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Dewey v. R.J. Reynolds Tobacco Co.: A Welcome Exercise of Restraint in Applying Preemption Doctrine to State Tort Actions

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COMMENTS

DEWEY v. R.J. REYNOLDS TOBACCO CO.*: A WELCOME EXERCISE OF RESTRAINT IN APPLYING PREEMPTION DOCTRINE TO STATE TORT ACTIONS

INTRODUCTION

The period from 1984 to 1988 witnessed a dramatic increase in the number of cases in which plaintiffs attempted to hold cigarette manufacturers liable for injuries and deaths allegedly caused by cigarette use.¹ This so-called "second wave" of tobacco litigation² was spearheaded in large part by the widely publicized efforts of the plaintiffs' attorneys in *Cipollone v. Liggett Group, Inc.*³ The plaintiffs brought a variety of claims

* 121 N.J. 69, 577 A.2d 1239 (1990).

¹ See Jacobson, *After Cipollone v. Liggett Group, Inc.: How Wide Will the Floodgates of Cigarette Litigation Open?*, 38 AM. U.L. REV. 1021, 1036 (1989) (few cigarette product liability cases were filed during the 1970s); Plum, *Anti-Smoking Cause Gets Infusion of New Blood*, NAT'L L.J., Oct. 30, 1989, at 1 (the number of cases against cigarette manufacturers peaked in July 1987, when there were 149 cases pending); Wermel, *Supreme Court Will Consider Tobacco Issue*, WALL ST. J., Mar. 26, 1991, at A3, col. 1 (as of March 1991, the number of smoker death cases has dwindled to approximately 45).

² Edell, *Cigarette Litigation: The Second Wave*, 22 TORT & INS. L.J. 90 (1986) (arguing that current developments in tort liability law and greater cooperation among plaintiffs' counsel will help plaintiffs prevail in cigarette liability cases). *But cf.* Crist & Majoras, *The "New" Wave in Smoking and Health Litigation—Is Anything Really So New?*, 54 TENN. L. REV. 551 (1987) (predicting that the recent spate of tobacco liability suits are going to fail in the same fashion as the suits that were brought in the 1950s and 1960s).

³ 593 F. Supp. 1146 (D.N.J. 1984), *rev'd*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987), *on remand*, 649 F. Supp. 664 (D.N.J. 1986), *later proceeding*, 683 F. Supp. 1487 (D.N.J. 1988), *aff'd in part*, 893 F.2d 541 (3d Cir. 1990), *cert. granted*, 111 S. Ct. 1386 (1991).

The *Cipollone* case and the plaintiffs' attorney, Marc Edell, attracted substantial attention in the national media and legal community. See Mintz & Gladwell, *Legal Battle Between Tobacco Firms, Opponents Won't End Anytime Soon*, WASH. POST, June 15,

based on strict liability,⁴ negligence,⁵ intentional tort⁶ and breach of warranty.⁷ However, after a series of rulings on motions by both sides, the district court and the Third Circuit whittled away at the bulk of the plaintiffs' original causes of action, significantly weakening the potency of the suit.⁸

1988, at F1, col. 3 (noting that *Cipollone* has been the most heavily publicized tobacco case to date); Mintz, *Winning Lawyer Hasn't Stopped Fight Against Tobacco Firms*, Wash. Post, June 19, 1988, at H5, col. 2. After *Cipollone* was filed in 1983, the number of cases against tobacco manufacturers rose substantially. See Margolick, *Antismoking Climate Inspires Suits By The Dying*, N.Y. Times, Mar. 15, 1985, at B1, col. 3.

⁴ To recover in strict liability, a plaintiff must show that there exists a defect in the product that is unreasonably dangerous but does not have to show that the defendant was negligent in causing the defect. Failure to warn may also constitute a defect. See W. KEETON, PROSSER AND KEETON ON TORTS § 99 (5th ed. 1984). The plaintiffs' strict liability claims included: 1) a design defect claim alleging that the defendants manufactured a defectively designed cigarette rather than an alternatively designed cigarette (the "design defect" claim); 2) a second type of design defect claim alleging that the defendants produced an unsafe and defective product, the risks of which outweighed its utility (the "risk utility" claim); and 3) a failure to warn claim alleging that the defendants failed to warn consumers adequately of the dangers associated with cigarette smoking (the "failure to warn" claim). *Cipollone*, 593 F. Supp. at 1149.

⁵ The plaintiffs also alleged that the defendants negligently failed to warn consumers of the dangers associated with cigarette smoking and negligently advertised their products so as to neutralize and render ineffective the cigarette label warnings. *Id.*

⁶ The plaintiffs asserted that the defendants intentionally advertised their products to neutralize whatever warnings were given ("fraudulent misrepresentation" claim) and conspired to deprive the public of data indicating that cigarette smoking is hazardous to health ("conspiracy to defraud" claim). *Id.* See *Cipollone*, 649 F. Supp. 664, 673 (D.N.J. 1986), for a fuller explanation of these claims.

⁷ The plaintiffs also claimed that the defendants breached express warranties, arising from their advertisements, that the cigarettes they manufactured and sold did not present any significant health consequences. *Cipollone*, 593 F. Supp. at 1149. Advertisements constitute express warranties if they form part of the basis of the bargain on which the consumer bought the advertised good. U.C.C. § 2-313 (1987). See *Cipollone*, 649 F. Supp. 664, 675 (D.N.J. 1986), for a fuller explanation of this claim.

⁸ See *Cipollone*, 789 F.2d 181 (3d Cir. 1986); *Cipollone* 649 F.Supp. 664 (D.N.J. 1986). The paring of the plaintiffs' claims began when the Third Circuit, on an interlocutory appeal, held that the Federal Cigarette Labeling and Advertising Act (the "Act") preempted those state law claims that challenged the adequacy of the warnings on cigarette packages or challenged cigarette manufacturers' advertising practices after the Act's enactment in 1965. 789 F.2d at 187. On remand, the district court interpreted the Third Circuit's decision to mean that the Act preempted the plaintiffs' failure to warn, express warranty, fraudulent misrepresentation and conspiracy to defraud claims insofar as they challenged the defendants' advertising, promotional or labeling activities after the Act's effective date on January 1, 1966. Because Mrs. Cipollone did not smoke brands manufactured by Philip Morris or Lorillard prior to the passage of the Act, the district court granted judgment on the pleadings on those claims to both defendants. However, because Mrs. Cipollone began smoking a Liggett brand in 1942, the claims against Liggett were not preempted, and a jury could consider only whether the pre-1966 tortious activity of Liggett was a proximate cause of Mrs. Cipollone's death. 649 F. Supp.

The federal and state courts that subsequently entertained cigarette cases generally echoed the determination of the Third Circuit in *Cipollone* and barred causes of action based on cigarette warning labels or cigarette advertising.⁹ By the beginning

at 669, 673-75.

In another ruling, the district court struck the plaintiffs' "risk utility" claim on the ground that it was barred due to the retroactive application of a New Jersey state statute. *Cipollone v. Liggett Group, Inc.*, No. 83-2864 (D.N.J. Oct. 27, 1987), *reconsideration denied*, (D.N.J. Dec. 28, 1987).

In yet another ruling, the district court struck the plaintiffs' "design defect" claim on the ground that the plaintiffs failed to present sufficient evidence that the defendants' failure to market an alternatively designed cigarette when it was feasible in the mid-1970s was a proximate cause of Mrs. Cipollone's death. 683 F. Supp. 1487, 1493-95 (D.N.J. 1988).

The Third Circuit, in an appeal from final judgment, affirmed the district court's rulings dismissing the plaintiffs' post-1965 failure to warn, express warranty and intentional tort claims against all defendants but reversed the district court's ruling barring the plaintiffs' "risk utility" claims. 893 F.2d 541, 547-48 (3d Cir. 1990).

Thus, after seven years of litigation, the plaintiffs have only a few remaining live claims: a "risk utility" claim against all three defendants, a "conspiracy to defraud" claim against all three defendants limited to their pre-1966 activity, a "fraudulent misrepresentation" claim against all three defendants limited to their pre-1966 activity, an "express warranty" claim against Liggett based only on its pre-1966 activity, and a "failure to warn" claim against Liggett based only on its pre-1966 activity. While the pre-1966 claims are viable, they suffer from a serious flaw: plaintiffs will have the unenviable task of proving that the defendants' pre-1966 activity was the proximate cause of Mrs. Cipollone's death in 1983.

However, the Supreme Court will have the last word on the plaintiffs' causes of action. On December 28, 1990, the plaintiffs' attorneys filed for certiorari, seeking Supreme Court review of the Third Circuit's holding that the plaintiffs' post-1965 "failure to warn" and "intentional misrepresentation" claims are preempted by the Act. The Supreme Court granted certiorari on March 25, 1991. 893 F.2d 541 (3d Cir. 1990), *cert. granted*, 111 S. Ct. 1386 (1991).

* All subsequent circuit court decisions agreed with the Third Circuit's preemption holding in *Cipollone*. See *Pennington v. Vistrion Corp.*, 876 F.2d 414 (5th Cir. 1989); *Roydsdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1989); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987). In the state arena, the reasoning of the Third Circuit was followed by the Minnesota Supreme Court in *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655 (Minn. 1989).

Of the six courts that have ruled against preemption in the cigarette cases prior to the *Dewey* decision, three have been reversed on appeal: *Palmer v. Liggett Group, Inc.*, 633 F. Supp. 1171 (D. Mass. 1986), *rev'd*, 825 F.2d 620 (1st Cir. 1987); *Cipollone*, 593 F. Supp. 1146 (D.N.J. 1984), *rev'd*, 789 F.2d 181 (3d Cir. 1986); *Forster v. R.J. Reynolds Tobacco Co.*, 423 N.W.2d 691 (1988), *rev'd*, 437 N.W.2d 655 (Minn. 1989). *Galbraith v. R.J. Reynolds Tobacco Co.*, No. 144417 (Cal. Super. Ct. Dec. 18, 1985), *appeal abandoned*, (Cal. App. Mar. 31, 1986) and *Haight v. American Tobacco Co.*, No. 84-2232 (S.D.W. Va. Dec. 26, 1984) were both decided before the Third Circuit opinion in *Cipollone*. In *Montana v. R.J. Reynolds Tobacco Co.*, No. 79850 (N.Y. Sup. Ct. Oct. 5, 1987), *vacating* No. 79850 (N.Y. Sup. Ct. Oct. 9, 1986), the court initially ruled against preemp-

of 1990 there was a consensus among five circuit courts and the highest court of Minnesota, that the Federal Cigarette Labeling and Advertising Act (the Act),¹⁰ enacted in 1965 to ensure uniform warning labels on cigarette packages, preempts all causes of action based on the failure to warn consumers adequately after 1965 about the dangers of smoking. The failure to warn claim, widely regarded as the most promising, had found its way into the dustbin.¹¹ To add to cigarette plaintiffs' woes, several state legislatures have enacted statutes limiting a manufacturer's liability for products that have inherently dangerous qualities known to the consuming public.¹² Together, these judicial and legislative developments threatened to reduce this second wave of tobacco liability suits to a barely perceptible ripple.

Against this background the New Jersey Supreme Court reached a strikingly different conclusion in *Dewey v. R.J. Reynolds Tobacco Co.*¹³ In *Dewey*, the court held that common law tort claims based on cigarette manufacturers' failure to warn adequately of the dangers of smoking are not preempted by the Act.¹⁴ While the *Dewey* court was not the first to hold that the

tion but vacated its opinion when the First Circuit opinion in *Palmer* was handed down.

¹⁰ Pub. L. No. 89-92, 79 Stat. 282 (codified as amended at 15 U.S.C. §§ 1331-1341 (1988)). See notes 22-32 and accompanying text *infra* for a discussion of the language and history of the Act.

¹¹ See Stein, *Cigarette Products Liability Law in Transition*, 54 TENN. L. REV. 631, 662 (1987) (failure to warn claim is the most promising claim in the cigarette liability cases because failure to warn of the dangers inherent in a product deprives a consumer not only of his ability to make an informed choice, a goal in contractual law, but also misrepresents the nature of the product, a tort); Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1565 n.143 (1973) (noting that the majority of design defect cases have been decided on a failure to warn theory).

A duty to warn arises where there is information upon which a reasonable inference might be drawn that there is a likelihood the product is potentially hazardous. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734 (1983). In addition, warnings must be understandable and must accurately convey the gravity of the possible harm. Warnings may otherwise be deemed inadequate if promotion of the product neutralizes the warnings. Ausness, *Cigarette Company Liability: Preemption, Public Policy and Alternative Compensation Systems*, 39 SYRACUSE L. REV. 897, 907 (1988).

¹² California, Kansas, Louisiana, New Jersey, Ohio and Tennessee have enacted such statutes. See notes 259-61 and accompanying text *infra*.

¹³ 121 N.J. 69, 577 A.2d 1239 (1990).

¹⁴ *Id.* This Comment will not address the second part of the opinion, in which the *Dewey* court held that the New Jersey Products Liability Law, N.J. STAT. ANN. § 2A:58C-3a(2) (West 1987), did not apply retroactively to bar plaintiffs' "risk utility" claim. This

Act did not preempt failure to warn claims,¹⁵ the decision is nonetheless remarkable for its stance against the holdings of five circuit courts, including the Third Circuit, which encompasses New Jersey.¹⁶

This Comment first gives an overview of the history of the Act and the federal government's involvement in the smoking and health area. This Comment then discusses how the preemption issue has been resolved in prior tobacco litigation, from the New Jersey district court opinion in *Cipollone* to the various circuit court opinions. Next, this Comment analyzes the *Dewey* decision, arguing that the New Jersey Supreme Court's holding on the preemption issue was doctrinally correct. The *Dewey* court effectively attacked the circuit courts' unrestrained application of existing preemption doctrine to plaintiffs' claims. This Comment then focuses on preemption doctrine itself and takes to task one of the traditional formulas used to determine whether state law has been preempted by federal law. Under this formula, first articulated by the Supreme Court in *Hines v. Davidowitz*, courts will find state law preempted by federal law

ruling is in accord with the Third Circuit's ruling in *Cipollone*, 893 F.2d 541, 577-78 (3d Cir. 1990).

¹⁵ See *Cipollone*, 593 F. Supp. 1146 (D.N.J. 1984) (the district court was the first federal court to rule that the Act did not preempt any of plaintiffs' claims), *rev'd*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987).

¹⁶ See Daynard, *Up from the Ashes: Cigarette Litigation and the 'Dewey' Decision*, 18 Prod. Safety & Liab. Rep. (BNA) 1078, 1079 (1990) (comparing the *Dewey* decision to the arrival of cavalry in the final minutes of a Western); Hevesi, *Court in New Jersey Upholds Right to Sue Cigarette Makers*, N.Y. Times, July 27, 1990, at A1, col. 1 (noting that the decision might lead to a review of the tobacco liability preemption issue by the United States Supreme Court and reporting that the tobacco stocks fell sharply upon news of the ruling); Deveny & Freedman, *Tobacco Warnings Don't Pre-Empt Claims, Court Rules*, Wall St. J., July 27, 1990, at B1, col. 3 (remarking that this is the first time a state's highest court has held that cigarette failure to warn claims are not preempted and noting that attorneys affiliated with the tobacco industry described the case as "aberrant").

Indeed, the New Jersey Supreme Court has been labeled "independent" in the past. In a prescient New York Times article published two weeks before the *Dewey* decision, Laurence Tribe, the Tyler Professor of Constitutional Law at Harvard University, praised the New Jersey Supreme Court as a forerunner in advancing the principles of federalism, an issue central to the *Dewey* decision. Sullivan, *New Jersey Court Seen As Leader On Rights*, N.Y. Times, July 18, 1990, at B1, col. 2.

Moreover, the *Dewey* decision has recently gained adherence in a second appellate court. In *Carlisle v. Philip Morris, Inc.*, a Texas court of appeals, expressing its agreement with the *Dewey* court, held that the Act did not preempt plaintiffs' failure to warn claims. 805 S.W.2d 498 (Tex. Ct. App. 1991).

when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹⁷ This Comment submits that the *Hines* test invites courts to construe broadly the preemptive reach of federal law, leaving state common law, in particular, without adequate constitutional safeguards against federal encroachment. Accordingly, this Comment proposes that the *Hines* formula be abandoned when the preemption of state common law is at issue. Finally, this Comment addresses several important considerations that underlie the circuit court decisions, including the desire to stem a potentially unmanageable flood of cigarette claims, but reiterates that such practical concerns do not justify preemption of these state law claims. Congress and the states have adequate means at their disposal to put a stop to cigarette litigation, means that do not involve expanding the scope of federal preemption to the detriment of state common law.

I. BACKGROUND

A. *The Federal Government's Relationship with Smoking and Health*

Although privately conducted studies demonstrating the possible connection of smoking with various health hazards were reported with increasing frequency after World War II, the first widely publicized involvement of the federal government in the smoking and health area came in 1964.¹⁸ In that year, the United States Surgeon General issued a 387-page report entitled *Smoking and Health: Report of the Advisory Committee to the Sur-*

¹⁷ 312 U.S. 52, 67 (1941).

¹⁸ The first large-scale epidemiological studies of the relationship between tobacco and cancer began in the 1940s. U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, *SMOKING AND HEALTH—A REPORT OF THE SURGEON GENERAL* 1-5 (1979).

Throughout the 1950s, certain magazines, *READER'S DIGEST* in particular, reported on the growing body of medical evidence that revealed a link between smoking and cancer, chronic bronchitis and other diseases. M. NEUBERGER, *SMOKE SCREEN: TOBACCO AND THE PUBLIC WELFARE* 80 (1963).

As early as 1957, the Surgeon General of the United States noted that "the weight of the evidence is increasingly pointing in one direction: that excessive smoking is one of the causative factors in lung cancer." 29 Fed. Reg. 8328 (1964). But the notoriety of the Surgeon General's Report in 1964 surpassed any previous federal involvement in the smoking and health area. See Crist & Majoras, *supra* note 2, at 557 (noting that media attention has continued unabated since the release of the 1964 Surgeon General's Report).

geon General, which linked cigarette smoking to lung cancer, bronchitis and emphysema.¹⁹ The Surgeon General determined that cigarette smoking was a "health hazard of sufficient importance" to warrant remedial action by Congress.²⁰

Several state legislatures reacted immediately to the Advisory Committee report by establishing mandatory warning labels for cigarettes sold within the state.²¹ Congress, in turn, responded both to the potential maze of inconsistent state regulations and to the Surgeon General's admonition that the federal government take an active role in the smoking and health area by enacting the Federal Cigarette Labeling and Advertising Act in 1965.²² The Act's most apparent accomplishment was to establish a uniform system of federally mandated warning labels on cigarette packages reading: "Caution: Cigarette Smoking May

¹⁹ U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, *SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE* 31 (1964) [hereinafter 1964 SURGEON GENERAL'S REPORT].

²⁰ *Id.* at 33.

²¹ For example, the New York State Legislature adopted the following label in June 1965: "WARNING: Excessive Use Is Dangerous to Health." Ch. 470, 1965 N.Y. Laws 663 (repealed).

See discussion in 111 CONG. REC. 13,901 (June 16, 1965) (statement of Sen. Moss): Mr. President, many States are showing their concerns over the smoking and health issue [sic]. For example, my own State [Utah] has recently considered adopting labeling requirements, and the State of New York is also contemplating both labeling and advertising restrictions. While I do not favor individual State action in this matter because of the maze of conflicting regulations which would result, I feel that the States should be allowed to exercise this prerogative if the Federal Government does not choose to do so.

See also H.R. REP. NO. 449, 89th Cong., 1st Sess. 3 (1965), *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 2350, 2352.

²² Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, 79 Stat. 282 (codified as amended at 15 U.S.C. §§ 1331-1341 (1988)). The Act took effect on January 1, 1966. The Act's declaration of policy and purpose is set forth in § 1331:

It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with the cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to the effect on each package of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

Id. § 1331.

Be Hazardous to Your Health."²³ However, it must be emphasized that the passage of the Act was not without controversy, as representatives from tobacco producing states insisted that their tobacco constituents not be hampered in marketing their products.²⁴ Thus the final version of the Act is a compromise, as attested to by the accompanying statement of congressional purpose, which declares that the Act has the dual purpose of adequately informing the public of the hazards of smoking while protecting cigarette commerce to the maximum extent.²⁵

Congress's subsequent activity in the smoking and health area has been considerable.²⁶ The Act was amended in 1970 to implement a stronger warning label on cigarette packages: "Warning: The Surgeon General Has Determined That Smoking Is Dangerous to Your Health."²⁷ The 1970 Act also prohibited all cigarette advertising via the electronic media.²⁸ Additionally, Congress gave express authority in the 1970 Act to administrative agencies to monitor smoking developments, to the Secretary of Health and Human Services to monitor and annually report on the health consequences of smoking, and to the Federal Trade Commission to monitor the effectiveness of labeling and advertising policies and issue an annual report on those policies.²⁹ Finally, in 1984, Congress passed the Comprehensive Smoking Education Act, which implemented a system of rotating warnings to address the hazards of smoking more specifically³⁰ and established the Interagency Committee on Smoking

²³ Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, 79 Stat. 282 (codified as amended at 15 U.S.C. § 1333 (1988)).

²⁴ See *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 622-23 (1st Cir. 1983); *Cipollone*, 593 F. Supp. at 1157-1166 (for a discussion of the legislative history of the Act). See also H.R. REP. NO. 449, 89th Cong., 1st Sess. 3-4 (1965), reprinted in 1965 U.S. CODE CONG. & ADMIN. NEWS 2350.

²⁵ See notes 21-23, *supra*. See also *Palmer*, 825 F.2d at 623 (noting that "Congress negotiated a hard-fought compromise" in passing the Act).

²⁶ See *Crist & Majoras*, *supra* note 2, at 563-66. These commentators go so far as to state that the evidence of past congressional involvement in the area of cigarette labeling and marketing suggests that Congress has occupied the field.

²⁷ Federal Cigarette Labeling and Advertising Act of 1970, Pub. L. No. 91-222, 84 Stat. 88 (codified as amended at 15 U.S.C. § 1333 (1988)).

²⁸ 15 U.S.C. § 1335 (1988) (entitled "Unlawful Advertisements on Medium of Electronic Communication").

²⁹ *Id.* § 1337 (entitled "Reports to Congress").

³⁰ Comprehensive Smoking Education Act § 4, Pub. L. No. 98-474, 98 Stat. 2200 (1984) (codified as amended at 15 U.S.C. § 1333 (1988)). These new warnings, which are to be rotated quarterly, are:

and Health to disseminate information regarding smoking and its adverse effects and to make appropriate recommendations to Congress.³¹ Moreover, since 1964, the United States Surgeon General has periodically issued reports reviewing the effects of cigarette smoking on public health.³²

B. Cipollone v. Liggett Group, Inc.: *The District Court Decision*

Although there were numerous tobacco liability suits filed in the 1950s and 1960s, the number dropped precipitously after the passage of the Act.³³ However, with the expansion of strict liabil-

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

15 U.S.C. § 1333 (1988).

In addition, the 1984 amendments required that the warnings appear on all advertisements and outdoor billboards as well as on the cigarette package itself. *Id.*

³¹ *Id.* § 1341(a)-(c).

³² See Jacobson, *supra* note 1, at 1027 n.42 (giving an exhaustive list of the Surgeon General's Reports since 1964). See also Hiltz, *U.S. Cites List of Gains From Quitting Smoking*, N.Y. Times, Sept. 26, 1990, at B4, col. 4 (reporting that the Surgeon General has issued 21 reports on the relation between smoking and health).

³³ See Note, *Plaintiffs' Conduct as a Defense to Claims Against Cigarette Manufacturers*, 99 HARV. L. REV. 809 (1986) (noting that most cases in the cigarette product liability area were brought in the late 1950s and early 1960s).

There were a substantial number of cigarette cases brought before the passage of the Act, all of which were unsuccessful. See, e.g., *Ross v. Philip Morris, Inc.*, 328 F.2d 3 (8th Cir. 1964) (breach of implied warranty of fitness); *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir. 1963), *cert. denied*, 375 U.S. 865 (1963) (breach of implied warranty of fitness and negligence); *R.J. Reynolds Tobacco Co. v. Hudson*, 314 F.2d 776 (5th Cir. 1963) (product liability); *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962), *question certified to state court*, 154 So. 2d 169 (Fla.), *rev'd and remanded*, 325 F.2d 673 (5th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964), *rev'd and remanded on rehearing*, 391 F.2d 97 (5th Cir. 1968), *rev'd per curiam*, 409 F.2d 1166 (5th Cir. 1969)(*en banc*), *cert. denied*, 397 U.S. 911 (1970) (breach of implied warranty of fitness for use); *Pritchard v. Liggett & Meyers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961), *aff'd on rehearing*, 350 F.2d 479 (3d Cir. 1965), *cert. denied*, 382 U.S. 987 (1966), *modified*, 370 F.2d 95 (3d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967) (warranty of fitness for use and negligent failure to warn); *Albright v. R.J. Reynolds Tobacco Co.*, 350 F. Supp. 341 (W.D. Pa. 1972), *aff'd*, 485 F.2d 678 (3d Cir. 1973), *cert. denied*, 416 U.S. 951 (1974) (product liability); *Fine v. Philip Morris, Inc.*, 239 F. Supp. 361 (S.D.N.Y. 1964) (breach of warranty, negligence and misrepresentation); *Mitchell v. American Tobacco Co.*, 183 F. Supp. 406 (M.D. Pa.

ity in the late 1970s and 1980s,³⁴ tobacco suits returned to the forefront of product liability litigation, beginning with *Cipollone v. Liggett Group Inc.*³⁵ In 1983 Antonio and Rose Cipollone

1960) (failure to warn and negligence); *Cooper v. R.J. Reynolds Tobacco Co.*, 158 F. Supp. 22 (D. Mass. 1957), *aff'd*, 256 F.2d 464 (1st Cir. 1958), *cert. denied*, 358 U.S. 875 (1958) (fraud by false advertising).

For a thorough analysis of the early cigarette liability cases see Stein, *supra* note 11, at 631-38; Jacobson, *supra* note 1, at 1030-36; Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423, 1423-28 (1980).

The first wave of tobacco suits effectively ended in 1970, when the Supreme Court denied certiorari in *Green v. American Tobacco*, 397 U.S. 911 (1970). Garner, *supra*, at 1423.

The theories advanced to explain the dropoff in such suits include: 1) the growing body of lost lawsuits against the cigarette manufacturers, 2) the prohibitive cost of such suits, 3) the effect of comment i of the RESTATEMENT (SECOND) OF TORTS § 402A, and 4) the passage of the Act. See Levin, *The Liability of Tobacco Companies—Should Their Ashes Be Kicked*, 29 ARIZ. L. REV. 195, 200 (1987) (none of the early suits were successful in obtaining damage awards); Edell, *supra* note 2, at 91 (the tortuous road of appeals and retrials in many of these cases placed heavy financial burdens on plaintiffs' counsel, resulting in many voluntary dismissals).

While the RESTATEMENT (SECOND) OF TORTS § 402A signaled the advent of strict liability, it also put a halt to cigarette product liability litigation. Stein, *supra* note 11, at 639-47 (comment i of § 402A and the passage of the Act effectively immunized the tobacco industry). RESTATEMENT (SECOND) OF TORTS § 402A provides, in part:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer.

RESTATEMENT (SECOND) OF TORTS § 402A (1977).

Comment i to § 402A, which defines "unreasonably dangerous," provides in part: The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. . . . Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous.

Id.

³⁴ See generally Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 50 N.Y.U. L. REV. 796, 797-811 (1983) (discussing developments in products liability theories).

³⁵ 593 F. Supp. 1146 (D.N.J. 1984), *rev'd*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987), *on remand*, 649 F. Supp. 664 (D.N.J. 1986), *later proceeding*, 683 F. Supp. 1487 (D.N.J. 1988), *aff'd in part*, 893 F.2d 541 (3d Cir. 1990), *cert. granted*, 111 S. Ct. 1386 (1991).

See Note, *The Effect of Cipollone: Has the Tobacco Industry Lost Its Impenetrable Shield?*, 22 GA. L. REV. 763, 770 n.47 (1989) (noting that the number of cases filed against tobacco manufacturers has risen since the *Cipollone* case was filed in 1983).

The "new" wave of lawsuits has been linked to four developments: 1) the substantial change in products liability law favoring plaintiffs, 2) growing scientific evidence that smoking causes an array of diseases, 3) increasing public hostility towards smoking, and 4) increased cooperation among plaintiffs' attorneys. Jacobson, *supra* note 1, at 1036.

brought a 14-count diversity suit in New Jersey district court against Liggett Group, Inc., Philip Morris, Inc. and Loews Theatres, Inc. claiming that these defendants were liable in tort as manufacturers of cigarettes that allegedly caused Mrs. Cipollone to develop lung cancer.³⁶ The defendants, in turn, asserted that the plaintiffs' claims were preempted by the Act.³⁷

In the decision that was to become a template for other courts ruling in favor of cigarette plaintiffs, Judge Lee Sarokin held that post-1965 failure to warn and intentional misrepresentation claims were not preempted by the Act.³⁸ The court first set out a brief history of preemption and categorized the present forms of preemption.³⁹ The doctrine of preemption has its roots in the Supremacy Clause,⁴⁰ the court continued, which states that the Constitution and federal laws passed pursuant to the Constitution are paramount and that all states shall be bound by such law.⁴¹

Judge Sarokin went on to explain that courts have had perennial difficulty determining when federal law preempts state action, but that several basic principles of preemption do exist.⁴² First, federal law may expressly preempt state law by incorporating an express preemption clause.⁴³ Second, a federal law may

³⁶ *Cipollone*, 593 F. Supp. at 1149. See notes 4-8 *supra* for an in-depth discussion of the separate claims.

³⁷ *Id.*

³⁸ *Id.* at 1170-71. In *Palmer v. Liggett Group, Inc.*, the district judge expressed his agreement with the "exhaustive and scholarly" opinion by Judge Sarokin. 633 F. Supp. 1171, 1173 (D.Mass. 1986), *rev'd*, 825 F.2d 620 (1st Cir. 1987). The Minnesota Court of Appeals echoed those sentiments in *Forster v. R.J. Reynolds Tobacco Co.*, stating, "[w]e wish to acknowledge our reliance on the scholarly opinion of Judge Sarokin. . . ." 423 N.W.2d 691, 693 n.3 (1988), *rev'd*, 437 N.W.2d 655 (Minn. 1989).

³⁹ *Cipollone*, 593 F. Supp. at 1150.

⁴⁰ U.S. CONST. art. VI, cl. 2. provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

⁴¹ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Justice John Marshall was an early articulator of the doctrine of preemption. He noted in *Gibbons* that all state law that was "repugnant" to an act of Congress would be deemed void. *Id.* at 37-38.

⁴² *Cipollone*, 593 F. Supp. at 1150.

⁴³ *Id.* *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (state labeling requirement on packaged bacon held expressly preempted by congressional provision prohibiting implementation of "labeling, packaging or ingredient requirements in addition to, or different than, those made under [federal statutes]"). *Id.* at 530.

by implication preempt state law if Congress evinces an intent to "occupy the field" of a certain subject matter.⁴⁴ Third, federal law may preempt state law to the extent that state law "actually conflicts" with federal law.⁴⁵ Actual conflict occurs when "compliance with both federal and state regulations is a physical impossibility"⁴⁶ or when state law stands as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁴⁷ All of these doctrines of preemption, however, are tempered by the presumption "that Congress did not intend to displace State law."⁴⁸ Furthermore, this presumption is strengthened when preemption would leave a plaintiff without an adequate alternative remedy.⁴⁹

Judge Sarokin first addressed the issue of express preemption. Defendants had argued that the preemption clause in the Act, section 1334(b), expressly bars any "requirement or prohibition . . . under State law" based on the adequacy of cigarette labeling and advertising, including state common law claims.⁵⁰

⁴⁴ *Cipollone*, 593 F. Supp. at 1150; *Fidelity Fed. Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982) (legislative history of the Home Owners Act of 1933 made it clear that Congress intended to establish a comprehensive national regulatory scheme governing federal savings and loans and as such, the act preempted state laws, prohibiting certain banking techniques); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) (through the United States Warehouse Act, Congress intended to occupy the field of warehouse regulation, preempting state regulation).

⁴⁵ *Cipollone*, 593 F. Supp. at 1151.

⁴⁶ *Florida Line & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (California law that regulated marketing of avocados upheld on grounds that it was not physically impossible for a grower to comply with both federal and state laws regulating the marketability of avocados).

⁴⁷ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (Pennsylvania alien registration law preempted because it conflicted with the comprehensive scheme for the regulation of aliens established by the Federal Alien Registration Act).

⁴⁸ *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

⁴⁹ *Cipollone*, 593 F. Supp. at 1153 ("The presumption against preemption in these causes of action is strengthened when preemption would leave a putative plaintiff without adequate remedy for violation of his or her state created rights."); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) ("This silence [with regard to state remedies] takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.").

⁵⁰ 15 U.S.C. § 1334 (1988) (the preemption provision of the Act). Therein Congress stated:

(a) 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.

The court dissected the preemption clause, first noting that the Act on its face expressly preempts all state legislation concerning cigarette labeling and advertising.⁵¹ Next the court found that, as a matter of legal definition, a state law tort action is not the equivalent of "a regulation or prohibition" under state law.⁵² Defendants had further argued that the impact of a successful state tort claim based on failure to warn adequately amounted to regulation and thus should be preempted.⁵³ To this the court responded that the imposition of liability in a state tort action against the tobacco companies would not be akin to regulation because such a ruling would not act as an injunction requiring the defendants to introduce new warning labels but would merely present manufacturers with the choice of whether or not to change their labels.⁵⁴

The court next addressed the issue of implied preemption, breaking down its analysis into three parts.⁵⁵ First the court conducted a lengthy examination of the legislative history of the Act, focusing on whether Congress intended to preempt common law actions.⁵⁶ Finding no such intent manifest in the legislative history, the court addressed the issue of whether Congress intended to preempt state common law claims by "occupying the field" of cigarette labeling and advertising and again discovered no such congressional intent.⁵⁷ Ultimately, the court examined whether allowing state tort law claims "actually conflicts" with the Act.⁵⁸

Judge Sarokin's opinion is probably most noteworthy for its examination of the legislative history of the Act, an effort not matched by any of the courts that have subsequently addressed

(b) 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.

Id.

⁵¹ *Cipollone*, 593 F. Supp. at 1154.

⁵² *Id.* at 1155.

⁵³ *Id.* at 1154-56.

⁵⁴ *Id.* at 1155-57. *See also* Garner, *supra* note 33, at 1454 (stating that a damage award does not act like an injunction, requiring a cigarette company to affix new labels, but merely acts as an incentive to do so).

⁵⁵ *Cipollone*, 593 F. Supp. at 1157-63.

⁵⁶ *Id.*

⁵⁷ *Id.* at 1163-66.

⁵⁸ *Id.* at 1166-70.

the issue of cigarette claim preemption.⁵⁹ The opinion reveals that the bulk of the evidence from the congressional debates and related hearings supports the contention that Congress did not intend to preempt state common law. Among other telling indications, the opinion notes, there was significant discussion surrounding the effect the Act would have on the assumption of risk defense, debate that would have been superfluous had Congress intended to preempt state claims.⁶⁰ There were several comments made by members of Congress directly indicating that state common law claims should remain unaffected and almost no statements to the contrary.⁶¹ Also, the court made the point that the Act was passed while several large tobacco liability suits were pending in the federal appeals courts.⁶² That no mention of preemption of state tort claims surfaced in such a context certainly suggests the continuing viability of such actions.

Judge Sarokin then went on to examine whether Congress intended to "occupy the field" of cigarette labeling and advertis-

⁵⁹ *Id.* at 1157-63. The Third Circuit did not conduct a review of the legislative history, finding "the language of the statute itself a sufficiently clear expression of Congressional intent. . . ." *Cipollone*, 789 F.2d at 186. The First Circuit refused to "wade into the bog of doublespeaking legislative history. . . ." *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 625 (1st Cir. 1987).

⁶⁰ *Id.* at 1162. Congressman Fascell of Florida, commented that a manufacturer's compliance with the Act "in no way affects the right to raise the defense of 'assumption or [sic] risk.'" 111 CONG. REC. 16543-44 (July 13, 1965).

⁶¹ *Cipollone*, 593 F. Supp. at 1163. Representative Watson stated that, "nowhere in the Act of 1965 does it preclude an individual . . . from pursuing a common law liability." *Cigarette Labeling and Advertising: Hearings on H.R. 643, 1237, 3055 and 6543 Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 1st Sess. 579 (1969).

Even tobacco representatives present at the hearings did not spell out a desire that the Act preempt state law claims. *See Hearings on S. 559 and S. 547 Before the Senate Comm. on Commerce*, 89th Cong., 1st Sess. 246, 548 (1965) (statements of Bowman Gray, Chairman of the Board of R.J. Reynolds Tobacco Co.).

⁶² *Cipollone*, 593 F. Supp. at 1161-62. Two notable cases were *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962), *question certified to state court*, 154 So. 2d 169 (Fla.), *rev'd and remanded*, 325 F.2d 673 (5th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964), *rev'd and remanded on rehearing*, 391 F.2d 97 (5th Cir. 1968), *rev'd per curiam*, 409 F.2d 1166 (5th Cir. 1969) (*en banc*), *cert. denied*, 397 U.S. 911 (1970) (implied warranty of fitness for use); *Pritchard v. Liggett & Meyers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961), *aff'd on rehearing*, 350 F.2d 479 (3d Cir. 1965), *cert. denied*, 382 U.S. 987 (1966), *modified*, 370 F.2d 95 (3d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967) (warranty of fitness for use and negligent failure to warn).

ing to the exclusion of state law claims.⁶³ The court noted that there are three ways by which Congress may occupy the field in a given area: if federal regulation of that area is pervasive, if the federal interest in the area is dominant, or if Congress makes clear its intention to occupy that area.⁶⁴ The caveat is that occupation of the field will "not be lightly inferred."⁶⁵ Judge Sarokin noted that the Act set up a narrow area of congressional involvement, limited to the promulgation of a warning label, the establishment of cigarette advertising restrictions and the monitoring of developments on smoking and health.⁶⁶ The decision asserted that products liability matters and compensation to injured plaintiffs are not a part of the Act's scheme and are accordingly left to the states.⁶⁷ Furthermore, regulation of the smoking and health area has been considerably less pervasive than in areas such as labor or nuclear power, and even there courts have been hesitant to set aside state law.⁶⁸ The court also pointed out that Congress does not have a traditional interest in state tort remedies and thus cannot be said to have a dominant interest in the field.⁶⁹

Finally the court addressed whether state tort law actually conflicts with the Act. Conflicts occur either where compliance with both state and federal law is a "physical impossibility" or where compliance with state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁷⁰ This second prong of the actual conflict test has come to be known as the *Hines* "obstacle conflict" test. Once more the presumption against preemption enters into the calcu-

⁶³ *Cipollone*, 593 F. Supp. at 1163-66.

⁶⁴ *Id.* See note 44 *supra*, noting Supreme Court cases that address "occupation of field" preemption.

⁶⁵ *Cipollone*, 593 F. Supp. at 1164. See also L. TRIBE, AMERICAN CONSTITUTIONAL LAW 377 (1978).

⁶⁶ *Cipollone*, 593 F. Supp. at 1164.

⁶⁷ *Id.* at 1169.

⁶⁸ *Id.* at 1164-65. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 250 (1984) (although the legislative history of the Atomic Energy Act evidenced a Congressional intent to occupy the field of nuclear safety, it did not preempt tort remedies); *New York Dep't of Social Serv. v. Dublino*, 413 U.S. 405, 415 (1973) (holding that the "apparent comprehensiveness" of the WIN provisions of the Social Security Act was not sufficient to support the preemption of New York Work Rules).

⁶⁹ *Cipollone*, 593 F. Supp. at 1153, 1166. Torts are traditionally governed by state law.

⁷⁰ *Id.* at 1166. See notes 217-18 *infra*.

lation, and the court again cautioned that actual conflict "ought not be lightly inferred."⁷¹ The physical impossibility rationale for preemption was quickly dismissed: Liggett could comply with both federal and state law by continuing to use the federally mandated warning label and simultaneously pay damages to successful tort plaintiffs.⁷² For the second part of the actual conflict analysis, using the *Hines* test, the court posited a tripartite congressional purpose behind the Act: 1) to allow the cigarette industry to survive, 2) to protect cigarette manufacturers by enacting uniform labeling and advertising requirements, and 3) to warn the public adequately of the health concerns of smoking.⁷³ The court reasoned that allowing these suits would not jeopardize the tobacco industry, especially considering the failure of such suits in the past.⁷⁴ As to the tension between the uniform labeling requirements and the possibility of state tort liability, the court gave a brief argument that such claims can be tolerated.⁷⁵ First, Judge Sarokin noted that there are many other areas governed by federal labeling laws where courts have retained strict tort liability.⁷⁶ Second, the court held that as a general rule compensation, which is the primary goal of such common law claims, does not interfere with the governmental regulation of products.⁷⁷ Finally, the court dismissed as hypothetical the

⁷¹ *Id.*

⁷² *Id.* at 1167.

⁷³ *Id.* at 1168-69.

⁷⁴ *Id.* at 1168 n.17. As of March 1991 cigarette manufacturers have never had a damage award sustained against them in a cigarette product liability suit. The *Cipollone* case resulted in the only jury verdict requiring a cigarette manufacturer to pay damages, and it was reversed on appeal. Marcus & Lambert, *Tobacco Liability Case Nears High Court*, Wall St. J., Mar. 4, 1991, at B6, col. 4.

⁷⁵ *Cipollone*, 593 F. Supp. at 1168. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (the Court admitted that there was a "tension" created by allowing state tort liability and federal regulation of nuclear safety under the AEA but held that it was a tension Congress was apparently willing to accept).

⁷⁶ *Cipollone*, 593 F. Supp. at 1169. See, e.g., *Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652, 658 (1st Cir. 1981) (FDA-approved warning did not preempt state product liability claim against drug manufacturers despite the preemptive effect generally accorded to the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 (1938)); *Raymond v. Riegel Textile Corp.*, 484 F.2d 1025, 1026-28 (1st Cir. 1973) (state products liability law applied despite warnings established by the Flammable Fabrics Act, 15 U.S.C. § 1191 (1953)); *Hubbard Hall Chem. Co. v. Silverman*, 340 F.2d 402, 405 (1st Cir. 1965) (state tort action for failure to warn not preempted despite label approval from Department of Agriculture).

⁷⁷ *Cipollone*, 593 F. Supp. at 1169. See *Silkwood*, 464 U.S. at 263-66 (Blackmun, J., dissenting) (holding that compensatory damages unlike punitive damages would not in-

defendants' argument that tort liability will subject manufacturers to multiple and conflicting standards with regard to labeling and advertising, thereby undermining the goal of the Act. It is entirely possible that plaintiffs will not prevail in these lawsuits and even if they do, manufacturers can choose to pay tort awards rather than change labeling or advertising practices.⁷⁸

C. *Subsequent Court Decisions*

The district court's preemption analysis in *Cipollone* did not find many adherents among courts that subsequently ruled in tobacco cases. While the defendants' appeal to the Third Circuit in *Cipollone* was pending, a district court in Tennessee became the first to hold that failure to warn claims were preempted by the Act.⁷⁹ In *Roysdon v. R.J. Reynolds Tobacco Co.*, the court gave short shrift to the plaintiffs' failure to warn claim, not even mentioning *Cipollone* in its discussion. While the opinion agreed with the district court in *Cipollone* that the preemption clause of the Act did not explicitly prohibit state common law actions, the *Roysdon* court determined that permitting a damage award based on inadequate warning labels would be incompatible with the intent of Congress.⁸⁰

The Third Circuit, reversing the *Cipollone* district court, also refused to adopt Judge Sarokin's reasoning.⁸¹ While the circuit court agreed that state tort claims were not expressly preempted, the panel determined that such claims were by implication preempted.⁸² First the court noted that there was no need to resort to the Act's legislative history in light of the sufficiently clear language of the statute.⁸³ The court then engaged in a hybrid "occupy the field"/"actual conflict analysis," initially asserting that Congress established a comprehensive federal program

terfere with federal regulation of nuclear safety).

⁷⁸ *Cipollone*, 593 F.Supp. at 1169.

⁷⁹ *Roysdon v. R.J. Reynolds Tobacco Co.*, 623 F. Supp. 1189 (E.D. Tenn. 1985), *aff'd*, 849 F.2d 230 (6th Cir. 1988).

⁸⁰ *Id.* at 1191. More specifically, the *Roysdon* court held that allowing such claims would undermine Congress's intent to enact uniform labeling and advertising requirements, "permitting a state to achieve indirectly, through exposure to tort liability, what it could not achieve directly through legislation." *Id.*

⁸¹ *Cipollone*, 789 F.2d 181 (3d Cir. 1986).

⁸² *Id.* at 185-87.

⁸³ *Id.* at 186.

which evidenced its intent to "occupy a field."⁸⁴ To determine the scope of that field, the court examined the extent to which the plaintiffs' claims "actually conflict[ed]" with the Act to ascertain which claims were preempted.⁸⁵ The court next stated that the Act represented a "carefully drawn balance" between the goal of adequately warning of the dangers of smoking and the goal of protecting the interests of the tobacco industry.⁸⁶ Finding that state law claims based on warning labels or advertising would have a regulatory effect and would frustrate the objectives of Congress if successful, the court held that these claims "actually conflict" with the Act.⁸⁷ The court of appeals accordingly reversed the district court and granted the defendants' motion for partial summary judgment on preemption grounds.⁸⁸

The other circuit courts fell into line with the Third Circuit's decision in *Cipollone*, all agreeing that while state tort actions based on cigarette warning labels or advertising were not expressly preempted, they were by implication preempted. The

⁸⁴ *Id.* (quoting *Cipollone*, 593 F.Supp. at 1164 (emphasis in original)).

⁸⁵ *Id.* at 187. To evaluate the degree of this conflict, the Third Circuit examined "first the purposes of the federal law and second the effect of the operation of the state law on these purposes." *Id.* (citing *Fineberg v. Sullivan*, 634 F.2d 50, 63 (3d Cir. 1980)).

⁸⁶ *Cipollone*, 789 F.2d at 187.

⁸⁷ *Id.* For support the Third Circuit cited three cases in which state common law actions were preempted by federal law: *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 156-59 (1982); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 324-25 (1981); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959).

But see Edell & Walters, *The Doctrine of Implied Preemption in Products Liability Cases—Federalism in the Balance*, 54 TENN. L. REV. 603, 607, 621-22 (1987). These authors note that the three cases cited above are readily distinguished from the cigarette cases in that the federal law in question in these cases established federal remedial mechanisms or because the area in question was traditionally occupied by the federal government. In *Fidelity*, regulations promulgated by the Federal Home Loan Board pursuant to the Home Owners Act of 1933 were aimed at federal savings and loans and preempted state common law doctrines prohibiting certain banking practices because Congress intended to "occupy the field." 458 U.S. at 159-67.

In *Kalo Brick*, the Court held that the Interstate Commerce Act barred a shipper from pursuing a state law action for damages against a regulated carrier because the Act itself created a well-defined federal remedy in place of a state law remedy. 450 U.S. at 321-22.

In *Garmon*, the Court held that the National Labor Relations Act preempted a state law action for business losses caused by union picketing, partly because the Act itself articulated federal remedial practices for unfair labor practices, partly because labor is a traditional concern of the federal government. 359 U.S. at 242-45.

⁸⁸ *Cipollone*, 789 F.2d at 187.

Eleventh Circuit in *Stephen v. American Brands, Inc.* adopted the reasoning of the Third Circuit wholesale, without any elaboration.⁸⁹ The First Circuit followed with *Palmer v. Liggett Group, Inc.* in 1987.⁹⁰ Rather than determining which category of preemption the Act would fit into, the First Circuit examined the effect the suit would have on the federal regulation Congress established to balance the purposes of health warnings with the purposes of protecting tobacco commerce.⁹¹ The effect, the First Circuit continued, would be that one jury could conceivably disrupt the careful balance created by the Act—an intolerable result.⁹² The court then advanced some additional arguments. It compiled precedent showing that a federal court can cut off state remedies without providing a substitute remedy.⁹³ The court also held that a decision holding a manufacturer liable would have the effect of regulation, and thus violate the Act's preemption provision. A manufacturer who has a jury verdict entered against it is faced with a Hobson's choice: implement new warnings or be faced with large damage awards in the future.⁹⁴

The Sixth Circuit Court of Appeals in *Roysdon v. R.J.*

⁸⁹ 825 F.2d 312, 313 (11th Cir. 1987).

⁹⁰ 825 F.2d 620 (1st Cir. 1987).

⁹¹ *Id.* at 625-26. The court acknowledged that for state law to be preempted, the effect of the state law on a federal scheme must be actual and not potential. *Id.* at 626. See *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982).

However, it is instructive to note that while the court sets up its task by talking of the "actual" effect state tort law will have on the federal scheme, in its analysis it reverts to discussing the potential and conceivable disrupting effect of tort claims. For instance, the court notes "we do view compensatory damages as *potentially* regulatory in nature." *Palmer*, 825 F.2d at 625 n.10 (emphasis added). In a more pregnant passage the court notes "[i]t is *inconceivable* that Congress intended to have that carefully wrought balance superseded by the views of a single state, *perhaps* by the views of a single jury in a single state." *Id.* at 626 (emphasis added). Later on the court notes, "*if* a manufacturer's warning that complies with the Act is inadequate under a state tort theory, the damages awarded *can* be viewed as state regulation: the decision *effectively* compels the manufacturer to alter its warning." *Id.* (emphasis added). The court's qualified language reveals an uncertainty as to the actual effect tort claims will have on the Act. Such speculation does not support preemption.

⁹² *Palmer*, 825 F.2d at 625 n.10.

⁹³ *Id.* at 627. See *Chicago North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.* 438 U.S. 59 (1978); *Farmers Union v. WDAY*, 360 U.S. 525 (1959). See note 206 *infra* for a full discussion of these cases.

⁹⁴ *Palmer*, 825 F.2d at 627. The court compared the choice of how to react to a damage award to "the free choice of coming up for air after being underwater." *Id.*

*Reynolds Tobacco Co.*⁹⁵ and the Fifth Circuit in *Pennington v. Vistron Corp.*⁹⁶ echoed the *Palmer* court's reasoning, finding that the inadequate warning claims would both conflict with Congress's national label scheme and upset the balance established in the Act between adequately warning the public and protecting the national economy. The Supreme Court of Minnesota rounded out the pro-preemption rulings in 1989 with *Forster v. R.J. Reynolds Tobacco Co.*⁹⁷ The preemption advocates had seemingly won.⁹⁸

II. THE Dewey DECISION

On August 20, 1982, Claire Dewey, as executrix of her husband's estate, commenced a product liability action in New Jersey Superior Court against three cigarette manufacturers: R.J. Reynolds Tobacco Co., American Brands, Inc., and Brown & Williamson Tobacco Corp.⁹⁹ Her husband, Wilfred Dewey, began smoking in 1942 and continued to do so until his death from lung cancer in November 1980.¹⁰⁰ In her second amended complaint of June 28, 1983, Mrs. Dewey asserted that the defendants' cigarettes were defectively designed, that the defendants failed to warn the public and/or the plaintiff adequately of the hazards of smoking, and that the defendants committed fraud

⁹⁵ 849 F.2d 230, 234-35 (6th Cir. 1988).

⁹⁶ 876 F.2d 414, 421 (5th Cir. 1989). The Fifth Circuit was the first U.S. court of appeals to decide which of the plaintiffs' tort claims were specifically preempted by the Act. The court found that the failure to warn claim was preempted and the claim that cigarettes are "unreasonably dangerous per se" (a risk utility, design defect theory) was not preempted. *Id.* at 423.

⁹⁷ 437 N.W.2d 655, 660 (Minn. 1989). The Minnesota Supreme Court held that plaintiffs' cause of action for failure to warn was preempted but determined that plaintiffs' unsafe design claim and misrepresentation claim were not preempted. The court also held that plaintiffs' breach of warranty claim was not preempted insofar as it was not based on a duty to warn. *Id.*

⁹⁸ The only protest from the ranks of the circuit courts came from Chief Judge Gibbons in his concurring opinion in *Cipollone*, 893 F.2d 541, 583 (3d Cir. 1990). Judge Gibbons believed that the Third Circuit's interlocutory ruling on the preemptive effect of the Act was incorrect insofar as the panel reached a definitive ruling in the absence of an adequate factual record. He hinted that the Supreme Court might reverse the Third Circuit's preemption finding. *Id.*

⁹⁹ *Dewey v. R.J. Reynolds Tobacco Co.*, 216 N.J. Super. 347, 349, 523 A.2d 712, 713 (1986), *aff'd sub nom. Dewey v. Brown & Williamson Tobacco Corp.*, 225 N.J. Super. 375, 542 A.2d 919 (App. Div. 1988), *rev'd sub nom. Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 577 A.2d 1239 (1990).

¹⁰⁰ *Dewey*, 216 N.J. Super. at 350, 523 A.2d at 714.

and misrepresentation in their advertising and marketing of cigarettes.¹⁰¹

The ensuing litigation, which eventually worked its way up to the New Jersey Supreme Court, concerned a motion for summary judgment filed by only one of the defendants, Brown & Williamson. The decedent, Wilfred Dewey, began smoking the defendant's brand "Viceroy" in 1977, eleven years after the passage of the Act and the appearance of cigarette warning labels, and three years before his death.¹⁰² Brown & Williamson moved for summary judgment on the ground that because the plaintiff began smoking the defendant's products after the appearance of federal warnings on cigarette packages, the Act preempted all of the plaintiffs' claims.¹⁰³

A. *The New Jersey Superior Court*

The trial court granted the defendant's motion for summary judgment in part, holding that the failure to warn claim and the fraud and misrepresentation in advertising claim were preempted, while the defective design claim was not.¹⁰⁴ The trial judge found himself bound to follow the dictate of the *Cipollone* circuit court that the preemption defense apply,¹⁰⁵ and he proceeded to determine which of the claims would in fact be preempted, a task that the *Cipollone* circuit court had left to the district court on remand.¹⁰⁶ Accordingly, the trial court found actual conflict with the Act in the plaintiffs' claim that the defendant failed to warn the plaintiff's decedent adequately of the hazards of smoking subsequent to the effective date of the Act.¹⁰⁷ Similarly, the trial court found that the Act preempted the plaintiffs' claim that predicated liability on fraud and misrepresentation in defendant's advertising and marketing of

¹⁰¹ *Id.*

¹⁰² *Dewey*, 121 N.J. 69, 73, 577 A.2d 1239, 1241.

¹⁰³ *Dewey*, 216 N.J. Super. at 349, 523 A.2d at 713.

¹⁰⁴ *Id.* at 354-55, 523 A.2d at 716.

¹⁰⁵ *Id.* at 353-54, 523 A.2d at 715. The trial court held that under New Jersey law, federal decisional law is binding upon the state court when the state court must interpret federal statutes. Since the Third Circuit was the only court of appeals to have ruled on the preemptive effect of the Act in 1986, the trial court felt compelled to adopt *Cipollone's* reasoning. *Cf.* notes 109 and 115 *infra*.

¹⁰⁶ *Cipollone*, 789 F.2d at 188.

¹⁰⁷ *Dewey*, 216 N.J. Super. at 355, 523 A.2d at 715.

cigarettes.¹⁰⁸

B. *The New Jersey Appellate Division*

The appellate division also concluded that the Act preempted the plaintiffs' failure to warn, fraud, and misrepresentation in advertising claims.¹⁰⁹ As a practical matter, the court adopted the reasoning of the circuit courts; its preemption analysis was grounded on two lengthy quotes from the *Palmer* cir-

¹⁰⁸ *Id.* at 355, 523 A.2d at 716.

However, the trial court did find the plaintiffs' design defect claim reconcilable with the Act. Design defect claims, the trial court reasoned, do not directly implicate the way in which a product is labeled or advertised, and thus do not come in conflict with the Act, but rather aim at showing that a product is unreasonably dangerous despite warnings that a manufacturer might include on the package. The court added that, in New Jersey, the maintenance of a design defect claim would allow the trier of fact to conduct a risk-utility analysis. *Dewey*, 216 N.J. Super. at 355-57, 523 A.2d at 715-16.

The risk-utility test was adopted by New Jersey in *Cepeda v. Cumberland Eng'g Co.*, 76 N.J. 152, 174, 386 A.2d 816, 826 (1978). Because New Jersey adopted the risk-utility test, a plaintiff does not need to prove the feasibility of a safer, alternative design to support her design defect claim.

Under the risk-utility test, a plaintiff can make a *prima facie* showing that a product is defective if the product's risk outweighs its utility. See Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 837-38 (1973). The seven part risk-utility test outlined in Wade's article was adopted by New Jersey in *Cepeda*. The test weighs the following factors:

- 1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
- 2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
- 3) The availability of a substitute product which would meet the same need and not be as unsafe.
- 4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
- 5) The user's ability to avoid danger by the exercise of care in the use of the product.
- 6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of the general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
- 7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Cepeda, 76 N.J. at 174, 386 A.2d at 826.

¹⁰⁹ *Dewey*, 225 N.J. Super. 375, 542 A.2d 919 (App. Div. 1988), *rev'd*, 121 N.J. 69, 577 A.2d 1239 (1990). The appellate court noted that while a state court should be deferential to a circuit court's decision on a federal statutory interpretation question, it is not compelled to follow the federal court. See *State v. Norfelt*, 67 N.J. 268, 286, 337 A.2d 609, 617 (1975). Accordingly, the appellate division conducted an independent review of the preemptive reach of the Act.

cuit court decision, the thrust of which were that, if allowed to go to trial, inadequate warning claims would excessively disrupt the regulatory scheme enacted by Congress.¹¹⁰ Accordingly, the appellate division held that while inadequate warning claims were not expressly preempted, such claims were in "actual conflict" with Congress's purpose of preventing non-uniform cigarette and labeling requirements and thus were by implication preempted.¹¹¹

C. *The New Jersey Supreme Court Decision*

By the time *Dewey* reached the New Jersey Supreme Court,¹¹² five circuit courts and the Supreme Court of Minnesota had upheld the preemption defense.¹¹³ A victory for the defendants would undoubtedly have sounded the death knell for tobacco litigation in New Jersey.¹¹⁴ But the *Dewey* court did not oblige the cigarette manufacturers. Preferring the reasoning of Judge Sarokin to that of the circuit courts, the court held that the plaintiffs' inadequate warning and misrepresentation claims were not preempted by the Act.

In essence, the *Dewey* court advanced a five-step analysis in the cigarette liability preemption debate: first, there exists a well-established heavy presumption against preemption of state tort actions; second, as a matter of "actual conflict" preemption analysis, state tort claims have only a tangential relationship to the congressional purposes behind the Act; third, tort law has important compensatory goals and, as a matter of public policy, it is necessary that states retain the right to afford their injured

¹¹⁰ *Dewey*, 225 N.J. Super. at 380-81, 542 A.2d at 922 (quoting *Palmer*, 825 F.2d at 626-28).

¹¹¹ *Id.* The appellate division also agreed with the trial court's determination that the Act did not preempt plaintiffs' design defect claim. However, due to the enactment of the New Jersey Products Liability Law, N.J. STAT. ANN. §2A-58C-1 in 1987, the appellate division ruled that Mrs. Dewey could only proceed on a pared-down risk-utility theory. The appellate division held that a design defect claim premised on the theory that the defendants could have implemented a safer, alternative design was the only claim available to the plaintiff. 225 N.J. Super. at 382, 542 A.2d at 923.

¹¹² 121 N.J. 69, 577 A.2d 1239 (1990).

¹¹³ See note 9 *supra*.

¹¹⁴ Had the New Jersey Supreme Court ruled in favor of preemption, both the Third Circuit, in which New Jersey sits, and the state's highest court would have been in agreement—formidable precedent in favor of tobacco companies defending suits in New Jersey.

citizens compensation; fourth, there are a number of analogous federal labeling statutes that expressly preempt state regulation of the federal labels but allow inadequate warning claims; and, fifth, had Congress wanted to preempt state common law claims in the Act, it would have done so expressly.

After giving a brief history of preemption, the Act, and the circuit court decisions,¹¹⁵ the *Dewey* court prefaced its argument by emphasizing the strong presumption against federal preemption. The court compiled various United States Supreme Court formulations of this presumption: the Court requires a showing of a "clear and manifest purpose" on the part of Congress,¹¹⁶ or an "unambiguous congressional mandate" to preempt state law remedies.¹¹⁷ Moreover, such a presumption is heightened when state and local health and safety matters are at issue.¹¹⁸

Passing over the express preemption and "occupying the field" preemption doctrines because of the general agreement among the circuit courts that Congress neither expressly preempted state cigarette injury tort claims nor occupied the field of tobacco regulation, the court directed its attention to the "actual conflict" brand of preemption.¹¹⁹ In its actual conflict analysis, the court first considered the purpose of the federal law and then evaluated the effect that the plaintiffs' tort claims would have on the uniform labeling purpose of the Act.¹²⁰ The court

¹¹⁵ The threshold issue, whether the state court was compelled to follow the preemption rulings of the unanimous circuit courts was decided in the negative. Agreeing with the appellate division, the New Jersey Supreme Court held that, according to New Jersey law, the state courts are to give the circuit court opinions "due respect" but are not bound by such decisions. *State v. Coleman*, 46 N.J. 16, 36, 214 A.2d 393, 403 (1965). In *Coleman*, the New Jersey Supreme Court declined to follow the Third Circuit's constitutional analysis in *United States ex rel. Russo v. New Jersey*, 351 F.2d 429 (1965).

¹¹⁶ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("[T]he historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.").

¹¹⁷ *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 147 (1963) (California statute regulating avocado maturity did not come into conflict with a federal regulation that established different standards for avocado maturity—"We are not to conclude that Congress legislated the ouster of this California statute by the marketing orders in the absence of an unambiguous congressional mandate to that effect.").

¹¹⁸ *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985) (local blood plasma donation ordinance was not preempted by FDA regulations governing the same activity, in large part because the ordinance addressed a health matter of great concern to the locality).

¹¹⁹ *Dewey*, 121 N.J. at 82-84, 577 A.2d at 1246.

¹²⁰ *Id.* at 87-88, 577 A.2d at 1248. See *Palmer*, 825 F.2d at 627.

advanced a novel interpretation of the purpose behind the Act.¹²¹ The court held that Congress had a hierarchy of goals in mind when it passed the Act. Warning the public of the hazards of smoking was the first and paramount purpose of the Act. The second stated purpose, that of protecting the interests of the national economy, was indeed a secondary goal in the court's view, only to be accomplished if "consistent with" the primary goal of adequately warning the public.¹²² Here, the *Dewey* court directly challenged the circuit courts' emphasis on the "carefully drawn balance" between the two purposes of the Act.¹²³ The court suggested that Congress could accept an imbalance in favor of warning the public, as long as the imbalance would not inordinately obstruct national economic interests.

The court then addressed the effect tort claims would have on the Act. The court attacked as tenuous the precedent of *San Diego Bldg. Trades Council v. Garmon*,¹²⁴ relied on by the circuit courts to show that state damage awards have a direct "regulatory" effect.¹²⁵ The court pointed out that several recent Su-

¹²¹ *Dewey*, 121 N.J. at 87-88, 577 A.2d at 1248.

¹²² *Id.* The court referred back to the Act's legislative history to demonstrate that the "principle purpose" of the Act was to "provide adequate warning to the public of the potential hazards of cigarette smoking" through the labeling requirement. H.R. REP. NO. 449, 89th Cong., 1st Sess. 3, reprinted in, 1965 U.S. CODE CONG. & ADMIN. NEWS 2350.

¹²³ This is one of the few instances where the *Dewey* court's conclusions are not compelling. The language of the statute itself does not comport with the court's assertion that the commerce protection goal was secondary. Rather, § 1331 plainly states that commerce should be protected "to the maximum extent consistent with" warning the public. 15 U.S.C. § 1331 (1988) (emphasis added). Moreover, the history of the Act, which reveals that its passage was the result of a hard-fought compromise between partisan forces, militates against the conclusion that the warning goal trumps the commerce protection goal. *Dewey*, 121 N.J. at 104, 577 A.2d at 1256-57 (Antell, J., dissenting); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 626 (1st Cir. 1987). Admittedly conflicting, these goals are also interdependent.

However, the *Dewey* court's questionable interpretation of the purposes behind the Act does not seem to infect the rest of the court's reasoning. The court does not refer to its interpretation of the purposes behind the Act in any other part of the opinion, and it accords the commerce protection goal significant weight in determining whether to allow the plaintiffs' failure to warn and intentional misrepresentation claims to stand as an obstacle to the Act.

¹²⁴ 359 U.S. 236 (1959). In *Garmon*, the Court addressed whether a lumber business owner could bring an action for damages against a union for picketing in front of his business. The Court held that the damage action was preempted because the National Labor Relations Act (NLRA), 61 Stat. 140, 29 U.S.C. §§ 157, 158 (1935), vests all power over peaceful union activity in the National Labor Relations Board (NLRB).

¹²⁵ *Dewey*, 121 N.J. at 88, 577 A.2d at 1248 (citing *Garmon*, 359 U.S. at 246-47). The *Dewey* court ably distinguishes *Garmon*. First, the *Garmon* ruling was peculiar to the

preme Court decisions, *Silkwood v. Kerr-McGee Corp.*,¹²⁶ *Goodyear Atomic Corp. v. Miller*,¹²⁷ and *English v. General Electric Co.*,¹²⁸ moved away from *Garmon* and rejected the preemption defense and the notion that allowing state tort claims is akin to imposing state regulation. In each of these cases, the Supreme Court found that the state law claims involved did not reach the level of direct legislative regulation. When confronted with direct state regulation, manufacturers are forced to change their behavior, often on penalty of criminal proceedings; when confronted with a common law damage award, manufacturers may choose how they will change their behavior or whether they

NLRB because there is a presumption in favor of preemption whenever the NLRB is involved. *Dewey*, 121 N.J. at 88, 577 A.2d at 1248 (citing *Brown v. Hotel Employees Int'l Union*, 468 U.S. 491, 501 (1984)). Second, the NLRA established its own remedial scheme for unfair labor practices, unlike the Cigarette Labeling and Advertising Act, which sets up no remedy for the victims of cigarette-related injuries. See *Garner v. Teamsters Union*, 346 U.S. 485, 490-91 (1953). Furthermore, the concurring judges in *Garmon* viewed the majority opinion with a good deal of skepticism, noting that the majority opinion might "cut deeply into the ability of the states to furnish an effective remedy" for those injured by tortious conduct. *Garmon*, 359 U.S. at 253 (Harlan, Clark, Whittaker, and Stewart, J.J., concurring). Subsequently, the Supreme Court has carved out many exceptions to the NLRA's preemptive reach. See *Farmer v. Bhd. of Carpenters & Joiners of Am.*, Local 25, 430 U.S. 290 (1977) (allowing state law trespass actions in a labor-relations context). In *Farmer*, the Court stated that "inflexible application of the [*Garmon*] doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the regulatory scheme." 430 U.S. at 302. See also *Cipollone*, 539 F. Supp. at 1153 n.3.

Finally, it should be noted that the *Garmon* opinion is full of language suggesting that "threatened interference" or "potential frustration" with a congressional policy would be sufficient to preempt state tort action. *Garmon*, 359 U.S. at 243, 245. Such potential conflict would not support a finding of preemption today. See *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982).

¹²⁶ 464 U.S. 238, 256 (1984) (state law action against a nuclear facility for radiation injuries not preempted by the AEA). The court in *Dewey* cited *Silkwood* as evidence that Congress is often willing to accept the incidental regulatory consequences state law claims might have on a federal statute, even if direct state legislation is preempted. *Dewey*, 121 N.J. at 88-89, 577 A.2d at 1248-49.

¹²⁷ 486 U.S. 174, 186 (1988) (injured workers' claim for supplemental benefits based on state law was not preempted by the AEA). In *Miller*, the Supreme Court stated that, "Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not." *Id.*

¹²⁸ 110 S. Ct. 2270 (1990) (nuclear plant employee's state law claim for emotional distress caused by defendant's alleged retaliatory firing of plaintiff for "whistleblowing" was not preempted by the Energy Reorganization Act (ERA) despite tangential effects upon the ERA's purpose). The Court held that such state law claims did not reach the level of direct legislative regulation and should be permitted because they do not come into "actual conflict" with the federal law. *Id.* at 2278.

will change it at all. The manufacturer could, for instance, place a package insert in its product, a practice not regulated by the Act, or might simply find it more cost effective not to change its label and instead pay periodic damage awards.¹²⁹

The court next advanced a policy argument against preemption, holding that state tort law may have "broader compensatory goals" than federal regulation.¹³⁰ A state has broad powers to promote the health of its citizens and provide compensation even in the face of a federal warning scheme.¹³¹ The court indicated that it had chosen to focus on the compensatory goal of tort law rather than on any incidental regulatory effect granting such an award might have.¹³²

The court also noted that a number of other federal labeling statutes and regulations expressly preempt state regulation of products governed by federal law but allow for state law tort claims based on inadequate warning. For instance, courts have held that compliance with the Food and Drug Administration's oral contraceptive labeling requirements,¹³³ and the labeling requirements of the Federal Hazardous Substances Act¹³⁴ and the Federal Insecticide, Fungicide and Rodenticide Act¹³⁵ do not im-

¹²⁹ *Dewey*, 121 N.J. at 90, 577 A.2d at 1249 (citing *Cipollone*, 593 F. Supp. at 1154). See *Silkwood*, 464 U.S. at 264 (Blackmun, J., dissenting).

¹³⁰ *Dewey*, 121 N.J. at 90, 577 A.2d at 1250 (quoting *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1540 (D.C. Cir.), cert. denied, 469 U.S. 1062 (1984)).

¹³¹ *Id.* In *Ferebee*, the court focused on the compensatory goal of allowing the plaintiff, whose husband died from dermal exposure to dangerous chemicals, to proceed with her claim, despite the fact that the label on the chemical compound complied with the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y (1982) (FIFRA), and despite the possibility that allowing such a suit would conflict with FIFRA's regulatory aim of uniform labeling.

¹³² *Dewey*, 121 N.J. at 91, 577 A.2d at 1250.

¹³³ *Dewey*, 121 N.J. at 92, 577 A.2d at 1250-51 (citing *MacDonald v. Ortho Pharmaceutical Corp.*, 394 Mass. 131, 475 N.E.2d 65 (1985)). Warnings on oral contraceptives are to be "precise and nationally uniform." 21 C.F.R. § 310.501(a) (1984). In *MacDonald*, the court held that compliance with FDA labels did not shield manufacturers from liability. *MacDonald*, 394 Mass. at 139, 475 N.E.2d at 70.

¹³⁴ *Dewey*, 121 N.J. at 93, 577 A.2d at 1251 (citing *Burch v. Amsterdam Corp.*, 366 A.2d 1079 (D.C. 1976)). The Federal Hazardous Substances Act (FHSA) sets up a labeling requirement for hazardous household substances sold in interstate commerce and, like the Federal Cigarette Labeling and Advertising Act, specifically enjoins states from establishing different labels. Pub. L. No. 94-284, § 17(a), 90 Stat. 510 (1976) (codified at 15 U.S.C. §§ 1261-1263 (1970)). However, in *Burch*, the court concluded that plaintiffs may bring failure to warn claims despite a manufacturer's compliance with the FHSA. 366 A.2d at 1085.

¹³⁵ *Dewey*, 121 N.J. at 92, 577 A.2d at 1250-51 (citing *Ferebee v. Chevron Chem. Co.*,

munize manufacturers of products regulated by these federal laws from liability based on inadequate warning.¹³⁶ The court likened these other federal labeling laws to the Act; whatever tension there may be between preempting state regulations and permitting state tort claims has been accepted by Congress in various federal statutes and regulations which, like the Act, are aimed at establishing a nationally uniform labeling scheme.¹³⁷

736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984)). In *Ferebee*, the court held that FIFRA did not preempt claims based on inadequate warning. 7 U.S.C. §§ 136-136y (1982).

¹³⁶ The *Dewey* court was undoubtedly worried about the potentially catastrophic consequences if the holdings of the circuit courts in the cigarette cases were to carry over to the food and drug area. See Tribe, *Federalism with Smoke and Mirrors*, THE NATION, June 7, 1986, at 788, 790 ("[The Third Circuit's] view of preemption has the burning force of a prairie fire, and it is hard to see what structures of state compensation would survive the ensuing conflagration. Food, drugs, cosmetics and toxic substances are all governed by federal warning laws.").

¹³⁷ The analogy between the Act and the other federal labeling laws, while instructive on the preemptive reach of the Act, is hardly dispositive. The regulatory schemes set up by FIFRA, FHSA and the FDA regulation of oral contraceptives are distinguishable from that established in the Act insofar as the goal of uniformity is more apparent in the Act than in these other federal schemes. Under FIFRA, the EPA governs the warnings on over 40,000 herbicides and pesticides. *Palmer*, 825 F.2d at 628 n.13. Moreover, the EPA does not promulgate a precise warning for each herbicide and pesticide but, rather, requires each manufacturer to submit a proposed label for approval. *Id.* Clearly, concerns with uniformity were not as overriding in FIFRA as in the Act and thus it appears that inadequate warning claims would pose less of an obstacle to FIFRA's warning scheme than to the Act's. With regard to the FDA warning labels on oral contraceptives, the FDA does not promulgate official warnings but requires individual companies to prepare booklets informing the user of the hazards of their particular contraceptives. 21 C.F.R. § 310.501 (1978). Again the goal of uniformity was not as central to the FDA scheme as it was to the Act. Finally, the FHSA was enacted to strengthen the warnings on approximately 300,000 common household products, and Congress did not prescribe specific warnings but gave only general instructions on the warnings. 15 U.S.C. § 1261 (p) (1) (1970); *Burch v. Amsterdam Corp.*, 366 A.2d 1079, 1082, 1085 (D.C. 1976). Once again, uniformity was not as central to the FHSA as to the Act.

Furthermore, there was really no question that state tort claims would survive the FDA oral contraceptive labeling scheme and the FHSA. In *MacDonald v. Ortho Pharmaceutical Corp.*, the court gave the defendant's preemption argument short shrift, merely asserting that the regulatory history of the FDA's warning scheme revealed that the FDA specifically intended to allow for state tort claims. 394 Mass. 131, 139, 475 N.E.2d 65, 70 (1985). In *Burch v. Amsterdam Corp.*, the court did not even address the preemptive reach of the FHSA, apparently assuming that state tort claims would survive the enactment of the statute. 366 A.2d 1079 (D.C. 1976). In essence, both *MacDonald* and *Burch* merely held that compliance with a federal regulation or statute would not immunize a manufacturer from liability for failure to warn adequately. *MacDonald*, 394 Mass. 131, 139, 475 N.E.2d 65, 70; *Burch*, 366 A.2d 1079, 1085.

Preemption, which is the sole issue in *Dewey*, is significantly different from the defense of compliance with a federal statute or regulation. In the compliance defense con-

In its final note on preemption, the court stated: "We are convinced that had Congress intended to immunize cigarette manufacturers from packaging, labeling, misrepresentation, and warning claims, it knew how to do so with unmistakable specificity."¹³⁸ Accordingly, the *Dewey* court held that the plaintiffs' inadequate warning and misrepresentation claims were not preempted.

D. *The Dissent*

The dissent echoed the Third Circuit's finding that the Act represents a carefully wrought balance of congressional objectives which would be upset by the inadequate warning claims. The dissent accordingly exerted considerable effort to disprove the majority's contention that the protection of commerce and the national economy comprised a secondary goal of the Act.¹³⁹ Section 1331, the dissent noted, plainly states that commerce should be protected "to the *maximum extent* consistent with" warning the public. The dissent also pointed out that the history of the Act reveals that its passage was the result of a hard-fought compromise between partisan forces, militating against the conclusion that the warning goal trumps the protection of commerce goal.¹⁴⁰

It is also interesting to note that the dissent directly questioned the validity of the plaintiffs' substantive claims, something the circuit courts in other tobacco litigation only hinted at. Once the congressional warning was in place, the dissenting judge argued, people like Wilfred Dewey smoked at their own risk.¹⁴¹ The dissent also voiced fears, latent in the circuit court

text, manufacturers claim that because they complied with a federal standard which they are entitled to rely upon, they cannot be held liable. As a rule, however, compliance with a federal standard does not prevent a finding that a manufacturer was negligent. See RESTATEMENT (SECOND) OF TORTS § 288C (1965). By contrast, in arguing preemption, a manufacturer attempts to prove that the federal government specifically intended to bar a plaintiff from contesting the adequacy of the federal standard. Because they focus on the shortcomings of the compliance defense, *MacDonald* and *Burch* are of little probative value on the preemption issue central to *Dewey*.

¹³⁸ *Dewey*, 121 N.J. at 94, 577 A.2d at 1251.

¹³⁹ *Id.* at 101-02, 577 A.2d at 1256 (Antell, J., dissenting).

¹⁴⁰ *Id.* at 103-04, 577 A.2d at 1256 (Antell, J., dissenting).

¹⁴¹ *Id.* at 108, 577 A.2d at 1259 (Antell, J., dissenting):

The federal legislation gives effect to the coordinate goals of protecting the public with minimal consequences to the cigarette industry. It does this by

opinions, that a flood of claims would engender judicial chaos.¹⁴²

III. ANALYSIS

The *Dewey* court's conclusions are compelling. In conducting its preemption analysis, the *Dewey* court properly accorded the state law at issue considerable weight. By contrast, the circuit courts ran roughshod over the protections afforded state law, and state common law in particular, in our federal system. Four arguments, all of which are touched on in *Dewey*, strongly support the contention that the Act does not preempt plaintiffs' post-1965 failure to warn and intentional misrepresentation claims. First, and perhaps most important, the cigarette manufacturers have not managed to overcome the heightened presumption against preemption.¹⁴³ Second, the Supreme Court has exhibited an increased hesitancy to preempt state laws that have the potential to infringe upon the congressional purposes behind federal law, maintaining that Congress is often willing to tolerate a certain degree of tension between federal and state law.¹⁴⁴ In a parallel development, the Supreme Court has been downplaying the effect that state damage actions have on various federal schemes, making it less likely that such claims will be preempted.¹⁴⁵ Third, there is a strong policy argument that an injured party should not be left without means of redress.¹⁴⁶ This belief is shared by the Supreme Court, which is very wary

requiring that consumers be informed that cigarette smoking is "dangerous to your health," reflecting a judgment that this was all an ordinary consumer need to know to appreciate the risk of smoking and drawing the line at which personal responsibility begins.

Id. See also *Dewey*, 121 N.J. at 106, 577 A.2d at 1258 (Antell, J., dissenting) ("[W]hereas Silkwood was the hapless victim of a nuclear accident, here the decedent voluntarily exposed himself to the risks of smoking in the face of a federally prescribed warning that this would endanger his health.").

¹⁴² *Dewey*, 121 N.J. at 108-09, 577 A.2d at 1259 ("[T]he extent to which the warning can be particularized is infinite and that there are few cases of which it can be said that the manufacturer adequately covered the myriad possibilities about which a consumer could claim a warning should have been, but was not, given. Although Congress intended to put the matter to rest, the decision of the majority allows for the very chaos which the Act attempts to resolve.").

¹⁴³ See notes 150-62 and accompanying text *infra*.

¹⁴⁴ See notes 163-99 and accompanying text *infra*.

¹⁴⁵ *Id.*

¹⁴⁶ See notes 200-09 and accompanying text *infra*.

of leaving an injured party without a remedy.¹⁴⁷ Fourth, the lack of language in the Act expressly preempting state damage actions is especially telling in this instance, further supporting the conclusion that state damage actions should not be preempted.¹⁴⁸ These arguments strongly suggest that the Act does not bar an individual from pursuing his common law right to recover for injuries sustained by products with inadequate warnings.¹⁴⁹ While the plaintiffs in these cases may have difficulty at trial proving that the warnings mandated by the Act are inadequate, they should not be denied the opportunity to present such claims.

A. *The Presumption Against Preemption*

According to the principles of federalism, there is a proper

¹⁴⁷ *Id.*

¹⁴⁸ See notes 210-16 and accompanying text *infra*.

¹⁴⁹ This Comment, which concentrates on the broader contours of preemption analysis, does not give an exhaustive, analytical account of the arguments that have surfaced in favor of the plaintiffs. For instance, several courts have focused specifically on the Act's legislative history and on subsequent federal tobacco legislation to show that Congress did not intend to preempt state tort claims. Recently, a Texas appellate court, which echoed the finding of the *Dewey* court that the Act did not preempt any of the plaintiffs' claims, noted that the legislative history of the Act and the language of the 1986 Comprehensive Smokeless Tobacco Health Education Act (Smokeless Tobacco Act) belied the defendants' preemption argument. *Carlisle v. Philip Morris, Inc.*, 805 S.W.2d 498 (Tex. Ct. App. 1991). Citing Judge Sarokin's *Cipollone* opinion, the Texas court reemphasized that nowhere in the legislative history is there any mention that tort claims would be preempted by the Act even though several cigarette product liability cases were pending in the federal appellate courts at the time. *Id.* at 514. The Texas court also pointed out that the very existence of debate in the legislative history concerning the effect of the Act on the substantive defense of assumption of risk is inconsistent with the contention that Congress intended to preempt state tort claims. *Id.* See notes 59-62 and accompanying text *supra* for a full discussion of Judge Sarokin's treatment of the legislative history.

The Texas appellate court also held that the Smokeless Tobacco Act, 15 U.S.C. §§ 4401-4408 (1988), legislation that mandated warning labels on smokeless tobacco products, provides evidence that Congress did not intend to preempt state tort actions in the Act. 805 S.W.2d at 514. The Smokeless Tobacco Act, which, like the Labeling Act, preempts state regulation of the warnings on smokeless tobacco products, specifically states: "[n]othing in this chapter shall relieve any person from liability at common law or under state statutory law to any other person." 15 U.S.C. § 4406(c). This preemption provision shows that Congress did not intend to immunize the chewing tobacco industry from tort liability. Because there is no valid reason for Congress to distinguish between the smokeless tobacco and cigarette industry or between the scope of liability either is to face, this intent that the smokeless tobacco industry should pay tort damages should carry over to the Labeling Act.

allocation of power between federal and state authority.¹⁵⁰ The judiciary has preserved this federal-state balance by establishing the presumption that Congress does not intend to displace state law when it enacts federal legislation.¹⁵¹ This presumption

¹⁵⁰ Alexander Hamilton articulated the basic tenet of federalism in *THE FEDERALIST*: An entire consolidation of the States into one corporate national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the [Constitutional] convention aims only at partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act exclusively delegated to the United States.

THE FEDERALIST No. 32, at 243 (A. Hamilton) (B. Wright ed. 1961).

In *Gregory v. Ashcroft*, a recent Supreme Court exposition on the principles of federalism, the Court alluded to Alexander Hamilton's and James Madison's espousal of a healthy federal-state balance as a protection against federal tyranny. 111 S. Ct. 2395, 2400 (1991). The *Gregory* Court also invoked the Tenth Amendment as testimony to the fact that states retain substantial sovereign authority under the United States constitutional system. *Id.* at 2399. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONST. amend. X.

¹⁵¹ See *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (the preservation of the federal-state balance requires a "presumption that Congress did not intend to displace state law"). See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-25, at 480 (2d ed. 1988). Because Congress is the true arbiter of the federal-state balance and is entrusted with protecting the sovereignty of the states, there is a presumption that Congress did not intend to preempt state law.

The Supreme Court's most recent view of the federal-state balance was expounded in *Garcia v. San Antonio Metro. Transit Auth.*, where the Court held that functions traditionally performed by the state have no immunity from a particular federal regulation passed pursuant to the Commerce Clause. 469 U.S. 528, 546 (1985). In other words, Congress has exceedingly broad powers under the Commerce Clause and can regulate virtually all forms of state activity. However, with great power comes great responsibility. As a corollary to the broad Commerce Clause power, the presumption against preemption provides a safeguard whereby Congress can only infringe on state sovereignty by means of an explicit exercise of its lawmaking power. Indeed, Professor Tribe has indicated that, in light of *Garcia*, the presumption against preemption is perhaps more important than ever as an internal check on Congress's enhanced power. L. TRIBE, *supra*, § 6-25, at 479-80.

The Supreme Court, in *Gregory v. Ashcroft*, has recently endorsed Professor Tribe's view of the effect of *Garcia* on the presumption against preemption. 111 S. Ct. 2395, 2403 (1991). The Court stated:

Indeed, inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the states against intrusive exercises of Congress' Commerce powers, we must be absolutely certain the Congress intended such an exercise. '[T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the real procedure for lawmaking on which *Garcia* relied to protect states' interests.'

Id. at 2403 (quoting L. TRIBE, *supra*, § 6-25, at 480 (2d ed. 1988)).

In *Gregory* the Court held that Missouri's retirement age for judges did not violate

against preemption is heightened when areas of historical state concern, such as torts, are at issue.¹⁵² The presumption is further heightened when preemption of state law would leave plaintiffs without an adequate substitute remedy.¹⁵³ Procedurally, this presumption has the effect of putting a heavy burden of proof on the cigarette companies to prove preemption.¹⁵⁴

The *Dewey* court recognized that the presumption against preemption barrier in the cigarette cases is formidable¹⁵⁵—certainly not one that the circuit courts or the New Jersey appellate court effectively managed to overcome in allowing the preemption defense to stand. For instance, the First Circuit in *Palmer* did not even make a pretense of addressing

the Federal Age Discrimination and Employment Act (ADEA) largely on the grounds that Congress did not explicitly extend the ADEA's reach to judges. The Court went to considerable lengths to emphasize both the importance of state power in our federal system and the requirement that Congress speak with unmistakable clarity when it intends to preempt state law. *Id.* at 2399-403. If *Gregory* is any indication, the recently realigned Rehnquist Court will be especially vigilant in cases where federal law infringes upon state sovereignty. See Greenhouse, *A Remade Court Shifts The Fulcrum of Power*, N.Y. Times, July 7, 1991, §4, at 1, col. 4.

Note that in the cigarette cases, there is no question that the federal government has the power under the Commerce Clause to preempt state tort claims. Rather, the question is whether Congress intended to use that power to preempt such claims, the presumption being that Congress did not.

¹⁵² *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("Congress legislated here in a field which the states have traditionally occupied . . . [S]o we start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.").

¹⁵³ *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984).

¹⁵⁴ See *Silkwood*, 464 U.S. at 255 (party moving to preempt state law has burden of proof); *Stephen v. American Brands, Inc.*, 825 F.2d 312, 313 (11th Cir. 1987) (burden of proof is on the cigarette manufacturers to prove displacement of traditional tort remedies).

¹⁵⁵ In *Forster v. R.J. Reynolds Tobacco Co.*, 423 N.W.2d 691, 696 (1988), *rev'd*, 437 N.W.2d 655 (Minn. 1989), a case cited at length in *Dewey*, the Minnesota Court of Appeals rested its entire analysis on the presumption against preemption:

In the present case, the traditional presumption against preemption is heightened by four factors. First, Congress has spoken on the issue of preemption and not expressly preempted state tort claims. Second, the state law which respondent attempts to displace relates to the health and safety of the citizens of Minnesota and thus falls within the traditional domain of the states. Third, examination of the Act's legislative history does not persuade us Congress intended to preempt tort claims. Finally, if state tort law is preempted, personal injury victims would be left without a remedy — a situation which has not been tolerated by either the United States Supreme Court or the Supreme Court of Minnesota.

Id. at 696.

the presumption against preemption.¹⁵⁶ The Third Circuit in *Cipollone*, while recognizing the presumption against preemption, skirted the issue in its implied preemption analysis, never acknowledging that the conflict between state and federal law must be significant enough to evidence a "clear and manifest" purpose on the part of Congress to displace state law.¹⁵⁷ The Third Circuit instead used a two-step argument: 1) Congress made it clear that any regulations enforcing a warning other than that prescribed in section 1333(a) of the Act are preempted;¹⁵⁸ and 2) several Supreme Court opinions have held that state law damage claims have a regulatory effect.¹⁵⁹ From this analysis, the Third Circuit gleaned that Congress must have intended to preempt state tort claims. This inference is hardly the equivalent of showing that Congress had a "clear and manifest" purpose to displace state law.¹⁶⁰

Of course it is difficult to say with any degree of exactitude what sort of showing a party moving for preemption would have to make to overcome this doubly heightened presumption. But, in this instance, where Congress has not expressly preempted state damage actions, where the legislative history reveals no intent to preempt such action (if anything, it reveals an intent to preserve such actions),¹⁶¹ where the federal government does not have a dominant interest in the subject matter,¹⁶² and where the Act does not provide any remedial scheme, it is exceedingly difficult to overcome the presumption. The circuit courts' conspicuous silence on the issue of the presumption stems from the very fact that it was not overcome.

¹⁵⁶ The *Palmer* court's only mention of the presumption against preemption was in the context of discussing the *Palmer* district court's treatment of express preemption. The fact that the *Palmer* court claimed to have "no hesitation in determining that the Act impliedly preempts (under whatever rubric) the Palmers' claim" belies its failure to consider seriously the presumption against preemption. *Palmer*, 825 F.2d at 625.

¹⁵⁷ *Cipollone*, 593 F.2d at 185.

¹⁵⁸ *Id.* at 187.

¹⁵⁹ *Id.* See *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 166 (1982); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 324-25 (1981). See note 87 *supra* for a full discussion of *Fidelity* and *Kalo Brick*.

¹⁶⁰ Professor Tribe noted that the Third Circuit opinion seemed "hard to square . . . with the overriding presumption that 'Congress did not intend to displace state law.'" L. TRIBE, *supra*, note 151, § 6-26, at 491 (2d ed. 1988) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

¹⁶¹ See notes 59-62 and accompanying text *supra*.

¹⁶² See note 69 and accompanying text *supra*.

B. Recent Developments Concerning "Obstacle Conflict" Preemption

Any court engaged in determining whether a state law stands as an obstacle to the federal law must gauge the effect the state law will have on the purposes behind the federal law.¹⁶³ However, the Supreme Court has defined "obstacle" narrowly in recent years; in certain cases even a state law having a direct and substantial effect on a federal scheme will not comprise an obstacle to a federal scheme.¹⁶⁴ Congress, the Supreme Court has indicated, is often willing to accept significant tension between state and federal law. Furthermore, the Supreme Court seems to be particularly reluctant to preempt state damage actions. The Court has recognized that a party subject to a state damage action is not in the same situation as a party faced with state regulation; the former will change its behavior only when it is cost effective to do so, while the latter is forced to change its behavior.¹⁶⁵ State damage actions are thus less likely to stand as an "obstacle" to a federal scheme because a party subject to such actions will not necessarily alter its behavior in such a way that infringes upon the federal law. A manufacturer may respond to tort liability in a variety of ways. The *Dewey* court properly concluded that *Brown & Williamson* "overstate[d]" the effect of the tort claims on the Act:¹⁶⁶ preserving tort claims would have only an indirect effect upon the Act and would not stand as an "obstacle" under the *Hines* analysis.¹⁶⁷

Recent cases have shown that the Supreme Court is hesitant to find state law preempted on the grounds that it stands as an "obstacle" to the purposes behind the federal law. In *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*,¹⁶⁸ the Court considered whether a California state

¹⁶³ *Fineberg v. Sullivan*, 634 F.2d 50, 63 (3d Cir. 1980) ("[The *Hines*] test requires us to examine first the purposes of the federal law and second the effect of the operation of the state law on these purposes.").

¹⁶⁴ See, e.g., *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983). See notes 168-73 and accompanying text *infra* for a full discussion of *Pacific Gas*.

¹⁶⁵ See *English v. General Electric Co.*, 110 S. Ct. 2270, 2279 (1990); *Miller v. Good-year Atomic Corp.*, 486 U.S. 174, 186 (1988). See notes 182-88 and accompanying text *infra* for a full discussion of *English* and *Miller*.

¹⁶⁶ *Dewey*, 121 N.J. at 90, 577 A.2d at 1249.

¹⁶⁷ See note 17 and accompanying text *supra*.

¹⁶⁸ 461 U.S. 190 (1983).

moratorium on nuclear power plant construction was preempted by the Atomic Energy Act (AEA).¹⁶⁹ The Court first noted that while Congress intended to occupy the field of nuclear safety, it left the states free to regulate the economic aspects of nuclear power.¹⁷⁰ Because the moratorium was motivated at least in part by economic concerns, the Court held that the moratorium did not encroach upon the federally occupied field of nuclear safety.¹⁷¹ The Court's next consideration was whether the moratorium would stand as an obstacle to the congressional objective behind the AEA of promoting the commercial use of nuclear power.¹⁷² The Court held that while Congress did evince a clear intent to promote nuclear power, it did not intend to do so "at all costs" and allowed the state moratorium to stand despite the possibility that it would fully frustrate the congressional purpose behind the AEA.¹⁷³

*Silkwood v. Kerr-McGee Corp.*¹⁷⁴ is particularly relevant to the cigarette cases because it involved the preservation of state damage actions in the face of a federal scheme. In *Silkwood*, the estate of Karen Silkwood brought a suit based on common law tort principles for plutonium contamination injuries and was awarded both compensatory and punitive damages from the Kerr-McGee Corporation.¹⁷⁵ Relying on its earlier interpretation of the AEA in *Pacific Gas*, the Court found that Congress had invested the federal government with exclusive power over the regulation of nuclear safety.¹⁷⁶ However, the Court also found evidence in certain amendments to the AEA, requiring nuclear operators under certain circumstances to obtain private financial protection in case of nuclear accidents, that Congress assumed that state remedies were available to those injured in nuclear accidents.¹⁷⁷ In its *Hines* analysis, the majority noted that there

¹⁶⁹ 42 U.S.C. §§ 2011-2284 (1976).

¹⁷⁰ *Pacific Gas*, 461 U.S. at 206-07.

¹⁷¹ *Id.* at 214-16.

¹⁷² *Id.* at 204.

¹⁷³ *Id.* at 222. See Kim, *Preemption After Cipollone: Preserving State Tort Remedies in the Face of Federal Regulation*, 20 TOLEDO L. REV. 797, 812 (1989) ("The Supreme Court in *Pacific Gas* upheld a state moratorium that threatened to bar completely the achievement of the federal goal of promoting commercial nuclear development.").

¹⁷⁴ 464 U.S. 238 (1984).

¹⁷⁵ *Id.* at 241-44.

¹⁷⁶ *Id.* at 249.

¹⁷⁷ *Id.* at 251. The court referred to the Price-Anderson Act, under which the Nu-

was a "tension" between allowing state tort liability and the finding that the federal government occupied the field of nuclear safety but added that it was a tension that Congress was willing to accept.¹⁷⁸ The majority also noted that the purpose behind the AEA would not be frustrated by state law liability because Congress did not intend to promote nuclear power at the expense of leaving victims of nuclear mishaps without a remedy, and it accordingly granted both compensatory and punitive damages to the plaintiffs.¹⁷⁹ The dissent, on the other hand, insisted that an award of punitive damages would upset the AEA's scheme. By way of explanation, Justice Blackmun made an important distinction between punitive and compensatory damages.¹⁸⁰ Punitive damages have a regulatory purpose aimed specifically at deterring conduct and thus would upset the accommodation between federal regulations and state common law. Justice Blackmun, nevertheless, agreed with the majority that compensatory damages have only an indirect regulatory impact and that allowing compensatory damages would not frustrate the purpose of the AEA.¹⁸¹

clear Regulatory Commission is given discretion whether to require licensed nuclear plants to maintain financial protection. Pub. L. No. 85-256, 71 Stat. 576 (codified as amended at 42 U.S.C. § 2210 (1976)).

¹⁷⁸ *Silkwood*, 464 U.S. at 256.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 263 (Blackmun, J., dissenting).

¹⁸¹ *Id.* at 264 (Blackmun, J., dissenting). But see *Palmer*, 825 F.2d at 628. The *Palmer* court went to considerable lengths to distinguish *Silkwood* from the cigarette cases. The court first noted that, unlike the Act, the federal law at issue in *Silkwood*, the AEA, contained no preemption provision. Second, whereas the Act left no role to the states in the labeling and advertising of cigarettes, the AEA expressly reserved significant authority for the states.

These arguments are not sufficient to dismiss the *Silkwood* analogy. First, in *Pacific Gas*, the Supreme Court concluded that the federal government occupied the field of nuclear safety, signifying that the absence of a preemption provision did not lessen the AEA's preemptive reach to all areas of nuclear safety. *Pacific Gas*, 461 U.S. 190, 212 (1983). Second, the *Pacific Gas* Court held that the only authority reserved to the states by the AEA was over the economic aspects of nuclear power. *Id.* See 42 U.S.C. §§ 2018, 2021(b), 2021(k). No authority over nuclear safety, which was at issue in *Silkwood*, was granted to the states by the AEA.

The *Palmer* court, however, made an additional point in attempting to distinguish the federal scheme at issue in *Silkwood* from the Act: The Price-Anderson Act, a 1957 amendment to the AEA, set up an indemnification scheme whereby operators of nuclear facilities could be required to obtain private financial protection against state lawsuits in the event of a nuclear catastrophe. Pub. L. No. 85-256, 71 Stat. 576 (codified as amended at 42 U.S.C. § 2210 (1976)). This, the *Silkwood* majority reasoned, stood as evidence that

The Supreme Court addressed a similar issue in *English v. General Electric Co.*¹⁸² In *English*, an employee at a nuclear facility was dismissed by General Electric, allegedly in retaliation for her whistleblowing.¹⁸³ She proceeded to bring a claim for intentional infliction of emotional distress. The Court held that English's state law claim was not preempted by federal law even though the Federal Energy Reorganization Act had remedial provisions for retaliatory dismissal which would potentially be jeopardized by allowing state law claims.¹⁸⁴ The Court, in a unanimous decision, noted that even though allowing state tort claims might have some tangential effect upon the "resource allocation" safety decisions of nuclear operators, and thereby possibly interfere with Congress's intention that the federal government regulate nuclear safety to the exclusion of state law, the effect was neither direct nor substantial enough to warrant pre-

Congress did not intend to preempt nuclear injury tort claims. *Silkwood*, 464 U.S. at 251. Accordingly, the *Palmer* court opined that the *Silkwood* case was not instructive: the *Silkwood* Court had found explicit evidence in the legislative history that Congress did not intend to preempt nuclear injury tort claims, whereas there was no explicit evidence in the Act's language or legislative history that Congress did not intend to preempt cigarette injury tort claims. *Palmer*, 825 F.2d at 628.

However, the *Palmer* court's analysis overlooks the Supreme Court's more general finding that Congress was willing to accept the "tension" between whatever regulatory consequences allowing state tort claims might have and the determination that safety regulation is the exclusive concern of federal law. *Silkwood*, 464 U.S. at 256. State tort claims may be allowable even if Congress has occupied the field. The *Silkwood* majority also found that allowing state law claims would not frustrate Congress's purpose of promoting nuclear power because Congress did not intend to do so "at all costs." *Id.* at 257. Certainly these broad holdings apply in determining the preemptive reach of the Act, in which uniform labeling was a goal, not to be achieved at all costs, but rather to be achieved "consistent with" the goal of informing the public of the hazards of smoking.

Moreover, observations by Justice Blackmun in his dissent in *Silkwood* about the nature of compensatory damages also lend support to the contention that failure to warn claims should be allowed despite the Act. 464 U.S. at 263-64. The purpose of compensatory damages is to compensate victims, Blackmun noted, and an award of such damages has only an indirect impact upon the behavior of a nuclear operator. "Whatever compensation standard a State imposes . . . a licensee remains free to continue operating under federal standards and to pay for the injury that results." *Silkwood*, 464 U.S. at 264. While the compensatory damage claims at issue in the cigarette cases could potentially have a greater economic impact on the tobacco industry than the damage claim at issue in *Silkwood* could have on the nuclear power industry, the impact of such cigarette injury claims would nonetheless be nonregulatory and indirect in nature.

¹⁸² 110 S. Ct. 2270 (1990).

¹⁸³ *Id.* at 2271-72.

¹⁸⁴ *Id.* at 2278.

emption of the plaintiff's tort claim.¹⁸⁵

In *Miller v. Goodyear Atomic Corp.*,¹⁸⁶ an employee at a nuclear production facility sustained injuries due to the facility's failure to comply with a state safety regulation and brought a claim against the facility for additional workers' compensation benefits. The Court held that the plaintiff's claim against the facility under an Ohio workers' compensation law was not preempted by the AEA. The Court noted that direct state regulation of a federal facility is distinct from the incidental regulatory effect that results when a state workers' compensation law is applied to provide additional awards to injured workers.¹⁸⁷ Such an award was considered incidental because the federal facility could "choose" to disregard the state safety regulation and award compensation.¹⁸⁸

In summary, the Supreme Court has held recently in *Pacific Gas*,¹⁸⁹ *Silkwood*¹⁹⁰ and *English*¹⁹¹ that when state law and a federal regulatory scheme come into conflict, state law will not be preempted unless it infringes on the object of the federal regulation substantially or directly. In other words, there is an elasticity of tension that can be tolerated before preemption is triggered. In a corollary development, the Supreme Court held, in *Silkwood*,¹⁹² *Miller*¹⁹³ and *English*¹⁹⁴ that it does not view state tort claims, at least insofar as they are for compensatory damages, as comprising direct regulation, moving away from its 1959 holding in *San Diego Bldg. Trades Council v. Garmon*.¹⁹⁵ This

¹⁸⁵ *Id.* at 2279-81. *But see* *Kotler v. American Tobacco Co.*, 926 F.2d 1217, 1223 (1st Cir. 1990). The plaintiff in *Kotler*, the surviving spouse of a decedent smoker, argued that *Palmer v. Liggett Group, Inc.*, the First Circuit's precedent on cigarette presumption, should be reconsidered in light of the Supreme Court's decision in *English*. *Id.* at 1222. The First Circuit disagreed. Noting that there were gaping differences between the Energy Reorganization Act, at play in *English*, and the Labeling Act, in *Palmer*, the court held that *English* did not affect the validity of *Palmer*. *Id.* at 1223.

¹⁸⁶ 486 U.S. 174 (1988).

¹⁸⁷ *Id.* at 177.

¹⁸⁸ *Id.* at 186.

¹⁸⁹ 461 U.S. 190 (1983).

¹⁹⁰ 464 U.S. 238 (1984).

¹⁹¹ 110 S. Ct. 2270 (1990).

¹⁹² 464 U.S. 238 (1984).

¹⁹³ 486 U.S. 174 (1988).

¹⁹⁴ 110 S. Ct. 2270 (1990).

¹⁹⁵ 359 U.S. 236 (1959). See notes 124-25 *supra* for a discussion of *Garmon*. See also Stein, *supra* note 11, at 652 n.147.

conclusion rests on the determination that nuclear facility operators have a choice of reacting to state tort claims through resource allocation decision making whereas they do not when faced with state regulation.¹⁹⁶ These parallel developments in the Supreme Court cases narrow the parameters of the "obstacle conflict" preemption, mandating preemption only where there is effective state regulation directly obstructing the purposes behind the federal law.

Applying these recent Supreme Court decisions to the cigarette cases, one can have little doubt that the Act and inadequate warning claims can coexist. While there is tension between allowing state court claims and the Act's goal of protecting national commerce, this tension is far from fatal. Rather, the Supreme Court makes it clear that allowing tort claims, which are part of the states' historic police powers, is acceptable as long as such claims do not substantially and directly affect congressional purposes. Contrary to the circuit court opinions, inadequate warning claims do not directly compromise the Act's goal of uniformity. The circuit courts' approach simply rests on too many contingencies. First, a considerable number of plaintiffs would have to wage successful suits before a manufacturer would contemplate changing the warning; this result is far from a given considering the fact that cigarette products liability suits have been entirely unsuccessful in the past.¹⁹⁷ Second, these suits would have to challenge successfully the present warning labels, in place since 1984. A determination that the earlier warning labels were inadequate would have no bearing on the adequacy of present labels and thus could hardly serve as an incentive to manufacturers to strengthen the present label. Third, the form

¹⁹⁶ See Ausness, *supra* note 11, at 926-27 (1988); G. CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 68-128 (1970).

Governmental regulations and substantive tort law are essentially different. Dean Calabresi illustrates this point by dividing accident cost avoidance methods into two categories: general deterrence and specific deterrence. Under principles of general deterrence, the mechanism behind tort liability, it is the market which determines managerial decisions about accident cost measures, allowing manufacturers to internalize the costs of compensating injured consumers. G. CALABRESI, *supra* at 68-69. Manufacturers faced with liability will make their products safer, but only as long as it is cost effective to do so. In contrast, specific deterrence, under which category governmental regulations fall, mandates particular cost avoidance measures, taking the decision-making function away from the market and management. *Id.* at 95.

¹⁹⁷ See *Cipollone*, 593 F. Supp. at 1168 n.17. See also note 74 *supra*.

of a manufacturer's reaction to liability will not necessarily conflict with the Act. The manufacturer has the option of placing a package insert in the product or simply deciding not to alter the warning label when it is not cost-effective to do so.¹⁹⁸ Finally, manufacturers may react by strengthening their labels uniformly, wholly in conformity with the goals of the Act. Indeed, the case for allowing such claims may in fact be stronger than in *Silkwood*, *Miller* and *English* because such claims, by airing specific hazards of smoking, have the additional effect of promoting the explicit congressional purpose of warning the public of the dangers of smoking.¹⁹⁹

C. Compensatory Goals of Tort Law

The *Dewey* court makes much of the fact that state tort law has broader compensatory goals than federal law.²⁰⁰ Indeed, one of the foundational bases of tort law is the compensation of injured victims.²⁰¹ Furthermore, states have long taken an interest in compensating citizens who are injured by defective products.²⁰² Federal safety regulations as a rule are designed only to

¹⁹⁸ See *Dewey*, 121 N.J. at 90, 577 A.2d at 1249.

¹⁹⁹ The cigarette cases have arguably increased public awareness of possible deception on the part of the cigarette manufacturers. In a pretrial ruling in the *Cipollone* case, Judge Sarokin held that all discovery documents entered into evidence that could not be proven to be confidential were not protected from public disclosure. *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86, 87 (D.N.J. 1986). This ruling led to the dissemination of some potentially damaging documents concerning what the tobacco companies knew about the hazards of smoking and when they knew it. This ruling generated considerable media interest. Singer, *Cigarette Papers*, AM. LAW., May 1988, at 91, 93.

²⁰⁰ *Dewey*, 121 N.J. at 90-91, 577 A.2d at 1249-50.

²⁰¹ See H. STREET, THE LAW OF TORTS 4 (7th ed. 1983) ("[T]he essential aim of the law of torts is to compensate those who have suffered harm through the invasion of certain of their interests occasioned by the conduct of others.").

See, e.g., *Silkwood*, 464 U.S. at 263 (Blackmun, J., dissenting) ("[T]he purpose of compensatory damages is to compensate victims."); *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1540 (D.C. Cir.), cert. denied, 469 U.S. 1084 (1984) ("State tort law, in contrast [to federal law], may have broader compensatory goals . . ."); *Cipollone*, 593 F. Supp. at 1155 ("Indeed, compensation is the very purpose of tort liability in this state and elsewhere.").

See Stein, *supra* note 11, at 652 n.147. The author notes that state damage claims were viewed as having an impermissible regulatory impact when brought in an area governed by federal law in the 1950s, and were consequently preempted. However, throughout the 1980s, courts have considered the primary purpose of state tort law to be compensation of victims, distinct from the regulatory objective of federal statutes, and allowed such claims to proceed.

²⁰² See, e.g., *Ferebee*, 736 F.2d at 1542 ("The provision of tort remedies to compen-

deter conduct and prevent injury while doing nothing to make the victim whole.²⁰³

Indeed, as a matter of public policy, there is a strong argument that these tort claims should be preserved.²⁰⁴ It would be manifestly unfair to leave a plaintiff without means of seeking

sate for personal injuries 'is a subject matter of the kind [the] Court has traditionally regarded as properly within the scope of state superintendence . . . ' (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963)); *Feldman v. Lederle Laboratories*, 97 N.J. 429, 461, 479 A.2d 374, 390-91 (1984) ("[T]here is a strong state interest in compensating those who are injured by a manufacturer's defective products.").

²⁰³ See Kim, *supra* note 173, at 813. See also *Silkwood*, 464 U.S. at 263 (Blackmun, J., dissenting) ("[T]he Federal Government does not regulate the compensation of victims . . .").

²⁰⁴ The *Dewey* court's focus on the compensatory purpose of tort law works primarily as a policy argument, rather than a purely legal argument. In order to determine whether state law stands as an obstacle to the federal law in question, the court must examine "first the purposes of the federal law and second the effect of the operation of the state law on these purposes." *Fineberg v. Sullivan*, 634 F.2d 50, 63 (3d Cir. 1980) (emphasis supplied) (citing *Perez v. Campell*, 402 U.S. 637, 650-52 (1971)). As the district court in *Cipollone* conceded, the court, when addressing "actual conflict," is obligated to focus, not on the purpose of the state law but on the effect of the state law on the federal scheme. *Cipollone*, 593 F. Supp. at 1166 n.14. The effect of state law claims on the federal scheme is the same whether the articulated purpose of the claim be compensatory or regulatory; cigarette manufacturers will be faced with the same liability.

However, by that same token, the Fourth Circuit has expressly held that policy determinations play a major role in determining if the state law is preempted through actual conflict. *Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1113 (4th Cir. 1988). Accordingly, in *Abbot*, the court held that the Public Health Service Act, 42 U.S.C. §§ 201-300 (1981), and the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-392 (1986), and the FDA's regulation of prescription drugs did not preempt failure to warn claims against manufacturers of child vaccines.

Furthermore, several courts have specifically rejected the notion that the purpose behind the state law in question has no place in the *Hines* preemption calculus. A Texas appellate court addressing the cigarette preemption issue recently stated, "Although the purpose of a state law is not a major factor to be considered in deciding preemption questions, *Perez v. Campell*, 402 U.S. 637, 651-52 (1971), it cannot be ignored, *Pacific Gas & Electric*, 461 U.S. at 216." *Carlisle v. Philip Morris, Inc.*, 805 S.W.2d 498, 512 (1991). This statement is borne out by *Pacific Gas*. In *Pacific Gas*, the Court considered California's alleged economic rather than safety rationale for enacting a moratorium on the certification of new nuclear plants in determining whether the state moratorium was preempted by the AEA, (which gave the federal government control over the safety aspects of nuclear power). The Court accepted California's nonsafety rationale and ruled both that the state statute lay outside the federally occupied field of nuclear safety regulation and did not frustrate the federal goal of developing nuclear power as a source of energy. 461 U.S. 190, 216-23 (1983). The *Pacific Gas* Court distinguished *Perez*, implying that if there was not an absolute conflict between state and federal law, as there was in *Perez*, the Court would look at the purpose behind the state law in determining whether it was preempted. 461 U.S. at 216-17 n.28.

redress. The heavy presumption against preemption of state common law, which is heightened when the federal law does not provide for an adequate remedy, testifies to the important public policy considerations of victim compensation that come into play in any preemption analysis. By preempting state tort law in the cigarette cases, the courts abrogate the state's historic police power to redress the injuries of its citizens—a determination that requires a stronger showing of congressional intent to preempt than the circuit courts have supplied.

This policy argument is strengthened by the Supreme Court's well-documented hostility to leaving claimants without adequate legal remedies. Starting with *United Constr. Workers v. Laburnum Constr. Co.*,²⁰⁵ the Supreme Court has consistently refused to preempt state tort actions on the ground that a state has a historical interest in protecting the health of its citizens and because the Court is hesitant to deprive claimants of an adequate remedy.²⁰⁶ This reasoning has been reiterated recently in

²⁰⁵ 347 U.S. 656, 663-64 (1954) (the Court refused to preempt a tort action brought by an injured worker even though the tort in question also constituted an unfair labor practice for which certain administrative remedies were available under the Labor Management Relations Act of 1947).

²⁰⁶ See *Forster v. R.J. Reynolds Tobacco Co.*, 423 N.W.2d 691, 700 (Minn. App. 1988), *rev'd*, 437 N.W.2d 655 (Minn. 1989):

Laburnum is the first in a long line of labor cases in which the Supreme Court has refused to preempt state tort actions, notwithstanding comprehensive federal labor regulations, because of the state interest in promoting the health and welfare of its citizens and because of the lack of an alternative remedy. See, e.g., *International Union, United Automobile, Aircraft and Agricultural Implement Workers v. Russell*, 356 U.S. 634 (1958); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966); *Farmer v. United Brotherhood of Carpenters and Joiners of America*, 430 U.S. 290 (1977); *Sears Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978).

423 N.W.2d at 700.

But cf. *Palmer v. Liggett Group, Inc.*, 825 F.2d at 627. The *Palmer* court cited three cases for the proposition that the Supreme Court often leaves parties without remedies by finding state common law preempted. However, the reading the *Palmer* court gives these cases is decidedly strained.

In *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, the Supreme Court did hold that the Interstate Commerce Act (ICA) preempted a negligence cause of action against a regulated railroad, but the Court made quite clear that the claimant had adequate opportunity to plead his case through channels provided by the ICA. 450 U.S. 311 (1981). Indeed, Justice Marshall noted that the ICA "spells out with considerable provision the remedies available to a shipper who is injured." *Id.* at 321-22.

In *Farmers Union v. WDAY, Inc.*, the Court did hold in a 5-4 decision that the Federal Communications Act preempted a state libel claim against a radio station for statements made by a candidate for public office during a broadcast that the station was

Silkwood,²⁰⁷ *County of Oneida v. Oneida Indian Nation*²⁰⁸ and *International Paper Co. v. Ouellette*.²⁰⁹ Indeed, the Act has no remedial provision to compensate those allegedly injured through cigarette manufacturers' labeling or advertising policies, in effect leaving a vacuum filled by state law. In short, the *Dewey* court's compensation argument is buttressed by both policy and Supreme Court precedent.

required to air. 360 U.S. 525 (1959). However, the plaintiff in that case still had a litigable claim against the political candidate. In addition, Justice Frankfurter lambasted the majority's preemption finding as resting on "hypothesizing congressional acquiescence and by supposing 'conflicting' state law" and noted the "unfairness" in leaving the claimant without a remedy. *Id.* at 546. Justice Frankfurter's preemption views have prevailed in the more recent Supreme Court cases. See notes 163-88 *supra*.

In *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, the Court held that an environmental group which claimed they had suffered reasonably foreseeable injuries as a result of the erection of a nuclear power plant did have standing to challenge the Price-Anderson Act, which limited liability of nuclear facilities in the event of nuclear catastrophe. 438 U.S. 59 (1978). The Court eventually determined that the Price-Anderson Act did not violate the Due Process clause of the Fifth Amendment. The full context of the *Duke Power* cite reveals a significantly different meaning from the one gleaned by the *Palmer* court: "Initially it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme duplicate the recovery at common law or provide a reasonable substitute remedy. However, we need not resolve this question here, since the Price-Anderson Act does, in our view, provide a reasonably just substitute for the common-law or state tort law remedies it replaces." *Id.* 438 U.S. at 88. This is a far cry from saying that the "Supreme Court has often left parties without a remedy by finding state common law preempted." *Palmer*, 825 F.2d at 627.

²⁰⁷ 464 U.S. 238, 251 (1984). The fact that Congress did not expressly preempt state law "takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Id.*

²⁰⁸ 470 U.S. 226, 236-40 (1985). In *Oneida*, the Court held that an action under federal common law by Indian tribes against two New York counties for damages representing the fair rental value of land occupied by the counties was not preempted by the Non-Intercourse Act of 1793. See 1 Stat. 329, 330 (1793). In doing so, the Court rested much of its decision on the fact that the Non-Intercourse Act did not provide for remedies for Indians displaced from their land. *Oneida*, 470 U.S. at 237-38.

²⁰⁹ 479 U.S. 481 (1987). In *International Paper Co. v. Ouellette*, the Court held that a nuisance suit by Vermont landowners against a New York pulp and paper mill operator was preempted insofar as the action was based on Vermont law but also held that the claimants could bring a nuisance suit under the law of New York, the source of the pollution. The Court opined that the suit based on the affected state's law was preempted largely because the Clean Water Act represents an "all-encompassing program of water pollution regulation," which included its own remedial provisions. *Id.* at 492 (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981)). In preserving the claims of the Vermont property owners under New York law, the Court emphasized the importance of not leaving an injured party without a remedy. 479 U.S. at 497.

D. *The Act Does Not Expressly Preempt Tort Claims*

The *Dewey* court's stress on express preemption at the end of its analysis is very apt.²¹⁰ The most reliable indicator of what Congress intended to preempt is what it expressly preempted in the statute.²¹¹ In the cigarette cases, where all courts addressing the issue have agreed that Congress did not expressly preempt state tort claims in the Act, the lack of express preemption stands as strong evidence that Congress did not intend to preempt state common law claims at all. First, Congress can always expressly preempt state tort claims when it wants to,²¹² and has not infrequently done so in the past.²¹³ Second, where Congress was fully aware that failure to warn claims were pending against cigarette manufacturers at the time of the passage of the Act, the absence of a provision expressly preempting such claims takes on added significance, further suggesting that Congress did not intend to preempt such claims.²¹⁴ Third, where the subject matter at issue has generally been left to the states, the Supreme Court seems to attach great significance to the absence of language of express preemption in the federal statute or regulation. In *CTS v. Dynamics Corp. of America*, a case involving the validity of an Indiana corporate antitakeover law, the Court emphasized that the lack of a provision in the federal statute ex-

²¹⁰ *Dewey*, 121 N.J. at 93-94, 577 A.2d at 1251. See *Pacific Gas*, 461 U.S. 190, 203 (1983). Express preemption occurs when Congress expressly states in an act or its legislative history that it intends to preempt state law.

²¹¹ See *Forster v. R.J. Reynolds Tobacco Co.*, 423 N.W.2d 691, 696 (Minn. App. 1988), *rev'd*, 437 N.W.2d 655 (Minn. 1989) ("There is no more reliable indication of what Congress intended to preempt on a given subject than what it expressly preempted in the statute.").

Implied preemption, on the other hand, requires a less-than-precise attempt to uncover Congressional intent. See Tribe, *supra* note 136, at 788-89. Professor Tribe notes that there are "manifest dangers in trying to discern the tune when listening to the sounds of congressional silence."

²¹² *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 780 (1947) (Frankfurter, J., concurring) ("Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority . . .").

²¹³ See, e.g., Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. §§ 1715z-17(d), 1715z-18(e) (1983); Copyright Act of 1976, 17 U.S.C. § 301(a); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a) & (c)(1).

²¹⁴ *Cipollone*, 593 F. Supp. at 1161. See also *Pritchard v. Liggett & Meyers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961), *aff'd on rehearing*, 350 F.2d 479 (3d Cir. 1965), *cert. denied*, 382 U.S. 987 (1966), *modified*, 370 F.2d 95 (3d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967) (warranty of fitness for use and negligent failure to warn).

pressly preempting certain state antitakeover laws, an area usually left to the states, stood as evidence that Congress did not intend to preempt such state law.²¹⁵ Fourth, where Congress has expressly preempted state regulation, as it did in the Act, failure to expressly preempt state common law claims stands as additional evidence that Congress did not intend to preempt such claims.²¹⁶ When Congress does not expressly preempt state common law claims in a statute, the conclusion may therefore be drawn that it did not intend to preempt such claims.

The heightened presumption against preemption, together with the absence of a provision in the Act expressly preempting state damage actions and the Supreme Court's restrained interpretations of the "obstacle conflict" category of preemption mandate the conclusion that such claims are not preempted. Evidence that a remedial vacuum would be created if such state tort law claims were to be preempted further suggests that such claims should be preserved. The *Dewey* court was carefully observant of the presumption against preemption and the special deference afforded state law claims by the Supreme Court when conducting a preemption analysis, and it correctly held that such claims were not preempted. The circuit courts gave insufficient consideration to these concerns and erroneously held that the cigarette plaintiffs' claims were barred by the Act.

IV. THE CIGARETTE CASES HIGHLIGHT THE INADEQUACIES OF THE *Hines* DOCTRINE

While the *Dewey* court made a convincing case that inadequate warning claims do not stand as an obstacle to the Act, the preemption controversy in the cigarette cases, as a whole, accents the inherent flaws in the "obstacle" conflict test itself. The "obstacle conflict" category of preemption was first articulated by Justice Black in *Hines v. Davidowitz*,²¹⁷ where he noted that the Court's primary role in preemption cases is to determine

²¹⁵ 481 U.S. 69, 87 (1987) (holding that the Williams Act, regulations which govern corporate tender offers, did not preempt an Indiana Act aimed at tender offers, despite the fact that state law would delay the consummation of tender offers). The Court noted that "[t]he longstanding prevalence of state regulation in this area suggests that, if Congress had intended to pre-empt all state laws that delay the acquisition of voting control following a tender offer, it would have said so explicitly." *Id.*

²¹⁶ See *Forster*, 423 N.W.2d at 696.

²¹⁷ 312 U.S. 52, 67 (1941).

whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."²¹⁸ This doctrine has since become a standard in constitutional preemption analysis.²¹⁹ However, many commentators have criticized the doctrine, holding that it leaves courts too much discretion in construing both the congressional purposes behind the federal law and what would stand as an obstacle to those purposes and thus does not provide sufficient safeguards for state law.²²⁰ Some courts, vexed with the diaphanous nature

²¹⁸ *Id.* In *Hines*, the 6-3 majority concluded that a Pennsylvania law which imposed strict registration requirements on aliens was rendered invalid by the passage of the Federal Alien Registration Act of 1940, which provided for a one-time registration of aliens. The Court rested its preemption analysis on three bases: 1) the federal government has a dominant interest in immigration, *id.* at 68; 2) the federal statute set up a comprehensive scheme, a "single integrated and all-embracing system," *id.* at 74; and 3) the character of the obligations imposed by the federal law was to preserve rather than curtail the rights and liberties of aliens, making a finding of preemption easier, *id.* at 70. Underlying the Court's preemption analysis is a hostility to state laws that unequally burden aliens. The now-famous *Hines* preemption test ("[o]ur primary function is to determine whether . . . [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") was essentially dicta. *Id.* at 67. The Court based its preemption finding primarily on the three factors mentioned above rather than on the "obstacle conflict" test. Indeed, the "obstacle conflict" test engendered in *Hines* was unwarranted on the facts of the case.

In response, the dissent noted that the federal act did not in any way conflict with the state statutes. *Id.* at 78. The dissent also expounded a far more rigorous test for preemption: "an exercise by the state of its police power . . . is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be fairly reconciled or consistently stand together.'" (citing *Kelly v. Washington*, 302 U.S. 1, 10 (1938)). 312 U.S. at 80.

²¹⁹ See *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 220-21 (1983) ("It is well established that state law is pre-empted if it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"); *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

²²⁰ See, e.g., Rothschild, *A Proposed "Tonic" With Florida Lime to Celebrate Our New Federalism: How to Deal with the "Headache" of Preemption*, 38 U. MIAAMI L. REV. 829, 854 (1983). Professor Rothschild would dispose of the "obstacle conflict" analysis altogether, and replace it with the "physical impossibility" test as articulated in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963).

This Comment does not address whether the *Hines* test should be abandoned entirely, but merely suggests that the *Hines* test should not be applied when state common law claims are at issue. A coherent distinction can be made between state common law claims and state regulations in the preemption context. First, a tort claim does not have an absolutely ascertainable impact—it invites speculation surrounding its effect which a state regulation does not. Accordingly, in determining that a state law stands as an obstacle under the *Hines* test, a court is forced to speculate to a greater degree than it

of the *Hines* test, have implicitly called it into question.²²¹ The

would if a state regulation were at issue. Second, state tort law is compensatory in nature whereas state regulations generally are not. Courts, worried about creating a remedial vacuum, are hesitant to find that state tort law stands as an obstacle to federal law. See notes 200-09 and accompanying text *supra*. Third, common law claims are more preemption-resistant than state statutory or regulatory law because common law is often the result of long and careful judicial development. *Cipollone*, 593 F. Supp. at 1152; *Iconoco v. Jensen Constr. Co.*, 622 F.2d 1291, 1296 (8th Cir. 1980) (holding that a tort claim did not present an obstacle to the Small Business Act, 15 U.S.C. §§ 631-647 (1976), largely because of the overriding state interest, "historically, and deeply rooted in its common-law tradition," in redressing torts). Finally, and more important, unlike most state legislation, state tort law is an axiomatic part of the historic police powers of the states, powers that are afforded extra protection against preemption. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). There already being a heightened presumption against preemption where state common law is concerned, it is not too great an analytical leap to exempt tort law from "obstacle conflict" preemption altogether. See Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363 (1978).

²²¹ The *Dewey* court itself was obviously wary of the *Hines* "obstacle conflict" analysis. In outlining its approach to determine if there is an actual conflict, the court did not quote the usual language from the body of the *Hines* decision, but rather quoted from *Savage v. Jones*, 225 U.S. 501, 533 (1912), to which the *Hines* Court devoted a footnote. *Dewey*, 121 N.J. at 87, 577 A.2d at 1247. The language of *Savage*, that state law will only be preempted "[i]f the purpose of the [federal] act cannot otherwise be accomplished — [] its operation within its chosen field else must be frustrated and its provisions be refused and their natural effect," *Savage v. Jones*, 225 U.S. at 533, is certainly more qualified than the language of *Hines*, that state law will be preempted when it "stands as an obstacle to the accomplishment of [federal purposes]." *Hines*, 312 U.S. at 67. Second, the *Dewey* court emphasized that a potential or hypothetical conflict would not be sufficient to preempt state law. To this effect, the court quoted Justice Stone's dissenting opinion in *Hines*, where he cautioned against resting preemption on "vague inferences." *Hines*, 312 U.S. at 75. Finally, the court's conclusion that Congress could always have expressly preempted state common law was an implicit criticism of the *Hines* doctrine.

The Fourth Circuit, in *Abbot v. American Cyanamid Co.*, recognized that courts may be quite whimsical when engaged in a *Hines* analysis: "While preemption under a theory of express or implied preemption is essentially a matter of statutory construction, preemption under a frustration of federal purpose theory is more an exercise of policy choices by a court than strict statutory construction." 844 F.2d 1108, 1113 (4th Cir. 1988).

A restrained view of actual conflict preemption calling the *Hines* doctrine into question has also surfaced in Supreme Court decisions. In *Florida Lime & Avocado Growers, Inc. v. Paul*, the Court held that a California agricultural statute was not preempted by a federal statute touching on the same subject. 373 U.S. 132, 142-43 (1963). In doing so, the Court adopted and applied a new and more rigorous test for actual preemption, whether "compliance with both federal and state regulations is a physical impossibility," and found that both statutes could be complied with simultaneously. *Id.* Indeed, the adoption of the "physical impossibility" test seems to have been motivated by the Court's frustration with the *Hines* doctrine. *Id.* See Rothschild, *supra* note 220, at 857-58.

In *Jones v. Rath Packing Co.*, the Court held that a California statute which required flour packages to list the net weight without permitting variations for loss of

flaws in the doctrine have been thoroughly revealed in the cigarette cases, where the circuit courts have construed broadly both Congress's commerce protection goal and the effects of state tort claims on those goals, to the detriment of state tort law.²²² This Comment argues that the *Hines* doctrine should not be applied when state tort law is at issue. First, the *Hines* doctrine, by virtue of its very language, gives courts too little guidance in analyzing preemption cases.²²³ Second, the *Hines* doctrine does not require courts to give adequate recognition to the compensatory goals of tort law.²²⁴ Third, the *Hines* doctrine cannot easily be reconciled with the heightened presumption against preemption.²²⁵ In sum, the *Hines* doctrine should be abandoned by courts when determining whether state common law claims are preempted.

The *Hines* doctrine allows for entirely too much federal incursion on state common law. The operative language of *Hines*, "obstacle" and "full purposes of Congress"²²⁶ is very broad, giving courts little guidance.²²⁷ In determining whether state com-

moisture after packing, stood as an obstacle to the objective of the federal statute, which also required labels to list the net weight but allowed for variations due to moisture loss. 430 U.S. 519 (1977). In his dissent, Justice Rehnquist vociferously objected to the majority's expansive interpretation of the obstacle conflict doctrine stating that the majority "seriously misapprehends the carefully delimited nature of the doctrine of preemption." *Id.* at 549. His dissent makes reference to several stringent formulations of the actual conflict test, noticeably avoiding the *Hines* formulation. For instance, Justice Rehnquist cited *Kelly v. Washington*, 302 U.S. 1, 10 (1937), which held that the exercise of its police power by a state would be superseded by federal law "only where the repugnance or conflict is so 'direct and positive' that the two acts cannot be 'reconciled or consistently stand together.'" 430 U.S. at 518. Justice Rehnquist also quoted passages from *Savage*, 225 U.S. 501 (1912), 430 U.S. at 546, and *Goldstein v. California*, 412 U.S. 546, 554-55 (1973), 430 U.S. at 545, both to the effect that there must be a definite conflict between state and federal law that entirely frustrates the federal law before state law will be preempted. The proper inquiry according to Justice Rehnquist was "whether the two statutory schemes are in utter conflict." 430 U.S. at 544. In this case, Rehnquist discerned only a potential conflict between the California statute and the federal law, which was insufficient to preempt state law.

²²² See notes 79-98 and accompanying text *supra*.

The *Palmer* court's reformulation of the *Hines* test brings to light the inherent vagueness of the test: "If the state law disturbs too much the congressionally declared scheme . . . it will be displaced through the force of preemption." *Palmer*, 825 F.2d at 626.

²²³ See notes 226-31 and accompanying text *infra*.

²²⁴ See notes 232-36 and accompanying text *infra*.

²²⁵ See notes 237-40 and accompanying text *infra*.

²²⁶ *Hines*, 312 U.S. at 67.

²²⁷ See Comment, *Common Law Claims Challenging Adequacy of Cigarette Warn-*

mon law stands as an obstacle or frustrates congressional purposes, courts are virtually forced to proceed in an abstract fashion. If a court is antagonistic to the state law, it will be tempted to envisage potential situations in which state law will stand as an obstacle to federal law.²²⁸ In the cigarette cases, the circuit courts foresaw plaintiffs bringing a flood of failure to warn actions, forcing cigarette companies faced with massive liability to strengthen their warnings. While this scenario is conceivable, it is nonetheless hypothetical. To begin with, no plaintiff has yet won a suit against the cigarette manufacturers. Moreover, courts should note the large number of suits that would have to be successful before a manufacturer would feel compelled to change its warnings.²²⁹ It must also be taken into consideration that these suits would have to demonstrate that the labels mandated by the 1984 amendment to the Act were inadequate; merely proving the inadequacy of labels prior to 1984 would not force manufacturers to change their present labels. Furthermore, a manufacturer might not change its warnings if it were not cost-effective to do so.²³⁰ Finally, there is nothing in the Act barring manufacturers from independently strengthening their warnings.²³¹ Only successful tort actions that would force manufacturers to adopt a nonuniform labeling scheme, as opposed to a stronger nationally uniform labeling scheme, would impede the purposes behind the Act. The circuit courts rested their rulings on a worst-case scenario, a phenomenon to which the *Hines* doctrine lends itself. It is apparent that courts utilizing the *Hines* doctrine can and will transform hypothetical conflicts into actual conflicts.

Second, as the *Dewey* court intimated, courts applying the *Hines* test tend to overlook the compensatory goals of state tort law.²³² As the cigarette cases demonstrate, courts can view state tort claims as an obstacle under the *Hines* test solely because of those state tort claims' possible regulatory effects without giving

ings Preempted Under the Federal Cigarette Labeling and Advertising Act of 1965: *Cipollone v. Liggett Group, Inc.*, 60 *ST. JOHN'S L. REV.* 754, 767 (1986).

²²⁸ *Id.*

²²⁹ *Cipollone*, 593 F. Supp. at 1168 n.17. See also note 74 *supra*.

²³⁰ See *Garner*, *supra* note 33, at 1454.

²³¹ See *Dewey*, 121 N.J. at 90, 577 A.2d at 1249.

²³² *Dewey*, 121 N.J. at 90-91, 577 A.2d at 1249.

any consideration to the important purposes behind tort law.²³³ Affording an injured citizen a means of redress is a fundamental duty of a state;²³⁴ to abrogate that duty because the citizen's claim might stand as an obstacle to federal law is manifestly unfair to the state and the injured citizen. There is the distinct danger of creating a remedial vacuum if state tort law is preempted. As a matter of policy, the purposes behind the state tort law should be taken into account. Because the main purpose behind state tort law is compensation, and the main purpose behind federal law is regulation, the two ought to coexist in the absence of an "unambiguous mandate" to the contrary from Congress.²³⁵ Indeed, the other tests used by the Supreme Court to analyze preemption take into account the purpose behind the state law.²³⁶ Because the *Hines* test has a built-in blind spot regarding the compensatory goals of state tort law, it should not be utilized when analyzing whether such claims are to be preempted.

Finally, while the heightened presumption against preemption should, in theory, be sufficient to preserve most state common law claims peripherally at odds with federal law, the presumption has not held sway when courts utilize the *Hines* doctrine.²³⁷ The cigarette cases provide a glaring example of

²³³ See notes 79-98 and accompanying text *supra*.

²³⁴ See *Feldman v. Lederle Laboratories*, 97 N.J. 429, 461, 479 A.2d 374, 390-91 (1984).

²³⁵ Admittedly, when the federal law has remedial provisions, this policy argument has less force, because an injured party will be afforded a possibility to pursue a federal remedy.

The *Hines* doctrine, however, is not needed to ensure that federal laws with remedial provisions will retain their capacity to preempt state law. First, the presumption against preemption is not as strong when the federal government provides for an alternative remedy, making it easier for remedial federal laws to preempt state law. Second, in many instances where the federal law provides its own remedy, Congress has also "occupied the field" in that area, allowing courts to find preemption under an "occupy the field" rationale. See, e.g., *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 242-45 (1959).

²³⁶ See L. TRIBE, *supra* note 151, at 498 n.9 (noting that the Supreme Court takes into account the purposes behind the state law when considering federal occupation of the field). See also notes 244-47 *infra*.

²³⁷ For instance, a majority of the courts addressing whether tort claims based on failure to equip cars with air bags are preempted have held that such claims are preempted by federal law under the *Hines* test. See *Wood v. General Motors Corp.*, 865 F.2d 395, 400-02 (1st Cir. 1988) (claims based on failure to equip cars with passive restraints stand as an obstacle to the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431, and the Federal Motor Vehicle Safety Standards promulgated

courts only nominally recognizing the presumption against preemption—the presumption is brushed aside when the circuit courts engage in an “obstacle conflict” analysis. As mentioned in section IIIA of this Comment, the presumption against preemption is at its acme in the cigarette cases, and still the circuit courts glossed over the presumption.²³⁸ Indeed, the courts seem to have been seduced by the broad language of *Hines*, which makes preemption sound so easy, and to have forgotten about the caveat against preemption. Indeed, it is difficult to square the heightened presumption against preemption with the *Hines* “obstacle conflict” analysis in tort causes of action. Whereas the presumption compels the party arguing preemption to make a strong showing that Congress had a “clear and manifest” purpose to preempt state law,²³⁹ the “obstacle conflict” analysis places a seemingly much less onerous burden on the moving party—to demonstrate that state law would somehow stand as “an obstacle to the full purposes of Congress.”²⁴⁰ This irreconcilability with the presumption against preemption further warrants the abandonment of “obstacle conflict” analysis when state common law claims are at issue.

A. Other Categories of Preemption

The other tests typically invoked in preemption cases provide courts with more determinate frameworks than the *Hines* test for analyzing whether Congress intended to preempt state law.²⁴¹ Accordingly, they afford state law greater protection. One

under the Safety Act, 15 U.S.C. §§ 1391(2), 1392(a) (1982)).

²³⁸ See notes 150-62 and accompanying text *supra*.

²³⁹ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

²⁴⁰ *Hines*, 312 U.S. at 67.

²⁴¹ Supreme Court preemption cases usually contain some version of the following:

It is well established that within constitutional limits Congress may preempt state authority by so stating in express terms. Absent explicit pre-emptive language, Congress' intent to supercede state law altogether may be found from a “scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it,” because the ‘Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,’ or because ‘the object sought to be obtained by the federal law and the character of obligations imposed on it may reveal the same purpose.’” Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when “compliance with both federal

such test, enunciated in *Florida Lime & Avocado Growers, Inc. v. Paul*, is whether "compliance with both federal and state regulations is a physical impossibility."²⁴² This is essentially an objective test: where a party complying with state law necessarily breaches federal law or vice-versa, state law must be preempted. Under the *Florida Lime* test, it is clear that state tort actions would not be preempted by the Act because it is not physically impossible for a manufacturer to comply with the labeling statute and simultaneously pay tort damages.²⁴³ Another standard test is whether Congress intended to "occupy the field" in a given area to the exclusion of state law. Such intent may be inferred either if the federal interest in the area is dominant, or if there is a pervasive scheme of federal regulation in the area.²⁴⁴ The requirement that the federal interest in the specified area be dominant gives a court firm guidelines: There are a limited number of peculiarly national concerns.²⁴⁵ Determining whether the federal law is so pervasive as to preempt state law is somewhat less scientific.²⁴⁶ Nonetheless, the test protects state law to

and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983) (citations omitted).

²⁴² 373 U.S. 132, 142-43 (1963). The Court determined that a California regulation which prohibited avocados containing less than 8% oil by weight from being sold in the state was not preempted by a federal regulation that established different standards for the marketability of avocados, giving no significance to oil weight.

While the Court did cite the *Hines* test, the Court seemed to rest its decision solely on the ground that it was not "physically impossible" for a seller to comply with both the federal standard and the state oil-content standard. 373 U.S. at 141-42. See Rothchild, *supra* note 220, at 857 n.157.

Indeed, Rothchild has argued that, because it gives a clear, objective preemption guideline to courts, the *Florida Lime* test is the best available preemption test. *Id.*

²⁴³ *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1167 (1984).

²⁴⁴ The "dominant" federal interest and the "pervasive" federal scheme tests are both found in dictum in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (An "Act of Congress may touch a field in which federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.").

²⁴⁵ See Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 103 (1988) (suggesting that the level of federal interest in the law in question is an appropriate method of analyzing preemption in part because there are a manageable number of federal concerns).

²⁴⁶ This type of "occupation of the field" analysis has had its detractors. "Metaphor—'occupied the field'—has at times done service for close analysis." Bethlehem

a greater extent than does the *Hines* doctrine because it takes into account the purposes behind the state law, requiring courts to preserve state laws that have a different purpose from the federal law.²⁴⁷ Finally, Congress can expressly preempt state law.²⁴⁸ What Congress expressly preempts provides courts with the best indication of what Congress intended to preempt, giving courts the firmest grounds on which to rest their holdings.²⁴⁹

That these tests are more rigorous than the *Hines* test is apparent: None of the circuit courts found the inadequate warning claims preempted under these tests. But preemption doctrine is only as strong as its weakest link, the *Hines* doctrine. As long as the *Hines* doctrine remains a staple in the vocabulary of preemption, courts will always be able to exploit a flawed doctrine to invent grounds on which state law can be said to stand as an impermissible obstacle to federal law.

V. OTHER CONCERNS RAISED BY THE CIGARETTE CASES

This Comment, while applauding the *Dewey* decision and urging a modification of existing preemption doctrine to better safeguard state tort claims, does not overlook several practical considerations that undoubtedly influenced the circuit court opinions.²⁵⁰ First, it is questionable whether any of these ciga-

Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 782 (1947) (Frankfurter, J., concurring).

"Little aid can be derived from the vague and illusory but often repeated formula that Congress 'by occupying the field' has excluded from it all state legislation." *Hines v. Davidowitz*, 312 U.S. 52, 78 (1941) (Stone, J., dissenting).

Indeed, the pervasive federal scheme "occupation of the field" test may dissolve into question begging. Having determined that Congress intended to occupy the field, the court must next determine what the field encompasses. See *Cipollone*, 593 F. Supp. at 1164.

²⁴⁷ See *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 216 (1983) (discussed fully in notes 168-73 and accompanying text *supra*). The Court held that the state's purpose in enacting the regulation was the touchstone in determining whether the federal law occupied the field: if the state's purpose was not the same as the purpose behind the federal law, the state law would not be preempted. Thus, it seems that after *Pacific Gas*, whether a federal law occupies the field of state common law actions turns largely on whether the federal law sets up its own remedial scheme.

²⁴⁸ *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

²⁴⁹ See Wolfson, *supra* note 245, at 111-14 (noting that federal courts can best protect states' interests by requiring Congress to expressly preempt state law in most cases).

²⁵⁰ See Kim, *supra* note 173, at 827-28 (noting that the circuit courts' awareness of the assumption of risk defense and their concern about exposing the cigarette industry

rette injury suits could succeed on the merits.²⁵¹ Plaintiffs will have difficulties proving that the federally mandated warnings are inadequate.²⁵² There is also a strong argument that these plaintiffs assumed the risks of smoking.²⁵³ Second, there is the legitimate fear that, if successful, such claims would flood the courts and create judicial chaos.²⁵⁴ Finally, there is the related

to potentially enormous tort liability lay behind the preemption decision); Henderson & Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 321-22 (1990) (suggesting that the logical explanation behind the decisions in favor of preemption is that the courts feared that cigarette inadequate warning claims would overload the judicial system).

²⁵¹ See Crist & Majoras, *supra* note 2, at 582-602 (arguing that the tobacco plaintiffs' theories of liability are seriously defective as a matter of state law).

The district court in *Cipollone* conceded that it would be "extremely difficult for a plaintiff to prove that the present warning is inadequate." 593 F. Supp. at 1148. Similarly, the Minnesota Court of Appeals recognized that the plaintiffs' claims would be "difficult to prove." *Forster v. R.J. Reynolds Tobacco Co.*, 423 N.W.2d 691, 701 (Minn. App. 1988).

²⁵² *Forster*, 423 N.W.2d at 701.

²⁵³ The First Circuit noted that cigarette smoking is a "voluntary activity." *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 627 (1st Cir. 1987). The Sixth Circuit, in affirming a district court order directing a verdict in favor of R.J. Reynolds on plaintiffs' design defect claim, pointed out that the risks of smoking are "common knowledge." *Royedon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 236 (6th Cir. 1988).

See generally RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965), which provides in part: "... the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name assumption of risk, is a defense under this Section as in other cases of strict liability."

See also Note, *Tobacco Suits Today: Are Cigarette Plaintiffs Just Blowing Smoke?*, 23 U. RICH. L. REV. 257, 268 (1989) (noting that the assumption of risk defense is bolstered by the existence of warning labels); but cf. Note, *supra* note 33, at 810 (arguing that while cigarette litigation seems to offer the paradigmatic case for a successful plaintiff conduct defense, the doctrinal requirements of assumption of risk, specific knowledge of the risk and voluntariness, may not be met in these cases).

²⁵⁴ See *Palmer*, 825 F.2d at 627 (describing the procedural "confusion" that would be engendered if inadequate warning claims were allowed to proceed).

See also Henderson & Twerski, *supra* note 250, at 322 (maintaining that the courts are convinced that a flood of cigarette litigation will ensue if post-1965 claims are not preempted).

In addition, the specter of the asbestos litigation hovers over the cigarette cases. This fear of a replay of the asbestos litigation is all the more palpable considering that asbestos and cigarette manufacturers have, on many occasions, been co-defendants in cancer suits. See, e.g., *Gunsalus v. Celotex*, 674 F. Supp. 1149, 1151 (E.D. Pa. 1987) (plaintiff alleging that the synergistic effect of working with substantial amounts of asbestos and smoking cigarettes caused him to develop lung cancer). The asbestos crisis has succeeded in both backlogging the courts and bankrupting the industry. *Jenkins v. Raymark Indus.*, 782 F.2d 468, 470 (5th Cir. 1986). It is estimated that 21 million workers have been exposed to significant quantities of asbestos since 1940. Taking into ac-

concern that a string of victories for the plaintiffs in these cases could bankrupt the cigarette industry and wreak economic chaos.²⁵⁵

Existing preemption doctrine, however, should not be broadened to dispatch these troublesome claims.²⁵⁶ Rather, there are alternative means of curbing cigarette litigation if Congress or the states deem it necessary to do so—means that do not involve tampering with preemption doctrine or the principles of federalism. First, Congress can amend the Act and expressly preempt state tort claims.²⁵⁷ The Act has been amended before, in 1970 and 1984, and it can be amended again whenever Congress wills. Second, the states themselves can always curb cigarette litigation through legislative action. California, for instance, widely considered to be a leader in the development of product liability law,²⁵⁸ has effectively curtailed cigarette litiga-

count that there are currently 54 million smokers in the United States, the effect of a cigarette litigation crisis could overshadow the chaos engendered by the asbestos crisis. See Ausness, *supra* note 11, at 958-960.

²⁵⁵ See Ausness, *supra* note 11, at 956 (discussing the possible economic ramifications if cigarette companies are found liable in these cases).

The dissent in *Dewey* voiced concerns that plaintiffs might use offensive collateral estoppel to facilitate recovery in these actions, increasing the potential liability of cigarette manufacturers. *Dewey*, 121 N.J. at 102 n.3, 577 A.2d at 1259 n.3 (Antell, J., dissenting). Offensive collateral estoppel would preclude a defendant from relitigating issues decided against it in a previous suit. However, the courts will probably not allow plaintiffs to use offensive collateral estoppel in the cigarette cases, because issues litigated in earlier suits would not be identical to issues presented in the case at hand. Ausness, *supra* note 11, at 967-68.

²⁵⁶ Tribe, *supra* note 136, at 790. Professor Tribe spelled out the possible effects of the circuit courts' rulings:

It is the broadest ramifications of the Third Circuit's ruling which are the most ominous. That court's view of preemption has the burning force of a prairie fire and it is hard to see what structures of state compensation would survive the ensuing conflagration. Food, drugs, cosmetics and toxic substances are all governed in some manner by Federal warning laws. If innocent people are injured because of inadequate warnings, or because advertisements downplay the product's dangers, are all of them barred by Federal law from pursuing tort claims in state court? If so, the circuit court's ruling is cause for a knowing snicker in corporate board rooms across the country.

Id.

²⁵⁷ The amendment process gives Congress the final word on any preemption issue, allowing it to deal with potential litigation crises by expressly preempting state tort law. See Rothschild, *supra* note 220, at 858; Wolfson, *supra* note 245, at 103. This is entirely in keeping with dictum in *Dewey* which notes that the only true indication of what Congress intended to preempt is what Congress expressly preempted in the statute or regulation.

²⁵⁸ See Note, *The Product Liability Provision of the Civil Liability Reform Act of*

tion in the state through tort reform.²⁵⁹ Kansas, Louisiana, New Jersey, Ohio and Tennessee have also enacted laws that presumably bar some claims against cigarette manufacturers.²⁶⁰ Fur-

1987: *An Evaluation of Its Impact and Scope*, 62 S. CAL. L. REV. 1449, 1449 (1989).

²⁵⁹ CAL. CIV. CODE § 1714.45 (West Supp. 1989). Section 1714.45 provides:

(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 Restatement (Second) of Torts.

(b) For purposes of this section, the term "product liability action" means any injury or death caused by a product, except that the term does not include an action based on a manufacturing defect or breach of 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.*, 8 Cal. 3d 121 (1972), and shall apply to all product liability actions pending on, or commenced after, January 1, 1988.

In *American Tobacco v. Superior Ct.*, a California appellate court held that section 1714.45 gives cigarette manufacturers immunity from liability. 208 Cal. App. 3d 480, 486, 255 Cal. Rptr. 280, 282 (1989). The effect has been dramatic: while thirty-five suits were pending against tobacco defendants in California in 1986, that number stands at zero today. See Glick & Escher, *Personal Choice and Civil Code Section 1714.45: An Epilogue for California's Smoking and Health Litigation*, 25 CAL. W.L. REV. 239, 239 (1989); Levin, *Tobacco Industry Unharmful by Landmark Defeat in Smoker Death Case*, L.A. Times, Dec. 31, 1989, at A41, col. 1.

²⁶⁰ KAN. STAT. ANN. § 60-3305 (1981) provides:

In any product liability claim any duty on the part of the manufacturer or seller of the product to warn or protect against a danger or hazard which could or did arise in the use or misuse of such a product, and any duty to have properly instructed in the use of such product shall not extend:

(c) to warnings, protecting against or instructing with regard to dangers, hazards or risks which are patent, open or obvious and which should have been realized by a reasonable user or consumer of the product.

LA. REV. STAT. ANN. § 2800.57(B) (West 1988) provides:

A manufacturer is not required to provide an adequate warning about his product when:

(1) The product is not dangerous to an extent beyond that which would be contemplated by the ordinary user or handler of the product, with the ordinary knowledge common to the community as to the product's characteristics; or

(2) The user or handler of the product already knows or reasonably should be expected to know of the characteristic of the product that may cause damage and the danger of such characteristic.

N.J. STAT. ANN. § 2A:58C-3(a)2 (West 1987) provides in part:

In any product liability action against a manufacturer or seller for harm allegedly caused by a product that was designed in a defective manner, the manufacturer or seller shall not be liable if:

thermore, several states have judicially incorporated comment i of the Restatement (Second) of Torts Section 402A into their tort law, making it difficult for a plaintiff to bring a successful product liability action against cigarette manufacturers.²⁶¹ Allowing the states individually to determine whether to limit such tort claims is the solution to a possible cigarette litigation crisis most in keeping with the principles of federalism.²⁶²

CONCLUSION

On December 24, 1990, Brown & Williamson announced that it would not ask the United States Supreme Court to review the *Dewey* decision.²⁶³ However, four days later, the plaintiffs' attorneys in the *Cipollone* case filed a petition for certiorari, challenging the Third Circuit's findings that the Act preempts post-1965 cigarette injury claims based on failure to warn and intentional misrepresentation.²⁶⁴ Then, on March 1, 1991, in a turnabout, the tobacco company defendants in the *Ci-*

(2) The characteristics of the product are known to the ordinary consumer or user, and the harm caused by an unsafe aspect of the product that is an inherent characteristic of the product and that would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the class of persons for whom the product is intended

OHIO REV. CODE ANN. § 2307.76 (B) (Baldwin 1989) provides:

A product is not defective due to lack of warning or instruction or inadequate warning or instruction as a result of the failure of its manufacturer to warn or instruct about an open and obvious risk or a risk that is a matter of common knowledge.

TENN. CODE ANN. § 29-28-105(d) (1980) provides:

A product is not unreasonably dangerous because of failure to adequately warn of a danger or hazard that is apparent to the ordinary user.

²⁶¹ Tennessee, for instance, has judicially adopted comment i of the RESTATEMENT (SECOND) OF TORTS § 402A (1965). *Roysdon v. R.J. Reynolds*, 623 F. Supp. 1189, 1191 (D.C. Tenn. 1985), *aff'd*, 849 F.2d 230 (6th Cir. 1988). The *Roysdon* court accordingly directed a verdict on plaintiffs' design defect claim. *Id.*

²⁶² Tribe, *supra* note 136, at 790. Professor Tribe noted:

[I]t is true that such litigation is highly controversial. Like the cigarette cases, the food and drug cases have been criticized by some as excessive and wasteful. But in our Federal system, reform of litigious excesses should ordinarily come from the states. If state legislatures and courts decide to act to limit or constrain recovery, that is their prerogative. For a federal appellate court to draw a cloak of immunity over such cases is to overstep its place in our Federal scheme.

Id.

²⁶³ *Tobacco Company Won't Ask Review*, N.Y. Times, Dec. 25, 1990, at 45, col. 2.

²⁶⁴ 19 Prod. Safety & Liab. Rep. (BNA) 3 (Jan. 4, 1991).

pollone litigation filed a brief supporting the plaintiffs' petition for certiorari.²⁶⁵ In asking for Supreme Court review, both sides noted that the split between the New Jersey Supreme Court in *Dewey* and the Third Circuit in *Cipollone* subjected litigants in New Jersey to two conflicting standards depending on whether such claims were filed in state or federal court.²⁶⁶ On March 25, the Supreme Court granted certiorari.²⁶⁷ The Court is expected to issue a final decision in the spring of 1992.²⁶⁸ If the Court follows the trend it has set in its recent holdings in ruling on the merits, it should find, as the *Dewey* court did, that the Act does not preempt plaintiffs' post-1965 inadequate warning and intentional misrepresentation claims. It is also an opportunity for the Court to address the dangers inherent in the *Hines* doctrine.

Certainly a holding that the Act does not preempt failure to warn and intentional misrepresentation claims is not trouble-free. Cigarette injury claims are highly controversial to begin with, given the strong argument that many of these plaintiffs chose to smoke at their own risk. Nor do the courts want another asbestos crisis on their hands. However, a finding that such claims are preempted would have a far more damaging effect. Such a holding might well lead to the broadening of the preemption defense and a corresponding curtailment of the states' ability to fashion remedies for their injured citizens in many areas, such as food and drugs, which are governed in large part by federal warning laws. In the absence of a clear congressional intent to preempt such tort claims, injured citizens should

²⁶⁵ *Marcus & Lambert, Tobacco Liability Case Nears High Court*, Wall St. J., Mar. 4, 1991, at B6, col. 4.

²⁶⁶ *TOBACCO ON TRIAL*, Jan. 15, 1991, at 2 (noting that the plaintiffs' petition pointed out the direct conflict between the New Jersey Supreme Court and the Third Circuit on the preemption issue); *TOBACCO ON TRIAL*, Mar. 15, 1991, at 1 (noting that the tobacco companies agreed that the current situation in New Jersey is intolerable).

²⁶⁷ *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, cert. granted, 111 S. Ct. 1386 (1991).

The importance of the Supreme Court's decision to hear the case was not lost on the press. "This is the high court's first venture into a high-stakes controversy that will have enormous ramifications for the tobacco industry. If the tobacco companies win, the ruling will sharply limit the number of personal injury lawsuits filed by smokers or their families. If the smokers win, the decision may spark hundreds of lawsuits by smokers against tobacco firms." Wermeil, *Supreme Court Will Consider Tobacco Issue*, Wall St. J., Mar. 26, 1991, at A3, col. 1. The financial community also reacted sharply to the news as tobacco company stocks tumbled. *Id.*

²⁶⁸ Wermeil, *supra* note 267.

at least be given the opportunity to bring them. Any other result would fly in the face of the principles of federalism.

Sven Krogius