OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: THOMAS CIPOLLONE, INDIVIDUALLY, AND AS EXECUTOR OF THE ESTATE OF ROSE D. CIPOLLONE, Petitioner v. LIGGETT GROUP, INC., ET AL.

CASE NO: 90-1038

PLACE: Washington, D.C.

DATE: Tuesday, October 8, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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THOMAS CIPOLLONE, INDIVIDUALLY :
AND AS EXECUTOR OF THE :
ESTATE OF ROSE D. CIPOLLONE, :
Petitioner :
v. : No. 90-1038
LIGGETT GROUP, INC., ET AL. :

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Washington, D.C.

Tuesday, October 8, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

MARC Z. EDELL, ESQ., Short Hills, New Jersey; on behalf of the Petitioner.

H. BARTOW FARR, III, Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in number 90-1038, Cipollone v. the Liggett Group.

Mr. Edell.

ORAL ARGUMENT OF MARC Z. EDELL

ON BEHALF OF THE PETITIONER

MR. EDELL: Thank you Chief Justice Rehnquist, and may it please the Court:

The issue in this case is whether the Federal Cigarette Labeling Act preempts State common law tort claims against cigarette manufacturers for failure to warn, fraud, deception, and misrepresentation.

In 1964, the Surgeon General's Advisory Committee on Smoking and Health issued its landmark report. In that report, it indicted cigarette smoking as the major cause of preventable death in the United States. In response to that report, States and municipalities across the country began proposing legislation that would require cigarette manufacturers to place warning labels on their packs of cigarettes and in their advertising.

At the same time, the Federal Trade Commission began its rulemaking process which would likewise require cigarette manufacturers to place a specific warning on packs of cigarettes and in their advertising.

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In the wake of all this activity, in 1965, Congress intervened. Congress intervened for two reasons. First, to decide what steps it should take on a national basis in light of the Surgeon General's report and its conclusions. And second, to address the cigarette manufacturers' concern that if they were forced by these various State regulations and the Federal Trade Commission to put different warning labels on packages of cigarettes and in their advertising, they would not be able to conduct business on a national basis. Congress heard hearings for many weeks. Industry representatives testified. Submissions were made. The industry again asked for preemption of State regulations and of the FTC so that they could go ahead and do business.

Congress, in enacting the 1965 Cigarette Labeling Act required, one, a specific warning on packs of cigarettes; and two, it gave the industry the preemption it asked for, not preemption of State common law tort claims -- claims that the industry had already been faced with for over a decade prior to the 1965 act. It preempted any statements to be required on packages of cigarettes other than the Federally mandated statement, and it preempted any warning requirements in cigarette advertising whatsoever.

In 1969, Congress intervened again on the issue

of preemption. It was not because the cigarette manufacturers, now 15 years into the litigation, decided that they needed some protection from these tort suits. The reason was that the section 1334(b), that is the preemption section applicable to warning labels in advertising, was to expire on July 1, 1969. Congress again held hearings. And again the industry said, we need preemption of State regulations that would require us to put different warning labels on packs of cigarettes and in our advertising. And again, Congress gave them their request.

But Congress decided in 1969 to restructure the act somewhat. It restructured it by giving the Federal Trade Commission freedom now to proceed with its rulemaking process to decide whether or not warnings should be required in cigarette advertising. It restructured it also to make clear that not only were the States, but also the States' political subdivisions were also precluded from imposing these regulations that would require warning labels in advertising or in -- on packages of cigarettes.

In 1969, Congress also decided on a new warning, and for other reasons it removed cigarette advertising from electronic media.

At no time during the 1969 hearings or in the

1965 hearings did the industry ask for protection for these cases. At no time during either of the hearings in 1965 or '69 is there any suggestion that Congress, any one Congressman -- Congressperson -- suggested that there would be preemption of State common law tort claims.

All discussions regarding State common law tort claims were based upon the assumption that these cases were to continue.

QUESTION: Well, the language Congress used is -- certainly can be construed more broadly than you're suggesting. Don't you agree with that?

MR. EDELL: I don't agree with that, Chief Justice Rehnquist.

QUESTION: You don't think that the provision of section (b) could be read to preclude the sort of failure to warn claims in State tort litigation?

MR. EDELL: No, I don't, Chief Justice Rehnquist.

QUESTION: Then you think the Third Circuit is simply irrational, I suppose, if you don't think it can even reasonably be read that way.

MR. EDELL: I think that the natural read of section 1334(b) does not suggest that these cases -- that these cases are encompassed in that preemption. And in fact, the Third Circuit did not read 1334(b) as

specifically including these cases. The Third Circuit said that on the issue of expressed preemption, 1334(b) did not state that these cases were preempted.

QUESTION: Suppose in a suit such as the type that was heard here the judge says, ladies and gentlemen of the jury, you're instructed that the warnings currently on cigarette packages are required by Federal law, and that as a matter of Federal and State law they're adequate. And that you may impose no additional prohibition or requirement on such advertisements. Is that a proper instruction to the jury?

MR. EDELL: As it stands today under the Third Circuit's ruling?

QUESTION: No. Is that a proper interpretation of instruction to the jury based on this statute?

MR. EDELL: No, I don't think so. I think that --

QUESTION: You can't instruct the jury that?

MR. EDELL: I don't think that as a matter of law, this statute but for the Third Circuit's opinion --

QUESTION: Forget about the Third Circuit's opinion.

MR. EDELL: Okay.

QUESTION: What do you think is the proper interpretation of the statute? Is the manufacturer

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entitled to that instruction based on your reading of the statute?

MR. EDELL: No. I think that the manufacturer is entitled to the instruction that the jury, in considering whether or not the manufacturer met its standard of care that's required under common law, placed a warning required by the Federal Government on its packs of cigarettes and in its cigarette advertising. But until the Third Circuit opinion, it has historically been in the area of tort law that if a manufacturer, or anyone else for that matter, follows a regulation, that that regulation sets the floor and not the ceiling for manufacturers' behavior.

QUESTION: So the manufacturer's not entitled to an instruction that these labels as a matter of Federal law are adequate and sufficient, and that the jury may not impose as a matter of State law any more restrictive requirement.

MR. EDELL: To answer the first part of your question, Justice --

QUESTION: I mean, isn't that just the words of the statute?

MR. EDELL: It is. It is, but with respect to tort law, juries don't decide what further language should be placed on packages of cigarettes or in cigarette

advertising at any time. For example, in this case let's assume the jury heard all of the evidence. It saw the Federally mandated warning. It saw the warning in the advertisement. It saw the advertising. It saw all of the internal documents that we've developed during the course of discovery, some of which are a part of our appendix. And where the industry attempted to neutralize the effect of the Federally mandated warning.

The only question that the jury would then answer would be, question, did cigarette manufacturer X adequately inform its consumers of the health hazards of cigarette smoking? Yes or no. And if they answered no, that doesn't mean that the warning itself is not adequate. It could very well be that but for the intentional acts to neutralize that warning that the warning by itself is adequate. And this is not an alien concept. This is a concept that --

QUESTION: Let me just -- I just want to make clear. Would it be error for the district -- for the trial court to instruct the jury that you may require -- you may impose no requirement or prohibition other than what is set forth in the Federal law?

MR. EDELL: I don't see how that fits in the context of a tort action.

QUESTION: Well, what's wrong with reading a

statute to jury? It's the law, isn't it?

MR. EDELL: Well, it's -- with all due respect, Justice Kennedy, I don't know whether or not it's relevant on the issue of -- the issue that the jury is to decide. The issue to be decided is whether or not they adequately informed their consumers.

QUESTION: May I ask a related question? Part of the basis for the liability, I think, was on fraudulent misrepresentation in advertising. Is that right?

MR. EDELL: That's correct.

QUESTION: And 1334(b) says no requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising. Now, a tort suit based on fraudulent misrepresentation in advertising does appear to seek to impose a State law prohibition within the meaning of that subsection. What option does the manufacturer have other than to cease using the advertising? And how is that not covered by (b) in the literal language?

I know that's not the basis on which CA-3 decided, but I just wonder, in the context of the fraudulent misrepresentation, how it is not covered by (b).

MR. EDELL: Justices O'Connor, I think that is probably one of the more difficult issues in this case.

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Not necessarily only on fraudulent misrepresentation, because the question that's posed to the jury on that issue is, did cigarette manufacturer X fraudulently misrepresent to its consumers the health hazards of cigarette smoking. And when the jury considers that issue, they will consider not only the advertising, they will consider the public relations communications. They will consider all of the activities of the industry, the suppression of test results.

So a yes answer to that question does not necessarily, even if the manufacturer wanted to do something, does not necessarily require them from no longer using the particular advertising. Because we don't know from the jury verdict whether or not it was the -- a particular advertisement that convinced the jury that there was fraudulent misrepresentation.

I think the harder issue, and I will admit it, is the express warranty issue, where you have a particular advertisement, and a jury says this particular advertisement is a breach of warranty. The cigarette manufacturer has the choice of, one, paying the judgment, as we say in our brief, and merrily proceeding to employ the same express warranty -- and that's a business decision that they make. And that is the difference between requirements, if you will, and tort actions. It

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leaves the discretion on the manufacturer as to how to proceed.

But yes, at some juncture with $500 billion worth of --

QUESTION: Excuse me. Suppose you have a regulation that has as the sanction for its violation only the payment of money. Why isn't that precisely the same as a tort action?

MR. EDELL: Because a regulation gives the manufacturer no discretion of what their activities are.

QUESTION: Yes, he does. He can violate it and pay the money, just as with the tort action. You violate the law, the tort law, and pay the money.

MR. EDELL: But then you are a lawbreaker. I mean --

QUESTION: You're not a lawbreaker when you intentionally violate someone's rights under the common law of torts?

MR. EDELL: You're not violating a law, you're violating a standard, if you will, Justice Scalia, a standard of how we interact between ourselves as citizens. It is a moral -- a standard of morality that we impose upon ourselves.

QUESTION: Is that so even if the governmental sanction is not called a criminal sanction, but it is just

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a civil penalty?

MR. EDELL: I believe so. I think that the difference is the exercise of discretion.

QUESTION: What about punitive damages? Suppose the jury not only finds the cigarette manufacturer misrepresented contrary to common law and imposes compensatory damages, but even imposes punitive damages. Does that change your answer at all?

MR. EDELL: It would give the manufacturer greater incentive to exercise its discretion in a reasonable fashion, yes, I believe so.

QUESTION: But I mean, you'd say punitive damages are also allowed because they do not impose, or are not based, upon any requirement of law?

MR. EDELL: They're not regulations, and this act is directed to regulations.

QUESTION: What is it? What does it have to be to be a regulation?

MR. EDELL: It has to be an ordinance. It has to be a statute. It has to be --

QUESTION: Depends on whether it's created by the courts or by a legislative or executive agency. Is that the distinction you're drawing?

MR. EDELL: I would say that for the purposes of this act, if the executive branch was empowered to enact a

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particular proclamation that would require a cigarette manufacturer to do something violative of this act --

QUESTION: Oh, I know that, but about a court? Suppose a court -- suppose a State supreme court gets specific enough that it says in one of its decisions, under the common law of our State a manufacturer is liable unless the manufacturer says on the cigarette package, in these words, beware, cigarettes may cause cancer, emphysema, and death. And the State supreme court says that's the common law in our State. Does that violate -- is that all right?

MR. EDELL: I don't think that that was what Congress was trying to prevent. I think Congress was well aware of these tort actions. I think they were willing to accept any tension that might exist between compensating the individual who is injured as a result of that tortious conduct. I think as a matter of fact, a State can impose absolute liability on a cigarette manufacturer.

QUESTION: So long as it does it through a court decision and not an executive or legislative.

MR. EDELL: No, but --

QUESTION: And what if, in following up to Justice Scalia's question, the court also granted an injunction against the future sale of cigarettes unless it had that warning on it?

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MR. EDELL: If there was a tort action, if there was a -- for example, a nuisance action, that would require a manufacturer to specifically place a particular warning in an advertisement, and if they failed to do that, then an injunction would issue. I would think that that would come close to a conflict and that the act would not -- the intent of the act would not tolerate it.

QUESTION: Well, my hypothetical was a little simpler. My hypothetical was an action for damages. At the end of the complaint he says, and I also ask for such other relief as the court deems appropriate. And after entering the injunction -- and he sues on behalf of a class of people who smoke a lot -- after getting a damage judgment the court does enter the equitable decree.

MR. EDELL: But that's not how -- our court system doesn't permit that. The concept of the --

QUESTION: You mean New Jersey's court system doesn't?

MR. EDELL: There's no tort system, product liability tort system that I know of in this United States that grants equitable relief like that, that would actually regulate the behavior directly of the manufacturer. All that the jury does is say, under the circumstances, they failed to meet the responsibility the consequences of which are you must pay.

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QUESTION: It's his State, Mr. Edell. He has a State supreme court that says we're going to issue these injunctions.

(Laughter.)

QUESTION: There are a lot of areas of the law where they do that. I don't know about New Jersey and cigarette cases, but it's not unusual to grant equitable relief in addition to damages. Do you think that would be preemptive?

MR. EDELL: I think that if equitable relief could be -- would include an injunction, I think that that comes very close to an actual conflict.

QUESTION: Well, Mr. Edell, in the same general area, I suppose the award of compensation in a tort suit is based on finding some preexisting duty by the tort feasor -- a duty.

MR. EDELL: Yes.

QUESTION: And why isn't a duty determined by State law somehow regulatory? Has this Court ever thought that it could be, for instance in the Garman case or other cases? Have we ever looked at tort liability and said yes, that can be a form of regulation?

MR. EDELL: Yes, Justice O'Connor. What the Court said in Garman was that it could have a regulatory effect. And given the broad nature of the preemption in

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Garman, it is a conflict. It's not an expressed preemption, but it's a conflict. But I think if we look at some of the more recent jurisprudence from this Court. If we look at Silkwood, if we look at English, if we look at Goodyear, if think that we see the Court saying, indirect regulatory effect is something much, much different than direct regulatory effect that Congress intended to prohibit.

QUESTION: Well, I think that's true. But of course in Silkwood, it appears at least that we referred to an affirmative intent on the part of Congress to preserve State tort remedies. And I'm not sure here we see what Congress intended, other than by the language that it used.

MR. EDELL: Well, I think that if we look at the legislative history, we don't see a whisper, Justice O'Connor, of an intent to preempt. And we start out with the assumption that State common law tort claims are to continue. That's our presumption that we walk into this Court with. And I think if you look at the structure of the act also.

This Court, for example, in Ingersoll, said let's look for some special feature here that will help us distinguish whether or not this is a matter that should be preempted. And the special feature this Court found so

persuasive there was the alternative remedial scheme. We look at this act and we say to ourselves, there's no remedial scheme whatsoever. Congress did away with 100 years of development of common law, provided no remedial scheme. Not a whisper of it is contained in the legislative history, not in any committee reports. And we walk into this Court with a presumption against preemption and we're supposed to assume that that's the way Congress did it? It doesn't coincide with the way things work. And I think it's an absurd suggestion.

QUESTION: Maybe it's also, as some of the earlier questioning suggested it, I mean what we're grappling with is, it also seems a little absurd to think that Congress said, you can't do this, unless of course, you do it through the courts. If you do it through the courts, you know, you can completely frustrate our handiwork. So long as that requirement, you know, beware cigarettes may cause -- cigarettes cause cancer, emphysema, and possibly death -- so long as it's some judge who says that that has to be there, it's okay.

Could Congress possibly have meant that?

MR. EDELL: Yes, Justice Scalia. I think we see evidence of it. And I don't like to compare one act to another, but just the concept of the absurdity of the thought, we see evidence of it in the Smokeless Tobacco

Act. There the Congress said, this is the specific warning that should be put on packs of smokeless tobacco. And yet it provided at the very same time, in light of all of the preemption decisions, a savings clause saying, it's okay, we say this is the warning, but you can continue to sue. That's a specific example that I could give you.

Now, I guess, you know, in the end the burden is not on us to show that Congress intended that these matters were to continue. It's the burden of the respondents to show with crystal clarity, I would suggest, that it was Congress' intent to do away with these tort actions.

I think that with respect to the tension issue, Congress was willing to accept the tension that these lawsuits might produce. And again, when we talk about these lawsuits, we talk about, is it realistic to assume that it's going to change the behavior of this industry? Is it realistic to assume a failure to warn claim will require them to change their warning label --

QUESTION: Mr. Edell, certainly in some of the debates over so-called tort reform, one of the arguments used by people who are against capping damages and that sort of thing, is that these kind of suits are the best way to regulate an industry and to keep its products safe.

MR. EDELL: There is no question that there are

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those who think that this -- products liability is the way to affect behavior. But the basic concept of products liability is premised upon compensation as opposed to anything else. That the State of New Jersey could impose absolute liability, they can impose a tax upon cigarette manufacturers, use that tax to pay for the injuries that occur to smokers. That would not be preempted.

QUESTION: They are still not regulating?

MR. EDELL: No, they're not regulations. They're not regulatory. They may have some indirect effect, Chief Justice Rehnquist.

QUESTION: And I'm not sure where you came down with punitive damages. What about punitive damages? Is that a harder case?

MR. EDELL: I don't think it's a harder case. I think Congress was willing to stand by that also.

Just one more -- I want to reserve the remainder of my time. Just one other matter on the conflict issue. The manufacturers, in order to make sure that their consumers are adequately warned, could probably -- I mean, there are a myriad of ways of resolving that, but the most effective way is just to stop their intentional concerted effort to neutralize the Government action.

It's really quite a thought to think that Congress --

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QUESTION: Well, would you be satisfied with a result that said, if you could convince a judge or a jury that the companies are actually neutralizing or negating their warnings, that you can recover?

MR. EDELL: As part of the lump, Judge?

QUESTION: No, that's all you can recover.

MR. EDELL: I'll take whatever I can get, Justice.

(Laughter.)

QUESTION: Well, I know, but would you be satisfied? But I take it you want to go much farther than that.

MR. EDELL: I do. I do. Yes, I do.

QUESTION: So you would not be satisfied at all with just the failure to conform to their warnings.

MR. EDELL: I would be satisfied in part but not in whole.

QUESTION: Yes, I thought so.

(Laughter.)

QUESTION: Mr. Farr, we'll hear now from you.

ORAL ARGUMENT OF H. BARTOW FARR, III

ON BEHALF OF THE RESPONDENTS

MR. FARR: Mr. Chief Justice, and may it please the Court:

I would like at the outset to briefly summarize

why we think that the act preempts the claims at issue here. First, it was the judgment of Congress reflected in the act that the Federal Government should make the ultimate decisions about what cigarette companies must or must not say. That is that it, along with the Federal agencies, should set the standards of conduct that the companies were required to meet in this area.

To carry out this scheme, the States were preempted from setting their own standards of conduct, and it naturally follows that unless Congress says otherwise in the act, that Congress also means to preempt the States from enforcing their standards of conduct, whether they choose to do so by sanctions, like fines, or remedial provisions, like damages and injunctions.

Second, Congress did not mean to preempt just some State restrictions. Although Congress clearly was concerned and wanted to preempt the ability of the States to require warnings in advertisements, it wanted to preempt any restrictions, like bans on advertising or partial bans on advertising that would upset the balance of interest, national interest, that Congress itself had struck in the act. And that scope of preemption covers all the claims before this Court.

Now in discussing the question of preemption, I think it is useful to keep in mind the background against

which Congress was legislating in this area. As petitioner has noted, after the Surgeon General's report came out, there were a number of different proposals regarding restrictions that could be put on the marketing of cigarettes. There were a number of different warnings that had been drafted and proposed, and there were proposals to require warnings on packages, to require warnings in advertisements, to ban advertising altogether as far as cigarettes were concerned, or less restrictive bans on advertising.

And what Congress recognized, correctly, was that this was a national problem and it needed a national solution. And thus, that it was the Federal Government, Congress together with the agencies, that would have to ultimately set the requirements that the companies would have to meet.

QUESTION: This sounds like an argument of field preemption.

MR. FARR: Well, it is in a sense, Your Honor, it is that Congress would --

QUESTION: Are you -- I take it you're in a sense disagreeing with the court of appeals.

MR. FARR: We both agree and disagree with the court of appeals. We think that --

QUESTION: So you really aren't defending the

court of appeals opinion.

MR. FARR: I certainly would defend the part of it in which it found preemption. What I would say differently, Justice White, is that I do not think that the court of appeals, frankly, gave enough weight to the plain language of section 1334(b).

QUESTION: In that regard, Mr. Farr, do you think it looked at the plain language of the '65 statute or the '69 statute?

MR. FARR: Well, clearly, the courts were interpreting the '69 statute.

QUESTION: Well, do you think the '69 statute changed the meaning of the '65 statute?

MR. FARR: No, I don't.

QUESTION: So you would be content to rest your case on the language of the '65 statute?

MR. FARR: I would be content to rest my case on the '65 statute, but let me explain the difference between your question and my answer, if I might.

QUESTION: That will take some doing.

(Laughter.)

MR. FARR: To start, the 1969 act, I think, clearly preempts by its very terms requirements and prohibitions. The 1965 act, as far as 1334(b) is concerned, which is not the entire act, of course, but

just that specific preemption provision, does not contain as broad language as the '69 act.

Our position, however, is the act as a whole --

QUESTION: So it only relates to statements in advertising.

MR. FARR: Pardon me?

QUESTION: It only relates to statements in advertising.

MR. FARR: That's correct. But our contention is that the act as a whole, when you take into account the purposes and policies of section 1331, was in fact intended even for that 4-year period to also cover what the 1969 act clearly covers. And what happened in fact, and the legislative history supports this -- in 1969, what was before Congress was essentially a debate about the scope of the 1965 act. A number of Congressmen took the position that the 1965 act essentially covered only what your question would suggest, Justice Stevens, simply requirements about statements in advertising. And that was the position that the court of appeals had taken here in D.C. in the Banzhaf case.

However, a number of other Congressmen said that is not what the 1965 statute did. What it did was preempted all State regulation of advertising. And what Congress did in 1969, therefore, and what the Senate

report indicates, is that it clarified what the meaning of the 1965 act as a whole was intended to be.

So we believe that in fact the scope of both acts is the same.

QUESTION: As far as your field preemption field argument is concerned, I take it that's what you're talking about.

MR. FARR: We believe that the field is essentially the same. I mean, to some extent any preemptive provision preempts some field, and that's of course what we're saying.

QUESTION: But if there is a so-called field preemption that you're arguing for and that you have to get around to express conflict or frustration, doesn't the '69 act help you in that regard?

MR. FARR: Well, I think the entire act should be read together. This is why I think it is difficult to say we are relying only on one theory of preemption. Because we think you can get there by a number of different routes. To start with, as I said, we think the language of 1334(a) and (b) together convey a very broad scope of preemption. They cover all requirements regarding warnings and labeling. They require all -- rather they cover all requirements and prohibitions with respect to advertising and promotion.

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However, even if you didn't have that, what you do have all along is a clear intention by Congress to set the policy in the field. Section 1331 talks about a comprehensive Federal program whereby the public will be warned. And yet, and this is an important part, at the same time Congress was concerned that the national economy not be unduly disrupted and that the companies not be subjected to disuniform, in its word, diverse and disuniform regulations.

QUESTION: Mr. Farr, do you think that your theory means that Congress intended to set a ceiling on the amount of information that consumers would receive from the manufacturers?

MR. FARR: I don't think Congress intended to set a ceiling on the amount of information that consumers would receive. I think what Congress intended to do was to set a regulatory structure, in other words, a structure in which the Federal Government would set the requirements for what the companies had to do.

QUESTION: The lower limit of a requirement so that additional warnings are appropriate perhaps?

MR. FARR: Well, what Congress did in the area of warnings, I believe, Justice O'Connor, is to say the companies have to provide this particular warning on their packaging.

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QUESTION: As a minimum?

MR. FARR: That is the both the minimum and the maximum that they are required to put on their package. In other words, as far as requirements go, it is a floor and a ceiling. Congress did not leave open --

QUESTION: Are they prohibited from adding additional warnings on their packages, in your view, by that language?

MR. FARR: Assuming they're not required to do so by State law, but are simply acting on their own?

QUESTION: Well, we can get to both.

MR. FARR: Well, I ask the question because I think there is a distinction.

QUESTION: Without regard to State law, is the manufacturer under the terms of the act free to add additional warnings?

MR. FARR: I do not read the act as specifically prohibiting a manufacturer from putting additional warnings on a package. However --

QUESTION: All right, then do you think that it's open to a State, through its tort law, to establish a duty to provide additional warnings?

MR. FARR: No, I do not. That is the distinction that I am drawing. It think the act quite clearly is talking about the power of the States to

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require additional warning.

QUESTION: But there is a presumption, I guess, that Congress didn't intend to disrupt State tort law.

MR. FARR: Well, I think any case in which you are examining preemption starts with that presumption. But I think the next question is at what point is that presumption properly overcome. The position we would take is that when Congress says in plain language in the act that States may not impose any other requirements within a particular field, whether it happens to be labeling or whether it is advertising and promotion, and indeed where the structure of the act makes clear that Congress itself is the one that wants to set the policies and set the requirements for good reason, that that itself overcomes any presumption against preemption.

QUESTION: Well, in the Smokeless Tobacco Act, Congress was pretty clear in indicating that it thought State tort suits could continue.

MR. FARR: But I think that, in fact, points out the very clear difference between this situation and the situation that you have in the Smokeless Act, and in fact, in Silkwood and Goodyear Atomic, which were mentioned earlier.

Our position is that when Congress preempts the ability of the States to set substantive standards, the

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natural conclusion is that Congress has also preempted any ability on the part of the States to enforce those standards, as I said before, by fines, by criminal penalties, by suits for damages, by injunctions. The exception is where Congress makes clear in the act that despite its preemption of the standards, it is willing to tolerate some particular form of enforcement. In other words, that it is willing to have its policies frustrated.

QUESTION: I was going to say, isn't the sort of the limit of the obvious effectiveness of your argument, though, in the fact that when you speak of Congress establishing substantive standards, and as you did earlier, standards of conduct, that simply leaves open the question whether Congress is establishing substantive standards for advertising and promotion or substantive standards governing ultimate liability. Clearly, they're establishing substantive standards for advertising and promotion. Nobody would disagree. I assume nobody would disagree with you there.

But it seems to me that the closest you've come so far to an argument that those substantive standards go beyond advertising and promotion to the questions of ultimate liability or ultimate conduct, if you will, in selling cigarettes is in the remark that you made earlier that in the debate over the scope of the original act,

Congress clarified it in the 1969 amendments in favor of a broad rather than a narrow reading.

Is your best argument for that reading of Congress' clarification the language of the 1969 amendments or can you point to some kind of an explicit statement in legislative history in which somebody says, we're taking the broad view by using this new language?

MR. FARR: Well, I think there is both, Justice Souter. I think what Congress was dealing with, frankly throughout, from 1965 on, was the variety of different means of regulation, a variety of different efforts at both the State and the Federal level to impose restrictions on cigarette companies. And I think what Congress did was to say quite explicitly, certainly in 1969 explicitly, that we do not want the States to be imposing requirements or prohibitions in this area. That, supported by the legislative history, I think, makes clear that Congress does not want a State, for example, to require that a warning be put in an advertisement. I think that's common ground among the parties here. That, at the very minimum, is what Congress had in mind.

However, the problem is from there on there is really no sensible place to draw any line. If a State can say all right, maybe we're preempted from requiring a warning, what we will do is we'll ban advertising

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altogether, or we'll ban advertising that doesn't carry a warning, or we will say that any advertising even if it does carry a warning, but shows attractive subjects, pleasant settings, is misleading because it suggests that smoking and health are compatible and we as a State have made the judgment that they are not.

In all of those situations, it seems to me, Congress is saying this is not something we want the States to be free to do. If such action is necessary, we will take it. And of course, in 1969 -- excuse me, just to finish the answer -- in 1969, of course, Congress stepped in and did ban some advertising, with respect to broadcast advertising.

QUESTION: Now your argument would also be consistent with -- the argument that you have just made would be consistent with the text of the '69 amendment if that text had omitted the language with respect to the advertising or promotion of cigarettes, wouldn't it? In other words, there would have been no need to put in that qualification with respect to advertising and promotion if they wanted to find the clearest way to occupy the field not merely of promotion, but of all regulation including promotion.

MR. FARR: Oh, well, Justice Souter, I'm sorry. I want to make clear what my position is and perhaps I

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have not made it clear. We are not suggesting that Congress has occupied the entire field of smoking and health. The field that we are talking about is essentially the requirements that can be imposed with regard to information about smoking and health, what I loosely called at the beginning what the companies must say, what the companies must not say. That is what Congress was directly involved in.

QUESTION: In other words, it was involved with the means, if you will, of providing these regulations.

MR. FARR: I'm sorry, I'm not sure I understand the question.

QUESTION: The means being the use of advertising and promotion to sell the cigarettes as opposed to regulating, let's say, through tort law which might be a source of regulation if there were no advertising whatsoever.

MR. FARR: Well, it depends on what the aim of the particular law is. Again, we're not suggesting that all tort suits are preempted. We have said in our brief that tort suits based, for example, on fairly common strict liability theories like manufacturing defects or design defects are not preempted. And we're not suggesting here that that is part of the field that Congress has occupied.

QUESTION: Mr. Farr, what if a cigarette manufacturer voluntarily puts on the package, cigarettes may be bad for your health in some respects, but scientific evidence shows that they are good in other respects. They fight bronchial asthma germs or something like that. And there's no evidence for this, this is purely fanciful.

MR. FARR: If the question is could a State regulate that or provide a tort suit based on that, our answer is no, that that is something that is corrected at the Federal level, and clearly would be corrected by the FTC. They would be down on the cigarette companies in a minute for doing something like that. But the Congress did not intend --

QUESTION: But if they didn't -- if the FTC chose not to move, there could be no tort remedy under general misrepresentation, fraud, or anything else.

MR. FARR: That's correct.

QUESTION: The entire field of fraud, deceit?

MR. FARR: Well, let me explain why that is true. That what you have here is the difficulty of trying to decide where the lines begin and end. Now I'm sure that if Congress was confident that it could say we will allow some State requirements, as long as those requirements only go to the most egregious examples of

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conduct, that Congress might well have considered that. But that, I think, is simply an impractical way to look at the system. That once you say to the States we are going to allow you to apply your standards in this field, whether it's to intentional misrepresentation to whatever an adequate warning would be, at that point, you essentially cannot have national standards. You can't have both national standards and have 51 or more State standards.

QUESTION: You know, there are two limitations in this text, and we were speaking with Mr. Edell mostly about the limitation requirement or prohibition, what constitutes a requirement of prohibition. But it also says based on smoking and health. And maybe what Congress meant by that is that the prohibition has to be one that is rather narrowly focused. And a general fraud or deceit prohibition is not a prohibition based on smoking and health. You're not allowed to lie. We don't care whether you do it about the benefits of -- the health benefits of cigarette or anything else, you're just not allowed to lie.

MR. FARR: But if that were true, Justice Scalia, then the State could have a general standard that says you have to give adequate warnings about products that you sell in this State, and say, we're not saying

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that you -- we're not applying a specific standard to cigarettes, we're just applying our general standard to your warning. And it's not adequate.

QUESTION: That's right. That's exactly your opponent's argument.

MR. FARR: Well, the problem is it doesn't make any sense. That -- there is no reason to think that Congress was essentially playing a guessing game here. What Congress said was if you are indiscreet enough to pass a specific statute or apply, or to have a law that is specific with regard to cigarettes, and that requires a different warning, or that prohibits something in advertising, that's perfectly all right with us, even though it will have exactly the same effect on the national policies and all of that, we're willing to tolerate that. But, if in fact -- excuse me, we're not willing to tolerate that.

But if you have a general prohibition and then apply it specifically to cigarettes to say this warning is not good enough, this kind of advertising can't be allowed in our State, that's perfectly acceptable to us. The effect of both of them is exactly the same.

Let me take an example. If a State has a statute that says we do not permit deceptive or misleading advertising in this State, and we have an agency that is

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set up to administer this statute. And it will review your advertising to determine whether it is permitted or not. And that agency then determines that any advertising by a cigarette company is inherently misleading unless it just has the name of the cigarette.

There is no reason to think that so long as the agency is acting that way and not -- or by a specific adjudication, that it would make any difference. And yet one would be more general, one would be more specific, and the overall statute could be quite general. But the effect, ultimately, is the same. What the State is saying is, in our State, you have to meet these standards of conduct, and that is essentially the price that you have to pay to market in our State.

QUESTION: Well, Mr. Farr, suppose the State just passes a law and says no one may bring into the State any product that's determined by a commission to be dangerous to the public health. And it is decided that a whole list of products including cigarettes are dangerous to the public health. And here a cigarette company brings in some cigarettes in violation, and it is -- and they say well, this is -- you're just wrong. We're not, this product isn't dangerous to public health. Well, they lose the case.

Do you think that's preemptive?

MR. FARR: Not under the analysis that I am talking about. Now, but I want to be clear.

QUESTION: I know. So that would just be an ordinary tort suit that says, look, you've brought in a dangerous product and you've hurt somebody, and you're going to have to pay. We don't care what -- we're not saying anything about advertising, warnings or anything else. Here is just a dangerous instrumentality.

MR. FARR: But this is the point --

QUESTION: Was that kind of a suit preempted?

MR. FARR: If -- let me give the answer that says it is not preempted under the analysis that I am talking about. There is an argument to be made under this statute which is not part of the argument that we're making with respect to these claims, that Congress expected cigarettes could be sold lawfully in the State. But that is a completely different analysis from the analysis that I'm making, starting with the preemption provisions in 1334(b).

What they relate to are labeling, advertising, and promotion. Now the example that you've given, Justice White, simply does not fit within that field, so --

QUESTION: But you think the particular litigation that's involved here is in the field of information.

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MR. FARR: Absolutely.

QUESTION: All of the causes of action.

MR. FARR: This in fact goes back, I think, to the question that Justice Scalia asked about what do the words "based on" mean. Every claim in this case quite clearly is based on some relationship between smoking and health. You did not warn enough about smoking and health. You misrepresented the relationship between smoking and health.

QUESTION: It's a good argument. And it's based on the essentially inane consequences that ensue if you say the States can do through court decisions what they couldn't do through regulations. What you're saying is that's sort of an absurd way to read the statute.

MR. FARR: It is not --

QUESTION: Except you have, you know, the Smokeless Tobacco Act, which clearly produces exactly such an absurd result, doesn't it?

MR. FARR: Well, that's the point that I was making earlier.

QUESTION: So maybe it's not such an absurd result.

(Laughter.)

MR. FARR: It is not -- what I think would be more absurd, to borrow that word, would be to attribute

that to Congress where Congress has given no other indication in the statute. If Congress, as it did in Silkwood, says explicitly in the act, there will be tort suits -- I mean, that's the necessary implication of the provision that was being construed in Silkwood, which set a limit on the damages for tort suits. Or in Goodyear Atomic, Congress says explicitly, workman's compensation laws will apply exactly the same to Federal facilities within states as they do to any other facility. The Smokeless Tobacco Act, again, you have an explicit provision.

So at that point it is entirely legitimate, it seems to me, for the Court to say Congress is willing to accept the tension between some regulation and the effort to set uniform national standards or to protect Federal facilities or whatever the Federal goal is but not --

QUESTION: You still haven't quite got around to explaining why Congress would want to occupy the field and not ever have a remedy or provide a remedy for injury caused by a dangerous product.

MR. FARR: Justice White, let me -- you see, I think there's a little bit of a misconception about the relationship between the remedies and the standards.

QUESTION: There's a remedy before the FTC to correct misleading advertising and things like that. But

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you're not going to recover any money.

MR. FARR: But there's more than that. Let me set out, if I can -- excuse me. Let me set out if I can what I think is the landscape as far as remedies are concerned. What Congress has clearly prohibited are remedies based on State requirements. That is what Congress, we say, has shut down. State requirements within the field of labeling, advertising, and promotion, what the companies can and cannot say.

However, that doesn't exhaust the field, to begin with. There are other types of suits that can be brought connected with smoking which are outside the field entirely, as I've indicated before. So when the plaintiffs are saying there is not a remedy here, when they are saying, for example, there is not a remedy for failure to warn, what they're really saying is there is not a failure for not -- there is not a remedy for not giving a greater warning than the warning that Congress required and said was the only warning that you could be required to give.

In the misrepresentation field, for example, to the extent that the claims are based, as they typically are, on standard product advertising, that again is specifically an area in which the Congress did not want the States to be able to set requirements. So the fact

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that one would say you have engaged, in our view, in misleading advertising within our State because you have shown, as I say, attractive people in an ad, or an attractive setting, the fact that you cannot bring a claim for that and get a remedy any more than an agency could fine you for doing the same thing is because Congress did not intend the States to be able to do that.

QUESTION: I suppose the fact perhaps is that in order to get a tort remedy such as this, you're going to get in -- to impose liability, you're going to have to say something about the failure to warn or the misrepresentation, or something like that. You just can't go into court and say this product is dangerous.

MR. FARR: Not -- one could do that, but the claims --

QUESTION: I know, but he may not win.

MR. FARR: The claims before this Court are not those claims. And that's what I want to emphasize. The claims here are not claims in which somebody simply says the product is dangerous. They are claims based on --

QUESTION: What you're saying is that there is no need for a remedy unless there's a wrong. And they've defined the scope of the wrong.

MR. FARR: That's correct.

QUESTION: I suppose there is a remedy if your

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clients just sold cigarettes without the warning label on them.

MR. FARR: That's correct. That was the point.

QUESTION: So there is a remedy for whatever Congress has set as a permissible -- can be defined as a wrong.

MR. FARR: That's absolutely correct. The preemption provisions do not apply if you do not comply with the specific Federal requirement about the warning on the package.

QUESTION: Mr. Farr, is there a remedy in your scheme for at least this -- the cigarette company publishes the warning required by Federal law, but then has under it, the Surgeon General's report is full of baloney.

(Laughter.)

QUESTION: It says that. You know, this report is not worth the paper it's written on.

MR. FARR: Justice Scalia, the short answer is no. But the reason --

QUESTION: They can do that?

MR. FARR: I'm sorry, there is no remedy.

QUESTION: No remedy. The FTC will take care of that.

MR. FARR: The FTC will take care of it. The

difficulty -- the point that I want to make here at the end is that when you were talking about the extreme hypothetical, the one, obviously, that causes anybody discomfort when they're thinking about the conduct, that is precisely the conduct that the FTC would be on instantly. It could get temporary restraining orders against it, could stop before it even happened. And Congress clearly understood that power. It reaffirmed the power of the FTC, it urged the FTC to use it liberally.

QUESTION: If it's truthful, if it just says, you know, not everyone agrees with the Surgeon General's report. How can the FTC come down on that?

MR. FARR: Well, if you're saying that --

QUESTION: It just says, you know, many experts disagree with the Surgeon General's report. Can that be on the cigarette under the Government warning?

MR. FARR: I think it would -- I mean, I don't know whether that would ultimately be a deceptive act or not.

QUESTION: But unless it's deceptive, the FTC wouldn't be able to do anything about it?

MR. FARR: Well, if it is the kind of deception on which you could base a State tort claim, I am quite confident that the FTC would have jurisdiction to handle it.

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QUESTION: Thank you, Mr. Farr.

Mr. Edell, do you have rebuttal?

REBUTTAL ARGUMENT OF MARC Z. EDELL

ON BEHALF OF THE PETITIONER

MR. EDELL: Since we've spent a lot of time on the 1969 language of 1334(b), I just wish to point out one thing. That if a jury was to say, cigarette manufacturer, you failed to adequately inform your consumers about the health hazards of cigarettes, what requirements or prohibitions would that impose on cigarette manufacturers in their advertising and promotion? None.

QUESTION: It would surely tell them they had to do something more than they'd done in the facts of the case.

MR. EDELL: That's correct. That's correct, Justice Stevens.

QUESTION: It would tell them that the warning proscribed by the Federal Government was not adequate.

MR. EDELL: But we're talking about this specific language, advertising and promotion. That's the broader language that respondents seem to fall back on. And in this specific language, a failure to warn claim or an inadequate warn claim --

QUESTION: Well, how do you ever warn except through advertising and promotion and labeling?

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MR. EDELL: You do it through a variety of means. I mean, you can take out an ad in the newspaper like --

QUESTION: Well, that's part of advertising.

MR. EDELL: Not an ad in terms of a product ad. What you do is you say, instead of saying R.J. Reynolds, can we have an open debate on cigarette smoking and health, what you do is you say, you know what, the Surgeon General's right. Cigarette smoking does cause cancer, heart disease. It's the major cause of disease, preventable death in the United States, kills 400,000 Americans every year. Maybe that's what's necessary when you look at --

QUESTION: If that's what's necessary to avoid tort liability, it seems to me that that is imposing a requirement there, a prohibition, in the teeth of the statute.

MR. FARR: In terms of their product advertising, Justice Stevens?

QUESTION: If you say their failure to do that, it would be a breach of duty that gives rise to damage liability.

MR. FARR: I misspoke then. What I meant to say is they could take that step in order to adequately inform.

QUESTION: But then you're saying the failure to take that step can give rise to liability.

MR. FARR: No, they can do it in a variety of other ways. They could make sure that their consumers are adequately informed. As I said before, they could stop their concerted effort to neutralize the effectiveness of the health warning. They, through nonproduct promotion, nonproduct public relations that is unconstrained by the FTC.

QUESTION: Mr. Edell, it doesn't seem to me satisfactory to say a requirement is not being imposed so long as you do not have to do any single thing, but you must do 1 of 10 things. I still consider that a requirement, don't you? It isn't enough to say, well, they wouldn't have to do it this way, they could do it a lot of other ways.

MR. FARR: I think when you're talking about --

QUESTION: To say you must do it 1 of 100 ways is still to impose a requirement, isn't it?

MR. FARR: I think it gives them the discretion if they want to take some remedial measures. Requirement forces you to do it. If you want to take some remedial measures, there are myriad ways of doing it other than a way that would conflict with the act.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Edell. The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)

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THOMAS CIPOLLONE, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF ROSE D. CIPOLLONE, Petitioner v. LIGGETT GROUP, INC., ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Michelle Saunders

(REPORTER)