit fraud and misrepresentation were not preempted. *Cipollone*, 505 U.S. at 531.¹⁰ There are a number of critical points to be taken from the holding and discussion in *Cipollone*.

¹⁰ *Cipollone* was a claim brought by a smoker, and later by her husband and son, alleging personal injury from defendants' actions. It was based upon alleged violation of state common law. The instant action is primarily an action brought pursuant to the state's private attorney general and consumer fraud statutes. As such, the state's interests are stronger and the presumption against preemption even stronger than in the *Cipollone* situation. *Supra* at 3-6.

First, the preemptive scope of the Act is governed entirely by the express language in section 5. *Cipollone*, 505 U.S. at 517. Therefore, courts should not look beyond the express language of the Act to infer preemption elsewhere; it is to be assumed that Congress intended that actions not covered by the express language in section 5 are not preempted. *Id.*

Second, it is not possible to make blanket statements governing preemption of all claims within particular subdivisions of causes of action. Instead, courts “must fairly but - in light of the strong presumption against preemption - narrowly construe the precise language of section 5(b) and ... look to each of petitioner’s common-law claims to determine whether it is in fact preempted.” *Id.* at 523 (footnote omitted).¹¹

Third, in relation to each cause of action the inquiry is 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.” *Id.* at 524. Each of the four quoted phrases (“requirement or prohibition”; “based on smoking and health;” “imposed under State law;” and “with respect to ... advertising or promotion”) within section 5 “limits the universe of common-law claims preempted by the statute.” *Id.*

¹¹ Portions of the Court’s opinion in *Cipollone* that deal specifically with the 1969 Act’s preemptive scope (parts V and VI) only have the support of four Justices. 505 U.S. at 507. However, Justice Blackmun, in a separate opinion joined by two other Justices, concluded that none of plaintiff’s causes of action were preempted by section 5. *Id.* at 531.

Fourth, the Court narrowly interpreted the clause “based on smoking and health” in concluding that the cause of action based upon fraudulent misrepresentation was not preempted. Specifically, claims based on allegedly false statements of material fact are not preempted by section 5(b) because those claims “are predicated not on a duty ‘based on smoking and health’ but rather on a more general obligation - the duty not to deceive.” 505 U.S. at 528-29.¹²

Fifth, the Court concluded that the Congressional purpose behind the Act was not undercut by the Court’s interpretation that section 5(b) did not preempt fraud causes of action. *Cipollone*, 505 U.S. at 529. Section 2 of the Act sets forth the two purposes of the statute:

(1) adequately informing the public that cigarette smoking may be hazardous to health; and (2) protecting the national economy from the burden imposed by *diverse, non-uniform, and confusing* cigarette labeling and advertising regulations. 505 U.S. at 514, 112 S.Ct. at 2616. (emphasis supplied).

Specifically, the Court held that “state law prohibitions on false statements of material fact do not create ‘diverse, non-uniform, 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.” *Id.* at 529.¹³

¹² Subsequently, the Supreme Court cited with approval the *Cipollone* Court’s reasoning on this point. *Medtronic*, 518 U.S. at 500, n. 19.

¹³ The Court also noted that the Act explicitly reserved to the FTC the authority to identify and punish deceptive advertising practices, thereby lending more support to (Footnote Continued on Next Page)

Finally, the Court continued its narrow construction of the preemption effect of section 5(b) by interpreting the clause “imposed under State law” to conclude that a claim based upon breach of express warranty was not preempted. 505 U.S. at 525. Specifically, the Court held that a breach of express warranty cause of action was not preempted because the warranty requirement was not imposed under “state law” but imposed “*by the warrantor.*” *Id.* at 526 (emphasis in original).¹⁴

The district court relies upon a later Supreme Court decision interpreting section 5(b) to the Act, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). *Lorillard*, however, is not inconsistent with the Supreme Court’s decision in *Cipollone* and does not support preemption in this case. In *Lorillard* the Supreme Court held that section 5(b) preempted a state law specifically focused on youth smoking and directed solely at cigarette advertising and promotion. The district court focuses on the *Lorillard* Court’s statement that “the concern about youth exposure to cigarette advertising is intertwined with the concern about cigarette smoking and health.” D.Ct.

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the conclusion that legal actions based upon fraud or deception were not intended to be preempted. *Cipollone*, 505 U.S. at 529.

¹⁴ The Court held that the express warranty cause of action was not preempted because it was not “imposed under state law” even though the claim arose under a state statute defining what constitutes an “express warranty.” 505 U.S. at 525. The Court specifically rejected the dissenting Justices’ argument that every express warranty obligation is a “requirement... imposed under state law” because “the general duty to honor express warranties arises under state law.” *Id.* at 526, n. 24. The Court noted that the dissent’s position might be valid if the Act preempted “liability” imposed under state law, rather than a “requirement or prohibition” imposed under state law, drawing a distinction between an express warranty which can only be enforced under state law, but is not “imposed” by the state. *Id.*

Order at 12. From this statement, the district court jumps to the conclusion that plaintiffs' claims in this case are "but for meticulous pleading," likely also to be "health-based claims because were it not for the detrimental health effects of the product... plaintiffs would not have any claim to have been cheated." *Id.*

The district court misread *Lorillard* and applied it improperly to this case. Indeed, a key component of the *Lorillard* decision is the fact that the state regulations at issue expressly targeted cigarette advertising. *Id.* at 547. Furthermore, the *Lorillard* Court preserved the distinction between general state laws which apply to cigarette manufacturers on an equal basis as other companies, and state laws aimed at tobacco companies. For example, the Court held that section 5(b) "does not restrict a State or locality's ability to enact generally applicable zoning restrictions." *Id.* at 551.

Each of the consumer protection statutes at issue in this case is a general statute aimed at a wide variety of fraud and deceptive practices. None of the statutes focuses on tobacco companies or treats such companies differently than other companies. As such, none of them is preempted by section 5(b) of the Act.

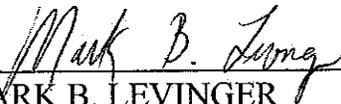
CONCLUSION

For the reasons stated above, amicus State of Minnesota urges this Court to reverse the district court's decision and hold that section 5(b) of the Federal Cigarette Labeling and Advertising Act does not preempt any cause of action in this case.

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