

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANDREW COHEN; TIMOTHY
HORNICK; KALEAH C. ALLEN;
KIMBERLY BENJAMIN; MARK
WEILER; MATT KOPPIN; SCOTT
CISCHKE; PAUL COLETTI; KRYSTLE
FAERYN; RODOLFO CABRERA;
BRANDY DAVIS; WILLIAM ZIDE;
DAVID HEDICKER; NANCY
MAEKAWA; CATHERIN GOODWIN;
KATHLEEN BOGGS; MARK KUNZE;
ARIANA RYAN; BECKY
WELLINGTON; M. GAIL SUNDELL;
VICTOR PERLMAN; ZACHARY
GOMOLEKOFF; GLENN JACOBS; JUNE
A. HALL,

Plaintiffs-Appellants,

v.

APPLE INC.,

Defendant-Appellee,

and

SAMSUNG ELECTRONIC AMERICA,
INC.,

Defendant.

No. 20-17307

D.C. No.
3:19-cv-05322-
WHA

OPINION

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Argued and Submitted December 10, 2021
Pasadena, California

Filed August 26, 2022

Before: William A. Fletcher, Johnnie B. Rawlinson, and
John B. Owens, Circuit Judges.

Opinion by Judge W. Fletcher

SUMMARY*

Preemption / Federal Communications Commission

The panel affirmed the district court’s summary judgment for Apple Inc., based on preemption of the state-law claims by federal law, in an action brought by plaintiffs, who are iPhone users, alleging that Apple breached state tort and consumer-fraud laws by misrepresenting and failing to disclose the amount of radiofrequency (“RF”) radiation emitted by iPhones.

A regulatory scheme established by a Federal Communications Commission 1996 RF Order set exposure limits that included cell phones, and it remains largely intact

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

today. Plaintiffs alleged that RF radiation emitted by iPhones regularly exceeded the federal exposure limit, and they brought eight claims against Apple under state tort and consumer-fraud laws. The district court held that plaintiffs' state-law claims were preempted by federal law.

The panel held that the Hobbs Act did not deprive the district court of jurisdiction. The panel rejected Apple's argument that the Hobbs Act broadly granted exclusive jurisdiction to courts of appeals over private suits that implicated the substance of agency determinations, and divested district courts of jurisdiction to pass on any issue that would require them to decide on a determination made in an FCC final order. Plaintiffs in this case did not challenge the validity of any of the FCC's final orders, either directly or indirectly. The issue in this case was whether the FCC's concededly valid orders had preemptive effect. A holding that the FCC orders do, or do not, preempt plaintiffs' state-law claims had no effect on their validity.

Turning to the merits of the appeal, the panel first addressed plaintiffs' argument that the FCC promulgated its RF Orders under the National Environmental Policy Act ("NEPA"), which was a purely procedural statute with no preemptive force, and therefore regulations promulgated under NEPA did not preempt plaintiffs' state-law causes of action. The panel agreed with plaintiffs that NEPA was a purely procedural statute and that it had no preemptive force. However, the panel did not agree with plaintiffs that the FCC's RF Orders were promulgated under NEPA. The panel held that the twin Communications Acts, the Communications Act of 1934 and the Telecommunications Act of 1996, granted to the FCC broad regulatory powers over wireless communications devices. The 1996 Act

directed the FCC to complete rulemaking for RF radiation that had already been initiated under the 1934 Act. NEPA, by contrast, granted no affirmative regulatory powers over wireless communications.

Next, plaintiffs argued that even if the FCC's RF Orders were promulgated under either, or both, of the two Communications Acts, the savings clauses in those Acts preserved their state-law causes of action. Specifically, first, plaintiffs argued that the 1934 Act did not authorize preemption by regulations promulgated under the Act, and therefore their state-law causes of action were not preempted by the FCC's Orders. The panel held that a federal statute need not specify its preemptive force in order for the statute to have such a force, and Congress did not need to expressly delegate preemptive authority to the FCC for its regulations to preempt state law. The operative question was whether the agency meant to preempt the state law. The intent to preempt need not be express. Under the doctrine of implied conflict preemption, the agency's statutorily authorized regulations will preempt any conflicting state or local law. The panel held that the conflict between the FCC's RF radiation regulations and plaintiffs' state law claims posed a sufficient obstacle to the full accomplishment of the FCC's objectives. The savings clause in § 414 of the 1934 Act did not help plaintiffs. The panel concluded that the FCC's regulations under the 1934 Act, setting upper limits on the levels of permitted RF radiation, preempted state laws that imposed liability premised on levels of radiation below the limits set by the FCC.

Second, plaintiffs argued that the preemptive scope of the FCC's radiation regulations could not be determined solely by consulting the 1934 Act. The panel disagreed, and held

that the scope of preemption of the FCC's RF regulations was controlled by the 1934 Act, and the preemption provisions of the 1996 Act were irrelevant. The savings clause in Section 332(c)(7)(A) of the 1996 Act was a narrowly focused savings clause and had nothing to do with RF radiation emissions from cell phones. The general savings clause in Section 601 of the 1996 Act by its very terms applied only to the 1996 Act and does not apply to the 1934 Act.

COUNSEL

Matthew W.H. Wessler (argued) and Linnet Davis-Stermitz, Gupta Wessler PLLC, Washington, D.C.; Elizabeth A. Fegan and Jessica H. Meeder, Fegan Scott LLC, Chicago, Illinois; for Plaintiffs-Appellants.

Joseph R. Palmore (argued) and Adam L. Sorensen, Morrison & Foerster LLP, Washington, D.C.; William F. Tarantino and James R. Sigel, Morrison & Foerster LLP, San Francisco, California; for Defendant-Appellee.

Leah M. Nicholls, Public Justice P.C., Washington, D.C., for Amicus Curiae Public Justice.

Scott L. Nelson and Allison M. Zieve, Public Citizen Litigation Group, Washington, D.C., for Amicus Curiae Public Citizen.

Joshua S. Turner, Megan L. Brown, and William K. Lane III, Wiley Rein LLP, Washington, D.C.; Paul V. Lettow and Stephanie A. Maloney, U.S. Chamber Litigation Center, Washington, D.C.; for Amicus Curiae Chamber of Commerce of the United States of America.

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