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Products Liability - The Federal Cigarette Labeling and Advertising Act Preempts State Common-Law Damage Actions Challenging Either the Adequacy of the Act's Warnings or the Propriety of the Advertising Practices of a Cigarette Manufacturer That Has Complied with the Act

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1987]

PRODUCTS LIABILITY—THE FEDERAL CIGARETTE LABELING AND
ADVERTISING ACT PREEMPTS STATE COMMON-LAW DAMAGE
ACTIONS CHALLENGING EITHER THE ADEQUACY OF THE ACT'S
WARNINGS OR THE PROPRIETY OF THE ADVERTISING
PRACTICES OF A CIGARETTE MANUFACTURER THAT
HAS COMPLIED WITH THE ACT

Cipollone v. Liggett Group, Inc. (1986)

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.¹

Cigarette smoking is linked to the deaths of hundreds of thousands of Americans each year.² Unfortunately, the welfare of the cigarette industry is just as closely linked to the economic survival of the hundreds of thousands of Americans who are tied to it, from tobacco farmers to convenience store employees.³ Acknowledging the threat to the health of the nation, but choosing a less radical course than prohibition,⁴ Con-

1. 15 U.S.C. § 1333(a) (1985) (Comprehensive Smoking Education Act, formerly Federal Cigarette Labeling and Advertising Act). This is one of four warnings now required on cigarette labels and advertisements on a rotational basis. The others are:

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

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

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

Id.

Each cigarette manufacturer or importer must submit to the Federal Trade Commission a plan for the rotation of these warnings. This plan must provide for the quarterly rotation of the warnings on cigarette packages, and must ensure that all four warnings are displayed in some form of advertising at all times. *Id.* § 1333(c).

2. "Smokers have a 70 percent greater [coronary heart disease] mortality [rate] than nonsmokers. . . . Smokers are at a two to four times greater risk for sudden cardiac death . . . than are nonsmokers." U.S. DEP'T OF HEALTH AND HUMAN SERVS., *THE HEALTH CONSEQUENCES OF SMOKING: CARDIOVASCULAR DISEASE IV-V* (1983). For further discussion of the adverse health effects of cigarette smoking (e.g., heart disease, lung cancer and emphysema), see *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146 (D.N.J. 1984), *rev'd*, 789 F.2d 181 (3d Cir. 1986). See also *N.Y. Times*, April 20, 1986, § 4, at 8.

3. "About 180,000 farms grow tobacco in the United States. Value of tobacco sales usually ranks fifth or sixth among crops. . . . In 1982, about 58,000 persons were employed in 163 tobacco manufacturing establishments. . . . Federal, State, and local taxes amounted to about \$9.2 billion [in 1985]. About 241,000 retail outlets sell tobacco products." ECONOMIC RESEARCH SERVICE, U.S. DEP'T OF AGRICULTURE, *TOBACCO: OUTLOOK AND SITUATION REPORT 35* (March 1986). For further information on the cigarette industry, see *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1158 (D.N.J. 1984).

4. An outright prohibition of cigarettes might deprive many people con-

gress passed the Federal Cigarette Labeling and Advertising Act of 1965⁵ (the "Act") which, among other things, requires cigarette manufacturers to print certain warnings on the packages of their cigarettes.⁶ Before the Act, a number of people had successfully sued cigarette manufacturers for smoking related injuries on the theory that the manufacturers had not adequately warned consumers of the dangers of smoking.⁷ Since the Act, few such suits have been brought, and only one, *Cipollone v. Liggett Group, Inc.*,⁸ has reached the appellate level.⁹ The

nected with the tobacco industry of their livelihoods. See *supra* note 3. Perhaps more importantly, however, such a prohibition would be viewed by many as a paternalistic intrusion on the individual rights of American citizens. *Cigarette Labeling and Advertising: Hearings on H.R. 2248 Before the House Committee on Interstate and Foreign Commerce*, 89th Cong., 1st Sess. 24 (1965) (consider comment of Congressman Morris K. Udall: "The Constitution guarantees us all these great freedoms including the freedom to abuse our health and make fools of ourselves if we want to, and I do not intend to deprive people of these great freedoms.").

5. 15 U.S.C. §§ 1331-1341 (1985). The Act was passed in 1965, effective in 1966. Act of July 27, 1965, Pub. L. No. 89-92. It was amended in 1970, 1973 and 1984. Act of April 1, 1970, Pub. L. No. 91-222; Act of September 21, 1973, Pub. L. No. 93-109; Act of October 12, 1984, Pub. L. No. 98-474.

6. 15 U.S.C. § 1333(a). The original warning required was "Caution: Cigarette Smoking May Be Hazardous to Your Health." Act of July 27, 1965, Pub. L. No. 89-92, § 4. That language was later changed to "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." Act of April 1, 1970, Pub. L. No. 91-222, § 2.

7. See, e.g., *Pritchard v. Liggett & Meyers Tobacco Co.*, 295 F.2d 292, 301 (3d Cir. 1961) (theories of negligence and breach of express warranty).

8. 789 F.2d 181 (3d Cir. 1986). The case was heard by Circuit Judges Hunter and Sloviter and District Judge Giles of the Eastern District of Pennsylvania, sitting by designation. *Id.* at 183 & n.1.

9. See, e.g., *Palmer v. Liggett Group, Inc.*, 633 F. Supp. 1171 (D. Mass. 1986); *Roysdon v. R.J. Reynolds Tobacco Co.*, 623 F. Supp. 1189 (E.D. Tenn. 1985).

In *Roysdon*, the court held that the plaintiffs' claims asserting the inadequacy of the Act's warnings were preempted by the Act. *Roysdon*, 623 F. Supp. at 1191. The court held that the imposition of tort liability would create an "actual conflict" with the Act, since the Act expressly prohibits state statutory or administrative regulation (15 U.S.C. § 1334), and the imposition of tort liability "would permit a state to achieve indirectly . . . what it could not achieve directly through legislation." *Roysdon*, 623 F. Supp. at 1191. The court also disposed of the plaintiffs' products liability theory on the basis that Tennessee law incorporates comment k to section 402A of THE RESTATEMENT (SECOND) OF TORTS, which gives "good tobacco" (i.e. not otherwise defective tobacco) as an illustration of a product that is not unreasonably dangerous. *Roysdon*, 623 F. Supp. at 1191-92 & nn.1-2. Interestingly enough, *Roysdon* makes no mention of the trial court's decision in *Cipollone*, despite the fact that *Cipollone* was decided fourteen months prior to *Roysdon*.

In *Palmer*, which noted both *Roysdon* and the Third Circuit's decision in *Cipollone*, the court found that the Act did not preempt state common-law tort claims. 633 F. Supp. at 1179. The court reasoned that Congress was aware of such suits at the time of passage, but decided to tolerate any interference with the Act that they might engender. *Id.* The *Palmer* court also noted that the decisions in *Cipollone* and *Roysdon* "effectively immunize[] the tobacco industry when Congress did not expressly do so." *Id.* at 1180. For further discussion of

issue: Does the Act preempt state common-law claims challenging either the adequacy of a cigarette manufacturer's warnings or the propriety of its advertising practices? In *Cipollone*, the Third Circuit answered yes.

Rose Cipollone began smoking cigarettes in 1942 and continued to smoke until at least 1981.¹⁰ On August 1, 1983, after Mrs. Cipollone was diagnosed as having terminal lung cancer,¹¹ she and her husband filed a fourteen-count complaint in the United States District Court for the District of New Jersey naming four cigarette manufacturers as defendants.¹² The Cipollones sued in negligence, breach of warranty, strict liability, and intentional tort, claiming, *inter alia*, that the defendants failed to give adequate warnings to consumers about the dangers of cigarette smoking, and that they engaged in advertising practices that neutralized the warnings that were given.¹³ To these and several other counts the defendants raised the Act as a defense, arguing that the Act preempts state common-law damage claims relating to the labeling and advertising of cigarettes.¹⁴ The trial court granted a motion by the Cipollones to strike the preemption defense.¹⁵

the immunizing effect of the Third Circuit's decision in *Cipollone*, see *infra* notes 101-03 and accompanying text.

10. *Cipollone*, 789 F.2d at 183.

11. *Id.* Mrs. Cipollone died in October, 1984. *Id.* After her death, her husband, Antonio Cipollone, continued the suit as executor of her estate. *Id.*

12. *Id.* at 183-84. The named defendants were Liggett Group, Inc. ("Liggett"), Phillip Morris, Inc., Loew's Corp. and Loew's Theatres, Inc. ("Lorillard"). *Id.* at 183.

13. The complaint contained fourteen counts, but count 1 and counts 10 through 14 were not relevant to the preemption issue. *Id.* at 184 n.2. The district court summarized the complaint as follows:

[Plaintiff] claims that defendants have produced an unsafe and defective product (Counts 2 and 7), the risk of which outweighs its utility (Count 2), but have negligently (Count 4) or intentionally (Count 8) failed adequately to warn consumers of the hazards associated with cigarette smoking. *See also* Count 3 (strict liability for failure to warn). Indeed, [the plaintiff] contends, defendants have negligently (Count 5) or intentionally (Count 6) advertised their products so as to neutralize and render ineffective those warnings actually given, warnings which are made meaningless in any event by the addictive qualities of cigarettes (Count 9).

Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146, 1149 (D. N.J. 1984) (footnote omitted).

14. *Cipollone*, 789 F.2d at 183.

15. *Id.* When the Cipollones moved to strike the preemption defense, Lorillard moved for judgment on the pleadings and was later joined in the motion by Philip Morris. *Id.* The motion was denied without discussion. *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1171 (D. N.J. 1984). Lorillard also appealed the denial of its motion for judgment on the pleadings, but abandoned the appeal. *Cipollone*, 789 F.2d at 183 & n.1.

Because the preemption question raised was one of first impression in the Third Circuit, Liggett and Lorillard were permitted to appeal the district court's order striking the preemption defense, pursuant to 28 U.S.C. § 1292(b). *Id.* at

On appeal, the Third Circuit began its analysis of the preemption question by setting forth the several tests which the Supreme Court of the United States has formulated to determine whether an Act of Congress preempts state authority.¹⁶

Congress clearly has the authority to preempt state law, both state statutes and state common law.¹⁷ Congress may, of course, do so expressly. For example, the Employee Retirement Income Security Act ("ERISA") states that its "provisions . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described. . . ."¹⁸ As to the scope of this preemption provision, Congress was also quite explicit: "The term 'State law' includes all laws, *decisions*, rules, regulations, or other State action having the effect of law. . . ."¹⁹ While express preemption of state common law may be found absent an explicit reference thereto, courts holding that statutes lacking such an explicit reference preempt state common law more frequently rely on principles of implied preemption to reach that

183. The Third Circuit reversed the district court's order and remanded the case. *Id.* at 188.

16. *Cipollone*, 789 F.2d at 185. It is worthwhile to note that "[t]he question [of] whether federal law 'preempts' state action [is] largely one of statutory construction, [and] cannot be reduced to general formulas." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-23, at 377 (1978). It is submitted, then, that the preemption inquiry is not particularly fact sensitive, and future actions against cigarette manufacturers will be very difficult to distinguish from *Cipollone* on the facts.

17. *Cipollone*, 789 F.2d at 185 (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). The power to preempt state law derives from the supremacy clause. U.S. CONST. art. VI, cl. 2. The Supremacy Clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . 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.

Id.

"The appropriate application of that part of the [supremacy] clause . . . is to [those] acts of the State Legislatures [that] do not transcend their powers, but, [al]though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the [constitutionally authorized] laws of Congress. . . ." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824). The Constitution gives Congress the power to regulate all trade between the states. *Id.* at 195-97. With regard to the subject matter at hand, Congress may exercise its commerce powers over the tobacco industry because "[i]f there is one product that is completely in interstate commerce and moves in interstate commerce it is tobacco." *Hearings on S. 559 Before the Senate Committee on Commerce*, 89th Cong., 1st Sess. 254 (1965) (statement of Senator Magnuson, Chairman). Thus, the Constitution empowers Congress to regulate the tobacco industry, and to preempt state law in that area.

18. 29 U.S.C. § 1144(a) (1985).

19. *Id.* § 1144(c)(1) (emphasis added). That Congress explicitly mentions "decisions" in ERISA's preemption clause is significant because Congress made no such explicit reference to the preemption of state common law in the Act. For the text of the Act's preemption provision and a discussion thereof, see *infra* notes 29 and 50 and accompanying text.

conclusion.²⁰

Congress may impliedly preempt state law as well, in either of two ways.²¹ First, a court will infer congressional intent to preempt state law when it finds that Congress, by passing the legislation, intended "to occupy a field."²² In turn, a court may infer congressional intent to occupy a field whenever it finds one of the following: (1) that "[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it;" (2) that "the Act of Congress touch[es] a field in which the federal interest is so dominant that the federal system [is] assumed to preclude enforcement of state laws on the same subject;" or (3) that "the object sought to be obtained by the federal law and the character of the obligations imposed by it reveal the same purpose"²³ (*i.e.*, to exert exclusive control over the field).

Under a second theory of implied preemption, even when Congress is found not to have intended to occupy a field, all state law is preempted "to the extent that it actually conflicts with federal law."²⁴ Laws may conflict in two ways. First, laws may conflict in a literal sense, *i.e.*, compliance with both state and federal law may literally be impossible.²⁵ Second, a court will deem that two laws conflict when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."²⁶

The Third Circuit concluded its summation of preemption principles by noting that "a court must be mindful of the overriding presumption that 'Congress did not intend to displace state law.'"²⁷ This presumption is of great importance to all preemption questions, arising as it does out of the very foundations of our federal system.²⁸

Having recited these principles, the Third Circuit went on to deter-

20. *Cipollone*, 789 F.2d at 185-86 (citing *Silkwood v. Kerr-McGee Corp.*, 104 S. Ct. 615 (1984); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981)).

21. For an example of the implied preemption of state law, see *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), discussed *infra* note 83.

22. *Cipollone*, 789 F.2d at 185.

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

24. *Id.* (quoting *Pacific Gas & Elec. Co., v. Energy Resources Cons. & Dev. Comm'n*, 461 U.S. 190, 204 (1982)). This principle is an obvious corollary to the Supremacy Clause. For a discussion of the application of the Supremacy Clause, see *supra* note 17.

25. *Cipollone*, 789 F.2d at 185 (citing *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963)).

26. *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

27. *Id.* (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

28. *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1151 (D. N.J. 1984). The district court stated that "[t]he preservation of that [federal] system requires a presumption 'that Congress did not intend to displace state law.'" *Id.* (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

mine whether the Act expressly preempted the Cipollones' claims. To do so required the court to examine the preemption provision of the Act in light of the presumption that state law is not preempted.²⁹ The court noted that the provision makes no explicit reference to state common law, and found that its language is not otherwise such as to clearly encompass state common-law claims.³⁰ The Third Circuit then concluded, in harmony with the district court, that the Act does not expressly preempt state common-law claims such as those of the Cipollones.³¹

Turning its attention to the two theories of implied preemption, the Third Circuit focused on the statement of congressional policy contained in the Act itself. In this statement, Congress makes clear that it has two concerns: the health of the American public and the health of the American tobacco industry.³² In particular, Congress voiced its concern about the impact upon the latter of conflicting state labeling and advertising requirements.³³ Addressing the first theory of implied preemption, the court considered both the "sweeping language" of the Act's preemption provision³⁴ and the reference in the Act's policy provision to "a comprehensive Federal program"³⁵ and concluded that Con-

29. *Cipollone*, 789 F.2d at 185-86. The preemption provision of the Act provides:

(a) No statement relating to smoking and health, other than the statement required by . . . 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 this Act.

15 U.S.C. § 1334 (1985).

30. *Cipollone*, 789 F.2d at 185.

31. *Id.*

32. The policy provision of the Act provides:

It is the policy of the Congress, and the purpose of this 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 about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and

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

15 U.S.C. § 1331 (1985).

33. *Id.* § 1331(2)(B).

34. *Cipollone*, 789 F.2d at 186. For the text of the preemption provision of the Act and a discussion thereof, see *supra* note 29 and accompanying text, and *infra* note 50 and accompanying text.

35. *Cipollone*, 789 F.2d at 186. For the text of the Act's policy provision, see *supra* note 32.

gress had indeed “intended to occupy a field.”³⁶ However, the court also found that the area of tort compensation lay outside the field Congress intended to occupy.³⁷ The court concluded that, in light of the presumption against preemption,³⁸ the federal scheme of legislation was not sufficiently pervasive, nor the federal interest sufficiently dominant, to justify the preemption of the Cipollones’ claims for compensation.³⁹ Nor, according to the court, did “the object of the Act and the character of obligations imposed by it reveal a purpose to exert exclusive control over every aspect of the relationship between cigarettes and health,” including the area of tort compensation.⁴⁰ Thus, according to both the Third Circuit and the district court, the Cipollones’ claims were not barred under the first theory of implied preemption, *i.e.*, that Congress had intended to occupy the field.⁴¹

Finally, having disposed of the first theory of implied preemption, the Third Circuit addressed the question of whether the state law involved in the Cipollones’ claims actually conflicted with the Act.⁴² This analysis required the court to take two steps: first, to define the purposes of the Act and second, to determine what effects the operation of the state law involved in the Cipollones’ claims would have on these purposes.⁴³ The court concluded that the statement of policy of the Act made it clear that “the Act 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.”⁴⁴ The court held that the preemption provision represented a congressional determination that the imposition of any requirement or prohibition regarding

36. *Cipollone*, 789 F.2d at 186 (quoting *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1164 (D. N.J. 1984)) (emphasis in original).

37. *Id.* The Third Circuit agreed with the district court that the field Congress has occupied is “expressly limited to ‘cigarette labeling and advertising with respect to any relationship between smoking and health.’” *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1164 (D. N.J. 1984) (quoting 15 U.S.C. § 1331 (1985)). For the complete text of this section, see *supra* note 32.

38. For a discussion of the presumption against preemption, see *infra* text accompanying notes 52-53.

39. *Cipollone*, 789 F.2d at 186.

40. *Id.*

41. *Id.*; *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1166 (D. N.J. 1984).

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

43. *Id.* (quoting *Finberg v. Sullivan*, 634 F.2d 50, 63 (3d Cir. 1980) (en banc) (citing *Perez v. Campbell*, 402 U.S. 637 (1971))). The Third Circuit did not address the question of whether it is possible to comply with both federal and state laws simultaneously, but the district court noted that “in no event is compliance with both the Act and state law a ‘physical impossibility.’” *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1167 (D. N.J. 1984). Payment of tort damages to a successful plaintiff would not inhibit a cigarette manufacturer’s ability to comply with the Act. *Id.*

44. *Cipollone*, 789 F.2d at 187. For the text of the Act’s policy provision, see *supra* note 32.

cigarette labeling or advertising different from those in the Act would upset this balance of interests, thereby interfering with the achievement of Congress' dual purposes.⁴⁵ Turning to the effect of the state law on these purposes, the Third Circuit concluded that the imposition of tort liability on a cigarette manufacturer that has fully complied with the Act, in claims challenging either the adequacy of the manufacturer's warnings or the propriety of its advertising practices, would be tantamount to the imposition of a requirement or prohibition different from those in the Act, and thus upset the balance sought by Congress.⁴⁶ The Third Circuit, reversing the district court, held such claims to be preempted by the Act.⁴⁷ The case was remanded for a determination by the district court of whether any of the Cipollones' claims fell into either of the categories identified by the Third Circuit as conflicting with the Act.⁴⁸

ANALYSIS

Express Preemption

The clearest way for Congress to indicate its intent to exercise its authority to preempt state law is by including in the legislation it passes a clause which unequivocally states this intent.⁴⁹ Congress included a preemption clause in the Act,⁵⁰ one which, the plaintiffs admitted, plainly "precludes state and government *regulation* of labeling and advertising."⁵¹ The question facing the Third Circuit with respect to express preemption was whether the language of the Act's preemption provision is sufficiently broad to include state common law damage actions, and

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

46. The court referred to several Supreme Court decisions which acknowledge "the regulatory effect of state law damage claims and their potential for frustrating congressional objectives." *Id.* at 187 (citing *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 156-59 (1982); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 324-25 (1981); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)). For discussions of *Fidelity*, *Kalo* and *Garmon*, see *infra* note 83.

47. *Cipollone*, 789 F.2d at 187. The Third Circuit stated its holding as follows:

[T]he Act preempts those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes. . . . [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.

Id.

48. *Id.* at 188.

49. For an example of such a preemption clause, see *supra* notes 18-19 and accompanying text.

50. For the text of the Act's preemption provision, see *supra* note 29.

51. *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1153 (D. N.J. 1984) (emphasis in original).

the key to this question lies in the presumption that Congress did not intend to preempt state law.⁵² This presumption is not a mere canon of judicial convenience; rather, it is essential to the preservation of harmony in our federal system.⁵³ The Supreme Court has held that, especially in areas traditionally occupied by the states such as tort compensation, "the historical police powers of the States [are] not to be superseded by [federal legislation] unless that was the clear and manifest purpose of Congress."⁵⁴ However, "Congress' words [in the Act] reveal far less clarity,"⁵⁵ and there is no serious doubt that the Act does *not* expressly preempt state common law damage claims.⁵⁶

Implied Preemption

It is submitted that there is a certain logical tension, if not contradiction, between the doctrine of implied preemption and the presumption against preemption. If courts are to afford more than lip service to this presumption, it would seem logical to limit the application of the preemption doctrine to cases of express preemption.⁵⁷ Implied preemption necessarily involves the inference from an ambiguous statute of congressional intent to preempt, by a court which, ostensibly, should be resisting preemption unless such was the "clear and manifest purpose of Congress."⁵⁸ It is the doctrine of implied, not express, preemption that creates problems in *Cipollone*.

However one evaluates the theoretical merits of the doctrine of implied preemption, its principles have been well established by the

52. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *see also Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

53. *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1151 (D. N.J. 1984).

54. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (citing *Allen-Bradley Local, U.E.R.M.W. v. Wisconsin Employment Bd.*, 315 U.S. 740, 749 (1941); *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 611 (1926)).

55. *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1156 (D. N.J. 1984).

56. Each of the four courts that have considered this issue has held that the Act does not expressly preempt state common-law damage claims. *See Cipollone*, 789 F.2d at 185-86; *Palmer v. Liggett Group, Inc.*, 633 F. Supp. 1171, 1174 (D. Mass. 1986); *Roysdon v. R.J. Reynolds Tobacco Co.*, 623 F. Supp. 1189, 1190 (E.D. Tenn. 1985); *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1156 (D. N.J. 1984).

57. Of course, when compliance with both state and federal law is a physical impossibility, state law must yield. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

58. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The very clearest manifestation of Congress' purpose can only be found in the precise words it used. It would not seem to be too great a burden on the legislative process for a court to require Congress to express any preemptive intent it might have, so as to avoid the vagaries of implied preemption analysis. For proof that Congress is eminently capable of doing so, *see supra* notes 18-19 and accompanying text.

Supreme Court.⁵⁹ Yet, to say that the doctrine is well-established is not to say that it is to be liberally applied. The presumption against preemption and its attendant requirement that congressional intent to preempt be "clear and manifest" are as much a part of a court's consideration of implied preemption as of express preemption.⁶⁰ The Third Circuit recognized this and cited the presumption against preemption as its primary reason for rejecting the first theory of implied preemption.⁶¹

In spite of this bias, the language of the Act's policy provision (*e.g.*, "a comprehensive Federal Program"⁶²) and the very existence of a preemption provision in the Act indicate that Congress did intend to occupy a field.⁶³ However, Congress addressed the Act only to the field of cigarette labeling and advertising and did not discuss compensation for those injured by cigarette smoking.⁶⁴ The Act provides for criminal penalties and injunctive relief in the event it is violated,⁶⁵ but it fails to mention compensation.⁶⁶ This being the case, the federal scheme of

59. *Palmer v. Liggett Group, Inc.*, 633 F. Supp. 1171, 1172 (D. Mass. 1986). For a discussion of these principles, see *supra* text accompanying notes 21-26.

The "physical impossibility" theory of implied preemption is, as mentioned above, more of a corollary to the supremacy clause than a separate judicial doctrine. When state and federal law clash, the state law must always yield. This is the decree of the Constitution, not a judicial construct. For a discussion of this issue, see *supra* note 17.

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

61. *Cipollone*, 789 F.2d at 186.

62. 15 U.S.C. § 1331 (1985).

63. *Cipollone*, 789 F.2d at 186; *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1164 (D. N.J. 1984).

64. *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1164 (D. N.J. 1984) (citing 15 U.S.C. § 1331 (1985)).

65. Any person who violates the Act is guilty of a misdemeanor and may be fined up to \$10,000. 15 U.S.C. § 1338 (1985). Furthermore, the Attorney General of the United States may apply to any federal district court "to prevent and restrain violations of [the] Act." *Id.* § 1339 (1985). It is important to note that these are not private remedies. Only the United States government, through its Attorney General, has standing to apply for an injunction, and, of course, only the United States government may bring a criminal prosecution for violation of a federal law. *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1165 (D. N.J. 1984).

66. The fact that Congress included such provisions together with the fact that Congress did not expressly preempt state common law presents an interesting argument of the "expressio unius est exclusio alterius" ilk: The Act promulgates federal regulations, provides for their enforcement, and expressly preempts state regulations. Congress thus implicitly confined the scope of the Act to active regulation. State common law was not expressly preempted, and thus Congress must have intended to exclude it from the scope of the Act. Also, consider the following in light of the absence of any compensatory provision in the Act: "The less comprehensive is a federal regulatory scheme, the more likely it is that a holding ousting state jurisdiction would create a substantial legal vacuum—and hence, the less likely is such a holding." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-25, at 385 (1978) (footnotes omitted).

regulation created by the Act can hardly be said to be "pervasive" with regard to private damage claims;⁶⁷ nor can the federal interest in the traditionally state-dominated field of tort compensation be considered "dominant" when Congress failed to mention compensation in any section of the Act.⁶⁸ For these reasons, the object of the Act and the character of the obligations imposed by it do not evidence congressional intent to exert exclusive control over the field of compensation for the victims of cigarette smoking.⁶⁹

Having examined the court's conclusions that Congress did not expressly preempt the Cipollones' state common-law damage actions, and that the Act does not preempt such actions under the theory that Congress intended to occupy the field of tort compensation for people injured by cigarette smoking, it is now necessary to consider whether the state law involved in these claims would "actually conflict" with the Act because it would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁷⁰ The first step in this analysis is to determine precisely what the purposes of the Act are.⁷¹ The second step is to determine what effects the operation of the state law here involved would have on these purposes.⁷²

The Third Circuit began by examining the congressional statement of policy in the Act and concluded that "the Act represents a carefully drawn balance between the purposes of warning the public . . . and [of] protecting the interests of [the] national economy."⁷³ This statement seems to suggest that these purposes are of equal importance, but it is submitted that, in fact, Congress used language in the Act that indicates a hierarchy of purpose.⁷⁴ Congress sought to protect the national econ-

67. *Cipollone*, 789 F.2d at 186.

68. *Id.*

69. *Id.*; *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1163-66 (D. N.J. 1984). For a very thorough examination of the legislative history of the Act with regard to the implied preemption issue, see *Cipollone*, 593 F. Supp. at 1157-63.

70. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). As mentioned in note 43, *supra*, the Third Circuit did not address the question of whether there is a conflict in the literal sense between the Act and the state common law involved in the Cipollones' claims. According to the District of New Jersey, "in no event is compliance with both the Act and state law a 'physical impossibility.'" *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1167 (D.N.J. 1984).

71. For the text of the Act's policy provision, see *supra* note 32.

72. *Finberg v. Sullivan*, 634 F.2d 50, 63 (3d Cir. 1980) (en banc) (citing *Perez v. Campbell*, 402 U.S. 637 (1971)). This analysis concerns the practical effect of the state law, and thus differs from the analysis of express preemption, wherein it was considered whether state common law was a "requirement" as that word is used in the preemption provision. *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1166 n.14 (D. N.J. 1984).

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

74. This hierarchy of purpose is expressed quite clearly in House Report No. 449, "The principal purpose of the bill is to provide adequate warning to the public . . ." H.R. No. 449, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. CODE

omy, but only “to the maximum extent consistent with” the policy of warning smokers of the imminent danger to their health presented by cigarette smoking.⁷⁵ Congress clearly placed more importance on the health of the American public than on the health of the American tobacco industry.⁷⁶

Furthermore, it is submitted that Congress’ primary concern for the tobacco industry was the damage it would suffer if each of the fifty states was allowed to develop its own labeling scheme.⁷⁷ According to the District of New Jersey, this latter concern motivated Congress to include a preemption clause, and this fact sheds some light on the scope of that clause.⁷⁸ The preemption clause in the Act refers only to actual *statutory or regulatory requirements*.⁷⁹ Therefore, the question of whether the “balance” of the Act would be upset by requirements or prohibitions other than those in the Act⁸⁰ should be approached with the understanding, first, that the “balance” Congress created was intended to be somewhat askew⁸¹ and, second, that Congress was primarily concerned with actual statutory or regulatory requirements.⁸²

According to the Third Circuit, “the duties imposed through state common-law damage actions have the effect of requirements that are capable of creating ‘an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’ ”⁸³ However, the only

CONG. & ADMIN. NEWS 2350; see also The report of the General Counsel of the Department of Commerce, *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 2361 (“[T]he proposed means of [protecting commerce and the national economy] may be incompatible with the health protection objective. . . . [W]e believe that the public health interest must prevail.”).

75. 15 U.S.C. § 1331(2)(A) (1985).

76. H.R. No. 449, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 2350. For some relevant text of this report, see *supra* note 74.

77. This concern is manifested in 15 U.S.C. § 1331(2)(B) (1985). For the text of this section, see *supra* note 32. According to the District of New Jersey, the legislative history shows that “the preemption provision of the Act, and the policy which underlies it, grew out of a concern that various states and localities would enact conflicting laws and ordinances.” *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1159 (D. N.J. 1984).

78. *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1159 (D. N.J. 1984).

79. This is simply a restatement of the conclusion reached in the discussion of express preemption. For a discussion of the express preemption issue, see *supra* notes 17-20, 29-31, 49-56 and accompanying text.

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

81. For a discussion of the Act’s hierarchy of purpose, see *supra* notes 74-76 and accompanying text.

82. For a discussion of the limited scope of the Act, see *supra* notes 29-31, 49-56 and accompanying text.

83. *Cipollone*, 789 F.2d at 187 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The court pointed to several Supreme Court decisions which acknowledge that state common-law damage claims may sometimes have a regulatory effect which might frustrate congressional objectives. *Id.* (citing *Fidelity Federal Sav. & Loan Ass’n v. De la Cuesta*, 458 U.S. 141 (1982); *Chicago & N.W. Transp.*

duty imposed on the defendant in a successful damage action is the duty

Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981), San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959)).

In *Fidelity Federal Saving & Loan Association v. De la Cuesta*, 458 U.S. 141 (1982), the controversy revolved around the enforceability of a "due-on-sale" clause held by a federal savings and loan. De la Cuesta purchased a property on which Fidelity held a mortgage. Fidelity discovered the sale and requested immediate payment of the outstanding principal pursuant to the due-on-sale clause. When De la Cuesta refused, Fidelity foreclosed. De la Cuesta sought to block the foreclosure by invoking a California common-law doctrine which would permit the enforcement of a due-on-sale clause only when the lender's security interest was impaired by the sale. Fidelity relied on a regulation of the Federal Home Loan Bank Board (the "Board") stating that a federal savings and loan "continues to have the power to include, as a matter of contract between it and the borrower," a due-on-sale clause enforceable at its option and that "exercise [of the clause] . . . shall be exclusively governed by the terms of the loan contract." 12 C.F.R. § 545.8-3(f) (1982).

The Supreme Court held that the regulation was, indeed, intended to preempt state common law. *Fidelity*, 458 U.S. at 159. There are, however, two critical distinctions between *Fidelity* and *Cipollone*. First, the preamble to the regulation involved in *Fidelity* made absolutely clear an intention to preempt all state law: "[I]t was and is the Board's intent to have . . . due-on-sale practices of Federal associations governed *exclusively* by Federal law. . . . Federal associations shall not be bound by or subject to any conflicting State law which imposes different . . . due-on-sale requirements. . . ." *Fidelity*, 458 U.S. at 158 (quoting 41 Fed. Reg. 18286, 18287 (1976)) (emphasis added by court). The Act involved in *Cipollone*, however, does *not* so clearly express such a far-reaching intent. Second, while the Third Circuit in *Cipollone* cites *Fidelity* as authority for the proposition that state common-law damage claims can have a regulatory effect on behavior, *Fidelity* does not even discuss such claims. At issue in *Fidelity* was the enforceability of a due-on-sale clause in a mortgage. California common law held that such a clause was not enforceable when the lender's security interest was not impaired by the sale. The Board regulation declared that such a clause was always enforceable at the option of the lender. State law and federal law conflicted; federal law preempted state law. It is submitted that, while *Fidelity* provides an example of the operation of the preemption doctrine, it provides no support for the proposition that state common-law *damage claims* have a regulatory effect.

In *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), the plaintiff brick company sued the defendant railroad for abandonment of a certain rail branch used solely by the plaintiff. The defendant had sought and received permission from the Interstate Commerce Commission (ICC) to abandon the branch. The Supreme Court held that since the Interstate Commerce Act gives the ICC the exclusive authority to determine the reasonableness of abandonments, the plaintiff's state common-law damage claim asserting the unreasonableness of the abandonment actually conflicted with the Interstate Commerce Act, and was thus preempted. In so holding, however, the Court stressed two considerations. First, in *Kalo*, the ICC's determination of the reasonableness of the abandonment occurred before the state claim was brought. Second, and more important to the present discussion, the Court stressed that the plaintiff was not left without a remedy, but rather it had the opportunity to contest the abandonment before the ICC and, failing that, to appeal the ICC's decision to the appropriate United States Court of Appeals. These remedies are created by the Interstate Commerce Act itself, and Congress' expression of these remedies alone was considered to be an exclusion of state common-law damage remedies. *Kalo*, 450 U.S. at 324-25, 330-32. The Act

to pay the judgment.⁸⁴ No duty is placed on the defendant to give a specific warning to consumers.⁸⁵ The jury in a state common law tort action is not called upon to suggest an adequate warning, merely to determine the manufacturer's liability and the amount of the damages, if any, to which the plaintiff is entitled.⁸⁶ Jury verdicts in such actions, although they may result in a requirement of compensation for a victim, have no direct regulatory impact because a judgment does not include specific guidelines for future conduct. Indeed, since the adequacy of the warning is a jury matter, the same warning may be adequate in one case and inadequate in another.

It is further submitted that the adoption of additional warnings in response to successful liability actions can more easily be characterized as a business decision than as a legal decision. Cigarette manufacturers exist to make profits, and liability is a cost of doing business. In the hope of reducing this cost, a manufacturer might adopt additional warnings, but because of the nature of jury verdicts there would be no basis in the law for predicting the effectiveness of such a measure.

provides no remedies at all for the person injured by cigarette smoking. *See infra* notes 101-03 and accompanying text.

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), a damage claim was brought in state court under state law regarding a labor practice as to which it was unclear that the National Labor Relations Act (NLRA) applied. The Supreme Court held such claims to be preempted because "[t]he obligation to pay compensation can be . . . a potent method of governing conduct and controlling policy." 359 U.S. at 247. The Court pointed to the exclusivity and integration of federal regulation of labor activities asserting, essentially, that there is no room in such a scheme for state action. 359 U.S. at 244-48. The impact of *Garmon* on the *Cipollone* case is tempered by two considerations. First, the exclusivity and integration of the NLRA are lacking in the Act. *See supra* note 64 and accompanying text. Second, the question in *Garmon* was more jurisdictional than substantive. The NLRA delegates the exclusive authority to hear disputes arising under it to the National Labor Relations Board (NLRB). 369 U.S. at 244-48. With that authority goes the exclusive authority to determine whether a given labor matter is governed by the NLRA. *Id.* The *Garmon* message is that any matter that is arguably governed by the NLRA may not be interfered with by the states (even by claims for compensatory damages) unless and until the NLRB determines whether the NLRA actually does apply to that matter. 359 U.S. at 246. In this respect, the NLRA appears to have created in regard to itself a presumption *in favor of* preemption. The Act creates no such presumption.

84. *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1156 (D. N.J. 1984) (quoting Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423, 1454 (1980)).

85. *Id.*

86. One scholar has noted:

Courts adjudicate prior misconduct and require payment for injury. When a court imposes liability for failure to adequately warn, no specific 'statement relating to smoking and health' is being required. . . . A damages award . . . 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.

D. Garner, *supra* note 84, at 1454 (footnote omitted).

While the distinction between a legal decision and a business decision may seem artificial, this is not the case. For example, suppose a cigarette manufacturer adopts an additional warning because it finds that such a forthright gesture would significantly enhance the goodwill it enjoys among smokers, and thus increase sales. This is clearly a business decision, as the voluntary adoption of additional warnings is not prohibited by the Act.⁸⁷ It is submitted that there is no sound basis for distinguishing between the adoption of a warning to improve sales and the adoption of a warning to cut costs. In each case, traditional legal analysis can provide very limited guidance. Thus, if a manufacturer adopts additional warnings in response to successful liability actions, it is not responding to a requirement of the law; rather, it is exercising its business judgment in such a way as to maximize the profitability of the enterprise. Therefore, it is submitted that because state common-law damage actions do not impose additional warning "requirements" on cigarette manufacturers, the Act does not preempt such actions.⁸⁸

Even if state common-law damage actions can be said to impose additional warning requirements on cigarette manufacturers, these actions are preempted only if they contravene the policy of the Act to avoid "diverse, nonuniform, and confusing" labeling requirements.⁸⁹ It is submitted that even if the imposition of liability would motivate cigarette manufacturers to provide additional warnings, the result for the industry would not be "diverse, nonuniform, and confusing" requirements. Because jury verdicts do not include specific guidelines for future conduct, jury verdicts against cigarette manufacturers, if such were to occur, would suggest, *quite uniformly*, that what is required is, simply, more. In this respect, the result of tort liability is not at odds with the

87. See *Banzhaf v. Federal Communications Comm'n*, 405 F.2d 1082, 1089 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

88. In its analysis, the district court drew a distinction between regulation, which imposes requirements, and motivation, which does not:

Regulation implies that certain behavior be absolutely required or prohibited. . . . Tort liability however, merely "motivates" a person or business entity to act or refrain from acting by creating certain financial incentives. . . . [T]ort liability does not regulate at all; it merely creates some probability of changing the behavior of those upon whom it [is imposed]. . . . What that probability is, and the form such behavioral change would take, provides a starting point for an analysis of whether a conflict exists between the imposition of state tort liability and . . . the Act.

Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146, 1155-56 (D. N.J. 1984) (citing *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1541 (D.C. Cir. 1984)).

The district court went on to conclude that the imposition of liability on cigarette manufacturers would not create a conflict with the Act. *Cipollone*, 593 F. Supp. at 1170.

89. The courts are in agreement that state common-law damage actions do not create "requirement[s] or prohibition[s]" that would come within the scope of the preemption provision of the Act. See *supra* note 56. For the text of the Act's preemption provision, see *supra* note 29.

congressional statement of policy. It is submitted, then, that the Act does not preempt state common law damage claims.

Furthermore, the Third Circuit described the "duties" imposed by tort actions as "capable of creating" an obstacle to the achievement of the Act's purposes.⁹⁰ Yet, the Supreme Court has held that "[t]he existence of a hypothetical or *potential* conflict is insufficient to warrant the pre-emption of the state [law]."⁹¹ It is submitted that, as applied to the present case, this principle counsels that the Cipollones' claims should not be held to be preempted simply because a recovery on their part *might* lead the defendants to adopt additional warnings at some time in the future.⁹² Certainly, the imposition of tort liability on the defendants would not encourage cigarette manufacturers to abandon the warnings required by the Act or to violate the Act in any other way.⁹³ In short, it is submitted that the conflict on which the Third Circuit relied to preempt the Cipollones' claims might never have materialized, and, therefore, the Act does not preempt state common-law damage claims.

The Result

It is submitted that the Third Circuit's decision in *Cipollone* was to some extent predicated on policy considerations not clearly expressed in its opinion. The court no doubt was concerned about the welfare of the tobacco industry.⁹⁴ This concern was explicit in the court's conclusion that the imposition of tort liability would tip the balance between the purposes of warning the public and of protecting the national economy.⁹⁵ The court implied that the imposition of liability would have an

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

91. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) (emphasis added).

92. The Cipollones' recovery would not require additional warnings in the sense that the defendants would not be forced to adopt new warnings. Nor would the voluntary incorporation of additional warnings by the defendants be contrary to the Act. See *Banzhaf v. Federal Communications Comm'n*, 405 F.2d 1082, 1089 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

93. If such were the case, an "actual conflict" would clearly exist, perhaps even under the "physical impossibility" test.

The Third Circuit did not hold that the voluntary implementation of additional warnings by cigarette manufacturers would violate the Act, and thus create a literal conflict. See *Banzhaf v. Federal Communications Comm'n*, 405 F.2d 1082 (D.C. Cir. 1968) (Congress did not intend "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"), *cert. denied*, 396 U.S. 842 (1969). Rather, its position was that the imposition of tort liability would pressure cigarette manufacturers to adopt additional warnings. *Cipollone*, 789 F.2d at 187. This pressure, the court reasoned, would tip the balance of the Act, and thus imposition of such liability would actually conflict with the Act. *Id.*

94. Certainly, the result is all that the tobacco industry could have wanted. For a discussion of the immunizing effect of the decision, see *infra* notes 101-04 and accompanying text.

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

adverse effect on the national economy, a result of its presumed effect on the tobacco industry. The Third Circuit, therefore, nipped such liability in the bud by declaring that the Act preempts claims such as those of the Cipollones.⁹⁶ It is submitted that if the imposition of liability would *not* have a substantially adverse effect on the industry and thus on the national economy, the court's reasoning fails.

Perhaps the Third Circuit feared that, unless claims like those of the Cipollones were preempted, the industry would be overcome by a tidal wave of lawsuits. Putting aside the merits of sheltering the makers of "undisputably harmful products"⁹⁷ from liability for the injuries those products have caused, it is submitted that resort to the preemption doctrine is unnecessary, as there are sufficient devices already present in state legal systems to prevent the imposition of indiscriminate liability on cigarette manufacturers. For example, the well-established defenses of contributory/comparative negligence and assumption of the risk are especially suited to the industry's cause.⁹⁸ Even without these defenses, plaintiffs in such cases have the very difficult burden of showing that the federally mandated warnings are inadequate.⁹⁹ Even if the Third Cir-

96. *Id.*

97. *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1170 (D. N.J. 1984).

98. *See, e.g., Pritchard v. Liggett & Meyers Tobacco Co.*, 350 F.2d 479, 485 (3d Cir. 1965) (assumption of risk is defense). As awareness of the dangers of cigarette smoking has been growing for decades, it is difficult to imagine any plaintiff circumventing the assumption of the risk defense. This would be especially true of plaintiffs who began to smoke after the Act took effect in 1966, when the first warning labels were printed on cigarette packages.

99. According to the district court, "it will be extremely difficult for a plaintiff to prove that the present warning is inadequate . . ." *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1148 (D. N.J. 1984).

The district court further noted the "common misperception of the function of government regulation" which is "that what is not prohibited is permitted or that a minimum standard fixes the maximum as well. . . . [G]overnment standards are meant to fix a level of performance below which one should not fall. . . . [L]egal minimums were never intended to supplant moral maximums." *Cipollone* 593 F. Supp. at 1170.

Along these lines, consider the following. A cigarette manufacturer complies fully with the letter of the Act, but places in its advertisements and on its packages statements to the effect that the Act's warnings are unsubstantiated, that the manufacturer has evidence contrary to the warnings, and generally that the Surgeon General is but the pawn of an evil nonsmokers' lobby. It is submitted that a plaintiff who has been enticed by such siren songs and then injured by his smoking would be barred from recovering on any claim regarding misleading or fraudulent advertising, since such a claim would "challenge . . . the propriety of a party's actions with respect to the advertising or promotion of cigarettes," and, therefore, imposition upon the manufacturer of such liability would be considered to amount to a prohibition other than those contained in the Act. *Cipollone*, 789 F.2d at 187. This, apparently, would be true even though the manufacturer clearly acted in defiance of the Act. It is submitted that such a possible result, consistent with the court's holding, casts doubt upon the correctness of the court's decision.

cuit's real concern is that every jury will be influenced to some degree by the David and Goliath character which these cases will invariably possess, and find against the manufacturer regardless of the merits of the plaintiff's case, there are still devices available to ensure justice, such as directed verdicts, judgments n.o.v., remittiturs and, if necessary, new trials. The court presented no evidence that the "national economy" would be substantially affected by allowing claims like the Cipollones' to go to trial.¹⁰⁰

The ramifications of the Third Circuit's decision are far-reaching. The defendants here, and indeed the entire tobacco industry, seek immunization.¹⁰¹ The Cipollones' "claims . . . represent an individual's sole recourse in the event of injury based on cigarette smoking. . . ."¹⁰² To hold that the Cipollones' claims are preempted is to leave them and others like them without a remedy.¹⁰³ It is submitted that when preemption would yield such a result, a court should require a very pronounced and immediate conflict between the state and federal laws involved.¹⁰⁴ No such conflict can be found here. Indeed, it is further submitted that if Congress intends to deprive the injured of their only existing remedy, it would not be overly burdensome for a court to require Congress to express its intent to do so, since the effect it seeks is so profound. No such intent was expressed in the Act.

CONCLUSION

In sum, it is submitted that *Cipollone* was wrongly decided. The Act does not expressly preempt the Cipollones' claims because its preemption provision refers only to "requirements" and "prohibitions," language not sufficiently broad to include state common law. Furthermore,

100. See *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1168 (D. N.J. 1984) (footnote omitted). "Congress' intention that the cigarette industry be allowed to survive . . . is not undermined by the imposition of liability on cigarette companies." *Id.* In the footnote to this observation, the district court points out that "this is particularly true in light of the failure of prior cases of this sort." *Id.* at n.17; see, e.g., *Pritchard v. Liggett & Meyers Tobacco Co.*, 350 F.2d 479, 481 (3d Cir. 1965) (jury verdict against plaintiff).

101. In *Cipollone*, it appears that the tobacco industry has achieved its goal, for here it has argued successfully that "compliance [with the Act] 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." *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1148 (D. N.J. 1984).

102. *Id.* at 1170. Claims based on other theories such as the "unreasonably dangerous product" theory have all failed. See, e.g., *Roysdon v. R.J. Reynolds Tobacco Co.*, 623 F. Supp. 1189, 1191-92 (E.D. Tenn. 1985).

103. *Palmer v. Liggett Group, Inc.*, 633 F. Supp. 1171, 1180 (D. Mass. 1986). The *Palmer* court noted that "the Third Circuit[s] opinion . . . effectively immunizes the tobacco industry when Congress did not expressly do so." *Id.*

104. Even actual state legislation supplementary to federal law is not preempted on the conflict theory unless the federal law is "significantly impeded by the state law." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-24, at 379 & n.12.

the Act is not an attempt by Congress to occupy the field of tort compensation for the victims of the cigarette industry, since the Act makes no reference thereto, and provides no alternative remedy to state law damage claims. Moreover, the state law involved in the Cipollones' claims does not "actually conflict" with the Act, for while it is possible that tort liability might motivate cigarette manufacturers to place additional warnings on their products, such a result would not interfere with the achievement of Congress' dual purposes of protecting both the public health and the national economy.¹⁰⁵ Finally, the decision in *Cipollone* effectively sacrifices the only remedy of those injured by cigarette smoking in order to immunize the tobacco industry from legitimate claims, without offering adequate support for such a protectionist stance.

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105. 15 U.S.C. § 1331(2)(B) (1985). For the complete text of the Act's policy provision, see *supra* note 32.

