When Precedent Goes Up in Smoke

By Michael Willemsen

In December 2008, the U.S. Supreme Court decided *Altria Group v. Good*, its third fundamentally inconsistent decision construing the pre-emption provision in the Federal Cigarette Labeling and Advertising Act. That provision 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." This language goes far beyond what Congress intended. Taken literally, it would ban a state law prohibiting giving out free cigarettes to minors, since that was a common and effective means of promoting the use of cigarettes. But the one thing the justices have unanimously agreed on is that the act does not invalidate state laws against the sale or distribution of tobacco to minors.

Under the 'Altria' analysis ... a cause of action seeking restitution for harms caused by smoking is not pre-empted if based on a general statute prohibiting unfair competition.

Moreover, unlike other pre-emption statutes, Section 1334(b) does not focus on the effect of the state law, but on whether the state law was "based on smoking or health." The recurrent issue is whether Section 1334(b) bars causes of action based on smoking and health derived from general tort or contract law.

In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), the Supreme Court said that the Federal Cigarette Labeling and Advertising Act did not pre-empt some causes of action for false advertising, even if the false statement concerned smoking and health. "The central inquiry in each case," said Justice John Paul Stevens, "is straightforward: we ask whether the legal duty that is the predicate of the common law damages action constitutes a 'requirement or prohibition based on smoking and health.'" Applying that test, Stevens concluded that common law actions were pre-empted only to the extent they attacked the Food and Drug Administration's prescribed cigarette package warning or claimed that the tobacco companies' advertising nullified that warning. But actions for breach of warranty were not pre-empted. Nor were actions charging false or deceptive advertising, because "[s]uch claims are predicated not on a duty 'based on smoking and health' but rather on a more general obligation not to deceive." But Stevens' opinion was a plurality opinion, and its precedential force was uncertain.

Two years later in *Mangini v. R.J. Reynolds Tobacco Company*, the California Supreme Court examined a claim that the tobacco company's advertising campaign for Camel cigarettes, featuring a cartoon character called Old Joe Camel, improperly targeted minors in violation of the state's Unfair Competition Law. It concluded that the claim was not pre-empted, for two reasons: First, under the *Cipollone* analysis, the predicate legal duty was not one based on smoking and health, but a more general duty not to engage in unfair competition by advertising illegal conduct or encouraging others to violate the law. Second, rather disingenuously, *Mangini* said that Penal Code Section 308, which prohibits the sale of tobacco to minors and the purchase of tobacco by minors, was not a regulation based on smoking and health. It was originally enacted in 1891, long before concerns about the effect of smoking on health arose, and was apparently intended to protect minors from immoral activities.

Thus as of 1994, decisions of both state and federal high courts suggested that state court actions were pre-empted only if they involved claims concerning the cigarette package warnings. In that year, 50 state attorneys general brought suit against the tobacco companies, alleging that the defendants had a policy and practice of marketing to minors. Four years later, that action was resolved by a master settlement agreement under which the defendants agreed to pay the states a total of $206 billion and consented to an injunction barring them from "taking any action, directly or indirectly, to target" minors in their advertising, promotion, or marketing of tobacco products.

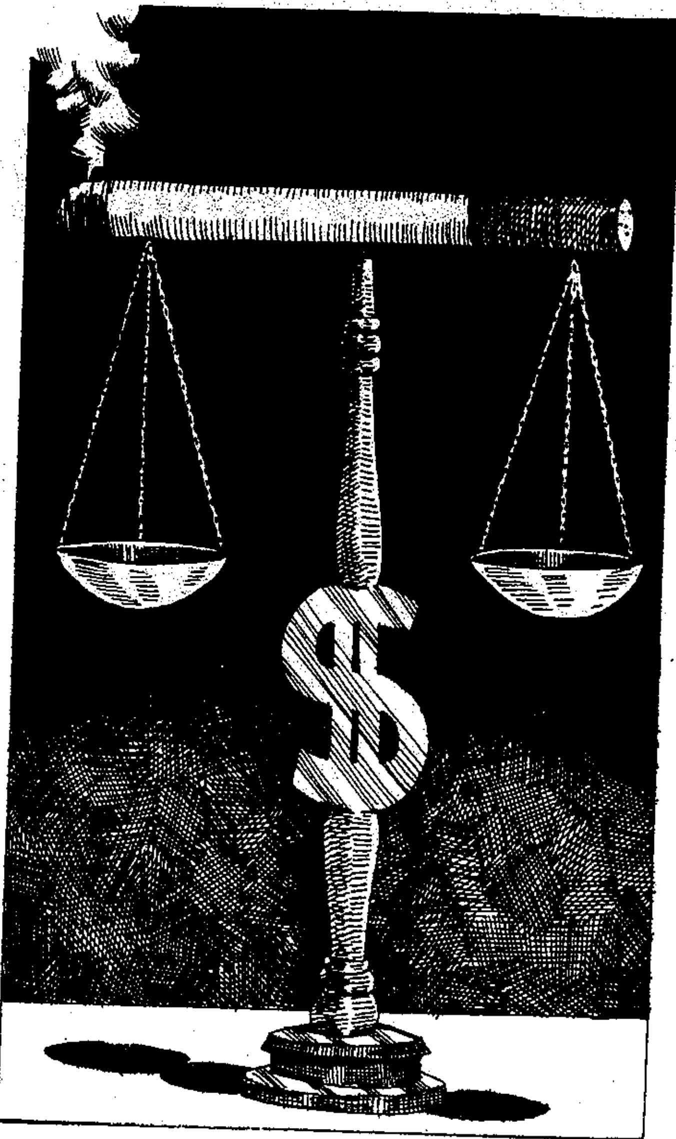
Then the U.S. Supreme Court changed direction. In *Lorillard Tobacco Co. v. Reilly*, the Massachusetts attorney general, acting under the authority of a state statute banning unfair or deceptive trade practices, had issued regulations that barred outdoor advertising of cigarettes within 1,000 feet of schools, parks or playgrounds. The high court held that the Federal Cigarette Labeling and Advertising Act pre-empted the Massachusetts regulations, not because the Massachusetts unfair competition law was based on concerns about smoking or health, but because the Massachusetts attorney general's regulations were based on concerns about smoking and health. In response to the attorney general's contention that the state regulations were "not 'based on smoking and health'" because they targeted only smoking by minors, the court said: "At bottom, the concern about youth exposure to cigarette advertising is intertwined with the concern about cigarette smoking and health."

Back to California. Relying on *Mangini*, and copying their pleadings from those in the settled 50 state attorneys generals' suit, the plaintiffs in *In re Tobacco II Cases* sought restitution under the California Unfair Competition Law for money spent on tobacco by minors. The California Supreme Court, however, repudiated *Mangini's* holding that Penal Code Section 308 was not a statute based on concerns about smoking and health. Even if such concerns did not inspire the 1891 Legislature that first enacted Section 308, it said, the current statute, as amended, was based on health concerns.

The California Supreme Court also rejected the plaintiffs' second argument, one derived from *Cipollone* — that the suit was founded on the Unfair Competition Law, a general statute not enacted because of concerns about smoking and health. That is precisely the duty that the U.S. Supreme Court in [*Lorillard Tobacco Co. v. Reilly*] held subject to FCLAA pre-emption because it is necessarily and inherently based on concerns about smoking and health."

This is fair enough if one looks only at *Reilly* as authoritative, but it overlooks *Cipollone's* holding that causes of action charging the tobacco companies with misrepresenting the effect of smoking on health — claims that were necessarily based on concerns about smoking and health — were not pre-empted. If the California Supreme Court thought *Cipollone* was no longer authoritative because it had been tacitly overruled in *Reilly*, it was in good company, for probably eight of the nine justices who decided *Reilly* thought that the two cases were inconsistent. But the crucial fifth vote for the *Reilly* majority came from Justice Sandra Day O'Connor, who joined the *Cipollone* opinion and did not view the cases as inconsistent.

In *Altria Group v. Good*, the U.S. Supreme Court again reversed directions. In an opinion by Stevens, who wrote the plurality opinion in *Cipollone* but joined the dissent in *Reilly*, it upheld an action under the Maine Unfair Trade Practices law attacking the market in "light" cigarettes. His opinion reasoned that the Federal Cigarette Labeling and Advertising Act pre-empts requirements and prohibitions based on smoking and health, not causes of action seeking redress for harms related to smoking and health. Apparently the Massachusetts attorney general lost in *Reilly* because he sought to accomplish his objectives through administrative regulations instead of litigation.



Under the *Altria* analysis, the California Supreme Court decision in *Tobacco II* was wrong, for a cause of action seeking restitution for harms caused by smoking is not pre-empted if based on a general statute prohibiting unfair competition. It turns out that *Cipollone*, not *Reilly*, was the controlling case after all.

To recapitulate this sad story: Congress enacted an overbroad and poorly worded pre-emption statute. In construing the statute, the U.S. Supreme Court issued first a plurality opinion, then a 5-4 opinion rejecting the reasoning of the plurality opinion, then another 5-4 opinion going the other way.

The California Supreme Court in *Mangini* followed the first U.S. Supreme Court decision, then overruled *Mangini* as inconsistent with the second high court decision, and now discovers that in light of the third high court decision, Mangini was right after all.

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