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STATE COURT LEAVES DOOR AJAR FOR FRAUD SUITS BY INJURED SMOKERS

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New Jersey's central judge for mass-tort litigation has ruled that state-court claims of fraud, concealment and misrepresentation by the tobacco industry are not pre-empted by federal law.

Judge Marina Corodemus ruled on May 23 that a seminal U.S. Supreme Court case, Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992), preserves claims that are based on a general duty by manufacturers not to deceive.

The suit Thies v. The American Tobacco Co. et al., MID-L-10563-98 MT, names The American Tobacco Co., Brown & Williamson Tobacco Corp., Lorillard Inc., Lorillard Tobacco Co., Philip Morris Inc., Philip Morris Cos. Inc. and R.J. Reynolds Tobacco Co. as defendants.

The defendants had argued that the 1966 Cigarette Labeling and Advertising Act, 15 U.S.C. Sec. 1331 et seq., and its 1969 amendments pre-empted all of the plaintiffs' post-1969 failure to warn, failure to disclose and fraudulent concealment claims.

The plaintiffs' attorney, Adam Slater, an associate with Livingston's Nagel, Rice, Dreifuss & Mazie, says the ruling is a green light for plaintiffs who can show that they were harmed by relying on false and deceptive representations. ""It opens up a whole area of attack that's been closed to plaintiffs for a long time," Slater says. "We're hopeful that this will turn the trend."

The deceased plaintiff, Arlene Thies, smoked cigarettes from 1954 to 1981 and was exposed to secondhand smoke through 1996, according to the opinion. She eventually contracted bladder cancer, which led to her death earlier this year.

Thies and her husband, George, filed suit in Middlesex County in 1998 against seven cigarette-producing companies for failure to warn of various health risks related to cigarettes, misrepresentation and fraud, manipulation of nicotine levels, concealment of health hazards, design defect, violation of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, and that cigarette smoking was the cause of her death.

The defendants subsequently filed a motion to dismiss the complaint, arguing that the claims were pre-empted by the Labeling Act and its 1969 amendments.

Citing Cipollone, Corodemus noted that claims of fraudulent misrepresentation are only pre-empted if they are based on state law obligations involving advertising or promotion of cigarettes. However, she added: "Claims of fraud which arise from advertising and promotion are not pre-empted if they are based on the more general duty not to deceive, and not on smoking and health."

Typically, courts throughout the nation have held that claims about misrepresentations by tobacco companies were

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pre-empted if the company's statements were made as part of advertising, even if they were misleading, Slater says.

But a handful of decisions have carved out exceptions, such as Burton v. Reynolds Tobacco Co., 884 F. Supp. 1515 (D. Kan. 1995), which held that failure to warn claims should be dismissed only to the extent that they assert that the defendants should have included more warnings than the law requires after 1969.

Corodemus also cited Vermont v. Philip Morris Inc., No. 5 744-97 (1998), which held that claims are not pre-empted by the Labeling Act if they are based on "the duty not to deceive" and not on smoking and health.

"This court agrees with the reasoning of the Vermont trial court," Corodemus wrote. "Moreover, even claims which arise from advertising and promotion remain viable as long as those claims are firmly based on the more general duty not to deceive and not based on smoking and health."

But the defendants' attorney, Alan Kraus, a partner with Morristown's Riker, Danzig, Scherer, Hyland & Perretti, says that any representations the companies may have made regarding cigarettes are based on smoking and health and should therefore be pre-empted.

Additionally, Kraus argues that the tobacco companies' communications to the plaintiffs also fall under the banner of advertising and promotion because Arlene Thies could not have been exposed to any other type of communication. Any such statements would also be pre-empted, Kraus maintains.

"The issue is whether or not there has been any statement other than advertising that Mrs. Thies may have heard and relied upon," Kraus says. "There really is no way that the tobacco companies communicated with the public other than advertising and promotion."

Kraus noted in his brief that the plaintiffs cannot "evade pre-emption by hypothesizing methods that the tobacco industry could have used to communicate with customers post-1969 that plaintiffs contends are outside of the scope of "advertising and promotion."D'

Citing Griesenbeck v. American Tobacco Co., 897 F. Supp. 815 (D.N.J. 1995), Kraus says that "a company's attempt to notify its mass market of anything, whether a danger warning or a marketing effort, is considered 'advertising and promotion' under the general usage of those terms, and a state cannot impose requirements on such activities without running afoul of the clear language of Cipollone."

Slater, however, did give Corodemus examples that statements or communications could not be considered advertising or promotional.

For instance, he cited media interviews, press conferences, legislative testimony, disclosures to stockholders and press releases.

Corodemus held that such statements would not be pre-emptively protected and rejected the defendants' broad definition of the terms "advertising" and ""promotion."

"This court is not willing to accept the proposition that there is no channel of communication which is not 'advertising or promotion' based on smoking and health at this point in the litigation," Corodemus wrote.

Kraus says the defendants have not yet decided whether to appeal.

With regard to allegations of fraudulent concealment, Kraus says the companies' only duty to speak arose by statute and requires the manufacturers to provide specific warnings, which they did.

Slater countered in his brief that the Labeling Act was not intended to be "a suit of armor" allowing the defendants to say whatever they want about cigarettes.

Corodemus agreed with the defendants that mere allegations that the companies made false or misleading

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statements are not enough to support the plaintiffs' claims of affirmative misrepresentation and concealment. Slater will now have to provide specific examples of the representations on which his deceased client relied.

The judge granted the plaintiffs 30 days to amend the complaint and plead with greater particularity, or the claims will be dismissed.

Corodemus also dismissed the plaintiffs' claims of violation of the New Jersey Consumer Fraud Act arising before 1971, because there was no private right of action under the statute at that time.

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