Filed 10/6/04; pub order 10/27/04 (see end of opn.)

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

IN RE TOBACCO CASES II, JCCP 4042,	D041356
	(Super. Ct. No. 719446)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald S. Prager, Judge. Affirmed.

The representative plaintiffs in this class action asserting claims under California's unfair competition law (Bus. & Prof. Code, § 17200 et seq. (UCL)) appeal a summary judgment in favor of defendant tobacco companies Philip Morris Incorporated (Philip Morris), R. J. Reynolds Tobacco Company (R. J. Reynolds), Lorillard Tobacco Company, and Brown & Williamson Tobacco Corporation.[1] The summary judgment is based on the granting of two separate motions for summary judgment brought jointly by

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1 The court certified the case as a class action after ordering it added to Judicial Council Coordination Proceeding No. 4042, entitled "In re Tobacco Cases II." The representative plaintiffs named in the second amended complaint (the operative pleading) are Devin Daniels, Bryce Clements, Daimon Fullerton and Nicole Morrow. At some point in the proceedings, Maren Beth Sandler, by and through her guardian ad litem Kay Steele Sandler, was added as a representative plaintiff.

defendants – one based on federal preemption under the Federal Cigarette Labeling and Advertising Act, 15 United States Code section 1331 et seq., (FCLAA) and the other based on the protection afforded commercial speech by the First Amendment of the United States Constitution and article I, section 2 of the California Constitution. Plaintiffs contend the court erred by (1) ruling all of their claims are preempted by the FCLAA; (2) ruling defendants' activities were protected by the First Amendment; and (3) denying plaintiffs' motion for "relief from proceedings" under Code of Civil Procedure section 473 that sought consideration of evidence identifying specific perpetrators of illegal sales in connection with their claim that defendants aided and abetted illegal sales of cigarettes to minors. Alternatively, plaintiffs contend they should be given leave to amend their complaint because the summary judgment motions were effectively motions for judgment on the pleadings.[2] We affirm the judgment on the grounds of FCLAA preemption and insufficient evidence to raise a triable issue of fact as to the only nonpreempted claim put in issue by plaintiffs.

FACTUAL AND PROCEDURAL BACKGROUND

This action was filed as a class action on behalf of "all persons who as California resident minors (under 18 years of age) smoked one or more cigarettes in California between April 2, 1994, and December 31, 1999." Plaintiffs' second amended complaint

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[2] The Attorney General filed an amicus curiae brief in support of plaintiffs, arguing the trial court misconstrued the standard for determining whether state-law regulation of advertising and promotion of tobacco products is preempted by the FCLAA and incorrectly held the First Amendment forecloses all of plaintiffs' claims.

(the complaint) sought restitutionary and injunctive relief under two causes of action, one for unlawful or deceptive business practices in violation of the UCL and one for untrue or misleading advertising in violation of Business and Professions Code section 17500 et seq.[3] The court certified the case as a class action.[4]

The complaint alleges: "This case arises from a scheme involving [d]efendants' systematic advertising efforts which appeal not only to adults, but also to children under the age of 18. . . . Defendants' scheme was to market cigarettes for consumption to California consumers, *including minors below 18*." According to the complaint, defendants have concealed internal research showing tobacco causes cancer and other diseases and have repeatedly told the public nicotine is not addictive despite knowing it is highly addictive. To prevent a precipitous decline in cigarette sales resulting from smoking-related deaths, defendants make children and teenagers the main target of

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3 Plaintiffs voluntarily dismissed a third cause of action for unjust enrichment. They also elected to forego injunctive relief and seek only restitution.

4 The court's class certification order appears to certify the class only as to plaintiffs' cause of action under the UCL, and defendants assumed this to be the case in their motion for summary judgment, stating: "Plaintiffs' Complaint also includes a non-certified claim under [Business and Professions Code section] 17500. Because that non-class claim is preempted for the same reasons as Plaintiffs' § 17200 claim, Defendants are entitled to summary judgment." However, the court's final summary judgment rulings suggest the court viewed the class certification to include both causes of action. The court stated: "The Complaint states two causes of action under Business & Professions Code sections 17200 et seq. and 17500 et seq. (the 'Unfair Competition Law' or 'UCL') that were certified for class action." Accordingly, we view the court's summary judgment rulings that "[p]laintiffs' *UCL case* does not withstand First Amendment scrutiny and therefore must be dismissed[,]" and that "[p]laintiffs' *UCL claims* are either preempted . . . or are based on inadmissible evidence" as disposing of both causes of action. (Italics added.)

"deceptive acts, including unfair and deceptive marketing programs and advertising." As a result, over 3,000 children begin smoking every day. Eighty-two percent of adults who have ever smoked had their first cigarette before age 18, and more than half became regular smokers before that age. Tobacco use by minors continues to increase. Defendants have intentionally promoted youth cigarette smoking by designing marketing and advertising campaigns intended to appeal to minors (while proclaiming they are not targeting minors); placing tobacco advertisements near schools and playgrounds and in youth-oriented publications; distributing logos and characters on promotional items like T-shirts and baseball caps directly to minors or in areas frequented by minors; advertising in video arcades; sponsoring events likely to attract youth interest; and paying for the promotion of their products in movies that appeal to young people. By advertising in magazines read by minors, defendants have willfully set in motion a chain of distribution illegal under Penal Code section 308, which prohibits the sale of tobacco to minors under the age of 18. Defendants never warned class members or any other California consumer that cigarettes are highly addictive.[5]

Defendants jointly filed two separate motions for summary judgment, one based on federal preemption under the FCLAA and the other based on the First Amendment.

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5 In their opposition to defendants' summary judgment motions (but not in their complaint), plaintiffs claimed defendants market "light" cigarettes with knowledge that the description was false because smokers ingest as much tar and nicotine from those cigarettes as from other cigarettes. Although the trial court addressed this issue in its summary judgment rulings, plaintiffs have not raised it in their opening brief. Consequently, we deem the issue waived or abandoned on appeal. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.)

The court issued telephonic rulings granting both motions. Plaintiffs requested oral argument and filed a "motion for relief from proceedings pursuant to [Code of Civil Procedure section 473, subdivision (b)]" seeking "relief from the . . . rulings granting summary judgment to Defendants insofar as those rulings were based on an alleged lack of evidence that Penal Code [section] 308 was violated during the class period." After hearing oral argument on the summary judgment motions, the court denied plaintiffs' motion for relief under Code of Civil Procedure section 473, issued a final ruling granting the summary judgment motions, and entered final judgment in favor of defendants.

DISCUSSION

I

Request for Judicial Notice

Defendants ask us to judicially notice four federal district court orders[6] and plaintiffs' opposition to the petition they filed in the California Supreme Court seeking review of this court's denial of their petition for writ of mandate challenging the trial court's class certification ruling. Plaintiffs have not opposed defendants' request for judicial notice.

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6 The federal district court orders are: (1) the order denying plaintiff's motion to remand and retaining jurisdiction in *Cannata v. Philip Morris et al.* (C.D. Cal. Dec. 11, 2002, No. CV-02-8026-ABC); (2) the order granting defendants' motion to dismiss in *Harshberger v. Philip Morris, Inc. et al.* (N.D. Cal. April 1, 2003, No. 02-05267-JSW); (3) the order denying plaintiffs' motion for leave to file a second amended complaint in *Newton v. R. J. Reynolds Tobacco Company et al.* (N.D. Cal. 2003, No. C-02-1415-VRW) and (4) the order denying plaintiffs' request for remand in *Rodarte v. Philip Morris Inc. et al.* (C.D. Cal. April 21, 2003, No. CV-03-0353-FMC).

"Although a court may judicially notice a variety of matters (Evid. Code, § 450 et seq.), only *relevant* material may be noticed." (*Mangini v. R.J. Reynolds Tobacco Co*. (1994) 7 Cal.4th 1057, 1063 (*Mangini*).) If a document is relevant and subject to judicial notice, notice is taken of its existence but not of the truth of any matters asserted in it. (*Ibid.*) Although we may take judicial notice of materials not before the trial court, including records of another court (Evid. Code, §§ 459, subd. (a), 452, subd. (d)), we need not give effect to that evidence. (*Doers v. Golden Gate Bridge etc. Dist*. (1979) 23 Cal.3d 180, 184, fn. 1.)

The opposition brief plaintiffs filed with the California Supreme Court is subject to judicial notice as a record of that court (Evid. Code, § 452, subd. (d)) and is relevant to defendants' argument that their summary judgment motions addressed all of the issues raised by plaintiffs' complaint. The four federal court orders in question are subject to judicial notice as court records (*Forty-Niner Truck Plaza, Inc. v. Union Oil Co*. (1997) 58 Cal.App.4th 1261, 1277, fn. 7) and as federal decisional law (Evid. Code, § 451, subd. (a); *Mangini v. R.J. Reynolds Tobacco Co., supra,* 7 Cal.4th at p. 1064). The first, second and fourth orders (attached to the request for judicial notice as exhibits B, C and E, respectively) are relevant to defendants' argument that statutory immunity bars plaintiffs' fraud-based claim that defendants falsely denied smoking was addictive. The third order (exhibit D) is relevant to defendants' preemption argument. All four orders are cited in defendants' respondents' brief. Because the materials defendants ask us to judicially

notice are relevant and subject to judicial notice, we grant defendants' request for judicial notice.[7]

II

Summary Judgment Standards

Summary judgment is proper when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment "bears the burden of persuasion that 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) A summary judgment motion must be directed to the issues raised by the pleadings, and the papers filed in opposition to the motion may not create issues outside the pleadings or operate as a substitute for an amendment to the pleadings. (*Nash v. Fifth Amendment* (1991) 228 Cal.App.3d 1106, 1116.) A defendant moving for summary judgment is not required to refute liability on some theory not included in the pleadings. (*Ibid.*)

On appeal from a ruling granting summary judgment, we conduct an independent review of the moving and opposition papers and apply the same standards as the trial court to determine whether the motion was properly granted. We are not bound by the

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7 The copies of the second and third orders attached to defendants' request for judicial notice are not file-stamped or signed and the third order bears no date. However, because defense counsel in a declaration supporting the request for judicial notice represents that they are true and correct copies of the respective court decisions and plaintiffs have not opposed the request for judicial notice, we accept counsel's representation.

trial court's stated reasons for its ruling on the motion; we review only the ruling and not its rationale. (*Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners* (1997) 52 Cal.App.4th 867, 873.) Although summary judgment rulings are reviewed de novo, the trial court's evidentiary rulings on a summary judgment motion are reviewed for abuse of discretion. (*Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1169; *Beane v. Paulsen* (1993) 21 Cal.App.4th 89, 93, fn. 4; *Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1319-1320.)

III

Preemption

Plaintiffs contend the trial court erroneously ruled that plaintiffs' UCL claims are preempted by the FCLAA. "Federal preemption occurs when: (1) Congress enacts a statute that explicitly preempts state law; (2) state law conflicts with federal law; or (3) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in the legislative field. [Citation.] When, however, Congress considers the issue of preemption and adopts a preemption [provision in a] statute that provides a reliable indication of its intent regarding preemption, the scope of federal preemption is determined by the preemption [provision] and not by the substantive provisions of the legislation. [Citation.] The reason is that 'Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.' [Citation.]" (*Lindsey v. Tacoma-Pierce County Health Dept.* (9th Cir. 1999) 195 F.3d 1065, 1069, citing *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516, 517 (*Cipollone*).)

The FCLAA is "a comprehensive federal scheme governing the advertising and promotion of cigarettes." (*Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 541 (*Reilly*).) The purposes of the FCLAA are (1) to adequately inform the public about the adverse health effects of cigarette smoking, and (2) to protect the national economy from "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." (15 U.S.C. § 1331; *Cipollone*, *supra*, 505 U.S. at p. 514.) Congress vested the authority to regulate cigarette advertising in the Federal Trade Commission (FTC). (*Reilly, supra,* 533 U.S. at pp. 545-546, 548.)

The FCLAA contains the following preemption provision: "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(b) (hereafter section 1334(b).)[8] Because section 1334(b) explicitly addresses preemption and provides a reliable statement of Congress's intent, the federal preemption issue in this case is governed by the express language of section 1334(b). (*Cipollone*, *supra*, 505 U.S. at p. 517.)

Cipollone

The plaintiff in *Cipollone* continued an action filed by his deceased parents against three tobacco companies. The complaint alleged the mother developed lung cancer because she smoked cigarettes manufactured and sold by the defendants. (*Cipollone*,

supra, 505 U.S. at p. 509.) The plurality in *Cipollone* rejected the argument that the phrase "requirement or prohibition . . . imposed under State law" in section 1334(b) limits the scope of FCLAA preemption to positive enactments by state legislatures and agencies. (*Cipollone,* at p. 522.) The plurality noted: "The phrase . . . sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules." (*Id.* at p. 521.) The plurality further noted that the phrase "state law" includes common law as well as statutes and regulations. (*Id.* at p. 522.)

However, section 1334(b) does not preempt all common law claims. (*Cipollone, supra*, 505 U.S. at p. 522.) Under *Cipollone*, a state law claim is preempted only if "the legal duty that is the predicate of the [claim] 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." (*Id.* at pp. 523-524.) "The appropriate inquiry is not whether a claim challenges the 'propriety' of advertising and promotion, but whether the claim would require the imposition under state law of a requirement or prohibition based on smoking and health with respect to advertising or promotion." (*Id.* at p. 525.)

The *Cipollone* plurality separately considered each of the common law claims asserted by the plaintiff in that case to determine whether it was preempted. (*Cipollone*, *supra*, 505 U.S. at p. 523.) The plurality concluded the plaintiff's failure-to-warn claims

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8 Section 1334(a) provides: "No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette

were preempted to the extent they required a showing that the defendants' advertising or promotions should have included additional or more clearly-stated warnings. (*Id.* at p. 524.) However, plaintiff's claims that relied "solely on [the tobacco companies'] testing or research practices or other actions *unrelated to advertising or promotion*" were not preempted. (*Id.* at pp. 524-525, italics added.)

The *Cipollone* plurality decided a fraudulent misrepresentation claim alleging the tobacco companies neutralized the effect of federally mandated warning labels through their advertising was "predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking. Such a *prohibition*, however, is merely the converse of a state-law *requirement* that warnings be included in advertising and promotional materials." (*Cipollone*, *supra*, 505 U.S. at p. 527.) The plurality concluded this theory of fraudulent misrepresentation was "inextricably related" to the plaintiff's "failure-to-warn theory," which the plurality concluded was "largely pre-empted by [section 1334(b)]." (*Id.* at p. 528.) The *Cipollone* plurality noted that because section 1334(b) preempted only state law obligations with respect to the advertising or promotion of cigarettes, claims that the tobacco companies concealed material facts were not preempted "insofar as those claims rely on a state-law duty to disclose such facts through channels of communication *other than advertising or promotion*." (*Cipollone*, *supra*, at p. 528.)

The plurality concluded claims based on allegedly false statements of material fact made in advertising were not preempted because "[s]uch claims are predicated not on a

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duty 'based on smoking and health' but rather on a more general obligation--the duty not to deceive." (*Cipollone*, *supra*, 505 U.S. at pp. 528-529.) The plurality stated: "State-law prohibitions on false statements of material fact do not create 'diverse, nonuniform, and confusing' standards. Unlike state-law obligations concerning the warning necessary to render a product 'reasonably safe,' state-law proscriptions on intentional fraud rely only on a single, uniform standard: falsity. Thus, we conclude that the phrase 'based on smoking and health' fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements." (*Id.* at p. 529.)

Mangini

In *Mangini, supra,* 7 Cal.4th 1057, the plaintiff claimed defendant R. J. Reynolds Tobacco Company and others violated the UCL by using a cartoon character called Old Joe Camel in its advertising to attract teenage smokers. (*Id.* at p. 1060.) Reviewing the Court of Appeal's reversal of the trial court's grant of summary judgment on that claim, the California Supreme Court considered the "narrow issue [of] whether, notwithstanding [California's] prohibition against *sale* [of cigarettes to minors], attempts in California to regulate or prohibit *advertisement* of cigarettes to minors are preempted by federal law." (*Id.* at p. 1065.) Finding the UCL claim clearly sought to impose a prohibition under state law with respect to advertising or promoting cigarettes, *Mangini* stated: "The entire issue thus comes down to this: Is the predicate legal duty 'based on smoking and health' as that phrase was construed in *Cipollone*? We answer that it is not." (*Mangini, supra,* at p. 1068.)

Mangini found the *Cipollone* plurality's predicate duty analysis regarding fraudulent misrepresentation claims dispositive. (*Mangini, supra,* 7 Cal.4th at p. 1068.) *Mangini* reasoned: "[I[t is unlawful in California to sell cigarettes to minors or for minors to buy them. Advertising aimed at such unlawful conduct would assist vendors in violating the law. The predicate duty is to not engage in unfair competition by advertising illegal conduct or encouraging others to violate the law. In *Cipollone*, the predicate duty—not to deceive—was not 'based on smoking and health'; this one is similarly not. 'Thus, we conclude that the phrase "based on smoking and health" fairly but narrowly construed does not encompass the more general duty not to' unfairly assist or advertise illegal conduct. [Citation.]" (*Mangini, supra,* at p. 1069.)

Regarding Congress's policy of avoiding "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health," (15 U.S.C. § 1331), *Mangini* reasoned that "[s]tate law prohibitions against advertisements targeting minors do not require [tobacco companies] to adopt any particular label or advertisement 'with respect to any relationship between smoking and health'; rather, they forbid *any* advertisements soliciting unlawful purchases by minors. The prohibitions do not create ' "diverse, nonuniform, and confusing" standards. Unlike state law obligations concerning the warning necessary to render a product "reasonably safe," state law proscriptions' against advertisements targeting minors 'rely only on a single, uniform standard': do not target minors. [Citation.]" (*Mangini, supra*, 7 Cal.4th at p. 1069.) Accordingly, *Mangini* concluded the UCL claim seeking to prohibit cigarette

advertising aimed at minors was not preempted by section 1334(b). (*Mangini,* at p. 1069.)

Reilly

In *Reilly, supra,* 533 U.S. 525, the United States Supreme Court considered whether the FCLAA preempted regulations promulgated by the Attorney General of Massachusetts that prohibited, as unfair or deceptive acts or practices, outdoor and point-of-sale advertising of cigarettes and smokeless tobacco products. (*Id.* at pp. 534-535.) The stated purpose of the regulations was " 'to eliminate deception and unfairness in the way cigarettes and smokeless tobacco products are marketed, sold and distributed in Massachusetts in order to address the incidence of cigarette smoking and smokeless tobacco use by children under legal age . . . [and] in order to prevent access to such products by underage consumers.' [Citation.]" (*Id.* at p. 533.)[9]

The Massachusetts Attorney General argued that the cigarette advertising regulations were not "based on smoking and health" within the meaning of section 1334(b) because they did not address health-related content in cigarette advertising but

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9 The Massachusetts regulations provided: "'[I]t shall be a unfair or deceptive act or practice for any manufacturer, distributor or retailer to engage in any of the following practices: [¶] (a) Outdoor advertising, including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school; [¶] (b) Point-of-sale advertising of cigarettes or smokeless tobacco products any portion of which is placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of any public playground, playground area in a public park, elementary school or secondary school, and which is not an adult-only retail establishment.' [Citation.]" (*Reilly, supra,* 533 U.S. at pp. 534-535.)

instead targeted youth exposure to the advertising. (*Reilly, supra,* 533 U.S. at p. 547.) The *Reilly* majority disagreed with the Attorney General's "narrow construction" of the phrase "based on smoking and health." (*Ibid.*) *Reilly* noted that Congress, in enacting the current FCLAA preemption statute, "did not concern itself solely with health warnings for cigarettes. In the 1969 amendments [to the FCLAA], Congress not only enhanced its scheme to warn the public about the hazards of cigarette smoking, but also sought to protect the public, including youth, from being inundated with images of cigarette smoking in advertising. In pursuit of the latter goal, Congress banned electronic media advertising of cigarettes. And to the extent that Congress contemplated additional targeted regulation of cigarette advertising, it vested that authority in the FTC." (*Id.* at pp. 547-548.)

Reilly concluded: "The context in which Congress crafted the current pre-emption provision leads us to conclude that Congress prohibited state cigarette advertising regulations motivated by concerns about smoking and health. Massachusetts has attempted to address the incidence of underage cigarette smoking by regulating advertising, [citation], much like Congress' ban on cigarette advertising in electronic media. *At bottom, the concern about youth exposure to cigarette advertising is intertwined with the concern about cigarette smoking and health*. Thus the Attorney General's attempt to distinguish one concern from the other must be rejected." (*Reilly, supra,* 533 U.S. at p. 548, italics added.) *Reilly* further stated: "In sum, we fail to see how the FCLAA and its pre-emption provision permit a distinction between the specific concern about minors and cigarette advertising and the more general concern about

smoking and health in cigarette advertising, especially in light of the fact that Congress crafted a legislative solution for those very concerns." (*Id.* at pp. 550-551.) Accordingly, *Reilly* held that the outdoor and point-of-sale advertising regulations targeting cigarettes were preempted by the FCLAA. (*Id.* at p. 551.)

Reilly concluded: "From a policy perspective, it is understandable for the States to attempt to prevent minors from using tobacco products before they reach an age where they are capable of weighing for themselves the risks and potential benefits of tobacco use, and other adult activities. Federal law, however, places limits on policy choices available to the States. [¶] In these cases, Congress enacted a comprehensive scheme to address cigarette smoking and health in advertising and pre-empted state regulation of cigarette advertising that attempts to address that same concern, *even with respect to youth.*" (*Reilly, supra,* 533 U.S. at pp. 570-571, italics added.)

Application of Cipollone, Mangini and Reilly to the Instant Case

Although plaintiffs contend this case involves UCL claims not based on defendants' advertising and promotion of cigarettes, the gravamen of the complaint is that defendants violated the UCL by targeting minors with cigarette advertising and promotion. Under *Mangini*'s reasoning, this claim is not preempted by the FCLAA because its predicate legal duty (the duty to not engage in unfair competition by advertising illegal conduct or encouraging others to violate the law) is not based on smoking and health. Although *Reilly* did not expressly address *Mangini*, *Mangini*'s reasoning cannot be reconciled with *Reilly*'s conclusion that FCLAA preemption does not "permit a distinction between the specific concern about minors and cigarette advertising

and the more general concern about smoking and health in cigarette advertising, especially in light of the fact that Congress crafted a legislative solution for those very concerns." (*Reilly, supra,* 533 U.S. at pp. 550-551.)

Reilly recognized that Congress's intent in enacting the FCLAA preemption statute was "to protect the public, *including youth*, from being inundated with images of cigarette smoking in advertising. In pursuit of the latter goal, Congress banned electronic media advertising of cigarettes. *And to the extent that Congress contemplated additional targeted regulation of cigarette advertising, it vested that authority in the FTC.*" (*Reilly, supra,* 533 U.S. at pp. 547-548, italics added.) As the trial court in this case correctly stated in its summary judgment ruling: "States cannot seek to impose regulations on tobacco 'advertising and promotion' in an effort to protect youth from exposure to such advertising, as Congress as already done so in banning all electronic advertising and in vesting the FTC with the authority to impose additional regulations."

Although the duty noted by *Mangini* "to not engage in unfair competition by advertising illegal conduct or encouraging others to violate the law" (*Mangini, supra,* 7 Cal.4th at p. 1069) may underlie a state-law claim that seeks to prohibit cigarette advertising aimed at youth, *Reilly* clarifies that, for purposes of FCLAA preemption, the predicate legal duty underlying such a claim is fundamentally based on the more general concern about smoking and health.[10]

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10 The conclusion that the UCL claims here are based on "smoking and health" concerns is underscored by the fact that more than 20 paragraphs of plaintiffs' complaint address the health hazards associated with cigarette smoking, including increased risk of lung cancer and other lung diseases, pregnancy complications and birth defects, heart

The United States Supreme Court's determination of a federal question, including the interpretation of a federal statute, "is binding upon the state courts, and must be followed, any state law, decision, or rule to the contrary notwithstanding." (*Chesapeake & O. Ry. Co. v. Martin* (1931) 283 U.S. 209, 220-221; *General Motors Corp. v. City of Los Angeles* (1995) 35 Cal.App.4th 1736, 1749; *Filipino Accountants' Assn. v. State Bd. of Accountancy* (1984) 155 Cal.App.3d 1023, 1034-1035.) Because *Mangini*'s FCLAA preemption analysis concerning state-law regulation of youth-directed cigarette advertising is contrary to *Reilly*'s analysis, we must follow *Reilly* and reject *Mangini*'s reasoning on the issue. Under *Reilly*, plaintiffs' essential claim that defendants violated the UCL by targeting children and teenagers with unfair and deceptive marketing programs and advertising is preempted by the FCLAA because it seeks to impose requirements or prohibitions based on smoking and health with respect to the advertising and promotion of cigarettes.[11]

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disease, vascular disease, stroke, peptic ulcer disease, fertility problems, and premature infant death.

11 In their opening brief, plaintiffs also claim their UCL claims "are based on prohibiting California businesses from cheating the competition [and] gaining unfair competitive advantage . . . ." To the extent plaintiffs are claiming defendants' acts of unfair competition harmed their tobacco company competitors, in contrast to the general public, plaintiffs do not have standing to assert the claim. (See *Rosenbluth Internat., Inc. v. Superior Court* (2002) 101 Cal.App.4th 1073, 1077-1079 [UCL action is not appropriate when the public in general is not harmed by the defendant's alleged unlawful practices].)

Reilly's Inchoate Offense Exception

Reilly observed that the FCLAA "does not foreclose all state regulation of conduct as it relates to the sale or use of cigarettes. The FCLAA's pre-emption provision explicitly governs state regulations of 'advertising or promotion.' Accordingly, the FCLAA does not pre-empt state laws prohibiting cigarette sales to minors." (*Reilly, supra,* 533 U.S. at p. 552, fn. omitted.) Noting it was illegal in Massachusetts to sell or distribute tobacco products to persons under the age of 18, *Reilly* stated: "Having prohibited the sale and distribution of tobacco products to minors, the State may prohibit common inchoate offenses that attach to criminal conduct, such as solicitation, conspiracy, and attempt. [Citations.]" (*Ibid.*) Plaintiffs argue that to the extent their UCL claims are based on defendants' youth-directed advertising, the claims fall within *Reilly*'s inchoate-offense exception to FCLAA preemption because defendants' advertising conduct constitutes the inchoate offense of aiding and abetting illegal sales of cigarettes to minors.[12]

California law does not support the imposition of criminal liability for aiding and abetting against tobacco companies based on their youth-oriented cigarette advertising and promotional activities. Penal Code section 31 provides that "[a]ll persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they

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12 Plaintiffs raise this argument mainly in connection with their contention that the court erroneously denied their motion for "relief from proceedings" under Code of Civil Procedure section 473 and refused to consider, in connection with their claim that defendants aided and abetted illegal sales of cigarettes to minors, evidence identifying specific perpetrators of illegal sales.

directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, . . . are principals in any crime so committed."

To prove criminal liability as an aider and abettor, it must be shown that "the defendant acted 'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.] When the offense charged is a specific intent crime, the accomplice must 'share the specific intent of the perpetrator'; this occurs when the accomplice 'knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime.' [Citation.]" (*People v. Prettyman* (1996) 14 Cal.4th 248, 259.)

Criminal liability for aiding and abetting attaches only when the accomplice *directly* aids or encourages an identifiable perpetrator, of whom the accomplice is specifically aware, to commit the underlying offense. Criminal liability for aiding and abetting cannot attach to defendants here on the theory that they were generally aware their advertisements and promotional activities would encourage some minors to illegally purchase cigarettes. (See *People v. Terman* (1935) 4 Cal. App. 2d 345, 347 ["To authorize the conviction of one as an aider and abettor of a crime it must be shown . . . that he criminally or with guilty knowledge and intent . . . aided the *actual perpetrator* in the commission of the act." (Italics added.)].) It is not reasonably probable that any governmental prosecutor would charge defendants with aiding and abetting the sale of

cigarettes to minors based on conduct relating to their advertising and marketing of cigarettes.

Further, plaintiffs' aiding and abetting argument raises First Amendment concerns because defendants' alleged aiding and abetting of illegal cigarette sales to minors was accomplished through their advertising, which is commercial speech. Case law addressing the loss of First Amendment protection for commercial speech that concerns unlawful activity is instructive in determining whether defendants' commercial speech at issue here is exempt from FCLAA preemption under *Reilly*.

The United States Supreme Court developed the following framework for analyzing whether regulation of commercial speech is invalid under the First Amendment: "'At the outset [a court] must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, [the court must] ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, [the court] must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.'" (*Reilly, supra,* 533 U.S. at p. 554, quoting *Central Hudson Gas & Elec. v. Public Serv. Comm'n* (1980) 447 U.S. 557, 566 (*Central Hudson*).)

A state may not suppress the dissemination of truthful information about lawful activity based on fear of the information's effect upon its recipients. (*Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 773.) *Reilly* stated: "The State's interest in preventing underage tobacco use is substantial, and even compelling, but it is no less

true that the sale and use of tobacco products by adults is a legal activity. We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products. In a case involving indecent speech on the Internet we explained that 'the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults.' [Citations.] As the State protects children from tobacco advertisements, tobacco manufacturers and retailers and their adult consumers still have a protected interest in communication. [Citation.]" (*Reilly, supra,* 533 U.S. at p. 564.) *Reilly* concluded: "The First Amendment . . . constrains state efforts to limit advertising of tobacco products, because so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult consumers have an interest in receiving that information." (*Id.* at p. 552.)

The Court of Appeals in *Dunagin v. City of Oxford, Miss.* (5th Cir. 1983) 718 F.2d 738 (*Dunagin*) applied similar reasoning to the issue of whether the State of Mississippi's prohibition against alcohol advertising violated the First Amendment. Rejecting the State's argument that the advertising was not entitled to First Amendment protection under *Central Hudson* because alcohol sale and distribution was illegal in nearly half of the counties in the state, *Dunagin* stated: "The commercial speech doctrine would disappear if its protection ceased whenever the advertised product might be used illegally." (*Dunagin,* at p. 743.) *Dunagin* also rejected the State's argument that the ban

on alcohol advertising was not protected "because it is misleading: falsely identifying alcohol with 'the good life' instead of disclosing the personal and social disasters it threatens, and particularly affecting the young and unsophisticated children in the public audience." (*Ibid.*) *Dunagin* responded: "Nearly all advertising associates the promoted product with a positive or alluring lifestyle or famous or beautiful people. Our policy is to leave it to the public to cope for themselves with Madison Avenue panache and hard sells." (*Ibid.*)

Dunagin set forth the following "central teaching of the commercial speech doctrine [as] summed up in *Central Hudson*: 'In applying the First Amendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. "[P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication[,] rather than to close them . . . ." [Citation.] Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.' " (*Dunagin, supra,* 718 F.2d 738, 743, quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, supra,* 447 U.S. at p. 562.) In response to the argument that the alcohol advertising would reach young children, *Dunagin* noted: " '[T]he government may not "reduce the adult population . . . to reading only what is fit for children." ' [Citations.]" (*Dunagin,* at p. 743.)

In *Rockwood v. City of Burlington* (D.Vt. 1998) 21 F.Supp.2d 411 (*Rockwood*), convenience store owners challenged a city ordinance regulating the advertising and sale

of tobacco products. The court noted that commercial speech proposing a commercial transaction enjoys First Amendment protection (*Rockwood,* at p. 421), and that "[t]obacco advertising proposes that people buy a product which is lawful for adults to possess and unlawful for minors to possess." (*Ibid.*) In response to the City's argument that the tobacco companies were using advertising to pitch their products to minors, *Rockwood* noted that "tobacco companies' advertisements attempt to appeal indiscriminately to any individual who views them . . . . Regardless of whether tobacco advertising causes adolescents to smoke, or whether the tobacco companies have targeted the 'youth market,' advertising that does not *directly* incite illicit activity is protected. [Citations.]" (*Ibid.*, italics added.)[13]

For the proposition that advertising must *directly* incite illicit activity to lose First Amendment protection, *Rockwood* cited *Carey v. Population Services International* (1977) 431 U.S. 678 (*Carey*) and noted *Carey* cited *Brandenburg v. Ohio* (1969) 395 U.S. 444, 447 (*Brandenburg*). In *Brandenburg*, the United States Supreme Court held that "the constitutional guarantees of free speech and free press do not permit a State to

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13 Addressing the argument that the tobacco advertising was misleading, *Rockwood* conceded "there is evidence that tobacco advertisements seek to associate use of tobacco with all sorts of desirable activities, and thereby deliberately suggest that smoking will make you healthier, wealthier, wiser, and wildly popular." (*Rockwood, supra,* 21 F.Supp.2d at p. 421.) *Rockwood* noted, however, that the tobacco advertisements in question also contained truthful, nonmisleading information about brand availability and price, and that if " 'truthful and nonmisleading expression will be snared along with . . . deceptive commercial speech, the State must satisfy the remainder of the *Central Hudson* test . . . .' " (*Id.* at pp. 421-422, quoting *Edenfield v. Fane* (1993) 507 U.S. 761, 768-769 [i.e., the first part of the test, requiring that the speech concern lawful activity and not be misleading, is satisfied].)

forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." (*Brandenburg, supra,* at p. 447.) In *Carey* the Supreme Court relied on *Brandenburg* as support for its conclusion that advertisements of contraceptive products could not be banned on the ground they would legitimize illicit sexual activity among young people, because the advertisements could not "even remotely be characterized as 'directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.' [Citation.] They merely state the availability of products and services that are not only entirely legal [citation], but constitutionally protected. [Citation.]" (*Carey, supra,* 431 U.S. at p. 701, fn. omitted, quoting *Brandenburg,* at p. 447.)

Reilly, Rockwood, and, by analogy, *Dunagin* and *Carey* support the proposition that however socially objectionable and subject to regulation by the FTC it may be, cigarette advertising and speech-related promotion that does not *directly* incite minors to purchase cigarettes passes the "lawful and not misleading" part of the *Central Hudson* test and thus is entitled to First Amendment protection. As in *Rockwood,* "there is no contention here that the advertisements, whatever the marketing strategy behind them, say 'Kids, get your Camels here.' " (*Rockwood, supra,* 21 F.Supp.2d at p. 421.) Because the cigarette advertising and promotion at issue in this case is not unlawful or misleading under the *Central Hudson* test, a fortiori, it cannot constitute aiding and abetting or any other inchoate criminal offense.

The trial court in this case concluded that because defendants' alleged aiding and abetting involved speech, the *Brandenburg* "inciting imminent lawless action" test would have to be satisfied to establish that defendants' conduct was sufficiently criminal to fall within *Reilly*'s inchoate offense exception to FCLAA preemption. Plaintiffs contend the *Brandenburg* test does not apply to a determination of whether restrictions on commercial speech violate the First Amendment under *Central Hudson*. Although the merit of that contention is dubious considering *Carey's* reliance on *Brandenburg*, we need not decide the point because we are not applying the *Brandenburg* test to determine whether plaintiffs' action seeks an unconstitutional restriction on commercial speech under *Central Hudson*; we are applying it to determine whether plaintiffs' claims are exempt from FCLAA preemption under *Reilly* because defendants' alleged conduct amounts to the inchoate criminal offense of aiding and abetting violations of Penal Code section 308.

McCollum v. CBS, Inc. (1988) 202 Cal.App.3d 989 (*McCollum*) supports the proposition that the *Brandenburg* test applies to any determination of whether speech can constitutionally be restricted on the ground it involves criminal conduct. *McCollum* noted that under *Brandenburg,* "to justify a claim that speech should be restrained or punished because it is (or was) an incitement to lawless action, the court must be satisfied that the speech (1) was directed or intended toward the goal of producing imminent lawless conduct *and* (2) was likely to produce such imminent conduct. Speech directed to action at some indefinite time in the future will not satisfy this test." (*McCollum,* at p. 1000, citing *Hess v. Indiana* (1973) 414 U.S. 105, 108; see also *People v. Rubin* (1979)

96 Cal.App.3d 968, 976-980 [applying *Brandenburg* test to determine whether defendant's public statements that could be interpreted as solicitation of murder were protected by First Amendment so as to immunize defendant from prosecution].)

Defendants' cigarette advertising and promotion allegedly aimed at youth, like advertising generally, was inherently directed to action (the purchase of cigarettes by recipients of the advertisement) at some indefinite time in the future. Consequently, it cannot be restrained on the ground it incites lawless action and cannot properly be deemed aiding and abetting illegal purchases of cigarettes by minors. Commercial speech entitled to First Amendment protection because it does not directly or expressly encourage illegal action cannot qualify as the type of encouragement to commit a crime required to impose criminal liability for aiding and abetting.[14]

To the extent plaintiffs' UCL claims are based on defendants' cigarette advertising and promotional activities, they are preempted by the FCLAA.

IV

Plaintiffs' Purported Nonadvertising or Promotion Claims

Plaintiffs contend the court should not have granted summary judgment on the ground of FCLAA preemption because they advanced four nonadvertising or promotion theories of recovery under the UCL. Plaintiffs' opening brief states that their "non-

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14 Considering our conclusion that, based on the allegations in the complaint, defendants cannot be held criminally liable for aiding and abetting illegal sales of cigarettes to minors, we need not address plaintiffs' contention that the court erred by denying their motion for "relief from proceedings" under Code of Civil Procedure section 473 and refusing to consider, in connection with their aiding and abetting claim, evidence identifying specific perpetrators of illegal sales of cigarettes to minors.

advertising . . . theories of recovery are premised on each of the [defendant's] specific unfair deceptive, and unlawful conduct of (i) researching, surveying and test marketing minors in order to craft strategies to encourage them to smoke, (ii) adulterating cigarettes to appeal to children and make them more rapidly addictive, (iii) using slotting agreements to create self-serve displays at retail locations where minors shop to make the Youth Brands more accessible to minors[,] and (iv) lying to the public and their competitors about their research, business strategies and the addictive properties of their cigarettes." We address these claims separately.

Researching, Surveying and Test Marketing Minors

In the general allegations section of the complaint, plaintiffs allege "each of the [defendants] studies how to attract minors and engages in conduct to accomplish that goal." After citing examples of internal memoranda by defendants R. J. Reynolds and Philip Morris concerning increased smoking by minors, plaintiffs allege "[d]efendants have engaged in a course of conduct designed to promote cigarette smoking among young people," including advertising campaigns intended to appeal to minors, placing tobacco advertisements near schools and playgrounds, and engaging in various promotional activities designed to appeal to young people.[15]

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15 These allegations involving youth-smoking studies by defendants and tobacco company internal memoranda about increased smoking among minors (contained in paragraphs 47 through 51 of the complaint) are the only allegations in the complaint suggesting defendants have engaged in "researching, surveying and test marketing minors in order to craft strategies to encourage them to smoke."

The *Cipollone* plurality stated the FCLAA "does not . . . pre-empt . . . claims that rely solely on [tobacco companies'] testing or research practices or other actions *unrelated to advertising or promotion.*" (*Cipollone*, *supra*, 505 U.S. at p. 524-525, italics added.) The corollary of that statement is that the FCLAA *does* preempt claims based on testing or research practices that *are* related to advertising or promotion. Plaintiffs' claim that defendants violated the UCL by researching, surveying and test marketing minors "*in order to craft strategies to encourage them to smoke*" (i.e., target them with cigarette advertising and promotion) is related to defendants' advertising and promotion of cigarettes, and is therefore preempted by the FCLAA.

Adulterated Cigarettes

Plaintiffs claim defendants violated the UCL by adding flavorings, including licorice and chocolate, to cigarettes to make them more palatable to children, and by adding ammonia and other chemicals to suppress the gag reflex of children experimenting with cigarettes and to make the cigarettes more rapidly addictive. Plaintiffs essentially are making this claim for the first time on appeal. The complaint contains no cigarette-adulteration allegations and plaintiffs did not address cigarette adulteration as an independent theory of UCL liability in any of their points and authorities in opposition to summary judgment.[16] Rather, plaintiffs stated in their

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16 Plaintiffs' only mention of cigarette adulteration in their briefing to the trial court is the following passing reference in the statement of facts section of their memorandum of points and authorities in opposition to defendants' joint motion for summary judgment on First Amendment grounds: "Camel's [post-1997] campaigns – What You're Looking For, Pleasure to Burn and Mighty Tasty – used almost explicit sex and mockeries of the FDA's warning labels to attract teenagers, along with flavorings such as vanilla, mint,

memorandum of points and authorities in opposition to defendants' motion for summary judgment based on FCLAA preemption: "This case presents three basic claims: *first,* the specific ad campaigns used by the Defendants for four of their cigarette brands . . . during the Class Period . . . were created and used to intentionally target teenagers and children, as did the ad placement, promotions and other marketing techniques used in those campaigns; *second*, to try to neutralize information reaching children from teachers, parents and public health officials concerning the health risks of smoking, the Defendants lied under oath to Congress during the Class Period, and made false statements in newspapers, denying that smoking was dangerous or addictive; *and third*, to make the public in general, and teenagers specifically, believe that the dangers of smoking could be reduced or avoided, Defendants marketed 'Light' cigarettes, with knowledge these descriptors were false because smokers ingest as much or more tar and nicotine smoking these cigarettes with no reduction in health risk."[17]

A summary judgment motion must be directed to the issues raised by the pleadings, and the papers filed in opposition to the motion may not create issues outside the pleadings or operate as a substitute for an amendment to the pleadings. (*Nash v. Fifth Amendment, supra,* 228 Cal.App.3d at p. 1116.) A defendant moving for summary judgment is not required to refute liability on some theory not included in the pleadings.

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chocolate and orange." Defendants' alleged addition of ammonia and other chemicals to cigarettes is not mentioned in any of plaintiffs' opposition points and authorities or separate statements of undisputed facts in opposition to defendants' summary judgment motions.

(*Ibid.*) Further, points neither asserted below nor considered and ruled on by the trial court are generally deemed waived and will not be considered for the first time on appeal. (*Martinez v. Scott Specialty Gases, Inc.* (2000) 83 Cal.App.4th 1236, 1249.) Accordingly, plaintiffs' cigarette-adulteration claim provides no basis to reverse the court's grant of summary judgment on the ground of FCLAA preemption.

Slotting Agreements

Plaintiffs asserted in their opposition to summary judgment that defendants, throughout the class period, "paid convenience store owners a premium to place self-service cigarette displays on the counters of their stores that are readily accessible to children so as to encourage children to take cigarettes without age verification." However, because plaintiffs' complaint makes no reference to these "slotting agreements," they were not a proper ground for opposing defendants' summary judgment motion based on FCLAA preemption.

In any event, we conclude the trial court correctly ruled that plaintiffs' slotting-agreement claim was preempted by the FCLAA based on language in *Jones v. Vilsack* (8th Cir. 2001) 272 F.3d 1030 (*Jones*). To ascertain the plain meaning of the word "promotion" as used in section 1334(b), *Jones* looked to an FTC report and the Surgeon General's 1994 report entitled *Preventing Tobacco Use Amongst Young People*, which lists various promotions conducted by tobacco companies. The following passage from the Surgeon General 's report, quoted by *Jones*, describes the type of promotion plaintiffs

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17 As noted, plaintiffs waived or abandoned their "Light" cigarette claim on appeal. (*Ante,* fn. 5.)

refer to as a "slotting agreement": "'Promotional activities can take many forms. Promotional expenditures can stimulate retailers to place and display products in ways that will maximize the opportunity for purchase (e.g., supplying retailers with point-of-purchase displays to locate products at checkout stands).'" (*Jones,* at p. 1035.)

Although *Jones* acknowledged the FTC Report and Surgeon General's Report did not "announce formal agency definitions of 'promotion' " (*Jones, supra,* 272 F.3d at p. 1035), *Jones* found use of the word "promotion" in the reports to be "probative of the term's plain and ordinary meaning in the context of cigarette marketing." (*Ibid.*) *Jones* stated: "To be sure, the FTC and the Surgeon General are experts on the topic. The FCLAA charges the FTC with a duty to report to Congress on the 'current practices and methods of cigarette advertising and promotion,' [citation], and the Surgeon General's Reports historically have provided the political and scientific impetus to enact and amend the FCLAA. Thus we consider the Reports' use of the term 'promotion' indicative of the term's plain and ordinary meaning." (*Id.* at pp. 1035-1036.)

Plaintiffs' unpleaded slotting agreement claim is preempted by the FCLAA because it seeks to impose a prohibition under state law with respect to the promotion of cigarettes.[18]

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18 Plaintiffs erroneously assert at two places in their opening brief that *Reilly* held state prohibition of point-of-sale placement of cigarettes is not preempted by FCLAA. *Reilly* held only that such prohibitions are not barred by the First Amendment (*Reilly, supra,* 533 U.S. at pp. 569-570); it did not address whether they were preempted by the FCLAA.

Misrepresentations to the Public and Competitors

Plaintiffs claim defendants deceived the public and their competitors by publicly denying they were targeting minors with their cigarette marketing strategies and denying cigarette smoking is addictive.[19] The only allegation in the complaint that defendants lied about marketing cigarettes to minors is that on or about April 1, 1994 (one day before the first day of the class period) the vice president of the Tobacco Institute, which is not a party to this appeal, stated on the MacNeil/Lehrer News Hour television program that tobacco manufacturers are not targeting and marketing the sale of cigarettes to minors.

Plaintiffs' separate statements of undisputed facts filed in opposition to defendants' summary judgment motions contain only two assertions involving misrepresentations about marketing cigarettes to minors.[20] The first is that in 1985, R. J. Reynolds's law department issued a "Marketing Assistant Training Manual" that stated the company did not research or market its products to persons under 18 years of age. This statement is not actionable because it predates the class period and, in any event, was not allegedly disseminated to the plaintiff class or other members of the general public.

Plaintiffs' other assertion involving a representation about marketing cigarettes to minors is that in February 2001, the president of defendant Lorillard Tobacco Company

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19 Plaintiffs do not have standing to challenge defendants' alleged misrepresentations to their competitors because those misrepresentations would not have harmed the general public. (Fn. 11, *ante.*)

20 Plaintiffs filed an original and a "first amended" separate statement.

stated in a letter to the Attorney General of Washington State that the company did not feel any of its current advertisements targeted young people. This statement is not actionable because it postdates the class period and was not allegedly disseminated to the plaintiff class or other members of the general public.

Even if plaintiffs' complaint sufficiently pleaded the theory that defendants denied targeting minors with their cigarette marketing strategies, their separate statements in opposition to summary judgment did not place that theory in issue. "A party waives a new theory on appeal when he fails to include the underlying facts in his separate statement of facts in opposing summary judgment. [Citation.] A new theory on appeal is also waived when the new theory involves a controverted factual situation not put in issue below. [Citation.]" (*City of San Diego v. Rider* (1996) 47 Cal.App.4th 1473, 1493.) Plaintiffs' theory that defendants denied targeting minors with cigarette advertising and promotion is waived.[21]

Plaintiffs asserted in their points and authorities in opposition to summary judgment on preemption grounds that "to try to neutralize information reaching children from teachers, parents and public health officials concerning the health risks of smoking, the Defendants lied under oath to Congress during the Class Period, and made false

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21 In any event, there is no merit to the claim that class members were deceived or misled by misrepresentations that the defendant tobacco companies were not targeting minors with cigarette advertising and promotions. Class members were either influenced to smoke by defendants' youth-directed advertising and promotions or they were not. In the highly unlikely event any of them were even aware of defendants' alleged misrepresentations about not engaging in youth marketing strategies, it is implausible that those misrepresentations factored into their decision to smoke.

statements in newspapers, denying that smoking was dangerous or addictive." Plaintiffs presented two evidentiary items to support this claim: the videotaped testimony of executives of defendants before Congress, and an April 13, 1994 advertisement by Philip Morris in the New York Times that contains the statement, "Philip Morris does not believe cigarette smoking is addictive." The trial court sustained defendants' objection to admission into evidence of that videotaped testimony before Congress based on Civil Code section 47, subdivision (b)(1), which immunizes statements made in legislative proceedings from liability. The court properly applied that statute and did not abuse its discretion by excluding defendants' Congressional testimony.[22]

The court also sustained defendants' objection to both items of evidence based on former Civil Code section 1714.45 (or the Immunity Statute) as interpreted by *Naegele v. R. J. Reynolds Tobacco Co.* (2002) 28 Cal.4th 856, 865 (*Naegele*). The Immunity Statute "granted tobacco companies complete immunity in certain product liability lawsuits as of January 1, 1988. (Added by Stats. 1987, ch. 1498, § 3, p. 5778.) The second version [of the statute] rescinded that immunity 10 years later on January 1, 1998. (Stats. 1997, ch. 570, § 1.)" (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 831-832, fn. omitted.)[23]

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22 Plaintiffs do not address this evidentiary ruling on appeal.

23 Former Civil Code section 1714.45 provided: "(a) In a product liability action, a manufacturer or seller shall not be liable if: [¶] (1) The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community; and [¶] (2) The product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, *tobacco*, and butter, as identified in comment i to Section 402A of the

In *Naegele* the California Supreme Court decided the Immunity Statute barred the plaintiff's claim that the defendant tobacco companies " 'lied about the addictive nature of smoking' in 'a campaign designed to deceive the public, plaintiff, the government, and others as to the health hazards of smoking.' " (*Naegele v. R. J. Reynolds Tobacco Co., supra,* 28 Cal.4th at p. 866.) *Naegele* stated that "under the Immunity Statute's broad definition of product liability lawsuits, it makes no difference whether a claim seeking damages for 'personal injury or death' caused by a tobacco product is labeled as one for negligence, manufacture of an inherently unsafe product or fraud." (*Id.* at p. 863.) *Naegele* concluded: "Regarding defendants' conduct during the statutory immunity period, we conclude that the Immunity Statute bars plaintiff's claims, *however labeled*, where they allege no more than personal injury caused by dangers or risks inherent in the consumption of tobacco products such as cigarettes." (*Id.* at p. 867, italics added.)[24]

The trial court in this case decided *Naegele*'s construction of the term "products liability action[s]" as used in the Immunity Statute was "obviously meant to include all

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Restatement (Second) of Torts. [¶] (b) For purposes of this section, the term 'product liability action' means any action for injury or death caused by a product, except that the term does not include an action based on a manufacturing defect or breach of an express warranty. [¶] (c) This section is intended to be declarative of and does not alter or amend existing California law, including Cronin v. J.B.E. Olson Corp., (1972) 8 Cal.3d 121 [104 Cal.Rptr. 433, 501 P.2d 1153], and shall apply to all product liability actions pending on, or commenced after, January 1, 1988." (Italics added.)

[24] *Naegele* held that "the statutory immunity does not shield a tobacco company from liability for injuries or deaths caused by something not inherent in the product itself . . . ." (*Naegele v. R. J. Reynolds Tobacco Co., supra,* 28 Cal.4th at p. 865.) Accordingly, *Naegele* held the immunity statute did not bar the "plaintiff's claims that the defendants adulterated the cigarettes plaintiff smoked with additives that exposed him to dangers not inherent in cigarette smoking." (*Id.* at p. 867.)

tort actions and non-tort actions (such as the instant UCL case) based on tort theories like fraud and misrepresentation . . . ." The court agreed with defendants that "any other interpretation would turn the law on its head, as it would mean that plaintiffs who have suffered actual physical injury or death due to tobacco company fraud during the [i]mmunity period could not recover, while a member of the instant class who is alleging no injury, other than being induced to smoke, could recover through the remedy of restitution the cost of the cigarettes purchased during the class period simply because he is a member of a UCL class action."

Plaintiffs contend the court erroneously sustained defendants' objection to Philip Morris's New York Times advertisement, arguing *Naegele*'s holding does not apply to their UCL action because they are not seeking tort damages but rather restitution for each class member's "separate and distinct injuries." However, the determination of whether a case is barred by the Immunity Statute does not turn on the type of relief plaintiffs seek; it turns on whether the action is an "action for injury . . . caused by a product" within the broad meaning of former Civil Code section 1714.45. The fact that plaintiffs seek restitution instead of tort damages does not make the Immunity Statute inapplicable.

The Immunity Statute does not differentiate between physical and economic injury in its definition of the term "products liability action"; it simply defines that term as "*any* action for injury or death caused by a product . . . ." (Italics added.) Black's Law Dictionary defines "injury" as "[t]he violation of another's legal right, for which the law provides a remedy; a wrong or injustice." (Black's Law Dict. (8th ed. 2004) p. 801, col.

1.) The same dictionary defines "personal injury" as "[a]ny invasion of a personal right, including mental suffering and false imprisonment." (*Id.* at p. 802, col. 1.)

The complaint alleges plaintiffs have been deceived by defendants' advertising campaigns and failure to disclose the addictive nature of cigarettes and the costs associated with maintaining the addiction. As a result, plaintiffs allege they "have developed an addiction to cigarette smoking which effects [*sic*] each and every one of them every day. The representative Plaintiffs inexplicably desire to smoke and feel a need to do so at certain times every day. This need drives them to continue to purchase and consume cigarettes even though the adverse health effects are becoming increasingly well-known." The complaint also alleges that "[e]ach of the named class representatives and members of the class were exposed to Defendants' systematic deceptive advertising campaigns and inadequate cigarette packaging labels in the State of California; *each of the Plaintiffs and members of the class have been damaged by Defendants' deceptive business practices as alleged herein.*" (Italics added.) The complaint's prayer for relief requests "an order requiring defendants to make restitution to the members of the class of all monies wrongfully acquired by defendants by means of their violations of [the UCL]."

The allegations that plaintiffs were deceived by defendants' advertising and nondisclosures *and suffered cigarette addiction* as a result, along with the general allegation that plaintiffs were damaged by defendants' alleged deceptive business practices and the prayer for monetary restitution, establish that plaintiffs are suing for physical, psychological and economic "injuries" – i.e., wrongs inflicted by defendants in violation of plaintiffs' legal right not to be subjected to them – and that the alleged

injuries were, at bottom, caused by cigarettes manufactured and sold by defendants. Thus, the allegations bring the instant action within the Immunity Statute's "broad definition of product liability lawsuits" (*Naegele v. R. J. Reynolds Tobacco Co., supra,* 28 Cal.4th at p. 863), as they establish an "action for injury . . . caused by a product" within the meaning of the statute. Because plaintiffs' claim that defendants lied about the addictive nature of cigarettes is a "products liability" claim within the meaning of the Immunity Statute, defendants are immune from liability for that claim.[25]

We conclude the trial court properly applied the Immunity Statute and *Naegele* to the instant action. Accordingly, we conclude the court did not abuse its discretion by sustaining defendants' evidentiary objections to Philip Morris's April 1994 New York Times advertisement and defendants' Congressional testimony. Plaintiffs presented insufficient evidence to raise a triable issue of fact as to whether defendants made actionable misrepresentations about the addictive properties of their cigarettes to members of the plaintiff class.

V

Plaintiffs' Request for Leave to Amend the Complaint

Plaintiffs contend that defendants' summary judgment motions were effectively motions for judgment on the pleadings and, therefore, we should order the trial court to allow them to amend their complaint if the alleged facts show they have a good cause of

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25 Although the class period extends a year beyond the expiration of the Immunity Statute, defendants' Congressional testimony and Philip Morris's New York Times advertisement occurred in 1994, when former Civil Code section 1714.45 was still in effect.

action imperfectly pleaded. We reject this contention because plaintiffs did not seek leave to amend below.

If the facts presented on a summary judgment motion would support causes of action not asserted in the complaint, "it is incumbent on the pleader to make some request to amend so that the pleading *is* adequate. In the absence of such a request, the court is under no duty to inquire whether there are causes of action or defenses inherent in the facts but not articulated by the pleading. [Citations.]" (*Lee v. Bank of America* (1994) 27 Cal.App.4th 197, 216.) A plaintiff may not seek leave to amend his or her pleading for the first time on appeal when the record does not show the plaintiff sought leave to amend before the hearing on a summary judgment motion. (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1264-1265.)

CONCLUSION

Restriction of cigarette advertising and promotion directed to minors reflects a governmental policy. However, we simply conclude that under the FCLAA, Congress has given the FTC the exclusive authority to address society's concern about smoking and health by regulation of cigarette advertising and promotion, and has preempted "state regulation of cigarette advertising that attempts to address that same concern, even with respect to youth." (*Reilly, supra,* 533 U.S. at pp. 570-571.)[26]

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26 Because we conclude plaintiffs' claims are preempted by the FCLAA, we do not address the parties' First Amendment arguments apart from our discussion on the issue of whether defendants' youth-directed advertising and promotion of cigarettes is within *Reilly*'s inchoate offense exception to FCLAA preemption.

DISPOSITION

The judgment is affirmed. Defendants are entitled to costs on appeal.

McDONALD, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.

Filed 10/27/04

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

IN RE TOBACCO CASES II, JCCP 4042,	D041356 (Super. Ct. No. 719446) ORDER GRANTING PUBLICATION; DENYING MODIFICATION; AND DENYING REHEARING

THE COURT:

The opinion filed October 6, 2004, is ordered certified for publication.

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Munger, Tolles & Olson, Gregory P. Stone, Daniel P. Collins, Steven B. Weisburd; Seltzer Caplan McMahon Vitek, Gerald L. McMahon and Daniel E. Eaton for Defendant and Respondent Philip Morris USA Inc.

Gray Cary Ware & Freidenrich, William S. Boggs and Brian A. Foster for Defendant and Respondent Lorillard Tobacco Company.

Howard, Rice, Nemerovsky, Canady, Falk & Rabkin, H. Joseph Escher III, Todd E. Thompson; Jones, Day, Reavis & Pogue and William T. Plesec for Defendant and Respondent R.J. Reynolds Tobacco Company.

Sedgwick Detert Moran & Arnold and Steven D. DiSaia for Defendant and Respondent Brown & Williamson Tobacco Corporation.

The motion for modification is denied.

The petition for rehearing is denied.