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Preemption of Recovery in Cigarette Litigation: Can Manufacturers be Sued for Failure to Warn Even Though They Have Complied with Federal Warning Requirements

Taylor A. Ewell

PREEMPTION OF RECOVERY IN CIGARETTE LITIGATION: CAN MANUFACTURERS BE SUED FOR FAILURE TO WARN EVEN THOUGH THEY HAVE COMPLIED WITH FEDERAL WARNING REQUIREMENTS?

> [There are] manifest dangers in trying to discern the tune when listening to the sounds of Congressional silence. . . . [T]he benefit of the doubt in our Federal system is tilted against Federal pre-emption of state law . . . .[1]

I. INTRODUCTION

During the past three years, consumers have filed hundreds of suits against cigarette manufacturers[2] under a variety of tort theories.[3] This wave of litigation represents the second major assault on cigarette companies in the past twenty-five years.[4] Aggregate losses due to potential suits could approach eighty billion dollars each year which, if passed to consumers, would triple the price of cigarettes to thirty dollars per car-

1. Tribe, *Federalism With Smoke and Mirrors*, THE NATION 788, 788-89 (June 7, 1986).

2. By October, 1985, 240 cases had been filed. Note, *Plaintiffs' Conduct as a Defense to Claims Against Cigarette Manufacturers*, 99 HARV. L. REV. 809, 809 n.1 (1986). Approximately 120 tobacco cases were on file as of December 1, 1986. Gidmark, *A Tobacco Case Activist Predicts Success by End of '87*, Nat'l L.J., Dec. 1, 1986, at 9, col. 2.

3. Note, *supra* note 2, at 809-10.

4. The first wave of litigation began in the late 1950's and continued through the 1960's. *Id.* at 809. Eleven cases generated opinions in the state and federal courts in the first wave of litigation: Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963); Hudson v. R.J. Reynolds Tobacco Co., 314 F.2d 776 (5th Cir. 1963), *after remand*, 427 F.2d 541 (5th Cir. 1970); Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962), *question certified on reh'g*, 154 So. 2d 169 (Fla.), *rev'd and remanded*, 325 F.2d 673 (5th Cir. 1963), *rev'd after remand*, 391 F.2d 97 (5th Cir. 1968), *rev'd on reh'g en banc*, 409 F.2d 1166 (5th Cir. 1969), *cert. denied*, 397 U.S. 911 (1970); Padovani v. Liggett & Myers Tobacco Co., 293 F.2d 546 (2d Cir. 1961); Cooper v. R.J. Reynolds Tobacco Co., 234 F.2d 170 (1st Cir. 1956), *on remand*, 158 F. Supp. 22 (D. Ma. 1957), *aff'd*, 256 F.2d 464 (1st Cir. 1958); Albright v. R.J. Reynolds Tobacco Co., 350 F. Supp. 341 (W.D. Pa. 1972), *aff'd mem.*, 485 F.2d 678 (3d Cir. 1973), *cert. denied*, 416 U.S. 951 (1974); Fine v. Philip Morris, Inc., 239 F. Supp 361 (S.D.N.Y. 1964); Mitchell v. American Tobacco Co., 183 F. Supp. 406 (M.D. Pa. 1960); Ross v. Philip Morris & Co., 164 F. Supp. 683 (W.D. Mo. 1958), *aff'd*, 328 F.2d 3 (8th Cir. 1964); Pritchard v. Liggett & Myers Tobacco Co., 134 F. Supp. 829 (W.D. Pa. 1955), *granting new trial*, 295 F.2d 292 (3d Cir. 1961), *after remand*, 350 F.2d 479 (3d Cir.), *cert. denied*, 382 U.S. 987 (1965), *modified*, 370 F.2d 95 (3d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967); Thayer v. Liggett & Myers Tobacco Co., Civ. No. 5314 (W.D. Mich. Feb. 19, 1970). *See* 1.1 TPLR 4.1 (undated citation as provided in the Tobacco Products Litigation Reporter which is available at the UCLA Law Library).

ton.[5] Yet, should actions for failure to warn adequately be preempted by federal legislation, consumers likely will be unable to pass smoking-related losses[6] to cigarette manufacturers since other tort theories of recovery have proven unsuccessful.[7]

In an opinion resulting from an interlocutory appeal, the Court of Appeal for the Third Circuit held that the Federal Cigarette Labeling and Advertising Act (1965 Act),[8] as amended (Act),[9] preempted plaintiff's common-law claims which alleged that cigarette manufacturers have failed to warn adequately of hazards associated with cigarette smoking.[10] This unanimous decision by Circuit Judges Hunter and Sloviter and District Judge Giles overturned a 1984 district court ruling that plaintiff's claims were not preempted by the federal statute.[11] District courts in four other circuits have disagreed on whether common-law tort claims against cigarette companies for failure to warn are preempted by federal labeling legislation.[12]

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5. Tribe, *supra* note 1, at 788.

6. These losses have been estimated for 1986 at fifty billion dollars in health care costs and lost productivity. U.S. DEP'T OF HEALTH AND HUMAN SERV., SMOKING AND HEALTH: A NAT'L STATUS REPORT 7 (1986).

7. Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423, 1425 (1980). "[W]hen . . . injuries have been caused by indigenous components of tobacco smoke, defense counsel for the cigarette industry have compiled a twenty year record of unbroken court victories." *Id.* (footnote omitted); *see also* 1.1 TPLR 4.1. Recently, a California jury voted nine to three against holding R.J. Reynolds Tobacco Co. liable in the death of a lifelong smoker for failing to warn that cigarettes are clinically addictive. The jurors indicated that causation had not been established, and they remained unconvinced that smoking was addictive. *See* Kepko, *Products Liability—Can It Kick The Smoking Habit*, 19 AKRON L. REV. 269, 290 (1985) (discussing Galbraith v. R.J. Reynolds Tobacco Co., No. 144417 (Cal. Super. Ct. Dec. 23, 1985)).

8. Pub. L. No. 89-92, 79 Stat. 282 (1965).

9. Legislation is codified at 15 U.S.C.A. § 1331-1341 (Supp. 1986) and includes the following subsequent enactments: Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970); Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200 (1984). The Public Health Cigarette Smoking Act of 1969 (1969 Act) enacted § 1340, enacted provisions set out as notes in §§ 1331, 1333, and 1334, and amended §§ 1331-1339 of Title 15. 15 U.S.C.A. § 1331 hist. note (1982). The Comprehensive Smoking Education Act (1984 Act) enacted §§ 1335(a) and 1341, enacted provisions set out as notes in §§ 1331, 1333, and 1335(a), and amended §§ 1331-1333, 1336, and 1337 of Title 15. 15 U.S.C.A. § 1331 note (Supp. 1986). This combined legislation will hereinafter be referred to as the Act. Further amendments to the Federal Cigarette Labeling and Advertising Act, Pub. L. No. 93-109, 87 Stat. 352 (1973); Pub. L. No. 99-92, 99 Stat. 402 (1985); and Pub. L. No. 99-117, 99 Stat. 495 (1985), are not pertinent to this discussion.

10. Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986).

11. Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146, 1148 (D.N.J. 1984), *rev'd on interlocutory appeal and remanded*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 55 U.S.L.W. 3474 (U.S. Jan. 13, 1987) (No. 86-563).

12. A district court within the Fourth Circuit followed the district court *Cipollone* opinion, finding it "well-reasoned and instructive." Haight v. American Tobacco Co., No. 84-2232

This Comment considers preemption as it applies to common-law tort claims against cigarette companies for failure to warn adequately of the hazards of smoking. Part II will discuss the doctrine of preemption generally and outline the twenty-two year legislative history of the Act as it relates to the preemption issue. It will then set forth the tests four courts have applied to decide whether plaintiffs' failure-to-warn claims are preempted in cigarette cases. Part III will analyze the courts' reasoning and Congress' intent with regard to this issue. Finally, this Comment will propose alternative judicial and legislative solutions and present several policy considerations.

II. LEGAL BACKGROUND

A. The Doctrine of Preemption

The doctrine of preemption, which arises from the constitutional mandate of supremacy,[13] was first articulated in 1824 by United States Supreme Court Chief Justice Marshall:

> The nullity of any act, inconsistent with the constitution, is produced by the declaration, that the constitution is the supreme law. The appropriate application . . . is to such acts of the State Legislatures . . . [as] interfere with, or are contrary to, the laws of Congress . . . . In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.[14]

Thus, when state and federal laws directly conflict, federal law prevails;

(S.D.W.V. Dec. 26, 1984), *reprinted in* 1.2 TPLR 2.52, 2.59. A district court in the Sixth Circuit held that the common-law claim of failure to warn was incompatible with, and therefore preempted by, the Act. Roysdon v. R.J. Reynolds Tobacco Co., 623 F. Supp. 1189, 1190 (E.D. Tenn. 1985), *appeal filed*, No. 86-5072 (6th Cir. Jan. 20, 1986). A district court in the First Circuit held against preemption of similar claims. Palmer v. Liggett Group, Inc., 633 F. Supp. 1171 (D. Mass. 1986), *interlocutory appeal filed*, No. 86-8019 (1st Cir. June 4, 1986). A district court in the Eleventh Circuit expressly relied on the reasoning of the Third Circuit decision in *Cipollone* to find preemption. Stephen v. American Brands, Inc., No. PCA 86-4004-RV (N.D. Fla. Aug. 7, 1986), *reprinted in* 1.9 TPLR 2.203, 2.204. A New York state court followed the reasoning in the district court opinions of *Cipollone*, *Haight*, and *Palmer* to repudiate the logic of the Third Circuit and find against preemption. Montana v. R.J. Reynolds Tobacco Co., No. 79850 (N.Y. Sup. Ct. Oct. 9, 1986), *reprinted in* 1.10 TPLR 2.229.

13. Article six, clause two of the United States Constitution, commonly referred to as the supremacy clause, states:

> 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.

U.S. CONST. art. VI, cl. 2.

14. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210-11 (1824).

however, when actual conflict is absent, the appropriate resolution is less obvious.[15] When Congress has not expressly forbidden parallel legislation in an area the state attempts to regulate, the judiciary will interpret congressional intent.[16] Courts may find a state law impliedly preempted when that law interferes with federal objectives or impairs federal superintendence of the field.[17]

> [S]tate law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.[18]

Complicating the issue is another fundamental constitutional concept. There is a "preference in our Federal system for state governments to have broad powers to make and change their legal policies,"[19] and a presumption against preemption which is created by concerns of federalism.[20] State governments have a general police power to protect the health, safety, welfare or morals of their citizens. This power is limited only by the federal constitutional checks on state powers and is otherwise independent of federal scrutiny.[21] The maintenance of dual sovereignty requires a strong presumption that state police powers are not to be superseded by federal legislation unless that is the clear and manifest purpose of Congress in passing a particular law.[22] This "presumption against preemption . . . is strengthened where preemption would leave a putative plaintiff without adequate remedy for violation of his or her state created rights."[23] Yet if these presumptions can be overcome, con-

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15. Tribe, *supra* note 1, at 788.

16. Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 224 (1959). "[T]he Court and only the Court can make the final judgment of incompatibility required by the supremacy clause." *Id.*

17. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 292-93 (2d ed. 1983).

18. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (citations omitted).

19. Tribe, *supra* note 1, at 788. "State courts are the final interpreters of state law even though their actions are reviewable under the federal constitution, treaties, or laws." J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 17, at 20.

20. Maryland v. Louisiana, 451 U.S. 725, 746 (1981); City of Milwaukee v. Illinois, 451 U.S. 304, 316 (1981).

21. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 17, at 121.

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

23. Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146, 1153 (D.N.J. 1984), *rev'd on*

flicts created by the state judiciary are prohibited no less than conflicts created by state legislative and executive branches. "[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be a potent method of governing conduct and controlling policy."[24] Since regulation through monetary damages is one of two issues critical to a finding of preemption of common-law tort claims for failure to warn under the Act, this issue will be discussed more thoroughly in Part III of this Comment.

1. Express preemption

The supremacy clause precludes state action when state regulation has been expressly forbidden by federal legislation. When federal law prohibits a specific act which state law requires, the state law is considered to be expressly preempted.[25] Moreover, Congress may prohibit parallel state legislation.[26] Yet in the heat of controversy, Congress rarely articulates an intent to affect state regulation,[27] and it remains for courts to interpret and effectuate the purposes of Congress.[28] No court has held that federal legislation expressly preempts state common-law tort claims against cigarette companies for failure to warn.[29]

2. Implied preemption

State regulation is impliedly preempted when the federal government intends to "occupy the field" which a state seeks to regulate or when federal and state regulations "actually conflict."

a. occupation of the field

The United States Supreme Court has found that state laws are preempted by federal occupation of the field when either of two conditions exist: a pervasive federal regulatory scheme or a federal need for national

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interlocutory appeal and remanded, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 55 U.S.L.W. 3474 (U.S. Jan. 13, 1987) (No. 86-563); *accord Silkwood*, 464 U.S. at 251.

24. *Cipollone*, 593 F. Supp. at 1151 (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959)). Judge Sarokin listed twenty cases in which federal statutes have preempted state common law in a variety of areas. *Id.* at 1152.

25. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 17, at 292.

26. *Id.* at 292 n.2.

27. Note, *supra* note 16, at 209.

28. *See supra* note 16 and accompanying text; *see also* Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982).

29. *See infra* text accompanying notes 124-93.

uniformity.[30]

The Court often cites *Rice v. Santa Fe Elevator Corp.*[31] to illustrate occupation of the field. In *Rice*, Congress legislated the licensing of grain warehouses, an area of commerce which state regulation traditionally had occupied.[32] The Court began its analysis with the presumption that, even though Congress had the authority to regulate in this area, state regulation was not preempted absent clear and manifest congressional intent.[33]

The *Rice* Court held that congressional intent could be inferred from the pervasiveness of the regulation, the dominance of the federal interest, a federal purpose parallel with that of the state regulation or state policy which would lead to results inconsistent with federal objectives.[34] The Court found that Congress had acted so unequivocally as to make clear that it intended no regulation except its own:

> [A]s we read the Act, Congress in effect said that the policy which it adopted in each of the nine [matters] was exclusive of all others; and that if a licensed warehouseman complied with each requirement, he did all that he need do. He could not be required by a State to do more or additional things or conform to added regulations, even though they in no way conflicted with what was demanded of him under the Federal Act. . . .
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> . . . .
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> The test, therefore, is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State.[35]

In 1961, the Supreme Court held that federal legislation creating a uniform standard for grading tobacco sold at auction preempted supplementary state regulations.[36] In *Campbell v. Hussey*, the Court held that a Georgia statute which supplemented federal labeling of tobacco for auction by requiring an additional tag for "Type 14" tobacco was preempted

30. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 17, at 293. Chief Justice Warren announced this test for implied preemption in Pennsylvania v. Nelson, 350 U.S. 497, 502-05 (1956).

31. 331 U.S. 218 (1947).

32. *Id.* at 229-30.

33. *Id.* at 230.

34. *Id.*

35. *Id.* at 235-36.

36. Campbell v. Hussey, 368 U.S. 297, 301 (1961).

by the federal legislation.[37] The Court found preemptive congressional intent in language of the federal statute which expressly required a "uniform standard" for grading tobacco.[38] Additionally, a congressional report which reviewed the harm to growers "that resulted from the absence of regulations governing the 'grades' of tobacco sold in the auction market,"[39] supported a finding of preemption. Since the legislative purpose was to ensure standard grading, "complementary state regulation [was] as fatal as state regulations which conflict[ed] with the federal scheme."[40] Congress had intended to occupy the field, and parallel state legislation was not enforceable.

The Court has not always distinguished occupation of the field from other theories of preemption. This mixture of analysis is illustrated in *Fidelity Federal Savings & Loan Association v. de la Cuesta*.[41] In *Fidelity*, the Court held that a federal regulation which permitted federal savings and loan associations to use "due-on-sale" clauses in their mortgage contracts preempted a contrary California rule.[42] The California Supreme Court had limited a federal association's right to exercise a due-on-sale provision to instances where the lender could show that the transfer impaired its security.[43] The Court held that "[b]y further limiting the availability of an option the [Federal Home Loan Bank] Board considers essential to the economic soundness of the thrift industry, the State has

37. *Id.* at 300.

38. In 1935, Congress enacted the Tobacco Inspection Act, ch. 623, 49 Stat. 731 (1935) (codified at 7 U.S.C. § 511 (1980)). This act's declaration of purpose provided:

> [T]he classification of tobacco according to type, grade, and other characteristics affects the prices received therefor by producers; without *uniform standards* of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation, and control, and unreasonable fluctuations in prices and quality determinations occur which are detrimental to producers and persons handling tobacco in commerce; such fluctuations constitute a burden upon commerce and make the use of *uniform standards* of classification and inspection imperative for the protection of producers and others engaged in commerce and the public interest therein.

7 U.S.C. § 511a (1980), *quoted in Campbell*, 331 U.S. at 299 (emphasis added).

39. *Campbell*, 331 U.S. at 301 (quoting H.R. REP. NO. 1102, 74th Cong., 1st Sess. 1 (1935)).

40. *Id.* at 302 (citations omitted).

41. 458 U.S. 141 (1982).

42. *Id.* at 170.

43. *Id.* at 154-55. A due-on-sale clause is a "contractual provision that permits the lender to declare the entire balance of the loan immediately due and payable if the property securing the loan is sold or otherwise transferred." *Id.* at 145 (footnote omitted). The California Supreme Court had held that Bank of America's exercise of the due-on-sale clause violated California's prohibition of unreasonable restraints on alienation "unless the lender [could] demonstrate that enforcement [was] reasonably necessary to protect against impairment to its security or the risk of default." Wellenkamp v. Bank of America, 21 Cal. 3d 943, 953, 582 P.2d 970, 977, 148 Cal. Rptr. 379, 386 (1978).

created 'an obstacle to the accomplishment and execution of the full purposes and objectives' of the due-on-sale regulation."[44]

The latter analysis is typically used to find preemption based on conflict between state and federal regulation, not federal occupation of the field.[45]

> The *conflict* does not evaporate because the Board's regulation simply permits, but does not compel, federal savings and loans to include due-on-sale clauses in their contracts and to enforce those provisions when the security property is transferred. . . . [T]he California courts have forbidden a federal savings and loan to enforce a due-on-sale clause solely "at its option" and have deprived the lender of the "flexibility" given it by the Board.[46]

Furthermore, the Court seemed to hold that conflicting state law was expressly preempted by the regulation of the Board.[47]

Thus, although *Fidelity* is considered to be a case which illustrates preemption through occupation of the field, the Court reached its conclusion by combining several preemption theories. Implicit in *Fidelity*, however, is the pervasiveness of the Board's regulation. "In the preamble accompanying final publication of the due-on-sale regulation, the Board explained its intent that the due-on-sale practices of federal savings and loans be governed 'exclusively by Federal law.' "[48]

Thus, occupation of the field is a judicially-created test which determines whether the unexpressed intent of Congress was to regulate an area exclusively. Preemption will be found under this test based on: (1) the pervasiveness of the regulation; (2) the dominance of the federal interest; or (3) a federal purpose parallel with that of the state regulation.[49] When occupation of the field is found, any state regulation, even one which merely supplements the federal regulation, is preempted. The judicial outcome is typically dependent upon how the field is defined. As

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44. *Fidelity*, 458 U.S. at 156 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

45. *Id.* at 153.

46. *Id.* at 155 (emphasis added).

47. *Id.*

48. *Id.* at 147 (citation omitted).

49. *See supra* text accompanying note 34. The Court has been reluctant to hold the third test to be a sufficient condition for a finding of preemption. "This Court has, on the one hand, sustained state statutes having objectives virtually identical to those of federal regulations, . . . and has, on the other hand, struck down state statutes where the respective purposes were quite dissimilar." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963) (citations omitted).

applied to cigarette litigation, no court has found that Congress intended to occupy the field of cigarette labeling.

b. conflict with federal regulation

A second implied preemption test with which the Supreme Court has construed congressional intent focuses on whether federal legislation and state regulation conflict in actuality. The Court has found actual conflict when compliance with both state and federal regulation was physically impossible or, alternatively, when state regulation frustrated the congressional purpose.[50]

When the preemption test is a physical impossibility, the Court has cited[51] *Florida Lime & Avocado Growers, Inc. v. Paul*.[52] The preemption issue in *Paul* was whether California could apply a California statute to exclude Florida avocados from California markets on the basis of a high oil content which nonetheless was acceptable under a federal marketing order.[53] The Court held that while the California statute and the federal marketing order provided for different minimum levels of oil in the avocados, no actual conflict existed between the two regulatory schemes.[54] "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives."[55]

The *Paul* Court found, first, that the maturity of avocados traditionally had been regarded as within the scope of state interests.[56] Second, the Court reasoned, "[f]ederal regulation by means of minimum standards . . . however comprehensive *for those purposes* [picking, processing, and transportation of agricultural commodities] that regulation may be, does not . . . import displacement of state control over the distribution and retail sale of those commodities in the interests of the *consumers* of the commodities . . . ."[57] The Court held that absent the express com-

50. *See supra* text accompanying note 18.

51. *See Silkwood*, 464 U.S. at 248. *Accord* Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978).

52. 373 U.S. 132 (1963).

53. *Paul*, 373 U.S. at 134-35. The federal marketing regulation was promulgated by the Secretary of Agriculture pursuant to power given him by the Agricultural Adjustment Act: "to establish and maintain . . . such minimum standards of quality and maturity . . . as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest." *Paul*, 373 U.S. at 138 (quoting 7 U.S.C. § 602(3) (1980)).

54. *Id.* at 141.

55. *Id.* at 142.

56. *Id.* at 144.

57. *Id.* at 145 (emphasis in original).

mand of Congress, a state could impose standards higher than those federally required for export on products imported from other states.[58] Since the congressional design was deemed by the Court to promote regional cooperation between farmers and growers, and not to affect the distribution and sale of produce, traditional state power was not preempted.[59]

The Court has found actual conflict when state regulation "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."[60] Frustration of congressional purpose has formed the basis upon which several courts have found failure-to-warn claims against cigarette companies preempted by the Act. In *Hines v. Davidowitz*,[61] the Court stated "[t]here is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress."[62] Commentators have cited *Hines* to represent occupation of the field,[63] but the Supreme Court has generally cited the case to represent preemption based on frustration of congressional purpose.[64] The *Hines* Court itself did not distinguish occupation of the field from a list of expressions synonymous with conflict. "This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference."[65] Since language is the foundation of analysis, the blending of words which describe two distinct theories of preemption may have concomitantly blurred the analytical line between frustration of congressional purpose and occupation of the field.

In *Hines*, the question before the Court was whether the State of Pennsylvania could enforce its Alien Registration Act when a federal Alien Registration Act regulated identical subject matter.[66] The Court did not decide whether Congress had exclusive power to regulate;[67] instead, it found that the federal government had enacted a complete

58. *Id.*
59. *Id.* at 150.
60. *See supra* text accompanying note 18.
61. 312 U.S. 52 (1941).
62. *Id.* at 67.
63. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 17, at 293.
64. *Silkwood*, 464 U.S. at 248. *Accord Ray*, 435 U.S. at 158.
65. *Hines*, 312 U.S. at 67 (footnote omitted).
66. *Id.* at 60-61.
67. *Id.* at 62.

scheme of regulation in the field.[68] Thus, the states may not "conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations."[69] The *Hines* Court established a broad test of whether state law violates the intent of Congress.[70] "Our primary function is to determine whether . . . Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[71] The Court held that three factors were important in determining whether federal enactments precluded enforcement of state regulation: (1) the nature of the power exerted by Congress; (2) the object sought to be obtained; and (3) the character of the obligation imposed by the law.[72]

While the Court provided a test which indicated preemption based on conflict, the language used strongly indicates occupation of the field:

> Having the constitutional authority so to do, [Congress] has provided a standard for alien registration in a *single integrated and all-embracing system* in order to obtain the information deemed to be desirable in connection with aliens . . . . [I]t plainly manifested a purpose to . . . protect the personal liberties of law-abiding aliens through *one uniform national registration system*, and to leave them free from the possibility of inquisitorial practices and police surveillance that might not only affect our international relations but might also generate the very disloyalty which the law has intended guarding against. Under these circumstances, the Pennsylvania Act cannot be enforced.[73]

If the *Hines* Court had found that Congress intended to occupy the field, it most likely would have held that the federal government had the exclusive power to regulate alien registration.[74]

Maintaining a principled distinction between frustration of purpose and occupation of the field is crucial to the issue of preemption in cigarette litigation. If Congress intended to occupy the field of cigarette labeling, the courts might agree that common-law tort claims against

68. *Id.* at 66, 69-70.

69. *Id.* at 66-67 (footnote omitted).

70. *Id.* at 67.

71. *Id.* (footnote omitted).

72. *Id.* at 68. The Court distinguished between congressional power used to further "rights, liberties, and personal freedoms of human beings, and . . . state pure food laws regulating the labels on cans." *Id.* The Court held that states were not preempted from regulating labels on cans when Congress could have regulated them, but had not. *See id.* at 68 n.22.

73. *Id.* at 74 (emphasis added).

74. *See supra* text accompanying note 40.

cigarette companies for failure to warn are an infringement on the federal prerogative. Yet, no court has held that Congress so intended.

More recent Supreme Court decisions indicate that the Court is not eager to presume or infer congressional intent, and will refuse to do so absent "persuasive reasons evidencing congressional intent favoring preemption . . . ."[75] Whether federal preemption is based on the express mandate of Congress, the judicial interpretation of Congress' intent through its occupation of the field, or the conflict of state and federal law, the doctrine of preemption inevitably requires that the Court interpret a federal statute. This Comment will now outline the twenty-two year legislative history of the Federal Cigarette Labeling and Advertising Act as it relates to the preemption issue.

B. Legislative History

The Federal Cigarette Labeling and Advertising Act (1965 Act)[76] took effect on January 1, 1966,[77] and terminated on July 1, 1969.[78] The Act was Congress' response to the Surgeon General's landmark 1964 report which stated, "Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action."[79] The principal purpose of the bill was to "provide adequate warning to the public of the potential hazards of cigarette smoking."[80] The 1965 Act statement of policy, which has not been subsequently amended, states:

> DECLARATION OF POLICY
>
> Sec. 2. It is the policy of the Congress, and the purpose of the Act, to establish a comprehensive Federal program to deal with 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 that effect on each package of cigarettes; and

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75. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 17, at 295.

76. Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-1339 (Supp. III 1985)).

77. *Id.* § 11, 79 Stat. 284.

78. *Id.* § 10, 79 Stat. 284.

79. 1965 U.S. CODE CONG. & ADMIN. NEWS 2350, 2351.

80. *Id.* at 2350. The Department of Health, Education and Welfare reported that labeling should "neither mislead nor fail to give the consumer the information concerning the product that he needs in order to make an informed decision." *Id.* at 2357. "Such cautionary statement should . . . not be weakened in its impact . . . ." S. REP. NO. 195, 89th Cong., 1st Sess. 4 (1965).

> (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.[81]

Balancing the right to choose to smoke with the right to know of health hazards,[82] Congress specified a compulsory warning to be carried on each package of cigarettes manufactured, imported, or packaged for sale in the United States.[83] Further, Congress provided an express preemption clause:

> (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.
>
> (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.[84]

At that time, as expressed in the Interstate and Foreign Commerce Committee's report to Congress, Congress was concerned with preempting only the executive branches of state and local governments.[85] The primary congressional concern was that cigarette labeling be shielded from state and local authorities seeking to protect the health of their citizens by mandating a more stringent warning through an exercise of their traditional police powers.[86] Furthermore, congressional debate prior to

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81. 15 U.S.C.A. § 1331 (1982).

82. 1965 U.S. CODE CONG. & ADMIN. NEWS 2350, 2352.

83. The 1965 Act provided that:

> It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: "Caution: Cigarette Smoking May be Hazardous to Your Health." Such statement shall be located in a conspicuous place on every cigarette package and shall appear in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the package.

Pub. L. No. 89-92, § 4, 79 Stat. 283.

84. *Id.* § 5, 79 Stat. 283.

85. This inference may be drawn from the concerns stated by Rep. John E. Moss of Utah:

> Should the Congress pass . . . [the Act] as recommended in the majority report of the committee, it would in effect make a "sacred cow" out of the cigarette industry in U.S. commerce by shielding this industry from any future requirements concerning health warnings in tobacco advertisements which might be otherwise imposed by Federal, State, or local authorities.

1965 U.S. CODE CONG. & ADMIN. NEWS 2350, 2365. The "authorities" referred to were the "traditional guardians of public health" which would not be able to "protect their citizens if they believe a warning statement in cigarette advertising would do so." *Id.* at 2366.

86. *Id.* at 2366. Rep. Moss further stated, "I cannot conceive of any sound reason why the

the passage of the 1965 Act recognized the continued existence of common-law products liability cases, and the negative effect which the required warnings might have on a plaintiff's cause of action for failure to warn.[87]

When the 1965 Act expired, Congress replaced it with the Public Health Cigarette Smoking Act of 1969 (1969 Act).[88] Acting in the face of reports that the first label had been ineffective[89] and that a stronger message was needed,[90] Congress strengthened the requisite label to state "Warning: The Surgeon General has Determined That Cigarette Smoking is Dangerous to Your Health."[91] Preceding passage of the 1969 Act, more than ninety House members had either introduced or cosponsored bills dealing with cigarette labeling and advertising and almost all had sought stronger label warnings.[92] Further, the 1969 Act prohibited television and radio broadcasting of cigarette advertising on or after January 1, 1971.[93]

While the Declaration of Policy remained unchanged,[94] Congress amended the second paragraph of the preemption section to read "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 the Act."[95] The preemption clause, section 5, was retroactively effective July 1, 1969, in order to insure that "no State or local law

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sale and advertising of cigarettes should be granted Federal protection from States and local regulations which are more stringent than Federal Regulations." *Id.*

87. Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146, 1162-63 (D.N.J. 1984), *rev'd on interlocutory appeal and remanded*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 55 U.S.L.W. 3474 (U.S. Jan. 13, 1987) (No. 86-563).

88. Pub. L. No. 91-222, 84 Stat. 87 (1970) (codified as amended at 15 U.S.C. §§ 1331-1340 (Supp. III 1985)).

89. The Federal Trade Commission (FTC) reported in 1967 that "[t]here is virtually no evidence that the warning statement on cigarette packages has had any significant effect." 1970 U.S. CODE CONG. & ADMIN. NEWS 2655.

90. A 1968 Department of Health, Education and Welfare (HEW) report to Congress stated, "The warning statement required by the [Act] should be strengthened. This Department would support the wording recommended last year by the Federal Trade Commission, or a suitable paraphrase of the wording." *Id.* at 2655 (footnote omitted). "The wording recommended . . . was 'Warning: Cigarette Smoking is Dangerous to Health and May Cause Death From Cancer and Other Diseases.' " *Id.* at 2655 n.1. In its 1969 Report, the FTC recommended that the following warning be required on cigarette packages: "Warning: Cigarette Smoking is dangerous to health and may cause death from cancer, coronary heart disease, chronic bronchitis, pulmonary emphysema and other diseases." *Id.* at 2657.

91. Pub. L. No. 91-222, § 4, 84 Stat. 88.

92. 130 CONG. REC. S11,850 (daily ed. Sept. 26, 1984).

93. Pub. L. No. 91-222, § 6 (1970), 84 Stat. 89.

94. *Id.* § 2, 84 Stat. 87.

95. *Id.* § 5(b), 84 Stat. 88. The entire preemption clause was written as follows:

which . . . establishes any requirement or prohibition based on smoking and health with respect to cigarette advertising could be held to be valid for the period between July 1, 1969, and the date the legislation finally becomes law, or any portion thereof."[96] The 1969 Act additionally defined "State" to include "any political division of any state."[97]

In December 1969, the Senate Commerce Committee reported to Congress its rationale for amending the preemption clause and for including a definition of "State" in the proposed legislation:

> In some instances, counties or municipalities exercise their authority over advertising by local ordinances, or regulations, or even occasionally by resolution. In order to avoid the chaos created by a multiplicity of conflicting regulations, however, the bill preempts State requirements or prohibitions with respect to the advertising of cigarettes based on smoking and health. This preemption is intended to include not only action by State *statute* but by all other *administrative actions* or *local ordinances* or *regulations* by any political subdivision of any State.[98]

The House expressed its intent to preempt both state and federal regulatory agencies from legislating cigarette labeling requirements:

> By extending the act, the bill effectively continues the current absolute prohibition placed upon all regulatory agencies, federal and State. None may interfere with or place any limitation upon cigarette advertising, nor can they require any other caution to be placed upon a cigarette package than is already provided by the bill.
>
> . . . .
>
> . . . Refusal to surrender congressional function to the regulatory agencies is the meaning of the 30-word preemption provision, section 5(b) of H.R. 6543.[99]

(a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

(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 the Act.

Id. § 5, 84 Stat. 88.

96. 116 CONG. REC. 7922 (1970) (statement of Rep. Staggers).

97. Pub. L. No. 91-222, § 3(3), 84 Stat. 88. The congressional purpose was to make clear that preemption applied to cities, counties and other political subdivisions of the states as well as the states themselves. 1970 U.S. CODE CONG. & ADMIN. NEWS 2663.

98. S. REP. NO. 566, 91st Cong., 1st Sess. 12, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 2652, 2663 (emphasis added).

99. 115 CONG. REC. 16,159 (1969) (statement of Rep. Quillen). In the House, preemption

Most provisions of the 1969 Act are in effect today.[100] The preemption clause has not been modified since 1970.[101] In 1984, Congress passed the Comprehensive Smoking Education Act (1984 Act),[102] parts of which were codified in title 15 of the United States Code.[103] The congressional purpose is stated in section 2: "It is the purpose of this Act to provide a new strategy for making Americans more aware of any adverse health effects of smoking, to assure the timely and widespread dissemination of research findings and to enable individuals to make informed decisions about smoking."[104]

Consistent with its stated purpose, Congress again provided that more specific and stringent labeling be conspicuously displayed on cigarette packages.[105] Since October 12, 1985, the following warnings are required to be rotated quarterly, sized fifty percent larger than they had been previously, and to appear on all cigarette packages manufactured, packaged, or imported for sale or distribution in the United States:

> "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 Preganant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.
>
> "SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide."[106]

Congress in 1984 emphasized only its goal of informing the public. The House Committee on Energy and Commerce intended the variety of messages combined with broad based educational activities to assist the public in making an informed decision about whether or not to smoke.[107]

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was targeted against the federal as well as the state regulatory agencies. Representative Quillen went on to predict a scenario if Congress failed to assert its supremacy through a preemption clause: "The Federal Trade Commission will force all cigarette advertising to include such dire warnings of disease and death, that the industry would be compelled to stop advertising entirely." *Id.*

100. 15 U.S.C. §§ 1331-1341 (Supp. III 1985).

101. *Id.* § 1334.

102. Pub. L. No. 98-474, 98 Stat. 2200 (1984) (codified at scattered sections of title 15).

103. *See supra* note 9.

104. Pub. L. No. 98-474, § 2, 98 Stat. 2200.

105. *Id.* § 4, 98 Stat. 2201-2203.

106. *Id.*

107. H.R. REP. No. 805, 98th Cong., 2d Sess. 12, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3718, 3725. The committee held hearings for five days in 1982 and 1983.

Further, the Committee recommended the program with the belief that it ultimately would cause a reduction in smoking rates.[108] A major focus of the 1984 Act was to assist smokers in quitting smoking and to discourage young people from starting.[109] Less mention was made of the second purpose declared by Congress in 1965—that of protecting the national economy from "diverse, nonuniform, and confusing cigarette labeling . . . regulation."[110] In the 1984 Act, no new preemption clause was included, nor was preemption mentioned in the congressional debate or the unofficial legislative history.[111]

Most recently, Congress passed a bill regulating the tobacco industry's labeling of its smokeless products, such as snuff and chewing tobacco.[112] The Comprehensive Smokeless Tobacco Health Education Act of 1986 (Smokeless Act)[113] "for the most part, simply extends the provisions of P.L. 98-474, the Comprehensive Smoking Education Act of 1984, to include smokeless tobacco products."[114] The Smokeless Act makes it unlawful for any person to manufacture, package, or import for sale or distribution any smokeless tobacco product unless one of three

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During the course of the hearings, the committee heard about a successful Swedish system which combined varying warning messages with a broad-based educational program to dramatically reduce the rate of smoking in that country, particularly among young people. *Id.*

108. *Id.*

109. 130 CONG. REC. H9226 (daily ed. Sept. 10, 1984) (statements of Reps. Synar and Dingell).

110. *See supra* text accompanying note 81.

111. *See generally* 1984 U.S. CODE CONG. & ADMIN. NEWS 3718.

112. Recently, consumption of smokeless tobacco has been increasing rapidly.

> While cigarette consumption had risen from 49 cigarettes per person in 1900 to 3,958 per person in 1962, consumption of chewing tobacco had fallen from 4.10 pounds per person to 0.50 pounds per person during the same period. Consumption of snuff declined slightly . . . .
>
> . . . [M]oist snuff is [now] the fastest-growing product in the entire tobacco industry with poundage gains of 7 percent in 1984.
>
> . . . .
>
> . . . [L]egislation to require warning labels and limit advertising have established a public awareness of the dangers of cigarette smoking. There has been no parallel development of public information on the dangers of smokeless tobacco use.

S. REP. NO. 209, 99th Cong., 2d Sess. 5, *reprinted in* April 1986 U.S. CODE CONG. & ADMIN. NEWS 7, 10.

113. Pub. L. No. 99-252, 100 Stat. 30 (1986), *reprinted in* Apr. 1986 U.S. CODE CONG. & ADMIN. NEWS.

114. S. REP. NO. 209, 99th Cong., 2d Sess. 5, *reprinted in* Apr. 1986 U.S. CODE CONG. & ADMIN. NEWS 7, 11.

warnings appears conspicuously on the package.[115] Primary congressional concern involved effectiveness of required warnings on smokeless tobacco packages.[116] The Senate Committee on Labor and Human Resources reported Senate Bill 1574 "as a timely and necessary measure to facilitate a national public education and research effort to make our citizens more aware of the health consequences of using smokeless tobacco."[117]

Although the Smokeless Act regulates a different tobacco product category than does the 1984 Act, the language, purpose and method of implementing the two statutes are nearly identical.[118] The wording in the preemption clause of the Smokeless Act is more precise, however, than its cigarette counterpart written fifteen years earlier.

> (a) No Statement relating to the use of smokeless tobacco products and health, other than the statements required by [this Smokeless Act], shall be required by any Federal agency to appear on any package or in any advertisement . . . of a smokeless tobacco product.
>
> (b) No statement relating to the use of smokeless tobacco products and health, other than the statements required by [this Smokeless Act], shall be required by any State or local statute or regulation to be included on any package or in any advertisement . . . of a smokeless tobacco product.[119]

The Senate Committee report stated that manufacturers, packagers, and importers may add warnings to the three required by the Smokeless

115. Apr. 1986 U.S. CODE CONG. & ADMIN. NEWS 7, 16. These warnings, which would be rotated every four months, are:

WARNING: THIS PRODUCT MAY CAUSE MOUTH CANCER;
WARNING: THIS PRODUCT MAY CAUSE GUM DISEASE AND TOOTH LOSS;
WARNING: THIS PRODUCT IS NOT A SAFE ALTERNATIVE TO CIGARETTES.

Id.

116. *Id.* at 12.

117. *Id.* at 11.

118. Not only do both acts legislate specific rotational labeling, but they both require the Secretary of Health and Human Services to conduct and support research of the effect of the respective products on human health; to collect, analyze and disseminate studies resulting from the research; develop or coordinate educational programs relating to the effect of the respective products on human health; and report to Congress biennially the effects of the Secretary's efforts on public consumption. *See* S. REP. No. 209, 99th Cong., 1st Sess. 16-17 (1985); Pub. L. No. 98-474, § 3(a), (c), 98 Stat. 2200-2201.

119. Pub. L. No. 99-252, § 7(a), (b), 100 Stat. 34. *Cf. supra* text accompanying note 84 and *supra* note 95 and accompanying text.

Act.[120] Furthermore, the Committee emphasized that, by including health warnings on packages, and by preempting state and local laws requiring additional warnings, it did not intend to preempt product liability suits based on failure to warn.[121] This intent was manifested in

120. S. REP. NO. 209, 99th Cong., 1st Sess. 14, *reprinted in* Apr. 1986 U.S. CODE CONG. & ADMIN. NEWS 7, 13.

121. Apr. 1986 U.S. CODE CONG. & ADMIN. NEWS 7, 13. The congressional debate prior to the passage of the Comprehensive Smokeless Tobacco and Health Education Act of 1986 (Smokeless Act) clearly indicated that plaintiff's failure-to-warn claims were not preempted, and insinuated that this might be the congressional intent behind the Federal Cigarette Labeling and Advertising Act, as amended, as well. 131 CONG. REC. S17,680 (daily ed. Dec. 16, 1985). Mr. Danforth, Chairman of the Commerce Committee stated: "Tobacco products are unique. Unlike many other products which may be hazardous only when misused, these products pose health hazards when used as intended." *Id.* at S17,681. Mr. Danforth is later quoted as follows:

> It is my understanding that S. 1574 in no way addresses the question of product liability and is not intended to alter current product liability law with respect to the duties and rights of manufacturers and consumers of smokeless tobacco products—that S. 1574 leaves to the courts in each particular case the question of what significance will be given to the health warnings required by this legislation. . . .
>
> I would ask the chairman of the Labor and Human Resources Committee whether this understanding is correct . . . .

Id. at S17,682. Mr. Hatch replied:

> The distinguished chairman of the Commerce Committee is correct. S. 1574 is not intended to have any impact whatsoever upon current product liability law. On the contrary, I would like to stress on behalf of the Labor and Human Resources Committee, and as a matter of legislative history, that this legislation is not intended to alter or affect the current status of product liability law and is not intended to either enhance or diminish any rights, causes of action, or defenses available under current product liability law.

Id. Mr. Lugar, as the original cosponsor of the legislation, agreed with this assessment as a matter of legislative history. *Id.*

On December 19, the House discussed S. 1574.

> Mr. WAXMAN. . . . [O]ur proposal does try to develop a very visible way of displaying the warning label on the advertising, and it would have in its display a circle and an arrow to draw people's attention to that label. We want people to see the warning label, and hopefully they will be discouraged voluntarily from using this substance.
>
> . . . .
>
> Mr. BLILEY. . . . Mr. Speaker, this is a more stringent provision than is required on cigarettes at the present time, and I would be forced to object.
>
> Mr. ROSE. Mr. Speaker. My information is that the smokeless tobacco industry has signed off on what the gentleman from California is attempting to do. Is that not correct?
>
> Mr. BLILEY. That is correct, but the smokeless-tobacco industry is a small part of the industry, as the gentleman knows.
>
> Mr. ROSE. But this bill only affects the smokeless-tobacco industry.
>
> Mr. BLILEY. At the present time, yes, but the effects will be brought back on the others.

131 CONG. REC. H13,311 (daily ed. Dec. 19, 1985).

Senator Kennedy, the ranking minority member of the Labor and Human Resources Committee, remarked: " '[T]he Senate concurs in the statement by the managers of the House side and in our original committee report that we do not, by passage of this legislation, intend . . . to preempt product liability suits in State or Federal courts based on failure to warn.' "

a "savings clause" preserving common-law claims of prospective plaintiffs.[122]

No "savings clause" preserves state common-law tort actions in cigarette-labeling legislation. Legislative discussion on this subject, both in the Congressional Record and in the committee hearings, is lacking. Thus, federal legislation has not disposed of the preemption issue as it relates to common-law actions brought against cigarette companies which have complied with federally mandated warning requirements. Six federal courts have construed congressional intent in this area, however, and they have divided evenly on either side of the issue. The following section will set forth the analyses through which four[123] of these courts have made their determinations. The cases are presented in chronological order.

C. *Preemption in the Cigarette Cases*

1. First impression: *Cipollone v. Liggett Group, Inc.*

In what is generally considered to be one of the more scholarly modern opinions involving the doctrine of preemption,[124] New Jersey Federal District Court Judge Sarokin made the first judicial determination of whether the preemption doctrine applied to common-law tort cases brought against cigarette companies for failure to warn adequately of the potential hazards of tobacco smoking.[125] In the introduction to his opin-

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Palmer v. Liggett Group, Inc., 633 F. Supp. 1171, 1179 (D. Mass. 1986) (quoting 132 CONG. REC. S1124 (1986)). The *Palmer* court concluded: "It seems certain, therefore, that Congress believes that allowing products liability suits involving the adequacy of cigarette warnings will not frustrate its objective of uniform warnings." *Id.*

122. "Nothing in this Act shall relieve any person from liability at common law or under State statutory law to any other person." Pub. L. No. 99-252, § 7(c), 100 Stat. 34 (1986).

123. The two other courts provided citations to one or more of these four cases in place of independent analysis. *See supra* note 12 and accompanying text.

124. A federal district court in the First Circuit cited Judge Sarokin's opinion along with a 1959 United States Supreme Court opinion for the proposition that regulation can be effectively exerted through an award of damages. Animal Legal Defense Fund Boston, Inc. v. Provimi Veal Corp., 626 F. Supp. 278, 282 (D. Mass. 1986). A Missouri Court of Appeals cited the same opinion as the sole authority for the proposition that the question of preemption is largely a matter of statutory construction and cannot be resolved by "mechanistic formulae." Bennett v. Mallinckrodt, Inc., 698 S.W.2d 854, 857 (Mo. Ct. App. 1985). In a footnote, the Missouri court paid tribute to the scholarliness of Judge Sarokin's opinion. "In *Cipollone*, the court describes the development and application of the preemption doctrine in scholarly detail." *Id.* at 857 n.1. Another federal district court in the First Circuit referred to Judge Sarokin's opinion as "exhaustive and scholarly." Palmer v. Liggett Group, Inc., 633 F. Supp. 1171, 1173 (D. Mass. 1986).

125. Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146 (D.N.J. 1984), *rev'd on interlocutory appeal and remanded*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 55 U.S.L.W. 3474 (U.S. Jan. 13, 1987) (No. 86-563).

ion, Judge Sarokin wrote:

> This case presents the issue of whether cigarette manufacturers can be subjected to tort liability, if they have complied with the federal warning requirement .... In effect, the cigarette industry argues that such compliance immunizes it from liability to anyone who has chosen to smoke cigarettes notwithstanding the warning, that the federal legislation has created an irrebutable presumption that the risk of injury has been assumed by the consumer. This court rejects that contention.
>
> The clear purpose of the federal legislation was to establish a uniform warning which would prevail throughout the country. By so doing, cigarette manufacturers would not be subjected to varying requirements from state to state. However, the existence of the present federally mandated warning does not prevent an individual from claiming that the risks of smoking are greater than the warning indicates, and that therefore such warning is inadequate.
>
> ....
>
> ... Whether the present federally mandated warning is adequate and whether defendants have wrongfully attempted to neutralize that warning are thus issues which survive the federal statute and are not preempted by it.[126]

Rose Cipollone, who was dying of lung cancer at the time of trial, alleged fourteen counts of strict liability, negligence, intentional tort and breach of warranty against three defendants.[127] Defendants asserted an affirmative defense that plaintiff's claims were preempted by the 1965 Act as amended by the 1969 Act.[128] Plaintiff then moved to strike the defense and one defendant[129] made a cross-motion for judgment on the pleadings.[130]

a. express preemption

Judge Sarokin first determined that the 1969 Act expressly preempted states from imposing regulations requiring a warning other than

126. *Id.* at 1148.

127. *Id.* at 1149. The defendants were Liggett Group, Inc., Loew's Theatres, Inc. (Lorillard), and Philip Morris, Inc. *Id.* at 1146.

128. Pub. L. No. 91-222, 84 Stat. 87 (1970) (codified as amended at 15 U.S.C. §§ 1331-1340 (Supp. III 1985)). *See generally supra* text accompanying notes 76-123.

129. Defendant Loew's Theatres made the cross-motion for judgment on the pleadings. *Cipollone*, 593 F. Supp. at 1149.

130. *Id.*

that federally mandated.[131] The next issue was whether common-law causes of action rose to the level of a "requirement or prohibition" imposed under state law.[132] Plaintiff argued that her claims did not amount to regulation of cigarette labeling, but were designed merely to compensate her for the harmful effect of an inadequate warning. She contended that if Congress had wished to preempt her claim, it easily could have included such a statement in the preemption clause of the Act.[133] Defendants argued that state tort law has a regulatory effect expressly preempted by the Act's preemption clause. In addition, they argued that Congress easily could have included a statement saving the tort claims of individual plaintiffs if it had so intended.[134]

The court determined that Congress could have spoken to deny or to allow plaintiff's common-law claims, but had not so spoken.[135] Nor was it sufficiently clear to the court that a common-law claim amounted to a "requirement or prohibition" so as to be preempted expressly by the 1969 Act.[136] The court held that, by shifting the burden of losses, tort actions may have some secondary regulatory effect,[137] but they "merely create[ ] some probability of changing the behavior of those upon whom [they] impose[ ] liability . . . without dictating the form of such change."[138] In defining the differences between regulation and motivation, a distinction which is applicable to implied as well as express preemption analysis, the court quoted and relied on "the one scholar who has explored this particular question."[139]

> "When a court imposes liability for failure to adequately warn, no specific 'statement relating to smoking and health' is being required. The practical effect of this may be that cigarette companies will choose to add an addiction warning so as to avoid future liability. A damages award, however, requires only payment—it is not an injunction requiring the defendant to incorporate into its advertising a fixed legend different from the federally required label. The labeling acts do not prohibit a manufacturer from warning of undisclosed health risks. The

131. *Id.* at 1150. For the text of the preemption clause, see *supra* note 95 and accompanying text.

132. *Cipollone*, 593 F. Supp. at 1153.

133. *Id.*

134. *Id.* at 1154.

135. *Id.*

136. *Id.* at 1155.

137. *Id.*

138. *Id.* at 1156.

139. *Id.*

> only prohibition is against a state agency passing a law requiring cigarette companies to use a different label."[140]

Since the court did not find clarity in Congress' wording sufficient for a finding of express preemption, it next turned to the question of whether plaintiff's failure-to-warn claims were impliedly preempted by the 1969 Act.[141]

b. implied preemption

In order to determine whether plaintiff's claims were impliedly preempted by the 1969 Act, the court first considered whether Congress had intended to occupy the field of cigarette labeling and deny cigarette manufacturers the right to provide additional labeling.[142] Defendants contended that Congress had demonstrated its intent to occupy the field by providing a pervasive scheme of federal regulation aimed at avoiding conflicting labeling requirements.[143] The court agreed that Congress

> intended to occupy a field and that it indicated this intent as clearly as it knew how. . . . However the legislative history of the Act, as well as its language, persuades the court that the field it occupied does not encompass the common law products liability claims here asserted. That field was expressly limited to "cigarette labeling and advertising with respect to any relationship between smoking and health" . . . [and] proscribes state or local action that would *require* a particular statement on cigarette packages . . . .[144]

Further, the court agreed that Congress had established a pervasive scheme of regulation and had expressed the dominant federal interests in the fields sought to be regulated. Nevertheless, the court stated that Congress did not "address itself to the problem of compensating the victims of cigarette smoking, and/or imposing civil liability on cigarette companies."[145] The court reasoned that the problem Congress addressed, informing the American public of the hazards of cigarette smoking and protecting the economy consistent with that end,[146] was different

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140. *Id.* (quoting Garner, *supra* note 7, at 1454).

141. *Id.* at 1156-57.

142. *Id.* at 1157-71. *See generally supra* text accompanying notes 13-75.

143. *Id.* at 1164.

144. *Id.* (quoting and citing the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331, 1334(a) (1982)); see *id.* at 1157-64 for an extensive discussion of the history of the 1965 and 1969 Acts.

145. *Cipollone*, 593 F. Supp. at 1164.

146. *Id.* at 1149 (citing 15 U.S.C. § 1331 (1982)).

from the products liability issue raised in *Cipollone*.[147] Since two different areas were implicated, the court held that federal occupation of the field could not be a proper basis for preempting plaintiff's common-law claim.[148]

The court next examined the question of whether state tort law conflicted with the federal legislation. The test applied was whether an irreconcilable conflict existed between the federal and state standards. Resolution of the question turned on whether compliance with both standards was impossible or whether the state law interfered with the accomplishment of congressional objectives.[149]

First, Judge Sarokin noted that compliance with the 1969 Act and with a tort award was not impossible:

> At most, state law imposes liability in the form of damages upon defendants. Payment of such damages, as well as fulfillment of the labeling requirements of the Act, are clearly possible. Indeed, the imposition of criminal liability under the Act, as well as the payment of damages, are both possible. . . . [Common law liability] allows parties to choose between risking further liability by not changing their behavior, or attempting to negate such risk by . . . adding a more stringent label to a cigarette package. Which course of action one takes is a matter of choice; one cannot be enjoined or held criminally liable for the course taken.[150]

Judge Sarokin reasoned that since the 1969 Act did not make it unlawful for the tobacco industry to place additional warnings on cigarette packages, even a requirement of additional warnings could physically be achieved while complying with the federal legislation.[151]

Finally, the court considered whether the existence of state common law stood as an obstacle to the congressional purpose in passing the 1969 Act. The court concluded that Congress had intended that state common law survive; therefore, common-law claims did not frustrate the purpose of Congress.[152] "That congressional intent is . . . clear: state common law claims existed prior to passage of the Act, were assumed to

147. *Id.* at 1164.

148. *Id.*; see *id.* at 1165 for a discussion of the limited scope of the 1969 Act and the limited remedies available under the Act.

149. *Id.* at 1166.

150. *Id.* at 1167.

151. *Id.*

152. *Id.* at 1168. The court compared this case to Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984), finding that in both cases Congress intended not to interfere with state common law, and that tension between the federal legislation and the state law must be tolerated.

have a continued existence during the legislative process, and were not eliminated by the passage of the Act."[153]

The court found two purposes in Congress' enactment of the cigarette-labeling legislation. First, the Act was designed to ensure the continued vitality of the tobacco industry, as well as the health of the economy, by preserving individual freedom to choose to smoke. Second, Congress sought to combat a growing health problem through concise and unambiguous warning labels designed to inform the public adequately of the risks associated with smoking.[154]

Judge Sarokin stated that one of the ways in which Congress sought to assure the continued vitality of the cigarette industry was by regulating uniformity of labeling.[155] The court reasoned that state common-law claims need not be preempted in order to ensure that cigarette manufacturers will not be subjected to multiple or conflicting labeling requirements. "Plaintiffs may not prevail in these lawsuits and, if they do, manufacturers may not respond to such suits by altering their labels or changing their advertising practices."[156]

Defendants further argued that if the cigarette industry were to respond to successful common-law claims by adding warnings to cigarette packages, this response would dilute the effectiveness of the legislated warnings and undermine the primary purpose of the Act. Judge Sarokin stated that this argument was without merit. "Congress feared not stronger, but weaker statements; only the former would be encouraged by state tort recoveries."[157] Thus, plaintiff's common-law claim did not conflict with the purposes of the federal legislation, and no basis existed for finding that Rose Cipollone's claims were preempted by federal legislation.[158] The court granted plaintiff's motion to strike the defenses and denied defendant's motion for judgment on the pleadings.[159]

2. Preemption found: *Roysdon v. R.J. Reynolds Tobacco Co.*

The next year, a Tennessee district court reached an opposite conclusion on facts similar to those in *Cipollone*. Plaintiff, Floyd Roysdon, brought two actions against R.J. Reynolds: (1) failure to warn and fully

153. *Cipollone*, 593 F. Supp. at 1168; see also *id.* at 1162-63 for an analysis of congressional debate prior to the passage of the 1965 Act indicating congressional belief that common-law tort causes of action for failure to warn would be left in place after passage of that act.

154. *Id.* at 1166.

155. *Id.* at 1169; *see also supra* text accompanying note 83.

156. *Cipollone*, 593 F. Supp. at 1169.

157. *Id.* at 1170 (footnote omitted).

158. *Id.*

159. *Id.* at 1171.

apprise him of the medical risks involved in smoking, and (2) producing an unreasonably dangerous and defective product, causing him to suffer severe peripheral vascular disease. Prior to trial, the court dismissed the first cause of action holding this claim to be incompatible with, and therefore preempted by, the Act. The court then held that plaintiff had failed to prove his case and directed a verdict for the defendant on the second claim.[160]

In a brief opinion, the *Roysdon* court decided that compliance with the federal labeling requirement was an adequate defense to a common-law tort claim as a matter of law. It relied on a 1963 preemption case, *Sperry v. Florida*,[161] which held that a state law must yield when incompatible with federal legislation.[162] From the language in the Act,[163] the court found that Congress intended to "inform the public of the health hazards related to smoking" and to "insure uniformity of labeling."[164] The court held that exposing a manufacturer to potential damages for doing no more than complying with the Act would achieve indirectly what the state was expressly preempted from doing directly. The court reasoned that this was a way of "requiring" a more stringent label, and thwarting "the stated intent of Congress to have uniformity in the warnings."[165] Under Tennessee law, consumer knowledge of the hazards of smoking prevented any chance of recovery on the substantive tort issue.[166]

3. *Cipollone* overturned

The Third Circuit reversed the district court *Cipollone* decision, holding that the Act did preempt state common-law remedies in this area.[167] Plaintiff, who had filed her original complaint August 1, 1983, subsequently died in October 1984. Plaintiff's husband continued prosecution both in his individual capacity and as executor of his wife's estate after two of the defendants, Liggett Group, Inc., and Loew's Theatres

160. Roysdon v. R.J. Reynolds Tobacco Co., 623 F. Supp. 1189, 1190 (E.D. Tenn. 1985), *appeal filed*, No. 86-5072 (6th Cir. Jan. 20, 1986).

161. 373 U.S. 379 (1963).

162. *Roysdon*, 623 F. Supp. at 1190.

163. *See supra* text accompanying note 83.

164. *Roysdon*, 623 F. Supp. at 1191.

165. *Id.* at 1191 (citing San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959)).

166. *Roysdon*, 623 F. Supp. at 1191-92. "Knowledge that cigarette smoking is harmful to health is widespread and can be considered part of the common knowledge of the community. For this reason, . . . this Court finds that the plaintiffs did not make a *prima facie* case that the defendant's products are 'unreasonably dangerous.' " *Id.* at 1192.

167. Cipollone v. Liggett Group, Inc., 789 F.2d 181, 183 (3d Cir. 1986).

(Lorillard) appealed the district court ruling.[168]

The appellate court analysis paralleled that of the lower court as it reviewed the Act, general preemption principles, and express preemption principles as they applied to the Act.[169] In determining whether the Cipolones' claims were impliedly preempted, Judge Hunter found the legislative history informative but not dispositive. In addition, the court found the "language of the statute itself a sufficiently clear expression of congressional intent without resort to the Act's legislative history."[170] The appellate court agreed with the district court that regulation of labeling was not so pervasive as to dictate a finding of congressional intent to occupy the field, and preempt private rights of action.[171]

The Third Circuit then examined whether the failure-to-warn claims actually conflicted with the Act. "The test enunciated by this court for addressing a potential conflict between state and federal law 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.' "[172] The court stated that the explicit language denoting the Act's purposes[173] "represents a carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of the national economy."[174] Moreover, the court reasoned that a reading of the Act's preemption clause,[175] combined with its declaration of purpose, "makes clear Congress's determination that this balance would be upset by . . . a requirement of a warning other than that prescribed . . . ."[176] The court then proceeded to evaluate the "effect" of state common-law actions on the purposes of the Act.

Applying the principle that state law damage claims have a regulatory effect on defendants, the appellate court concluded that "claims relating to smoking and health that result in liability for noncompliance with warning, advertisement, and promotion obligations other than those prescribed in the Act have the effect of tipping the Act's balance of purposes and therefore actually conflict with the Act."[177] The court held:

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168. *Id.*

169. *Id.* at 184-85.

170. *Id.* at 186.

171. *Id.*

172. *Id.* at 187 (quoting Finberg v. Sullivan, 634 F.2d 50, 63 (3d Cir. 1980) (en banc)); *see also* Perez v. Campbell, 402 U.S. 637 (1971).

173. *See supra* text accompanying note 81.

174. *Cipollone*, 789 F.2d at 187 (citing Banzhaf v. Federal Communications Comm'n, 405 F.2d 1082 (D.C. Cir. 1968)).

175. *See supra* note 95 and accompanying text.

176. *Cipollone*, 789 F.2d at 187.

177. *Id.*

> [(1) T]he Act preempts those state law damage actions relating to smoking and health that challenge . . . the adequacy of the warning on cigarette packages . . . . [(2) W]here the success of a state law damage claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages, such claims are preempted as conflicting with the Act.[178]

The Third Circuit reversed the lower court's ruling striking appellants' preemption defenses, but did not determine which of the Cipollones' claims were preempted by the Act. Instead, it remanded the case to district court for "further development of the claims and theories of the parties."[179]

4. District court in the First Circuit rejects Third Circuit holding: *Palmer v. Liggett Group, Inc.*

Faced with a preemption issue identical to that addressed in *Cipollone* and *Roysdon*, a district court in the First Circuit found against preemption, contrary to the Third Circuit holding, but in agreement with the district court decision in *Cipollone*. In *Palmer*,[180] the wife of the deceased, Joseph Palmer, filed suit on her own behalf and as administratrix of the estate of the deceased against defendants, Liggett Group, Inc. and Liggett & Myers Tobacco Co., cigarette manufacturers and distributors. She claimed that defendants failed to provide adequate warnings about the harmful effects of smoking cigarettes, and specifically "L & M" cigarettes. Defendants filed a motion to dismiss on the ground that plaintiff's claims were preempted by the Act.[181]

In support of their motion, defendants argued that the effect of a verdict against them for failure to warn would impose a "requirement or prohibition" with respect to advertising of their products thereby contravening the express intent of Congress in the Act's Declaration of Policy.[182] The court disagreed, noting that Congress did not expressly preempt tort action as it had in other public laws. Judge Mazzone reasoned that Congress' omission of a "savings clause," expressly preserving

178. *Id.* (footnote omitted).

179. *Id.* at 187-88. See *infra* text accompanying notes 309-13 for a discussion of the remand opinion.

180. Palmer v. Liggett Group, Inc., 633 F. Supp. 1171 (D. Mass. 1986), *interlocutory appeal filed*, No. 86-8019 (1st Cir. June 4, 1986).

181. *Id.* at 1172.

182. *Id.* at 1174. See *supra* text accompanying note 81 for the Act's Declaration of Policy, § 1331(b).

the right of plaintiffs to bring common-law claims for failure to adequately warn, was "not as probative as its omission of a specific prohibition of common law claims because of the presumption against preemption."[183] Finally, the court stated that the meaning of "requirement or prohibition" did not equate to compensation of a negligence victim because cigarette companies are not required to change their labels in the face of monetary judgments, but may "keep them the same and pay for the injuries they cause."[184]

Defendants next argued that plaintiff's claims were impliedly preempted because Congress intended to occupy the entire field of cigarette labeling and advertising.[185] The *Palmer* court held that "although Congress intended to occupy a field, that field did not include private 'rights and remedies traditionally defined solely by state law.' "[186] The court reasoned that the Act did not create a particularly pervasive regulatory scheme, that congressional silence took on added significance absent an alternative basis for plaintiff recovery, and that the express federal interest in uniform cigarette labeling was distinct from the traditional state interest in remedying the personal injuries of its citizens.[187]

The court reasoned that an imposition of damages would not conflict with the Act because it was possible for a defendant both to comply with the Act and pay a damage award.[188] Defendants argued that it would be impossible to comply with federal labeling and diverse state labeling requirements in interstate commerce with cigarette packages transported by both consumers and distributors. The court held that "defendants' argument is fatally flawed in equating damage awards with direct state regulation."[189]

> Should defendant choose to add an additional warning because they are found negligent in one state, that would not cause them to run afoul of another state's "regulations" if the package crossed state lines. This is because the states, in granting compensation to victims, are not imposing regulations concerning labeling. Furthermore, the Act does not exclude other warnings in addition to the federal one, it simply requires that the federal warning be present and prohibits states or the fed-

183. *Palmer*, 633 F. Supp. at 1174-75.
184. *Id.* at 1175.
185. *Id.*
186. *Id.* at 1176 (quoting Cipollone v. Liggett Group, Inc., 789 F.2d 181, 186-87 (3d Cir. 1986)).
187. *Id.*
188. *Id.* at 1177.
189. *Id.*

eral government from requiring any different warnings.[190]

The court further held that plaintiff's common-law claims did not frustrate the purposes and objectives of the Act. It reasoned that Congress had struck a balance in the Act between two somewhat inconsistent goals: labeling which would adequately inform the public of the health hazards of smoking, and labeling "requirements" which were not "diverse, nonuniform, and confusing" so as to impede commerce.[191] The balance had been struck by "requiring . . . a uniform federal warning label, and prohibiting states or the federal government from requiring any different warnings."[192] Cigarette manufacturers were at liberty under the Act to include additional warnings concerning the health risks of smoking. To conclude otherwise would have been to " 'conclude that Congress legislated to curtail the potential flow of information lest the public learn too much about the hazards of smoking for the good of the tobacco industry and the economy.' "[193]

The *Palmer* court concluded that since tort compensation has traditionally been an area of state concern, a conclusion of preemption would be unwarranted absent express preemption in the statute or in its legislative history. Judge Mazzone was unwilling to find implied preemption in this case where Congress, aware of common-law tort claims, remained silent and chose to tolerate any tension which this silence caused. The court noted that any solution designed to address burgeoning litigation in this field must come from Congress and not the courts.[194]

III. CRITIQUE OF EXISTING LAW

The preemption issue on which courts have disagreed is whether state common-law tort claims against cigarette companies for failure to warn stand as an obstacle to the purposes of Congress and, therefore, actually conflict with the federal legislation. Two elements are necessary to a finding of frustration of congressional purpose in the cigarette cases. First, it must be shown that Congress intended to legislate uniformity of labeling on cigarette packages, not merely uniformity of regulation of such labeling. Courts have not addressed this distinction squarely, having omitted or presumed it. That uniformity of labeling was a purpose of Congress in passing the Act is yet to be shown. If uniformity of labeling

190. *Id.* (footnote omitted).
191. *Id.* at 1178.
192. *Id.*
193. *Id.* (quoting Banzhaf v. Federal Communications Comm'n, 405 F.2d 1082, 1089 (D.C. Cir. 1968)).
194. *Id.* at 1179-80.

is not required, then the federal label is, by definition, a minimum requirement which the cigarette companies may voluntarily enhance without frustrating congressional purpose.

Furthermore, even if the courts find that Congress intended uniformity of labeling, they must also find that money judgments against cigarette companies amount to regulation of labeling inconsistent with the purposes of the Act and its preemption clause. If money judgments do not regulate in a way which Congress intended to preempt, then even the requirement of label uniformity would not preclude the possibility of manufacturer's culpability. Both elements are required for a finding of preemption of the failure-to-warn claims.

A. The Reasoning of the Courts

Six federal courts have certified opinions[195] deciding whether a plaintiff's common-law tort claim for failure to warn adequately is preempted by the Federal Cigarette Labeling and Advertising Act, as amended.[196] All six courts have agreed that failure-to-warn claims are neither expressly preempted by the Act, nor impliedly preempted by a congressional design to regulate pervasively cigarette labeling, thereby "occupying the field."[197] Neither do these opinions hold that plaintiffs' common-law claims conflict with the Act due to physical impossibility of complying with both state tort judgments and federal regulation.[198]

Courts which have found implied preemption of state common-law claims have found those claims conflicted with the purposes of Congress in passing the Act. In *Roysdon v. R.J. Reynolds Tobacco Co.*,[199] the court held that the common-law claims were "incompatible" with the federal legislation because exposing a manufacturer to liability for doing no more than complying with the Act would achieve indirectly what the Act had expressly preempted.[200] The Third Circuit in *Cipollone v. Liggett Group, Inc.* [201] applied the principle that state common-law damage claims have a regulatory effect on defendants, and concluded that such claims effectively tip the Act's balance of purposes and, therefore, actually conflict with the Act.[202] This Comment next examines more closely

195. *See supra* notes 10-12 and accompanying text.

196. *See supra* note 9.

197. *See generally supra* text accompanying notes 124-94.

198. *See generally supra* text accompanying notes 124-94.

199. 623 F. Supp. 1189 (E.D. Tenn. 1985), *appeal filed*, No. 86-5072 (6th Cir. Jan. 20, 1986).

200. *See supra* text accompanying note 165.

201. Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986).

202. *See supra* text accompanying notes 172-76.

preemption based on conflict with congressional purpose. It will first review the bases on which two courts have found that failure-to-warn claims do not conflict with the Act's purposes and then compare the analyses of two courts which have arrived at the opposite conclusion.

In *Cipollone*,[203] District Court Judge Sarokin held that common-law claims posed no obstacle to congressional purpose, primarily because Congress intended that state common law survive the Act.[204] The court found two congressional purposes manifest in the Act: (1) to ensure the continued vitality of the tobacco industry[205] in order to preserve the freedom of choice of the individual smoker as well as the health of the economy, and (2) to combat a growing health problem through concise and unambiguous warning labels designed to inform the public of the risks associated with smoking.[206] While the Act expressly preempted a state requirement of additional labeling, the court held that additional stronger labeling by manufacturers would not conflict with the congressional purpose because "Congress feared not stronger, but weaker statements; only the former would be encouraged by state tort recoveries."[207] The court held that even if this were not true, common-law tort judgments are not the same as regulation because they do not require multiple or conflicting labels. "Plaintiffs may not prevail in these lawsuits and, if they do, manufacturers may not respond to such suits by altering their labels or changing their advertising practices."[208]

While Congress may have assumed that common-law tort actions would be preserved under the 1965 Act,[209] it is not facially clear that Congress feared only "weaker" statements on cigarette packages. As defendants evidently pointed out in their brief to the district court,[210] the

203. Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146 (D.N.J. 1984), *rev'd on interlocutory appeal and remanded*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 55 U.S.L.W. 3474 (U.S. Jan. 13, 1987) (No. 86-563).

204. *See supra* note 152 and accompanying text.

205. The district court noted that one of the ways in which Congress sought to assure the continued vitality of the cigarette industry was by mandating uniformity of labeling. *Cipollone*, 593 F. Supp. at 1169.

206. *Id.* at 1166.

207. *Id.* at 1170 (footnote omitted).

208. *Id.* at 1169.

209. "The legislative records make it clear that the passage of this law and compliance by the manufacturer in no way affects the right to raise the defense of an 'assumption of the risk' and the legal requirement for such a defense to prevail . . . ." 111 CONG. REC. 16,544 (1965) (statement of Rep. Fascell). See *Cipollone*, 593 F. Supp. at 1162-63, for a thorough discussion of this issue.

210. *Cipollone*, 593 F. Supp. at 1169-70. "[D]efendant's arguments that, were the Act to result in added warnings, it would dilute the effectiveness of the warnings that now exist, thereby undermining the primary purpose of the Act, is without merit." *Id.*

legislative history of the Act indicated congressional concern that clear communication to the cigarette smoker would be impeded by confusing and diverse labeling.[211] Following this logic, to state that Congress feared only weaker statements would be untrue. Rather, if consumers were the primary beneficiaries of a uniformity requirement, Congress would have feared any statements which could tend to confuse the consumer. Thus, any additional label, stronger or weaker, may have been contrary to the intent of the Congress in 1965.[212]

Defendants' argument that they were not the sole beneficiaries of a uniform labeling requirement appears disingenuous. The implication of that argument is that Congress intended to protect consumers through uniformity of labeling by denying them the benefit of more effective voluntary labeling. Furthermore, both defendants' and the court's analyses fail to distinguish between the *effectiveness* concerns of Congress when it evaluated proposed labels under the Act, and *uniformity* concerns when it expressly preempted alternative regulation of labeling by the states and their political subdivisions. Congress discussed effectiveness only in the context of the content of the federally mandated labels. It considered uniformity only in the context of regulation of labeling, both in the plain wording of the Act,[213] and in the legislative history of the 1965 Act.[214]

Every statute regulates, and therefore occupies, some field. Courts must address and decide what field Congress was regulating with the Act. If Congress intended to preclude all additional labels in order to protect consumers, then Congress pervasively has regulated and occupied the field of labeling permitted on cigarette packages. Yet, no court has held that cigarette companies may not voluntarily enhance the federally required warning labels with additional effective warnings. The

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211. The Senate Commerce Committee Report stated:

> [W]hile the Committee believes that the individual must [be] safeguarded in his freedom of choice . . . we believe equally that the individual has the right to know that smoking may be hazardous to his health.
>
> Therefore the Committee is satisfied that the public interest requires the inclusion of a fair and factual cautionary statement on every cigarette package.
>
> Such cautionary statement should be short and direct, and should not be weakened in its impact by any qualifying adjectives, such as "excessive," "continual," or "habitual."

S. REP. NO. 195, 89th Cong., 1st Sess. 4 (1965). *See infra* note 253 and accompanying text.

212. Note that even under the 1984 Act, where there are four labels that are somewhat longer and more specific than the original label, they are still rotated one at a time, and are combined with a comprehensive educational program to insure maximum effect on consumer awareness. *See supra* text accompanying notes 105-07.

213. *See supra* text accompanying note 81.

214. S. REP. NO. 195, 89th Cong., 1st Sess. 4 (1965). "[O]therwise a multiplicity of State and local regulations pertaining to labeling of cigarette packages could create chaotic marketing conditions and consumer confusion." *Id.*

plain language of the Act's Declaration of Policy protects "commerce and the national economy" from being "impeded by . . . diverse, nonuniform, and confusing cigarette labeling . . . regulations,"[215] but only to the extent consistent with the primary policy goal of informing the public of the hazards of smoking.[216] The commercial interest is subservient to the consumer interest. Commerce benefits from the uniformity of regulation requirement, and consumers benefit from information contained in the warning labels. Thus, it appears more correct to say that Congress feared neither stronger nor weaker labels, but feared *ineffective* warnings resulting from alternative labeling required by the states and their political subdivisions.

Under this analysis, congressional purpose will not be frustrated by voluntary additional labeling, unless such labeling negates the effect of the federally mandated labeling scheme. This interpretation follows because the primary intended beneficiaries of uniformity of labeling *regulation* are commerce, the cigarette companies and their chains of distribution, not consumers. To determine whether additional labels will negate the federal scheme, courts should determine whether the additional labels are stronger than those federally mandated. As Judge Sarokin has stated, weaker labels will frustrate the purpose of Congress. They frustrate the congressional purpose, however, because they negate the federal warning label, not because they are proscribed by a uniformity of labeling requirement in the Act. If cigarette companies are permitted to add stronger warnings to cigarette packages, then it would follow that consumers should be given the opportunity to show that the companies' failure to do so has caused injury.

A second issue is whether common-law liability amounts to a "requirement" or "prohibition" as used in the Act. One court has held that "[r]egulation can be as effectively asserted through an award of damages as through some form of preventive relief."[217] Yet, the Supreme Court held in *Silkwood v. Kerr-McGee Corp.*[218] that where: (1) there is no indication that Congress considered precluding common-law remedies; (2) Congress has failed to provide a remedy for persons injured by the conduct; and (3) the only congressional discussion concerning state tort remedies assumed that such remedies would be available, state tort law remedies, though regulatory as well as compensatory in nature, were not

215. *See supra* text accompanying note 81.

216. *Id.*

217. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959).

218. 464 U.S. 238 (1984).

preempted.[219] The *Silkwood* Court upheld a common-law punitive damage award even though the federal government had occupied the field of nuclear safety.[220]

All three criteria are present in the legislation and legislative history of the Act. Furthermore, the *Silkwood* Court looked to language in the congressional debate preceding passage and amendment of the, inapplicable but related, Price-Anderson Act which expressly left state tort law remedies intact.[221] Legislation regarding smokeless tobacco also expressly reserves state tort law remedies. Although it does not apply to cigarette legislation, it is related. It also expressly preserves state tort law remedies.[222]

Silkwood can be distinguished because evidence was presented at trial which showed that the defendant had not always complied with Nuclear Regulatory Commission regulations;[223] therefore, its conduct was not equivalent to the conduct of cigarette companies which comply with the federal statute. The burden of proving the preemptive intent of Congress, however, remains with the defendant. Further, the presumption is weighted heavily against a defendant when the field to be preempted traditionally is one of state concern.[224]

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219. *Id.* at 251. In *Silkwood*, the Court determined whether punitive damages awarded to the estate of a former employee, fatally injured by plutonium which escaped from a federally licensed nuclear facility, were preempted. Preemption was possible under the theory that either the federal government had occupied the field of nuclear safety regulation or because there was a conflict with some other aspect of the Atomic Energy Act of 1954. *Id.* at 241.

The original action, brought by Karen Silkwood's father, was a common-law tort claim brought under Oklahoma law to recover for contamination injuries to Karen's person and property. *Id.* at 243. After an award of $10 million in punitive damages, Kerr-Mcgee moved for judgment n.o.v. on the basis that compliance with federal regulations precluded an award of punitive damages. *Id.* at 245. The lower court disagreed because the congressional standard of maintaining radiation releases "as low as reasonably achievable" could not be demonstrated by showing control of escaped plutonium within any absolute amount. *Id.* Thus, it was not " 'inconsistent [with congressional design] to impose punitive damages for the escape of plutonium caused by grossly negligent, reckless and willful conduct.' " *Id.* (quoting Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566, 603 (1979), *aff'd*, 637 F.2d 743 (1980), *rev'd*, 464 U.S. 238 (1984)). The appeals court reversed this portion of the opinion and found preemption to apply. *Id.* at 246.

220. *Id.* at 257 (citing Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190 (1983)).

221. The Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (1957) (codified at 42 U.S.C. § 221 (1982)), was an indemnification scheme which amended the Atomic Energy Act of 1954. It limited liability for any one nuclear accident to $560 million, $60 million in private protection and $500 million in government indemnification. Price-Anderson, and its amendment, expressly left state law remedies intact. *Silkwood*, 464 U.S. at 251-53.

222. *See supra* text accompanying note 121.

223. *Silkwood*, 464 U.S. at 243.

224. *Id.* at 255.

If money judgments do not regulate in a way which Congress intended to preempt, then even the requirement of label uniformity would not preclude the possibility of a manufacturer's culpability. Judge Sarokin cited *Ferebee v. Chevron Chemical Co.*[225] for the proposition that common-law tort judgments are not the same as regulation because they do not require multiple or conflicting labels.[226] He reasoned that plaintiffs may not prevail in these lawsuits and even if they do, manufacturers may not respond to such suits by altering their labels or changing their advertising practices. Yet, in *Ferebee*, administrative guidelines set up by the Environmental Protection Agency clearly were a minimum labeling requirement, leaving defendants to provide a stronger warning if they so chose. The federal legislation required only that labeling be "adequate to protect health and the environment" and be "likely to be read and understood."[227] The warnings on cigarette packages have been legislated verbatim by Congress.

While the defendant in *Ferebee* was permitted to add a more stringent warning label to its product, courts have not determined that Congress intended cigarette companies to have the same power. Under the analysis of *Ferebee* as applied to this situation, cigarette companies would be held responsible for payment of common-law tort claims against them, even if required to provide the exact label on which judgment against them was based. "[I]t need not be the case . . . that the company can be held liable for failure to warn only if the company could actually have altered its warning."[228] Either of two results would flow from application of this analysis to cigarette labeling. Cigarette companies would continue to litigate and defeat plaintiffs' substantive tort claims. Alternatively, if the companies were to lose, they might petition Congress to legislate stronger warnings. The choice, then, would not be pay the judgments or strengthen the labels, but pay the judgments or petition Congress to strengthen the labels. The notion of "choice" is antithetical

225. 736 F.2d 1529 (D.C. Cir. 1984). Chevron contended that since § 136 v. (b) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 (1982), prohibited the states from imposing any requirements for labeling additional to or different from those required by FIFRA, and since damage actions based on inadequacy of label have a regulatory aim, this action was preempted by state law. The court held that "[d]amage actions typically . . . can have *both* regulatory and compensatory aims." *Ferebee*, 736 F.2d at 1540.

226. *Cipollone*, 593 F. Supp. at 1167.

227. *Ferebee*, 736 F.2d at 1540 (quoting 7 U.S.C. § 136 (q)(1)(E)).

228. *Id.* at 1541. The *Ferebee* court offered no supporting authority for this proposition. *Id.* It reasoned that the money judgment itself did not require Chevron to alter its label, but merely told Chevron that, if it chose to continue selling paraquat in Maryland, it might have to compensate for some of the resulting injuries. The court determined that "it is not equivalent to a direct regulatory command that Chevron change its label." *Id.*

to the notion of "requirement." Thus, even if Congress intended to require uniform labeling, money judgments do not amount to a "requirement" under state law.

The district court in *Palmer v. Liggett Group, Inc.*[229] agreed that plaintiff's common-law claims did not frustrate the purposes and objectives of the Act. The court noted that Congress struck a balance in the Act between two somewhat inconsistent goals: (1) labeling which would adequately inform the public of the health hazards of smoking, and (2) labeling "requirements" which were not "diverse, nonuniform, and confusing" so as to impede commerce.[230] The balance was struck by "requiring . . . a uniform federal warning label, and prohibiting states or the federal government from requiring any different warnings."[231] While the court did not squarely address the distinction between "uniformity of regulation of labeling" and "uniformity of labeling," it held that cigarette manufacturers are at liberty under the Act to include additional warnings concerning the health risks of smoking.[232] To conclude otherwise would be to " 'conclude that Congress legislated to curtail the potential flow of information lest the public learn too much about the hazards of smoking for the good of the tobacco industry and the economy.' "[233] Since uniformity of labeling is not required, then the federal label is, by definition, a minimum requirement which the cigarette companies may enhance without frustrating the congressional purpose. Yet, if uniform regulation of labeling were designed to protect the consumer as well as the manufacturer, this last quote would be inapposite, and the *Palmer* decision would be subject to the same weaknesses potentially found in *Cipollone*.

In 1986, during debate over the Comprehensive Smokeless Tobacco and Health Education Act of 1986,[234] the most recent federal legislation regulating the tobacco industry, Congress exhibited continuing concern with the effect of nonuniform regulation of labeling on commerce.[235]

229. 633 F. Supp. 1171 (D. Mass. 1986), *interlocutory appeal filed*, No. 86-8019 (1st Cir. June 4, 1986).

230. *Id.* at 1178.

231. *Id.*

232. *Id.*

233. *Id.* (quoting Banzhaf v. Federal Communications Comm'n, 405 F.2d 1082, 1089 (D.C. Cir. 1968)).

234. Pub. L. No. 99-252, 100 Stat. 30 (1986).

235. *Palmer*, 633 F. Supp. at 1179. " '[D]ifferent labels [are] far more injurious to commerce than inappropriate and ill-advised uniform labeling requirements of the Congress.' " *Id.* (quoting 132 CONG. REC. H250 (daily ed. Feb. 13, 1986)).

Yet, the plain language[236] and legislative history[237] of the Smokeless Act expressly allows additional labels, and expressly preserves the right of individual plaintiffs to bring common-law tort claims for failure to warn adequately.[238] Since the Act and the Smokeless Act are nearly identical in language, purpose and implementation,[239] one might infer that the burden on commerce Congress feared was diverse regulation, not diverse labeling. The *Palmer* court should have held that uniform regulation of warnings, not "uniform warnings,"[240] was the congressional purpose.

In *Roysdon v. R.J. Reynolds Tobacco Co.*,[241] District Judge Hull held that the common-law claims were "incompatible" with the federal legislation because exposing a manufacturer to liability for doing no more than complying with the Act would achieve indirectly what the Act had expressly preempted.[242] The *Roysdon* court relied on a 1963 preemption case, *Sperry v. Florida*,[243] which held that a state *law* must yield when incompatible with federal legislation.[244] Yet *Sperry* is inapposite to the present issue because it dealt with state law which was incompatible with the *express* purpose of the legislation.

In *Sperry*, petitioner was a registered patent agent who was not a lawyer. Though he was registered to practice before the United States Patent Office, the Florida Supreme Court enjoined him from preparing and prosecuting patent applications in the State of Florida, holding that such conduct constituted the unauthorized practice of law.[245]

Congress had provided that the Commissioner of Patents could prescribe regulations governing eligibility of persons to practice before the Patent Office, and the Commissioner had provided for representation by either an attorney or authorized agent.[246] "The statute thus expressly permits the Commissioner to authorize practice before the Patent Office by nonlawyers, and the Commissioner has explicitly granted such authority."[247] The state's power to proscibe appellant's activity was thus

236. The Smokeless Act includes a "savings clause." *See supra* note 122 and accompanying text.

237. *See supra* note 121 and accompanying text.

238. *Palmer*, 633 F. Supp. at 1179. *See supra* text accompanying notes 120-21.

239. *See supra* note 118 and accompanying text.

240. *Palmer*, 633 F. Supp. at 1179.

241. 623 F. Supp. 1189 (E.D. Tenn. 1985).

242. *See supra* text accompanying note 165.

243. 373 U.S. 379 (1963).

244. *Id.* at 384.

245. *Id.* at 381-83.

246. *Id.* at 384.

247. *Id.* at 385.

preempted by the expressed intent of the federal code.[248]

The critical distinction between *Sperry* and *Roysdon* is that *Sperry* relies on the express incompatibility of the federal regulation with the Florida statute, while *Roysdon* relies on its own projection that a money judgment would be incompatible with the inferred intent of Congress. In *Sperry*, the appellant had no control over the additional conditions which the state imposed upon his practice. The defendant in *Roysdon* could choose to settle out of court, defend the substantive claim, pay any adverse judgment without changing the labels that appear on cigarette packages, or add a stronger label for its protection against future failure-to-warn suits. Judge Hull pointed out that "congressional intent need not be expressly stated but may be implied from the structure and purpose of the particular statute."[249] From the express Declaration of Policy,[250] Judge Hull drew the inference that Congress had two, presumably equally important, purposes in mind: informing the public of the health hazards related to smoking and uniformity of labeling.[251] Once again, a court failed to emphasize the distinction between "uniformity of labeling" and "uniformity of regulation of labeling." Yet the second purpose, even if accurately interpreted, is meaningless except in relation to the first.

The principal policy of the Act was to inform the public adequately,[252] and the qualification, the second purpose, was that the manner of informing the public should protect the economy wherever possible. One method of protecting the economy is to insure that labeling is not subject to "diverse, nonuniform, and confusing labeling . . . regulations" among the states.[253] The Act's "Declaration of Policy" states that commerce and the economy need be protected only "to the maximum extent consistent with this declared policy."[254] There is no

248. *See* 37 C.F.R. § 1.31 (1986).

249. *Roysdon*, 623 F. Supp. at 1190 (citing Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982)).

250. *See supra* text accompanying note 81.

251. *Roysdon*, 623 F. Supp. at 1191.

252. H. REP. NO. 449, 89th Cong., 1st Sess. 1, *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 2350, 2350. "The principal purpose of the bill is to provide adequate warning to the public of the potential hazards of cigarette smoking . . . ." 1965 U.S. CODE CONG. & ADMIN. NEWS 2350, 2350.

253. *See supra* text accompanying note 81. "[S]uch a requirement as to labeling should be uniform; otherwise, a multiplicity of State and local regulations pertaining to labeling of cigarette packages could create chaotic marketing conditions and consumer confusion." 1965 U.S. CODE CONG. & ADMIN. NEWS 2350, 2352.

254. *See supra* text accompanying note 81.

declared policy other than to adequately inform the public and to do so by including a federally mandated label on each cigarette package.

As noted above, it is not clear that uniformity of labeling, as compared with uniformity of labeling regulation, was a purpose of the Act. Certainly, it was not a "stated intent."[255] Congress intended to preempt state regulation of cigarette labeling and advertising, but had not considered regulation of common-law claims. Remaining to be determined are: (1) whether uniformity of labeling was a purpose of Congress in passing the Act, and, if it were, (2) whether money judgments against cigarette companies for failure to warn adequately amount to regulation of labeling inconsistent with the purposes of the Act and its preemption clause. The *Roysdon* court presumed, but did not analyze, these issues. Since the contrary purposes of Congress are a necessary ingredient to a finding of incompatibility of state action, the *Roysdon* decision is not complete and should not stand as precedent in this area.

On appeal, the *Cipollone* case[256] was disposed of by the Third Circuit's finding of implied preemption of the Cipollones' claims. The Third Circuit reversed the district court's ruling striking appellants' preemption defenses on the basis that appellee's failure-to-warn claims actually conflicted with the Act. In order to determine whether a conflict exists "[t]he test enunciated by this court . . . requires us 'to examine first the purposes of the federal law and second the effect of the operation of state law on these purposes.' "[257] Citing *Banzhaf v. Federal Communications Commission*,[258] the Third Circuit held that the explicit language of the Act's purposes[259] "represents a carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of the national economy."[260]

Banzhaf was the only case to interpret the Act prior to Judge Sarokin's 1984 opinion in *Cipollone*. In *Banzhaf*, broadcasters joined the Tobacco Institute, Inc. in appealing a Federal Communications Commission ruling requiring radio and television stations which carried cigarette advertisements to also broadcast messages against smoking.[261] The *Banzhaf* court's analysis of the Act's purposes should be understood in context.

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255. *Roysdon*, 623 F. Supp. at 1191.

256. Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986).

257. *Id.* at 187 (quoting Finberg v. Sullivan, 634 F.2d 50, 63 (3d Cir. 1980)); *see also* Perez v. Campbell, 402 U.S. 637 (1971).

258. 405 F.2d 1082, 1090 (D.C. Cir. 1968).

259. *See supra* text accompanying note 83.

260. *Cipollone*, 789 F.2d at 187.

261. *See Banzhaf*, 405 F.2d at 1085.

> In short, we think the Cigarette Labeling Act represents the balance drawn between the narrow purpose of warning the public "that cigarette smoking may be hazardous to health" and the interests of the economy. In that reckoning, the question of the public's need for information about the nature, extent, and certainty of the danger was left out of the scales, and so is left unaffected, except incidentally, by the result. Congress may reasonably have concluded that a warning on each pack was adequate *warning*. It surely did not think the warnings were themselves adequate *information*. And we find no sufficiently persuasive evidence that Congress hoped to impede the flow of adequate information for fear that, if the public knew all the facts, too many of them would stop smoking.
>
> This relatively narrow reading of the Act is not in conflict with its declared objective of protecting commerce and the national economy against "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." Congress patently did not want cigarette manufacturers harassed by conflicting affirmative requirements with respect to the content of their advertising.[262]

The court held that "[s]ince the Commission's ruling does not require the inclusion of any 'statement . . . in the advertising of any cigarettes,' but rather directs stations which advertise cigarettes to present 'the other side' each week, it does not violate the letter of the Act."[263]

The quoted language illustrates that the balance found by Chief Judge Bazelon in *Banzhaf* is a narrow reading of the federal legislation in order to avoid preemption of regulatory action by the Federal Communications Commission. The court implied that the balancing of public and commercial interests necessarily made the congressional purpose narrow. In light of that compromise, the *Banzhaf* court found no greater meaning in the intent of the Act than the plain meaning of its words. There was no doubt that negative broadcast publicity potentially would be damaging to the cigarette industry and to the economy.[264] Yet, the court's construction of congressional intent limited the proscriptions of

262. *Id.* at 1090 (footnote omitted) (emphasis added).

263. *Id.* at 1088 (quoting 15 U.S.C. § 1334(b) (Supp. 1966)).

264. This, in fact, turned out to be the case following the broadcast of antismoking commercials pursuant to *Banzhaf*. "For the first time in years, the statistics began to show a sustained trend toward lesser cigarette consumption." Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 587 (D.D.C. 1971) (Wright, J., dissenting) (footnote omitted), *aff'd*, 405 U.S. 1000 (1972).

the Act to "conflicting affirmative requirements" and the requirement of inclusion of statements in cigarette advertising.

The Third Circuit, too, read the Act's preemption clause and its Declaration of Purpose, and found that they made clear "Congress's determination that this balance would be upset by . . . a requirement of a warning other than that prescribed . . . ."[265] At this point, the two courts parted ways. The *Banzhaf* court held that only requiring the inclusion of a warning, other than that mandated by the Act, was preempted. The Third Circuit found preemption in the regulatory effect of common-law claims.[266]

Common-law claims, the Third Circuit reasoned, in effect tip the Act's balance of purposes, and therefore, actually conflict with the Act.[267] Yet, the *Banzhaf* court found the balance of public and economic interests already drawn in favor of preempting only labeling requirements. A defendant in a failure-to-warn case is not required to include additional warnings. *Banzhaf* supports the argument that Congress did not seek to preempt the flow of information to the public, but only the affirmative requirement of additional labeling. Nothing short of that is inconsistent, incompatible, or an obstacle to Congress' purpose in legislating the Act.

Absent its use of the *Banzhaf* decision for its analysis, the Third Circuit has failed to analyze how money judgments against cigarette companies for failure to warn adequately amount to regulation of labeling inconsistent with the purposes of the Act and its preemption clause. Like the *Roysdon* court, the *Cipollone* appellate court has not analyzed how it came to its presumption that uniformity of labeling was a purpose of Congress in passing the Act. Furthermore, money judgments may not regulate in a way which Congress intended to preempt.[268] Thus, without further analysis, it may be inaccurate to state that "where the success of a state law damage claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages, such claims are preempted as conflicting with the Act."[269]

B. Congressional Purpose: Legislative Analysis

From its inception, the primary purpose of the Federal Cigarette

265. *Cipollone*, 789 F.2d at 187.
266. *See supra* text accompanying note 178.
267. *Id.*
268. *See supra* text accompanying note 228.
269. *Cipollone*, 789 F.2d at 187.

Labeling and Advertising Act, as amended,[270] was to provide adequate warning to the public of the potential hazards of cigarette smoking. This is clearly stated in the legislative history of the 1965 Act.[271] The 1969 Act strengthened the warning message in the face of reports that the first label had been ineffective and a stronger message was needed.[272] Informing Americans of the adverse health effects of smoking was also the purpose of the 1984 Act.[273] The 1984 Act again strengthened the mandatory labels, requiring four statements to be rotated on a quarterly basis.[274] The 1984 Act also combined its labeling requirements with broad-based educational efforts to assist smokers in quitting and to discourage young people from starting smoking.[275]

The second purpose of the federal legislation was to inform the public in such a way as to protect the economy wherever possible. One way to protect the economy was to insure that labeling was not subject to "diverse, nonuniform, and confusing labeling . . . regulations" among the states.[276] Similarly, Congress intended to protect consumers from confusion resulting from a multiplicity of additional required state and local labeling schemes.[277] Voluntary additional labels which are stronger than those federally mandated will not confuse consumers and, therefore, will not frustrate congressional purpose.

The Declaration of Policy states that uniform regulation of warnings, not uniform warnings, is the desired secondary congressional goal. Similarly, the courts, more often than not, have construed the intent of Congress as it relates to regulation of warning, not uniformity of warning. "[T]here are positive indications that Congress's 'comprehensive program' was directed at the relatively narrow specific issue of regulation of 'cigarette labeling and advertising.' "[278] Yet, courts have not analyzed the distinction.

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270. *See supra* notes 8-9.

271. *See supra* text accompanying note 80.

272. *See supra* text accompanying notes 88-91.

273. *See supra* text accompanying note 104.

274. *See supra* text accompanying note 106.

275. *See supra* text accompanying notes 107-09.

276. *See supra* text accompanying note 81.

277. *See supra* note 253 and accompanying text.

278. Banzhaf v. Federal Communications Comm'n, 405 F.2d 1082, 1089 (D.C. Cir. 1968); *accord* Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146, 1148 (D.N.J. 1984), *rev'd on interlocutory appeal and remanded*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 55 U.S.L.W. 3474 (U.S. Jan. 13, 1987) (No. 86-563). *Contra* Palmer v. Liggett Group, Inc., 633 F. Supp. 1171, 1176 (D. Mass. 1986); Roysdon v. R.J. Reynolds Tobacco Co., 623 F. Supp. 1189, 1191 (E.D. Tenn. 1985), *appeal filed*, No. 86-5072 (6th Cir. Jan. 20, 1986) ("It required nationally uniform warning labels . . . .").

Because the wording in the Declaration of Policy is so clear, it is unlikely that Congress intended to establish a maximum as well as a minimum uniform warning standard. Congress expressed its intent to inform the public and to do so in such a way that, wherever possible, it would not jeopardize the national economy in the process. Certainly Congress would not object to a more informative warning imposed by the cigarette companies, absent the consideration that the warning might be confusing to the extent of negating its effect. "In almost every instance, government standards are meant to fix a level of performance below which one should not fall."[279]

The legislative history of the Act provides evidence with which to answer the independent question of whether a common-law tort claim amounts to a "requirement" or "prohibition" within the meaning of Congress. Congressional debate prior to the passage of the 1965 Act recognized the continued existence of common-law products liability cases and the negative effect which the required warnings might have on a plaintiff's cause of action for failure to warn.[280] "[I]f Congress had meant to bar warning-related litigation, that discussion would never have taken place."[281] The primary goal of the preemption clause in the 1965 Act was to preempt the executive branch of state government from properly exercising its police powers by requiring labels in addition to those federally mandated.[282] The preemption clause of the 1969 Act was directed at regulation by states or their political subdivisions, specifically at "statutes," "administrative actions," and "local ordinances and regulations."[283] The Smokeless Act, which was Congress' first tobacco legislation following the decision in *Roysdon v. R.J. Reynolds Tobacco Co.*,[284] was nearly identical to the 1984 Act in purpose, language and implementation.[285] Yet, the legislative history of the Smokeless Act makes clear the congressional intent to allow additional warnings and to preserve common-law claims for failure to warn adequately against manufacturers which have complied with the federally mandated labeling requirements.[286]

Analyzed in its entirety, the legislative history of tobacco legislation

279. *Cipollone*, 593 F. Supp. at 1170.

280. *Id.* at 1162-63 (citing 111 CONG. REC. 16,543-16,545 (1965)).

281. Tribe, *supra* note 1, at 789.

282. *See supra* text accompanying notes 85-86.

283. *See supra* text accompanying note 98.

284. 623 F. Supp. 1189 (E.D. Tenn. 1985), *appeal filed*, No. 86-5072 (6th Cir. Jan. 20, 1986).

285. *See supra* note 118 and accompanying text.

286. *See supra* text accompanying notes 120-21.

over the past twenty-two years indicates a congressional intent to preempt state regulation exclusive of common-law judgments. Each new preemption clause has become more precise and specific, lending support to Judge Sarokin's statement that Congress originally indicated its intent to occupy a field "as clearly as it knew how," and that "the field it occupied does not encompass the common-law products liability claims here asserted."[287]

IV. PROPOSAL

While the issue may be complex and elusive, the alternative resolutions are simple. If Congress does not clarify its intent, courts will continue to split their decisions on this issue until the Supreme Court grants certiorari.[288] Since the first case which held that failure-to-warn cases were preempted,[289] Congress has not legislated with regard to cigarette labeling. Yet it passed the Comprehensive Smokeless Tobacco Health Education Act in February of 1986.[290] In the legislative history of that act, and in the legislation itself, Congress clearly stated that additional warnings were permitted and it did not intend to preempt common-law tort claims for failure to warn.[291] The Smokeless Act and the 1984 Act are almost identical in design, purpose, and method of implementa-

287. *Cipollone*, 593 F. Supp. at 1164.

288. The United States Supreme Court denied petition for writ of certiorari to hear the *Cipollone* case on January 12, 1987, with Justice Powell taking no part in the decision. 55 U.S.L.W. 3474 (U.S. Jan. 13, 1987) (No. 86-563). The petition, filed on October 6, 1986, presented the question "[w]hether a state authorized award of compensatory damages against a cigarette manufacturer arising from the inadequacy of health warnings provided to its customers and its improper advertising practices is preempted by the Federal Cigarette Labeling and Advertising Act." Petition for Writ of Cetitorari to the United States Court of Appeals for the Third Circuit, Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146 (D.N.J. 1984), *rev'd on interlocutory appeal and remanded*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 55 U.S.L.W. 3474 (U.S. Jan. 13, 1987) (No. 86-563), *reprinted in* 1.10 TPLR 3.365.

> Petitioner sought the writ on four bases:
>
> 1. the decision affects the states [sic] authority to provide tort remedies; 2. the opinion conflicts with other federal and state court opinions; 3. the decision is in conflict with the decision in . . . *Silkwood v. Kerr-McGee*; and 4. resolution of the preemption question would promote [a] speedy and consistent determination of the preemption issue in other product liability actions involving cigarettes and other products.

1.10 TPLR 3.365. There is no reason to believe that the Supreme Court will deny a second petition for writ of certiorari arising from a state supreme court or federal circuit decision which conflicts with the holding of the Third Circuit. *See* Gidmark, *supra* note 2, at 9, col. 4.

289. Roysdon v. R.J. Reynolds Tobacco Co., 623 F. Supp. 1189 (E.D. Tenn. 1985), *appeal filed*, No. 86-5072 (6th Cir. Jan. 20, 1986).

290. Pub. L. No. 99-252, 100 Stat. 30 (1986).

291. *See supra* text accompanying notes 120-22.

tion.[292] The court in *Palmer v. Liggett Group, Inc.*[293] analyzed the most recent tobacco legislation as follows:

> Congress must have been acutely aware during the period the bill was pending—July, 1985 to February, 1986—of cases like *Cipollone* and *Roysdon* in which cigarette manufacturers were arguing that the federal cigarette labeling requirements preempted common law claims . . . . It seems certain . . . that Congress believes that allowing products liability suits involving the adequacy of cigarette warnings will not frustrate its objectives of uniform warnings.[294]

The solution is for the courts to agree that Congress did not intend to promote uniformity of labeling, but only uniformity of regulation of labeling. Since the language of the Act states that uniformity of *regulation* of labeling is required, the burden of analysis rests with the courts to overcome a presumption of clarity. When courts analyze this distinction, they should hold that Congress intended mandatory labels to be a minimum standard—a minimum standard with a qualification. The qualification was that federal, state, and local regulations and statutes affecting labeling were preempted by the Act. Thus, cigarette companies should remain free to enhance the federal labeling scheme provided they do not negate the effect of the mandatory labels.

Furthermore, courts should resolve the congressional meaning of "regulation" to determine if, in fact, money judgments against cigarette companies for failure to warn adequately amount to regulation of labeling inconsistent with the purposes of the Act and its preemption clause. For the reasons that: (1) this area is traditionally occupied by state law; (2) prospective plaintiffs would be left without an alternative remedy; and (3) Congress has indicated its intent not to preempt common-law claims as a remedy in smokeless tobacco litigation, the burden should be weighted heavily against a finding of preemption. Congressional silence regarding common-law claims should not be sufficient to meet such a heavy burden.

Both preceding determinations are required for a finding of preemp-

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292. *See supra* note 118 and accompanying text. See also Ellington, *The Smokeless Tobacco Industry's Failure to Warn, A Case for the Courts*, 6 J. LEGAL MED. 489 (1985), which draws on facts equating the smokeless tobacco issue with the cigarette issue 22 years ago. Examples include: widespread use, recognition of a serious problem by health officials, direct link between use and health problems, lack of awareness of users of the dangers, and failure of manufacturers to warn consumers of the dangers. *Id.* at 489.

293. 633 F. Supp. 1171 (D. Mass. 1986), *interlocutory appeal filed*, No. 86-8019 (1st Cir. June 4, 1986).

294. *Palmer*, 633 F. Supp. at 1179.

tion of the failure-to-warn claims. If uniformity is not required, then the mandatory label, by definition, is a minimum requirement which the cigarette companies may enhance. If money judgments do not regulate in a way which Congress intended to preempt, then even the requirement of label uniformity would not preclude the possibility of a manufacturer's liability. While the second issue has been extensively analyzed,[295] the issue of uniformity has been neither explicitly stated nor analyzed, although it has been presumed. Since lower courts have been unable to agree on the preemption issue, it is likely the Supreme Court ultimately will construe the Act.

Alternatively, it is incumbent upon Congress to clarify its intent. This could be accomplished by adding a sentence to the end of the preemption clause of the Act: "We do (not) intend by this legislation to preempt existing rights of private citizens to bring common-law claims against manufacturers for failure to warn adequately of the potential and actual dangers of smoking tobacco."

V. POLICY JUSTIFICATION AGAINST A FINDING OF PREEMPTION

Donald W. Garner, Professor of Law at Southern Illinois University, predicted the present controversy in 1980, four years before the district court opinion in *Cipollone v. Liggett Group, Inc.*:[296]

> Aside from personal defenses, the defendant may assert that Congress has preempted the entire field of cigarette information under the old 1965 Cigarette Labeling and Advertising Act, and the subsequent Public Health Cigarette Smoking Act of 1969. The courts have rejected the argument that compliance with a congressional labeling requirement insulates the manufacturer from civil liability for failure to adequately warn of product danger. Statutory or regulatory labels are viewed as minimum requirements—not as the maximum duty of a defendant to warn of the dangers of his product. Cigarette producers will quickly point out, however, that the labeling Act not only requires a cigarette warning, but have [sic] also provided that no other statement relating to smoking and health shall be required.
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> . . . [T]he question of whether a civil court has lost its power to award damages based on failure to adequately warn of

295. *See generally supra* text accompanying notes 124-94.

296. 593 F. Supp. 1146, 1148 (D.N.J. 1984), *rev'd on interlocutory appeal and remanded*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 55 U.S.L.W. 3474 (U.S. Jan. 13, 1987) (No. 86-563).

addiction should be resolved in the smoker's favor.[297]

While the determination of preemption is based solely on a judicial interpretation of the expression or intention of Congress, it may be useful to determine what a finding of preemption would preempt.

A. Preemption Would Preempt the Congressional Purpose

Potential tort recovery will further Congress' primary purpose of informing the public of the health hazards of cigarettes. Publicity from the lawsuits will provide information to the public. Cigarette companies might increase the money they spend informing the public and seeking legislation for stronger warnings. Only since 1984 has Congress legislated more thorough warnings on cigarette packages which inform the public of several specific hazards of smoking.[298] Yet, other hazards remain unlabeled.

Even though smoking was condemned as addictive as early as 1604,[299] the critical issue of addiction to nicotine has not yet been addressed on a warning label. The Federal Trade Commission has reported that fifty percent of adult Americans do not know that cigarette smoking creates physical and psychological dependency, a fact particularly important to those who have not yet started smoking.[300]

> Dependency . . . adds a new dimension to the law's response to smoking injuries. The basis for the tobacco industry's freedom from liability is the consumer's knowledge and appre-

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297. Garner, *supra* note 7, at 1453 (footnotes omitted).

298. *See supra* text accompanying note 108.

299. Comment, *Smoking In Public: This Air is My Air, This Air is Your Air*, 4 S. ILL. L.J. 665, 665 n.1 (1984).

300. The Federal Trade Commission has studied consumer knowledge and awareness of various hazards commonly associated with cigarette smoking:

> * Over 50% of adult Americans do not know that cigarette smoking is "addictive," a fact particularly important for young people deciding whether or not to start smoking.
> * Approximately 40% of high school seniors do not believe that there is a great health risk in smoking.
> * Nearly 50% of all women do not know that smoking during pregnancy increases the risk of stillbirth and miscarriage.
> * Almost 60% of the public is unaware that smoking causes *most* cases of emphysema and chronic bronchitis.
> * Over 30% of the public is unaware that smoking causes heart disease; over 50% do not know that smoking causes *many* cases of heart disease.
> * While approximately 20% of the public remains unaware that smoking causes lung cancer, over 40% do not know that smoking causes *most* cases of lung cancer.

FED. TRADE COMM'N, STAFF REPORT ON THE CIGARETTE ADVERTISING INVESTIGATION, (1981). Contrast this with the fact that 90% of the American public is aware that cigarettes are hazardous to health. A lower percentage of heavy smokers, 76%, is aware of this fact, and presumably, they have most frequent contact with the warning labels. *See id.*

> ciation of *all* the significant risks of smoking. The critical risk of addiction, however, has not been disclosed by the cigarette industry. Additionally, information regarding the magnitude of this risk has not otherwise been made available to many potential smokers. Consequently, the underpinning of judicial protection of the tobacco industry is severely weakened.[301]

Another "unlabeled" finding from a 1972 Surgeon General's Report stated that "nonsmokers who experienced continual exposure to cigarette smoke may be subject to a 'serious public health problem.' "[302] Subsequent reports about passive smoking have "confirmed and broadened" these findings.[303] Smokers indifferent about their own health may still be disinclined to risk the health of those around them. This information, especially significant to smokers with families, has yet to appear on a warning label. If common-law tort claims against cigarette companies for failure to warn consumers adequately of the hazards of cigarette smoking are preempted by federal legislation, consumers may have ready access to less of the information which Congress intended they possess.

B. Preemption Would Preempt Traditional State Interests

In an amicus brief filed in *Palmer v. Liggett Group, Inc.*,[304] the Attorney General of Massachusetts asserted three state interests which would suffer as a result of a finding of preemption:

> First, as a sovereign, [the state] seeks to protect its "traditional authority to provide tort remedies to [its] citizens." Second, as *parens patriae*, it is concerned about those of its citizens who may have been injured by the purchase of a product as to which they received inadequate warnings. Third, again as *parens patriae*, it seeks to protect its citizens from future injuries through the indirect process of imposition of tort liability in private litigation when such liability is found to exist.[305]

The Attorney General argued that these state interests should not be preempted unless preemption is the clear and manifest purpose of

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301. Garner, *supra* note 7, at 1431.

302. Comment, *supra* note 299, at 667 (footnote omitted).

303. *Id.*

304. 633 F. Supp. 1171 (D. Mass. 1986), *interlocutory appeal filed*, No. 86-1525 (1st Cir. June 4, 1986).

305. Brief of *Amicus Curiae* Commonwealth of Massachusetts, Palmer v. Liggett Group, Inc., 633 F. Supp. 1171 (D. Mass. 1986), *interlocutory appeal filed*, No. 86-1525 (1st Cir. June 4, 1986), *reprinted in* 1.9 TPLR 3.335 (citation omitted) [hereinafter Amicus Brief].

Congress.[306]

State tort law reflects state policy relating to concerns of fairness and utility. Fairness concerns include "corrective justice," allocating burdens to wrongdoers; "distributive justice," shifting losses to avoid imposition of catastrophic burdens on individuals; and "benefit-burden" analysis, allocating burdens to those who enjoy the benefits of an activity. Utilitarian concerns include "resource allocation," whether consumers and manufacturers should contract freely for the efficient allocation of the risk of loss; and "accident-cost optimization," allocating burdens where it would be least expensive to avoid them.[307] A finding of preemption would leave a void negating the balance which individual states have struck on these policies, as well as denying the rights of individual state citizens to assert their claims.

Laurence H. Tribe, Tyler Professor of Constitutional Law at Harvard University, believes that the void left by a finding of preemption in the cigarette cases may not be limited to the cigarette industry.

> It is the broader ramifications of the Third Circuit's ruling that are 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.[308]

C. Court Implementation of Preemption May Lead to Unforeseen Results

On remand, Judge Sarokin interpreted the Third Circuit opinion to hold that:

> [N]o claim may be pursued which is predicated upon either the failure to warn the consuming public of known dangers regarding the risk of smoking, or upon the dissemination of information about smoking through advertising and promotion, *even if*

306. Amicus Brief, *reprinted in* 1.9 TPLR at 3.339 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

307. See Note, *supra* note 2, at 818-26, for an extensive discussion of how these policies should affect plaintiff-conduct defenses in cigarette litigation.

308. Tribe, *supra* note 1, at 790.

> *calculated to deceive or mislead* and to encourage existing smokers to continue and non-smokers to begin. It is ironic . . . that deceiving the consuming public and concealing the truth from it is deemed to be an activity which Congress impliedly intended to protect in enacting this legislation.[309]

It is possible that Judge Hunter of the Third Circuit might agree with Judge Sarokin's interpretation of his opinion, but it is almost certain that Congress did not intend to give the cigarette industry the unique privilege to "speak what is untrue, conceal what is true, and avoid liability for doing so merely by affixing certain mandated warnings to its products and advertising."[310] In 1969, Congress expressly exempted the authority of the Federal Trade Commission "with respect to unfair or deceptive acts or practices in the advertising of cigarettes" from what it had preempted.[311] The Senate analysis of this section in the 1969 Act states that "[t]he Commission remains free to proceed by complaint against any cigarette manufacturer who it believes is making unfounded health claims or false claims about the product's characteristics in advertising material."[312] While the authority of the Federal Trade Commission has no direct bearing on private causes of action, that continuing authority does indicate that Congress did not intend to give the cigarette companies the license which Judge Sarokin has interpreted the Third Circuit to establish.

Following the finding of preemption by the Third Circuit, the remand issue regarding which of the Cipollones' claims were preempted was less than obvious and required a "foray into New Jersey law, in order that [the district court could] determine whether the success of these claims 'necessarily depend[ed]' on a showing that defendants' warnings were inadequate."[313] Thus, it is not clear that a finding of preemption will lessen the burdens on the court system because following such a finding, the courts may still be required to decide which common-law claims are preempted.[314]

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309. Cipollone v. Liggett Group, Inc., 649 F. Supp. 664, 675 (D.N.J. 1986) (emphasis added).

310. *Id.*

311. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 7(b), 84 Stat. 89 (1970) (codified as amended at 15 U.S.C. § 1336(b) (1982)); Comprehensive Smoking Education Act, Pub. L. No. 98-474, § 8, 98 Stat. 2204 (1984) (codified as amended at 15 U.S.C. § 1336) (Supp. III 1985)).

312. S. REP. No. 566, 91st Cong., 1st Sess. 13 (1969).

313. *Cipollone*, 649 F. Supp. at 669.

314. This decision supports the conclusion of the *Palmer* court that any solution designed to address burgeoning litigation in this field must come from Congress and not the courts. *Palmer*, 633 F. Supp. at 1180.

Although interesting, policy concerns are of no consequence to the finding of preemption. Presumably, Congress made its policy judgments during the course of legislative enactment. When the Third Circuit determined that Congress intended to preempt common-law tort claims against cigarette manufacturers for failure to warn consumers adequately of the risks accompanying cigarette smoking, no other finding was necessary for it to implement that intent. Yet, to construe congressional intent when considering these claims, courts should first determine whether Congress intended to mandate uniform labeling or uniform regulation of labeling of cigarette packages. If the courts decide that Congress mandated a uniform label, then they must decide whether tort claims amount to a "requirement" or "prohibition" within the meaning of the Act. There are "manifest dangers in trying to discern the tune when listening to the sounds of Congressional silence. . . . [T]he benefit of the doubt in our Federal system is tilted against Federal pre-emption of state law: the symphonic tie normally goes to the plaintiffs."[315]

VI. CONCLUSION

Resolving the preemption issue is not equivalent to resolving the issues presented by substantive claims brought against cigarette companies. Preemption does not present issues of whether the warnings are adequate, the plaintiffs had knowledge of the risk, or the injury was, in fact, caused by cigarette smoking. Rather, preemption presents the issue of whether Congress intended to allow injured parties to be heard, to make a case, to have their day in court. If Congress intended to occupy the field of cigarette labeling by requiring uniformity of labeling, not merely uniformity of regulation of labeling, then plaintiffs probably have no right to claim that federally mandated labels provided inadequate warning of the hazards associated with cigarette smoking. Upon such a finding, plaintiffs might contend that preemption of common-law claims amounts to a denial of their due process rights. Yet, the state interest in protecting its citizens from dangerous products with inadequate warning labels, no matter how traditional or important, must bow to the demand of the federal intent. That is the nature of federalism as defined by the supremacy clause.

Only recently Congress expressed its intent to allow plaintiffs to bring failure-to-warn suits against tobacco companies. These expressions came in the context of smokeless tobacco and do not involve cigarettes directly. The existence of a savings clause in the Smokeless Act could be

315. Tribe, *supra* note 1, at 788-89.

helpful to either side of the preemption debate. The more reasonable interpretation of this legislation, however, is that it expresses the ongoing, unchanging, undiminished intent of Congress not to preclude common-law causes of action for failure to warn against the tobacco industry. The sounds of congressional silence have harmonized to a unified voice, the same unified voice with which Congress passed the Comprehensive Smoking Education Act of 1984. Congressional purpose, language, and debate, taken as a whole, are sufficient evidence from which to infer that Congress intended to preempt not common-law causes of action, but only the "requirements" and "prohibitions" of federal and state regulatory agencies with respect to labeling and advertising.

Taylor A. Ewell