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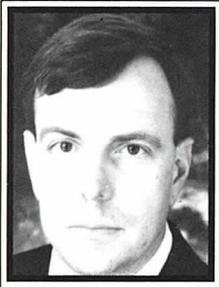
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PRODUCT LIABILITY

David J. Stout, J.D.

Cipollone v. Liggitt Group, Inc., Federal Preemption and the Preservation of State Common Law Claims

Federal preemption has become the “contributory negligence” of the 1980s. In virtually every case involving a defective product you can anticipate the manufacturer or supplier seeking refuge behind the tired refrain “the Government let me do it.” The scope and popularity of the preemption defense expanded dramatically during the 1980s, an exquisite irony given the politically fashionable criticism of “big government” and the administration’s efforts to free up business from the constraints of federal redtape. Justice Stanley Mosk of the California Supreme Court succinctly made this point:

There is a growing and ominous trend toward federal preemption of issues that belong within the sphere of control by the individual states. And these inroads into traditional federalism are taking place despite their inconsistency with the pious rhetoric emanating from Washington about returning government to the people at state and local levels.

Commercial Life Insurance Co. v. Superior Court, 253 Cal. Rptr. 682, 692, 764 P.2d 1059 (1988). The United State Su-

preme Court in its last term decided a trio of cases which go a long way toward stemming the preemption juggernaut. See **Cipollone v. Liggitt Group, Inc.**, 505 U.S. ___, 120 L. Ed.2d 407, 422-23, 112 S.Ct. __ (1992); **Gade v. National Solid Wastes**, ___ U.S. ___, 112 S.Ct. 2374, 120 L. Ed.2d 73, 84 (1992); **Morales v. Trans World Airlines, Inc.**, ___ U.S. ___, 112 S.Ct. 2031, 119 L. Ed. 2d 157 (1992). These three cases must be reviewed and digested whenever an issue of federal preemption arises.

What is this thing called preemption? At its most basic the doctrine of preemption limits the operation of state law in areas where Congress has intended that federal law be exclusive or controlling. The constitutional basis for preemption derives from the Supremacy Clause in the United States Constitution, art. VI, cl. 2, which effectively empowers the federal legislature to displace conflicting laws of the several states. See **Maryland v. Louisiana**, 451 U.S. 725, 746, 101 S.Ct. 2114 (1981). The key to the doctrine of federal preemption is to understand that it is entirely and exclusively a matter of congressional intent. See, e.g., **Cipollone v. Liggitt Group, Inc.**, 505 U.S. ___, 120 L. Ed.2d 407, 422-23, 112 S.Ct. __ (1992); **Louisiana Public Service Commission v. FCC**, 476 U.S. 355, 106 S. Ct. 1890,

1899 (1986); **Florida Lime & Avocado Growers, Inc. v. Paul**, 373 U.S. 132, 141 (1963).

The analysis begins with the “basic assumption that Congress did not intend to displace state law.” **Maryland v. Louisiana**, 451 U.S. 725, 746, 101 S.Ct. 2114 (1981). Time and again the Supreme Court has stated that “courts should not lightly infer preemption,” **International Paper Co. v. Ouellette**, 479 U.S. 481, 107 S. Ct. 805, 811 (1987), and there is a heavy presumption against finding preemption, particularly where the claim of preemption addresses the historic police powers of the state, such as common law tort liability. *See, e.g., Cipollone*, 120 L.Ed.2d at 422; **Florida Lime & Avocado Growers, Inc. v. Paul**, 373 U.S. at 144; **Ferebee v. Chevron Chemical Company**, 736 F.2d 1529, 1542 (D.C. Cir. 1984). “[W]e start with the proposition that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” **Rice v. Santa Fe Elevator Corp.**, 331 U.S. 218, 230 (1947); **Hillsborough County v. Automated Medical Lab., Inc.**, 471 U.S. 707, 715 (1985). The Supreme Court, only last term, unequivocally affirmed the “presumption against preemption of state police power regulations,” **Cipollone**, 120 L. Ed.2d at 424, such as those involving public safety. The burden of demonstrating federal preemption rests on the party claiming its benefit. *See Silkwood v. Kerr-McGee, Corp.* 464 U.S. 238, 255 (1984); **Buzzard v. Roadrunner Trucking, Inc.**, 966 F.2d 777, 780 (3d Cir. 1992).

Congressional intent may be “explicitly stated in the statute’s language or implicitly contained in its structure and purpose.” **Cipollone**, 120 L.Ed.2d at 422-23 *quoting Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Express preemption requires that there be a specific provision in the federal statutory scheme that addresses the question of what Congress intended to preempt. For example, the Employee Retirement and Income Security Act has a provision that provides: “[t]he provisions of this subchapter...shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.” 29 U.S.C. § 1144(a).

Assuming then that there is no express language in the federal legislation which addresses preemption, then there are two primary species of implied preemption. *First*, an intention to preempt can be inferred when the legislation is so comprehensive that it leaves no room for the states to supplement federal law (“field preemption”). *See California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 281 (1987); **Gade v. National Solid Wastes Management Association**, 505 U.S. ___, 120 L.Ed. 2d 73, 84, 112 S.Ct. __ (1982). *Second*, an intention to preempt a specific state law can also be inferred if the state law “actually conflicts” with the federal law (“conflicts preemption”). *Id.* Such an “actual conflict” will only be found where “compliance with both federal and state [law] is a physical impossibility” or “the state law stands as an obstacle to the accomplishment and execution of the full purposes of Congress.” **California Federal**, 479 U.S. at 281; **Gade v. National Solid Wastes Management Association**, 120 L. Ed. 2d at 84.

The importance of the recent Supreme Court cases is their reaffirmation that the critical inquiry is to determine whether there is some provision in the federal legislation which addresses the scope of the federal law or a limitation upon the operation of state law. Where Congress has expressly addressed the preemptive scope of the federal law it is unnecessary to “infer” or imply preemption. **Cipollone**, 120 L.Ed.2d at 422-23. “When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a ‘reliable indicium of congressional intent with respect to state authority’...‘there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation.” **Cipollone**, 120 L.Ed.2d at 423 (citations omitted).

Cipollone is the celebrated tobacco case which bounced around the courts for some nine years. Rose Cipollone started smoking in 1942. Rose contracted lung cancer, sued the Liggitt Group in 1983 and died in 1984. The **Cipollone** case involved the preemptive effect of the Federal Cigarette Labelling and Advertising Act of 1965 and its successor the Public Health Cigarette Smoking Act of 1969. The issue was the extent to which the warning requirements of the Acts preempted state common law claims for failure to warn, breach of warranty, fraudulent misrepresentation, and conspiracy. Cipollone’s design defect claim for safer alternatives was not at issue because the federal act clearly did not address that subject area.

The Court’s analysis turned on the specific language of the statute that addressed the scope of the labelling requirements. Each statute contained slightly different language with regard to the federal labelling requirements. The pertinent language from the 1965 Act was:

[N]o *statement* relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

The corresponding language from the 1969 Act was:

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

The Supreme Court held that the 1965 Act was limited to state statutory or regulatory action and a unanimous Court concluded that the 1965 Act did not preempt state common law tort claims.

The Court fragmented on the preemptive effect of the 1969 Act. The majority found that some of the claims were preempted such as fraudulent misrepresentation, because they related so closely to the area that the amendment addressed, that is, advertising of the product, and that some of the claims, such as breach of warranty, were not. *See Cipollone*, 120 L.Ed.2d at 428-29 (Section V of the Court’s opinion). The Court also concluded that a common law tort claim would constitute the type of “requirement or prohibition” as opposed to “statement” which Congress intended would be excluded by the Act. The important point for the purposes of this short discussion is that seven members of the Court, all except for Scalia and Thomas,

agreed that the proper analytic approach is to parse the specific language in the federal statute in order to determine the scope of the preemption.

The **Cipollone** decision focuses the central and controlling inquiry on the express preemptive language of the statute. The majority in **Cipollone** described its holding as:

a variant of the familiar principle of *expressio unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted.

Cipollone, 120 L. Ed.2d at 423. Where the federal legislation addresses the issue of preemption, Congress will be presumed to have limited the preemptive effect of the statute to those areas addressed by the legislation and the courts are not to infer an intent to preempt matters not specifically addressed in the legislation. "Absent explicit preemptive language", there is no express preemption and the analysis must be one of implied preemption. **Gade v. National Solid Wastes**, __U.S. __, 112 S.Ct. 2374, 120 L.Ed.2d 73, 84 (1992). Thus, where Congress has spoken directly to the preemptive scope of the statute there can be no implied preemption.

One of the few points of common agreement between the majority, dissenters, and concurring justices was that the plain holding of the **Cipollone** majority limited the application of implied preemption analysis to those circumstances where Congress did not address the scope of the federal legislation in the statutory scheme. Blackmun writing for himself, Souter and Kennedy concluded that:

"Where, as here, Congress has included in legislation a specific provision addressing — and indeed, entitled — pre-emption, the Court's task is one of statutory interpretation — only to "identify the domain expressly preempted" by the provision. *Ante*, at __ 120 L.Ed.2d, at 423. An interpreting court must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."

Cipollone, 120 L.Ed.2d at 432, Blackmun, J. *concurring quoting FMC Corp. v. Holliday*, 498 U.S. 52, __ (1990). Scalia characterized the majority's holding in his dissent joined by Justice Thomas as quite simply "Once there is an express preemption provision, in other words, all doctrines of implied preemption are eliminated. . ." **Cipollone**, 120 L.Ed.2d at 442, Scalia, J., *dissenting*.

The case of **Gade v. National Solid Wastes Management Association**, 505 U.S. __, 120 L.Ed. 2d, 112 S.Ct. __ (1982) confirms that "preemption inquiry ends where Congress expressly addresses the scope of the federal legislation. In **Gade** the Occupational Safety and Health Administration promulgated regulations implementing certain standards for the training of workers handling hazardous wastes pursuant to the Superfund Amendments and Reauthorization Act of 1986. In 1988 Illinois enacted a Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act the dual purpose of which was to protect both workers and the general public. The Illinois act contained certain training and experience provisions which

were different from those created by OSHA. A plurality of the Court agreed with O'Connor that OSHA impliedly preempted the Illinois regulations because they conflicted with the federal regulations and the overall purpose of the federal act.

A majority of the Court determined, however, that it was unnecessary to conduct an implied conflicts analysis because the scope of preemption was expressly addressed by the language of the federal statute itself. Thus, Kennedy found that OSHA expressly preempted the claims and the four dissenters concluded that the language of OSHA was "insufficient to demonstrate an intent to preempt state law," **Gade**, 120 L.Ed.2d at 96, Souter, J. dissenting, and that Congress intended to permit overlapping state and federal regulations. The point here again is that a majority of the Court focused the analysis solely on the express language of the Act.

Finally, in **Morales v. Trans World Airlines, Inc.**, 504 U.S. __, 119 L.Ed.2d 157, 112 S.Ct. __ (1992) the Court addressed whether the Airline Deregulation Act of 1978 preempts states from prohibiting deceptive fare advertisements through the states' general consumer protection statutes through the National Association of Attorneys General guidelines. The federal act contained an express preemption provision which prohibited states from enforcing any law "relating to rates, routes, or services of any air carrier." **Morales**, 119 L.Ed.2d at 164. The Court simply concluded that the enforcement of the NAAG consumer protection guidelines would, as a matter of statutory construction, "relate to" rates and services of air carriers. *Id.* at 168-70. The Court therefore concluded that the federal law preempted the state laws at issue. The salient feature of the case is its emphasis and focus on the plain words of the preemption provision of the statute.

Those courts which have applied the **Cipollone** preemption analysis have concluded that the implied preemption analysis is dead where Congress has addressed preemption in the legislation. Thus, Judge Weinstein in **Burke v. Dow Chemical Co.**, 797 F. Supp. 1128 (E.D.N.Y. 1992), a case involving the preemptive effect of Federal Insecticide, Fungicide, and Rodenticide Act, concluded that "in light of **Cipollone**, then, courts must focus on the specific wording of preemption clauses, interpreting them narrowly in light of the presumption against preemption." **Burke**, 797 F. Supp. at 1140. The court in **Burke** found that **Cipollone** directs an exclusive focus on express preemption clauses. *Id.* at 1141. So too, the Tenth Circuit in **Cleveland v. Piper Aircraft Corp.**, 985 F.2d 1438, 1443 (10th Cir. 1993) recognized that **Cipollone** limits inquiry to express reach of statute where legislation includes preemption provision.

In **Cleveland**, Piper Aircraft argued that the Federal Aviation Act and the regulations promulgated thereunder preempted plaintiff's state law tort claims because Congress intended to preempt the entire field of airplane safety. Piper did not argue that the Act expressly preempted plaintiff's claims since the Act did not contain an express preemption provision relating to airplane safety. The Tenth Circuit rejected Piper's argument and held that the "savings clause" contained in the FAA indicated a congressional intent *not* to occupy the field and

that together with the absence of an express preemption provision addressing safety established that "Congress intended to allow state common law to stand side by side with the system of federal regulations it has developed." **Cleveland**, 985 F.2d at 1444. The court also rejected Piper's claim for conflict preemption. The importance of **Cleveland** is that it constitutes a post-**Cipollone** analysis recognizing that "implied preemption is general inapplicable to a federal statute that contains an express preemption provision." **Cleveland**, 985 F.2d at 1443.

Why is it important that these cases and in particular **Cipollone** return the analysis to the plain language of a preemption provision? The reason is that a number of courts have gone beyond the language employed by Congress and have found state laws preempted in contexts where there are express provisions relating to the scope of the federal legislation or the limitation on state law. **Cipollone** sounds the death knell for the implied preemption analysis where the federal legislation addresses the scope or preemptive sweep of federal law.

The classic example of some courts' misguided analysis involves the airbag claims and The National Traffic and Motor Vehicle Safety Act ("the Safety Act"). See 15 U.S.C. § § 1381 to 1431. The Safety Act expressly preserves common law remedies for design defects through its "savings clause" and expressly provides that "[c]ompliance with any Federal motor vehicle safety standard. . . does not exempt any person from liability under common law." See 15 U.S.C. § 1397(k) (The 1988 amendments to the Safety Act changed the lettering of this section from 1397(c) to 1397(k).) The Safety Act also includes an express preemption provision which provides in pertinent part that:

"§ 1302(d) Whenever a federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment for any safety standard applicable to the same aspect of perfor-

mance of such vehicle or item of equipment which is not identical to the federal standard."

15 U.S.C. § 1392(d). Because these two provisions specifically address the scope of the federal legislation the role of the Court after **Cipollone** is simply to determine the extent of the Act's *express* coverage because Congress included provisions in the Safety Act that specifically address its preemptive scope. Those provisions are determinative and conclusive under **Cipollone** and there can be no implied preemption based on some manufactured "conflict" between state and federal law.

This point is significant because that aberrant line of airbag cases holding that failure to include an airbag claim was preempted by the Safety Act were virtually all decided on the basis of *implied* conflicts preemption. Those courts holding that the failure to include airbag claims are impliedly preempted have found a conflict between a common law claim requiring an airbag and FMVSS 208 which allowed a choice among restraint systems. See, e.g., **Woods v. General Motors Corp.**, 865 F.2d 395, (1st Cir. 1988) (no express preemption, but implied conflicts preemption; **Kitts v. General Motors Corp.**, 875 F.2d 787 (10th Cir. 1989) (follows **Wood** analysis); **Taylor v. General Motors Corp.**, 875 F.2d 816 (11th Cir. 1989) (rejected express preemption, but found an implied conflict preemption); **Pokorny v. Ford Motor Co.**, 902 F.2d 1116 (3rd Cir. 1990) (holding no express preemption, but finding an implied conflict preemption analysis with regard to the failure to install airbags claims). Under **Cipollone** that analysis of the Safety Act can no longer stand and the failure to include airbag claims should be reconsidered as a potential basis for design defect claims.

It is to be hoped that the wave of federal preemption has crested and that the federal courts will, under the specific guidance of **Cipollone**, be less inclined to look beyond the expressed purpose of Congress to find state common law tort claims preempted.

