

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JOYCE DENISCEVICH,)
ADMINISTRATRIX OF THE ESTATE)
OF LEON DENISCEVICH, and)
JOYCE DENISCEVICH,)
INDIVIDUALLY)
Plaintiff)
)
v.) C.A. No. 97-700L
)
BROWN AND WILLIAMSON TOBACCO)
CORPORATION)
Defendant)

MEMORANDUM AND ORDER

Ronald R. Lagueux, Chief Judge.

Leon Deniscevich ("Deniscevich") smoked Lucky Strike brand cigarettes from 1940 until near the time of his death on December 6, 1995. His wife Joyce Deniscevich ("plaintiff") sued Lucky Strike's manufacturer Brown and Williamson Tobacco Corporation ("defendant") both as an individual and as the administratrix of her husband's estate.

The suit outlines multiple counts against defendant, but only three are at issue now. Defendant moved to dismiss the case under Fed. R. Civ. P. 12(b)(6). That motion was referred to Magistrate Judge Robert W. Lovegreen who issued a Report and Recommendation (the "Report") advising a partial grant of the

motion based primarily on the preemption doctrine outlined in Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992). Defendant objects to Judge Lovegreen's refusal to recommend dismissal of all three counts.

This Court reconsiders the motion to dismiss de novo. However, a full analysis of Cipollone and the procedural posture of this case brings this Court to the exact same outcome recommended by Judge Lovegreen. As such, defendant's objections to the Report are rejected. Defendant's motion to dismiss is partially granted and partially denied as described in detail below.

I. Facts

Deniscevich smoked Lucky Strike cigarettes for more than 50 years, and his widow now brings suit against the cigarette manufacturer. In sum, plaintiff alleges that defendant knew or should have known that the cigarettes were dangerously defective and that they contained addictive substances including nicotine. That accusation is embedded in various counts, only three of which are at issue presently:

17(vii). Intentional fraud and misrepresentation by false statements of material fact in advertising and promotion of said Lucky Strike brand cigarettes.

17(viii). Fraudulent and material misrepresentation of

existing facts to induce the purchase of said Lucky Strike brand cigarettes by failure to disclose facts through channels other than advertising and promotion.

17(ix). Brown and Williamson's conspiracy with other manufacturers and sellers of cigarettes to misrepresent or conceal material facts concerning the health hazards of smoking.

(See Complaint at ¶¶ 17(vii)-17(ix).)

Although plaintiff did not characterize the claims as individual counts, this Court will simplify this opinion by referring respectively to Count 17(vii), Count 17(viii) and Count 17(ix).

II. Procedural Standards To Apply

A. Review of a Magistrate Judge's Decision

Determinations made by magistrate judges on dispositive pretrial motions are reviewed de novo by the district court. See Fed. R. Civ. P. 72(b).

In making a de novo determination, the district court "may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b); see also 28 U.S.C. § 636(b)(1). In reviewing a magistrate judge's recommendations, the district court must actually review and weigh the evidence presented to the magistrate judge, and not merely rely on the

magistrate judge's report and recommendation. See United States v. Raddatz, 447 U.S. 667, 675 (1980); Gioiosa v. United States, 684 F.2d 176, 178 (1st Cir. 1982).

B. Motions to Dismiss

In ruling on a motion to dismiss, the Court construes the complaint in the light most favorable to plaintiff, taking all well-pleaded allegations as true and giving plaintiff the benefit of all reasonable inferences. See Figueroa v. Rivera, 147 F.3d 77, 80 (1st Cir. 1998). Dismissal under Rule 12(b)(6) is appropriate only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

III. Preemption Under the Labeling Act of 1969

A. The Law

Defendant argues that many of plaintiff's claims are preempted by the Labeling Act of 1969, 15 U.S.C. §§ 1331-40. The Labeling Act banned cigarette advertising on television and radio and required warning labels that told purchasers that smoking "is dangerous" rather than merely telling them that it "may be hazardous" as required by the Labeling Act of 1965.

Most importantly for this case, the 1969 Act included the

following preemption provisions:

§ 1334 Preemption

(a) Additional statements

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) State regulations

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. Defendant maintains that this provision of the Labeling Act of 1969 preempts plaintiff's fraud/misrepresentation and conspiracy claims.

The controlling case on this issue is Cipollone, in which the Supreme Court addressed how the 1969 Act preempted state common-law damages actions. A plurality of the Supreme Court held that the 1969 Act preempted common-law actions founded in a requirement or prohibition based on smoking and health:

[Courts] must fairly but - in light of the strong presumption against preemption - narrowly construe the precise language of [section 1334(b)] and we must look to each of petitioner's common-law claims to determine whether it is in fact preempted. The central inquiry in each case is straight forward: we ask whether the legal duty that is the predicate of the common-law damages action constitutes a "requirement or prohibition based on smoking and health ... imposed under State law with respect to ... advertising or promotion," giving that clause a fair but narrow reading.

Cipollone, 505 U.S. at 523-24. As Judge Lovegreen correctly summarized, the Cipollone Court held that the 1969 Act preempted claims which imposed *de facto* requirements on cigarette manufacturers to provide more comprehensive or effective warnings through advertising but did not preempt claims which enforced the manufacturers' more general state law duty to refrain from fraud and deception. See Cipollone, 505 U.S. at 524-29 (Stevens, J.).

In this case, defendant argues that the 1969 Act preempts claims for fraudulent concealment after 1969. It argues that:

claims are preempted under the 1969 Act to the extent they are premised on allegations that after July 1, 1969, the defendant concealed or failed to disclose additional information regarding smoking and health.

(D.'s Mem. Of Law in Supp. of Its Partial Obj. to Magistrate Lovegreen's Report and Recommendation at 4.)

There appears to be a legitimate dispute over whether Cipollone's preemption reaches as broadly as defendant argues. Some courts have dismissed all claims based on a finding that any communication between a tobacco company and its customers would qualify as advertising and promotion. Therefore, claims based on any communication would be preempted. See, e.g., Sonnenreich v. Philip Morris Inc., 929 F. Supp. 416, 418-19 (S.D. Fla. 1996); Griesenbeck v. American Tobacco Co., 897 F. Supp. 815, 823

(D.N.J. 1995); Small v. Lorillard Tobacco Co., Inc., 679 N.Y.S.2d 593, 602-04, appeal filed, 681 N.Y.S.2d 748 (N.Y. App. Div. 1998). However, the First Circuit rejected such a broad view of preemption where it found that some laws could be predicated on a "more general obligation" to be truthful, see Philip Morris Inc. v. Harshbarger, 122 F.3d 58, 70-71 (1st Cir. 1997), and that some communication could be distinguished from advertising, see id. at 71-75.

On the first part, the First Circuit was clear that the duty not to deceive and the duty not to engage in unfair competition by advertising illegal conduct are not preempted by the 1969 Act. See id. at 70-71. As such, the Harshbarger Court certainly took a narrower view of preemption than the decisions cited by defendant. On the second, it found that some communications by tobacco companies did not qualify as advertising and promotion. See id. at 73 (differentiating between communication with the public and disclosure to a state agency). It refused to bind this circuit to a rule that would dismiss all claims based on a tobacco company's concealment or failure to reveal information regarding smoking and health:

While we need not decide the issue now, we are skeptical of the manufacturers' sweeping proposition that the FCLAA prescribes the exclusive means by which they may be

compelled to communicate health information directly to the public. On this point, we find informative the Cipollone plurality's preservation of some claims that were based, in part, on the duty to communicate smoking-and-health information to the public.

Id. at 75.

This Court takes its lead from the First Circuit, and therefore, it looks to whether the state law duty at the base of each claim is separate and apart from a requirement or prohibition based on health, smoking and advertising. See Cipollone, 505 U.S. at 529-30 (Stevens, J.); Harshbarger, 122 F.2d at 71-77. By law, some state duties were not preempted by the 1969 Act, and it is possible that a tobacco company violated those duties by concealing or failing to reveal information regarding smoking.

B. Applied to this Case

1. "False Statements of Material Fact in Advertising"

Count 17(vii) is not preempted because it is based on the state law duty that prohibits any company from making false statements of fact in advertising. Unlike the Massachusetts law in Harshbarger that was passed to protect the public health, see Harshbarger, 122 F.3d at 70, this state common law duty is not limited to tobacco companies or to health issues. It is a general duty under Harshbarger and therefore untouched by the

1969 Act. Therefore, Count 17(vii) is not preempted.

2. "Fraudulent and Material Misrepresentation Outside Advertising"

Similarly, Count 17(viii) is not preempted because it limits itself to fraud and material misrepresentation of existing facts outside of advertising and promotion. Defendant argues that every communication between a tobacco company and its customers must qualify as advertising and promotion. As noted above, several courts have so held as a matter of law. See, e.g., Sonnenreich, 929 F. Supp. at 419; Griesenbeck, 897 F. Supp. at 823. However, this Court rejects a broad-brush approach that would establish that no smoker can have any communication with any tobacco company outside the channels of advertising and promotion.¹ Either this Court or a jury will decide whether this plaintiff and this defendant had any material "other-channel" communication, and that fact-finding will occur at the proper time.

¹ At a minimum, the First Circuit suggested this outcome in Harshbarger by identifying different types of manufacturer-public communication. It differentiated between information that passed directly from manufacturer to the public, which would be preempted, and information that passed from the manufacturer to an administrative agency and then to the public, which would not be preempted because the second transmission was not advertising or promotion. See Harshbarger, 122 F.3d at 72-73.

On a motion to dismiss, this Court must take all well-pleaded allegations as true. As such, defendant makes its argument too soon. If it thinks that plaintiff cannot produce even minimal evidence, then it can move for summary judgment and force plaintiff to prove that some evidence exists to prove her claim. See Greater Providence MRI, L.P. v. Medical Imaging Network of Southern New England, - F. Supp.2d -, 1998 WL 879068, *3-5 (D.R.I. 1998) (discussing difference between motions to dismiss and for summary judgment). To survive summary judgment, plaintiff will have to provide some "other-channel" communication and show how it affected Denisceovich's smoking. To prevail at a trial, plaintiff will probably have to provide a jury with even more evidence.

However, at this stage, it is inappropriate to dismiss plaintiff's allegation that such "other-channel" communication occurred and affected Denisceovich's smoking. Defendant is correct that the vast majority of its interaction with Denisceovich was through the mass media, and all advertising and promotion claims are preempted. This Court cannot predict what evidence plaintiff will offer to support Count 17(viii), but the law is clear that this Court cannot consider the likelihood of plaintiff's success at this juncture. Therefore, defendant's

motion to dismiss Count 17(vii) is denied.

To assure both parties that this opinion offers no radical departure from tobacco-litigation precedents, this Court notes that many cases cited by defendant on this point were decided by trial courts on the merits. See, e.g., Allgood v. R.J. Reynolds Tobacco Co., 80 F.3d 168 (5th Cir. 1996) (reviewing the granting of summary judgment); Cantley v. Lorillard Tobacco Co., Inc., 681 So.2d 1057 (Ala. 1996) (same).

3. Conspiracy

Because this Court finds that the underlying claims are not preempted, it also concludes that the conspiracy charge in Count 17(ix) is not preempted as well. See Cipollone, 505 U.S. at 530 (explicitly noting that duty not to conspire to commit fraud is not a prohibition based on smoking and health) (Stevens, J.).

IV. Justifiable Reliance

Justifiable reliance is an essential element of a fraud claim under Rhode Island law. See Fournier v. Fournier, 479 A.2d 708, 714 (R.I. 1984). Defendant requests a holding that by law Denisceovich could not have relied on any misrepresentation after July 4, 1969 because he received the warning required by the 1969 Act.

This Court refuses to make such a broad pronouncement for

reasons parallel to Section III(B) (2), *supra*. Generally, justifiable reliance is a question of fact for the jury. See, e.g., Murray v. Ross-Dove Co., Inc., 5 F.3d 573, 579-80 (1st Cir. 1993). As a matter of law, Congress did not intend to preempt claims based on state law duties separate and apart from a requirement or prohibition based on health, smoking and advertising. See Cipollone, 505 U.S. at 530-31 (Stevens, J.); Harshbarger, 122 F.2d at 70-75. So this Court will not create a sweeping rule of justifiable reliance and dismiss fraud claims unrelated to a state's regulation of tobacco and health. Nor will this Court find that, as a matter of law, the 1969 Act warning contradicted defendant's other statements about cigarettes. See Fleet Nat'l Bank v. Anchor Media Television, Inc., 831 F. Supp. 16, 42 (D.R.I. 1993) (plaintiff could not justifiably rely on contradictory statements), aff'd on other grounds, 45 F.3d 546 (1st Cir. 1995). The warning labels were statements issued by the Surgeon General, not Brown and Williamson, and a jury could find that Deniscevich reasonably relied on defendant's statements that smoking was neither dangerous nor addictive.

Of course, plaintiff will bear the burden to prove specific examples of that reliance under Rhode Island law as early as the

summary judgment phase, and defendant can emphasize the significance of the 1969 Act warnings in its arguments at that stage.

CONCLUSION

This decision does nothing to predict plaintiff's likelihood of success on the merits, either at the summary judgment stage or at trial. In a recent opinion, this Court analogized to the diagnostic tools available to a doctor when it compared motions to dismiss, motions for summary judgment and jury trials. See Greater Providence MRI, - F. Supp.2d -, 1998 WL 879068, *2. A motion to dismiss is merely a judge's opportunity to examine by hand a patient with a possible malignancy buried beneath bone and flesh.

The doctor must assume the worst because she cannot see inside the patient's body. In the future, a summary judgment motion may, like an MRI scan, provide this Court with relevant facts from which to draw inferences and settle whether defendants' contract is a malady that must be cured. And, of course, there always lurks the possibility of the law's invasive equivalent of an operation -- a trial to root out any malignancy through the details of testimony and evidence.

Id. This case is still at the preliminary stage, and there may be many more stages yet to come.

For the preceding reasons, this Court adopts Judge Lovegreen's Report and Recommendation. To the extent that the

parties did not object to that Report, this Court adopts the reasoning of the Report as to those issues. This Court rejects defendant's objections to the Report after de novo review and adopts the Report based on the preceding analysis.

Therefore, defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is granted as to plaintiff's claims in ¶ 17(iii)(b), (iv), (v), and (vi), and denied as to plaintiff's claims in ¶ 17(iii)(a), (vii), (viii), and (ix). Further, plaintiff's claims based on express and implied warranties are dismissed.

It is so Ordered.



Ronald R. Lagueux
Chief Judge
March 4, 1999