

1997 U.S. Dist. LEXIS 2091, *

**PHILIP MORRIS INCORPORATED; R.J. REYNOLDS TOBACCO COMPANY;
BROWN & WILLIAMSON TOBACCO CORPORATION; and LORILLARD
TOBACCO COMPANY, Plaintiffs, v. L. SCOTT HARSHBARGER, ATTORNEY
GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS; and DAVID
H. MULLIGAN, MASSACHUSETTS COMMISSIONER OF PUBLIC HEALTH,
Defendants.**

CIVIL ACTION NO. 96-11599-GAO

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHU-
SETTS**

1997 U.S. Dist. LEXIS 2091

February 7, 1997, Decided

DISPOSITION: [*1] Plaintiffs' motion for partial summary judgment denied and defendants' motion for partial summary judgment granted.

COUNSEL: For PHILIP MORRIS INCORPORATED, Plaintiff: Thomas J. Griffin, Jr., Goodwin, Proctor & Hoar, Boston, MA. For R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, LORILLARD TOBACCO COMPANY, Plaintiffs: John H. Henn, Foley, Hoag & Eliot, Boston, MA.

For L. SCOTT HARSHBARGER, Attorney General of the Commonwealth of Massachusetts, DAVID H. MULLIGAN, Massachusetts Commissioner of Public Health, Defendants: Thomas A. Barnico, Rebecca P. McIntyre, Rosalyn Garbose, Attorney General's Office, Boston, MA.

JUDGES: George A. O'Toole, Jr., DISTRICT JUDGE

OPINION BY: George A. O'Toole, Jr.

OPINION

MEMORANDUM AND ORDER

February 7, 1997

O'TOOLE, D.J.

Massachusetts has recently adopted a statute that will require manufacturers of cigarettes to furnish to the Commonwealth's Department of Public Health certain specific information about the ingredients and nicotine yield ratings of their cigarettes. *Mass. Gen. L. ch. 94, § 307A* ("*Section 307A*"). The manufacturers brought this action to declare the new statute unconstitutional and to enjoin its enforcement. The plaintiffs [*2] advance several reasons why the statute should be declared invalid, one of which is presented now on the parties' cross-motions for partial summary judgment.

In the first count of their complaint, the plaintiffs contend that any state regulation requiring the reporting of tobacco ingredients is pre-empted by the Federal Cigarette Labeling and Advertising Act, *15 U.S.C. §§ 1331 et seq.* ("FCLAA"). For the reasons that follow, this Court concludes that *Section 307A* is not pre-empted by the federal statute.

The Pre-emption Issue

*Section 307A*¹ requires the plaintiff companies to disclose information about the ingredients in their products to the Massachusetts Department of Public Health. If the Department forms a reasonable scientific judgment that the general availability of the ingredient information could reduce public health risks, and if the state attorney general opines that public disclosure of the information would not amount to an unconstitutional taking of property, then the state authorities will make the information available as a public record. The statute also requires the companies to determine and report nicotine yield ratings for their products in accordance [*3] with a methodology to be established by the Department. The reported nicotine yield ratings will also be available as public records. According to the plaintiffs, the identity and relative amounts of the ingredients in their cigarette "recipes" constitute highly confidential product information the public disclosure of which would cause them serious economic harm.

1 *Section 307A* reads as follows:

For the purpose of protecting the public health, any manufacturer of cigarettes, snuff or chewing tobacco sold in the commonwealth shall provide the department of public health with an annual report, in a form and at a time specified by that department, which lists for each brand of such product sold the following information:

(a) The identity of any added constituent other than tobacco, water or reconstituted tobacco sheet made wholly from tobacco, to be listed in descending order according to weight, measure, or numerical count; and

(b) The nicotine yield ratings, which shall accurately predict nicotine intake for average consumers, based on standards to be established by the department of public health.

The nicotine yield ratings so provided, and any other such information in the annual reports with respect to which the department determines that there is a reasonable scientific basis for concluding that the availability of such information could reduce risks to public health, shall be public records; provided, however, that before any public disclosure of such information the department shall request the advice of the attorney general whether such disclosure would constitute an unconstitutional taking of property, and shall not disclose such information unless and until the attorney general advises that such disclosure would not constitute an unconstitutional taking.

This section shall not require a manufacturer, in its report to the department or otherwise, to identify or disclose the specific amount of any ingredient that has been approved by the Food and Drug Administration, Public Health Service, United States Department of Health and Human Services ("FDA"), or its successor agency, as safe when burned and inhaled or that has been designated by the FDA, or its successor agency, as generally recognized as safe when burned or inhaled, according to the Generally Recognized As Safe list of the FDA.

[*4] The FCLAA mandates that cigarette packaging and advertising contain warnings about the health risks of smoking. *15 U.S.C. § 1333*. In order to assure national uniformity in the regulation of cigarette labeling and advertising, the federal statute contains a pre-emption provision:

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

(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334.

The plaintiffs contend that *Section 307A* is a "requirement . . . based on smoking and health . . . under State law with respect to the advertising or promotion of . . . cigarettes" and is therefore forbidden by *§ 1334(b)*. Moreover, they say, even if the FCLAA does not pre-empt *Section 307A* expressly, it does so implicitly. In addition to mandating specific health warnings, the federal statute requires cigarette manufacturers to submit ingredient information to the United States Department [*5] of Health and Human Services under rigorous assurances of confidentiality. In contrast, the state statute permits confidential ingredient information to be made public. The plaintiffs assert that there is a conflict between the state and federal ingredient-reporting schemes which amounts to an impermissible interference by Massachusetts with the federal scheme.

Principles of Pre-emption

The pre-emption doctrine is rooted in the *Supremacy Clause of the United States Constitution*: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof. . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *U.S. Const. art. VI, cl. 2*. "It is basic to this constitutional command that all conflicting state provisions be without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746, 68 L. Ed. 2d 576, 101 S. Ct. 2114 (1981).

This does not mean, of course, that the States may not enact legislation dealing with the same subjects as federal law, or that a particular matter may not be the subject of simultaneous federal and state regulation. [*6] See *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103-104, 11 L. Ed. 2d 179, 84 S. Ct. 219 (1963). The existence of a federal interest in regulating the matter does not exclude the possibility of a legitimate concurrent state interest. "Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law." *Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707, 719, 85 L. Ed. 2d 714, 105 S. Ct. 2371 (1985).

In particular, the States historically have "exercised their police powers to protect the health and safety of their citizens." *Medtronic, Inc. v. Lohr*, 135 L. Ed. 2d 700, 116 S. Ct. 2240, 2245 (1996). "Consideration of issues arising under

the *Supremacy Clause* 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L. Ed. 1447, [*7] 67 S. Ct. 1146 (1947)). So, in evaluating what preemptive effect, if any, to give a federal statute, what Congress intended is "the ultimate touchstone." *Cipollone*, 505 U.S. at 516; *Retail Clerks*, 375 U.S. at 103.

It is plain that Congress intended the FCLAA to pre-empt *some* state laws. 15 U.S.C. § 1334(b). That being so, the question is how broad Congress intended the pre-emption to be. *Medtronic*, 116 S. Ct. at 2250; see *Cipollone*, 505 U.S. at 533 (opinion of Blackmun, J.)("In such cases, the question is not whether Congress intended to pre-empt state regulation, but to what extent."). The question can be answered primarily by reference to "the language of the preemption statute and the statutory framework surrounding it. . . . Also relevant, however, is the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Medtronic*, 116 S. Ct. at 2251 (internal quotation marks and citations omitted).

The inclusion in a statute of an express [*8] pre-emption provision does not foreclose a range of implied pre-emption as well. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 115 S. Ct. 1483, 1488, 131 L. Ed. 2d 385 (1995). "A federal statute, for example, may create a scheme of federal regulation 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' . . . Alternatively, federal law may be in 'irreconcilable conflict' with state law. . . . Compliance with both statutes, for example, may be a 'physical impossibility,' . . . or, the state law may stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Barnett Bank of Marion County, N.A. v. Nelson*, 134 L. Ed. 2d 237, 116 S. Ct. 1103, 1108 (1996)(citations omitted).

Finally, the inquiry into the scope of pre-emption is guided by the presumption that Congress does not "cavalierly" pre-empt state law, *Medtronic*, 116 S. Ct. at 2250, especially "'in a field which the States have traditionally occupied.'" *Id.* (quoting *Santa Fe Elevator*, 331 U.S. at 230). This approach "is consistent with both federalism concerns and the historic primacy of state regulation of matters [*9] of health and safety." *Medtronic*, 116 S. Ct. at 2250.

Express Pre-emption by § 1334(b)

Other than the specifically prescribed warnings about health risks from smoking required to be included on cigarette package labels and in cigarette advertising, including outdoor billboards, 15 U.S.C. § 1333, "no statement relating to smoking and health . . . shall be required on any cigarette package." 15 U.S.C. § 1334(a). Moreover, "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" FCLAA's labeling requirements. ² 15 U.S.C. § 1334(b).

2 There is no dispute that the plaintiffs' cigarettes are labeled in compliance with the FCLAA's requirements.

It is apparent that *Section 307A* is a "requirement . . . based on smoking and health . . . imposed under State law." It falls outside the pre-emption expressed in § 1334(b), however, because it is not a requirement [*10] "'with respect to the advertising or promotion' of cigarettes." See *Cipollone*, 505 U.S. at 528 (opinion of Stevens, J.).

Certainly the compelled furnishing of information to state authorities does not literally constitute "advertising or promotion." Members of the Supreme Court who disagreed on the interpretation of the FCLAA in other respects seem to agree on this. See *Cipollone*, 505 U.S. at 528 (opinion of Stevens, J.); *id.* at 554 (Scalia, J., dissenting).

The plaintiffs do not maintain that furnishing information to state regulators is itself any form of "advertising or promotion." Rather, their argument is that *Section 307A* represents an evasion by the State of the pre-emption expressed in § 1334(b), a device by which Massachusetts requires the plaintiffs to disclose via an indirect route information that it may not directly require them to disclose in their advertising and promotional materials. See *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157, 174 (1st Cir. 1989) (concluding that "Massport cannot do indirectly what it is forbidden to do directly."). Instead of compelling the companies themselves to disclose the information [*11] directly to the public, an attempt that would clearly be pre-empted by § 1334(b), *Section 307A* compels them to give the information to the department of public health, which may then disclose it to the public. Thus, the plaintiffs say, although *Section 307A* does not by its terms regulate cigarette advertising or promotion, it accomplishes the functional equivalent.

The fault in this analysis is that it wrongly equates the medium with the message and concludes that regulation of the one must be equivalent to regulation of the other. The FCLAA does not purport to pre-empt all state law requirements pertaining to the dissemination of information about cigarette smoking and health; it pre-empts only requirements "with respect to the advertising or promotion." *15 U.S.C. § 1334(b); Cipollone, 505 U.S. at 528* (opinion of Stevens, J.). Congress mandated exclusive federal authority over the subject of smoking and health as it might be addressed in the advertising and promotion of cigarettes. It does not follow, however, that Congress must therefore have intended to exclude the States from regulating in any other way the delivery of information to the public about smoking and health. [*12] The proposition is neither logical nor supported by a "reasoned understanding of . . . the statute and its surrounding regulatory scheme." *Medtronic, 116 S. Ct. at 2251*.

A principal reason the FCLAA was enacted was to avoid the prospect that various states would, on their own, establish disparate labeling and health warning regulations applicable to cigarettes. *Cipollone, 505 U.S. at 513-14*. Indeed, Congress expressed its purpose to avoid "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." *15 U.S.C. § 1331(2)(B)*. It is plain from this statement of purpose that the uniformity Congress sought to promote was limited to the media regulated by the federal statute: labels and advertising. Congress expressed no concern about the possibility that "diverse, nonuniform or confusing" information about smoking and health might come to the public from other sources. By precluding the States from regulating cigarette advertising, Congress did not preclude them from imposing a "duty to disclose such facts through channels of communication other than advertising or promotion." *Cipollone, 505 U.S. at 528* [*13] (opinion of Stevens, J.).

In sum, *Section 307A* does not purport to regulate the advertising or promotion of cigarettes. Nor do its provisions amount to the indirect imposition of a "requirement . . . based on smoking and health . . . with respect to advertising or promotion of . . . cigarettes." *Section 307A* is not pre-empted by *§ 1334(b)*.

Implied Pre-emption by § 1335a

In addition to prescribing health warnings on labels and in advertising, the FCLAA also requires cigarette manufacturers annually to provide the Secretary of Health and Human Services with a list of the ingredients added to tobacco in the manufacture of cigarettes without identifying the listed ingredients either to any particular manufacturer or brand. *15 U.S.C. § 1335a(a)*. The information provided in the submitted list is regarded as trade secret or confidential information the unauthorized disclosure of which warrants criminal prosecution. *15 U.S.C. § 1335a(b)(2)(A)*. The Secretary is directed to adopt specific procedures for insuring that the confidentiality of the information will be maintained. *15 U.S.C. § 1335a(b)(2)(C)*.

Section 307A similarly requires the manufacturers to submit ingredient [*14] lists, but the required information must be identified to specific brands and the ingredients must be listed in order according to "weight, measure or numerical count." Unlike the federal statute, the Massachusetts act contemplates that, subject to some conditions, ingredient information will be made public.

The plaintiffs contend that the federal ingredient reporting scheme impliedly pre-empts the state scheme for two reasons. First, by enacting the ingredient reporting scheme as part of the FCLAA, Congress intended the federal provisions to "occupy the field" of cigarette ingredient reporting. Second, because the state and federal statutes deal differently with the subject of ingredient information, and because the state statute goes farther than the federal with respect to public disclosure of cigarette ingredients, the state statute "interferes" with the congressional purpose in enacting *§ 1335a* and operates as an "obstacle" to the achievement of that purpose. If either proposition could be sustained, the plaintiffs would have the benefit of implied pre-emption, but neither can be.

Congress may legislate in a field which the States have traditionally occupied in such a way as [*15] to make reasonable an inference that it was Congress' purpose to leave no room for the States to supplement the federal legislation. *Rice v. Santa Fe Elevator Co., 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947)*. This might be true, for example, in the case of a field "[where] the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Id.* (citing *Hines v. Davidowitz, 312 U.S. 52, 61, 85 L. Ed. 581, 61 S. Ct. 399 (1941)*). Also, "the object sought to be obtained by the federal law and the character of the obligations imposed by it may reveal the same purpose." *Id.* (citing cases involving regulation affecting interstate railroads).

Those principles do not help the plaintiffs here. The Supreme Court has made clear in *Cipollone* that the FCLAA is not so broad in purpose or mandate as to exclude all state regulation in the field of smoking and health. Recognizing that, the plaintiffs attempt a more narrow definition of the relevant "field."

However, it is not enough simply to be able to give a name to the operational scope of a part of the federal statute. Because § 1335a deals with [*16] "ingredient reporting" does not mean that there ought to be a "field" identified as "ingredient reporting," and still less that federal legislation in that field should be held, without a strong indication of congressional intent, to exclude state forays into the same field. This is especially true where the state law is an exercise of traditional police power respecting public health and safety, there being a "presumption against preemption" in such circumstances. *Medtronic*, 116 S. Ct. at 2250; *Cipollone*, 505 U.S. at 523. There is no evidence in the text or structure of the FCLAA that Congress intended to define "ingredient reporting" as an exclusively federal domain.

"Conflict" pre-emption rests on the sound proposition that the effectiveness of federal statutes ought not be undercut or obstructed by inconsistent state legislation. It would be impossible, for instance, to comply with contradictory prescriptions of federal and state law. In such a case, the state law must yield to the federal. Here, there is no claim that it would be impossible for the plaintiffs to comply with both federal and state ingredient reporting requirements.

Alternatively, the state law might operate [*17] as an obstacle to the achievement of the full purposes of the federal law, and so again the state law would be required by the *Supremacy Clause* to recede. For example, in *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837 (1st Cir. 1988), a Massachusetts statute required takeover bidders to give notice of their intent to gain control of the target company *before* they had acquired five percent of the target's stock. The federal Williams Act, in contrast, required notice of takeover intent to be given within ten days *after* their acquisition of five percent of the stock. In these circumstances, the Court of Appeals concluded that, while the state and federal requirements were not directly contradictory because it was possible to comply with both, the enforcement of the state timetable would nevertheless disturb the balance chosen by Congress to accommodate competing policy considerations. The Court said:

Congress explicitly and carefully established a preferred balance in the Williams Act at a point where the benefit gained by shareholders from early disclosure is not outweighed by the detriment to those same investors if there is too great a deterrent to tender offers. [*18] Section 3 of the Massachusetts Act in effect second-guesses the balance struck by Congress, by altering the point in time at which control intent should be made public. There is, in other words, an 'actual conflict between federal and state law' concerning a matter that directly implicates the central purpose of the Congressional Act.

Hyde Park Partners, 839 F.2d at 850.

The companies urge that in enacting § 1335a Congress similarly struck a balance between competing policies by requiring the disclosure of confidential ingredient information to the Secretary, on the one hand, but requiring strict assurances to maintain the confidentiality of that information, on the other.

It is undoubtedly a fact of legislative life that enactments represent a compromise of competing considerations,³ and the guess may be hazarded that Congress could not have agreed on a proposal to require ingredient disclosure without the specific assurance that the confidentiality of the disclosed information would be protected. It is also likely true that Massachusetts lawmakers had little motive to take account of the impact *Section 307A* would have on economic interests that Congress, viewing matters [*19] from a national perspective, recognized and accommodated in striking its balance.

3 "All government -- indeed, every human benefit and enjoyment every virtue and every prudent act -- is founded on compromise and barter." Edmund Burke, Second Speech on Conciliation with America, March 22, 1775.

Legislative compromise to bring a law into being is not the kind of balance the First Circuit was describing in *Hyde Park Partners*, however. In that case, the statutes at issue both sought to regulate the timing of the public disclosure of information that would likely affect market decisions. From the range of possibilities, Congress determined that its purposes would be properly advanced if the disclosure were to be made after the bidder had already acquired five percent of the target's stock. In the Court's words, Congress had established a "preferred balance" between the possible benefits and the possible detriments to existing shareholders of the target. To require disclosure at a different point in time, as the [*20] Massachusetts statute did, would be to reweigh the relative benefits and detriments and strike a different balance.

In contrast, the statutes in this case do not involve different requirements governing the disclosure of information to the same audience, as in *Hyde Park Partners*. There is no danger that the plaintiffs' reporting of cigarette ingredients to the Secretary will be disturbed by the enforcement of the Massachusetts statute. What may be disturbed is the plaintiffs' ability to keep their ingredient information confidential. That is a legitimate concern for them. But while the confidentiality provisions of the federal statute may have been important, even essential, to achieving legislative consensus in support of the federal reporting scheme, there simply is no basis for concluding that it was Congress' purpose in enacting § 1335a to grant general trade secret or confidentiality protection to the plaintiffs' ingredient information.

The textual indications are rather to the contrary. In the first place, the statute by its terms grants protection only to confidential information that is submitted to the Secretary. It places a duty on the Secretary to protect confidential [*21] information she receives from manufacturers. It simply does not address whether or under what conditions information about cigarette ingredients ought otherwise to be given protection as confidential.

In addition, the FCLAA has an express pre-emption provision. 15 U.S.C. § 1334. Ordinarily, Congress' expression of a limited range of pre-emption fairly implies it meant to go no farther. *Freightliner*, 115 S. Ct. at 1488; *Cipollone*, 505 U.S. at 517. In enacting (and presumably in amending) the FCLAA, Congress fashioned "a carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of the national economy." *Palmer v. Liggett Group Inc.*, 825 F.2d 620, 626 (1st Cir. 1987)(internal quotation marks and citation omitted). The plaintiffs urge that the state ingredient reporting requirement disrupts that balance. To the contrary, the limited pre-emption provision is part of the balance; it expresses the congressional verdict as to how far pre-emption should extend in these matters.

When Congress amended the FCLAA to add the ingredient-reporting provision (and to make other substantial changes to the FCLAA), [*22] it left the pre-emption clause alone. See Pub. L. No. 98-474, 98 Stat. 2200 (1984) (the "Comprehensive Smoking Education Act"). Congressional inaction might normally be regarded an ambiguous indicator of intent, but not here. The Comprehensive Smoking Education Act was an occasion for Congress to review the FCLAA as a whole. It chose to make selected amendments to the statute, and it omitted to make any amendment to broaden the scope of pre-emption. On a previous occasion, Congress had broadened the pre-emption clause by amendment. Pub. L. No. 91-222, 84 Stat. 88 (1970). Congressional purpose is not to be discerned from the statute's text evaluated in isolation, but in context. *Medtronic*, 116 S. Ct. at 2250-51. In context, it is not a reasonable inference that Congress intended to expand the range of the FCLAA's preemption by mere implication instead of express direction.

Finally, it might even be said that the Massachusetts statute is in harmony with the purpose Congress expressed when it adopted § 1335a: "to provide a new strategy for making Americans more aware of any adverse health effects of smoking, to assure the timely and widespread dissemination of research findings [*23] and to enable individuals to make informed decisions about smoking." Pub. L. No. 98-474, § 2, 98 Stat. 2200 (1984). Section 307A is not an obstacle to the achievement of that purpose.

Conclusions

For the foregoing reasons, the plaintiffs' motion for partial summary judgment is denied, and the defendants' motion for partial summary judgment is granted.

The defendants shall be entitled to a judgment under Count I of the complaint declaring that *Mass. Gen. L. ch. 94, § 307A* is not pre-empted by any provision of the FCLAA.

It is SO ORDERED.

February 7, 1997

DATE

George A. O'Toole, Jr.

DISTRICT JUDGE