

‘LIGHTS’ OUT?

Troy attorney takes fight against purportedly mislabeled tobacco products to U.S. Supreme Court

Lawyers Weekly photo illustration/DOUGLAS J. LEVY

Consumer Protection Law

By **Melissa P. Stewart, Esq.**

Troy lawyer Gerard V. Mantese is taking on the tobacco industry.

He has held a grudge since his pre-law days at the University of Missouri in St. Louis, when he saw a full-page advertisement assuring consumers that there was no scientific evidence linking smoking to cancer.

“I was angry at the tobacco companies’ attempt to persuade people that smoking was safe,” he said. “I have always felt these companies should be held responsible for their fraud.”

Now, with a lawsuit against Philip Morris pending before the U.S. Supreme Court, Mantese has his chance to do just that.

“In 2004, I put together a consortium of law firms in several states ... with the goal of representing consumers who were defrauded by Philip Morris [when it] falsely represented that its Marlboro Lights had ‘lowered tar and nicotine,’” he explained.

Since then, Mantese has filed lawsuits in Maine, Arkansas and New Mexico accusing Phillip Morris of violating each state’s prohibition against deceptive advertising.

“All of the cases are based on the same theory: Philip Morris misrepresented the true nature of its so-called ‘light’ cigarettes [because] it represented that they contained lower [amounts of] tar and nicotine ... when a multitude of data, internal documents and evidences proves otherwise,” he said.

One case, *Altria Group, et al., v. Good, et al.*, has landed Mantese before the U.S. Supreme Court.

Initially, it was tossed out of court by a federal district court in Maine based on a finding that it was preempted by federal law. But later, the 1st U.S. Circuit Court of Appeals reinstated it.

Currently scheduled for oral arguments Oct. 6, the case seems destined to send shockwaves through state courts across the country, no matter how the justices ultimately rule.

Federal preemption of state laws has been a hot-button issue in recent years, and *Altria Group* is the latest such

case to be addressed by the U.S. Supreme Court.

At the center of Mantese's case is whether the Federal Trade Commission's power to regulate all cigarette labeling and advertising related to the health implications of smoking as provided by the Federal Cigarette Labeling and Advertising Act of 1965 (FCLAA) preempts deceptive labeling claims at a state level.

If the U.S. Supreme Court rules against Mantese, then it will inch case law one step closer to the notion that a product regulated by a federal government agency is immune from liability at the state level.

However, if the justices go the other way — allowing him to proceed against the tobacco giant — then, at the very least, the status quo will be maintained.

"A ruling in favor of the plaintiffs will give states control over the destinies of their citizens who are injured by fraud," Mantese said. "This case can set a firm foundation and recognition that states retain the power to provide redress for their citizens."

What's more, he added, "despite the trend toward preemption in other contexts, the statutory language in question is controlling, and it does not provide for preemption in this case."

To secure a win before the high court, Mantese told *Michigan Lawyers Weekly* he has focused on its own prior

rulings on fraud.

"The pivotal case in this area is *Cipollone v. Liggett Group*, which held that the FCLAA did not preempt state law claims of fraud," he said. Thus, "in our brief, we demonstrate that the Act does not preempt claims of fraud under state law, and that the Federal Trade Commission has not acted in such a way as to impliedly preempt state fraud claims."

Beyond specific arguments, though, Mantese said, "the largest question in the case is this: Do the states have the power to provide remedies when tobacco companies engage in fraud?"

For their part, the states have responded with a resounding "yes."

"That states do have the power to enforce their consumer protection law against tobacco companies was recognized by 47 of the 50 states who submitted amicus curiae briefs supporting our position," he said.

Conspicuously absent from the list of supporting states is Michigan.

A call to State Attorney General Michael A. Cox to determine whether Michigan intended to join the ranks of the other states was not immediately returned.

However, based on Mantese's experience with a similar case filed locally, it seems unlikely that Michigan will take a stand in the case.

"We did file a parallel case here in Michigan, but the complaint was dis-



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missed because of the way the Michigan Consumer Protection Act has been interpreted by the courts," he said.

According to him, "the Michigan Consumer Protection Act provides that it does not apply to any transaction or conduct that is 'specifically authorized by a regulatory board.'"

Thus, "although Philip Morris' false representation of 'lights' as having lowered tar and nicotine has never been 'specifically authorized,' Michigan courts have interpreted the term as including — and thus exempting — any activity that is generally within a regulatory board's purview, even if the specific transaction at issue is fraudulent or illegal and has never been regulated, authorized or even scrutinized by any agency," he said.

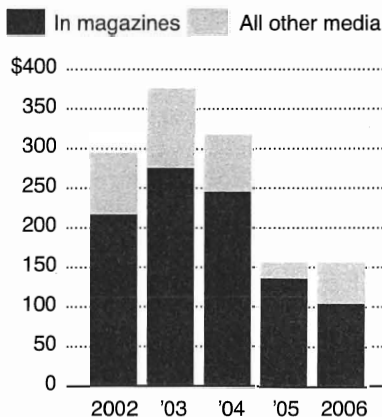
Perhaps it's the status of Michigan's consumer protection laws that has given Mantese an added incentive to pursue his arguments all the way to the U.S. Supreme Court.

"If we federalize this area too much, we will ultimately gut citizens' rights in the forums where they live and work," he said. "This case can set a firm foundation and recognition that states retain the power to provide redress for their citizens."

Not smoke-free yet

Tobacco advertising accounted for more than \$150 million in 2006 with 67 percent in magazines.

Money spent in advertisement for cigarettes, tobacco and accessories, in million



SOURCE: TNS Media Intelligence

AP

Cancer-causing

Lung cancer is the leading type of cancer caused by smoking.

Lung, trachea, bronchus

71%

Larynx

59

Upper aerodigestive*

39

Bladder

27

Kidney

26

Pancreas

21

Leukemia

12

Liver

12

Stomach

11

Cervix

3



Tobacco-related
cancer deaths
by type, 2005

*Includes lips, mouth, tongue, nose and parts of the throat

SOURCE: Centers for Disease Control and Prevention

AP