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Dewey v. R. J. Reynolds Tobacco Company: A Change in Cigarette Labels in New Jersey

Donna M. Dever

Recent Development

DEWEY V. R.J. REYNOLDS TOBACCO COMPANY: A CHANGE IN CIGARETTE LABELS IN NEW JERSEY?

I. INTRODUCTION

In *Dewey v. R.J. Reynolds Tobacco Co.*,[1] the New Jersey Supreme Court broke from the precedent established by the Court of Appeals for the Third Circuit and the courts of appeals for four other circuits on the preemptive effect of the Federal Cigarette Labeling and Advertising Act.[2] The New Jersey court held that this federal statute does not preempt state common law tort claims against cigarette manufacturers for inadequate warning and misrepresentation and fraud in advertising.[3] In contrast, the five circuit courts that have addressed this issue have found that the statute does preempt state law tort claims relating to smoking and health "that challenge either the adequacy of the warning on cigarette packages or the propriety of a [cigarette manufacturer's] actions with respect to the advertising and promotion of cigarettes."[4]

It appears likely that *Dewey* will be reviewed by the United States Supreme Court due to the conflict between the decisions of the circuit courts and the decision of the New Jersey Supreme Court. The Court's review may result in a reversal[5] of the *Dewey* decision thus preventing the potential adverse effects of the *Dewey* decision,[6] while promoting the goals of this statute.[7]

1. 121 N.J. 69, 577 A.2d 1239 (1990).

2. 15 U.S.C. §§ 1331-1341 (1988).

3. *Dewey*, 121 N.J. at 94, 577 A.2d at 1251. For a discussion of the facts and holding of *Dewey*, see *infra* notes 45-90 and accompanying text.

4. Cipollone v. Liggett Group, Inc., 789 F.2d 181, 187 (3d Cir. 1986) (footnote omitted), *cert. denied*, 479 U.S. 1043 (1987); *see* Pennington v. Vistron Corp., 876 F.2d 414, 421 (5th Cir. 1989); Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 235 (6th Cir. 1988); Palmer v. Liggett Group, Inc., 825 F.2d 620, 626 (1st Cir. 1987); Stephen v. American Brands, Inc., 825 F.2d 312, 313 (11th Cir. 1987). For a discussion of the holdings and rationales of these cases, see *infra* notes 13-44 and accompanying text.

5. For a discussion of the reasons that the opinions of the circuit courts of appeals will most likely prevail, see *infra* notes 91-113 and accompanying text.

6. For a discussion of the potential adverse effects of the *Dewey* decision, see *infra* notes 120-26.

7. For a discussion of the purposes of the Federal Cigarette Labeling and Advertising Act, see *infra* notes 91-96 and accompanying text.

II. BACKGROUND

A. *The Federal Cigarette Labeling and Advertising Act*

In 1965, Congress enacted the Federal Cigarette Labeling and Advertising Act (the Act).[8] According to 15 U.S.C. § 1331, the purpose of the Act is twofold: to adequately inform the public of the adverse health effects of cigarette smoking and to protect commerce and the national economy by preventing the promulgation of diverse and confusing cigarette labeling and advertising regulations.[9]

The preemption section of the Act prohibits state law requirements of any statement related to smoking and health on cigarette labeling other than the statement required by section 1333 of the Act. It also prohibits state law requirements or prohibitions based on smoking and health with respect to the advertising or promotion of cigarettes that are properly labeled.[10]

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8. Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-1341 (1988)). The Act was subsequently amended in 1970, 1973, 1984 and 1985. *See* Pub. L. No. 91-222, 84 Stat. 89 (1970); Pub. L. No. 93-109, 87 Stat. 352 (1973); Pub. L. No. 98-474, 98 Stat. 2204 (1984); Pub. L. No. 99-92, 99 Stat. 403 (1985).

9. 15 U.S.C. § 1331 (1988). For the text of the purpose section of the Act, see *infra* text accompanying note 92. For a further discussion of the purposes of the Act, see *infra* notes 91-96 and accompanying text.

10. 15 U.S.C. § 1334 (1988). Section 1334 provides:

> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

Id.

Section 1333 of the Act originally required that the following statement be conspicuously placed on every cigarette package: "Caution: Cigarette Smoking May Be Hazardous to Your Health." In 1970, the mandatory warning was changed to: "Warning, The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." The 1984 amendment to the Act required a conspicuous showing of the following warnings, on a rotating basis, on all cigarette packages sold in the United States and in all advertisements for cigarettes except for billboards:

> [a] SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy[;]
>
> [b] SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health[;]
>
> [c] SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight[; and]
>
> [d] SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

Id. § 1333(a) (1)-(2). The warnings required for billboard advertising differ only slightly from these warnings. *See id.* § 1333(a)(3).

B. *Decisions of the Federal Courts of Appeals on the Preemptive Effect of the Act*

The doctrine of preemption of state law by federal law stems from the supremacy clause of the United States Constitution.[11] Under the preemption doctrine, courts must examine congressional intent to determine the preemptive effect of a federal law.[12]

The Third Circuit was the first United States Court of Appeals to address the issue of the preemptive effect of the Act in *Cipollone v. Liggett Group, Inc.*[13] In *Cipollone*, the plaintiff brought claims based on strict liability, negligence, breach of warranty and intentional tort against the manufacturers and sellers of the cigarettes that she had smoked.[14] The plaintiff claimed, *inter alia*, that the defendants sold and/or manufactured cigarettes which were unsafe and defective, failed to adequately warn of the hazards of cigarette smoking and advertised their products in a manner that neutralized the warnings actually provided.[15]

Upon addressing the preemptive effect of the Act, the court began by noting the "overriding presumption that 'Congress did not intend to displace state law.' "[16] The court then recognized that the United States Supreme Court has held that Congress may preempt state law either expressly or impliedly.[17] As the preemption section of the Act did not

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11. The United States Constitution provides that "the Laws 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.

12. *See* R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 140 (1986) (Court looked at legislative history of federal statute to determine preemptive effect on ad valorem state taxation of imported goods stored in warehouses); Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 152 (1982) (resolution of issue of preemptive effect of federal regulation relating to due-on-sale clauses rested on determination of federal agency's intent to preempt state's due-on-sale law).

13. 789 F.2d 181 (3d Cir. 1986). The *Cipollone* case generated numerous court opinions. For a discussion of several of these opinions, see *Third Circuit Review*, 35 VILL. L. REV. 832 (1989).

14. 789 F.2d at 184. Mrs. Cipollone and her husband alleged that Mrs. Cipollone developed lung cancer from smoking cigarettes manufactured and sold by the defendants. *Id.* at 183. Upon Mrs. Cipollone's death, Mr. Cipollone continued the action against the defendants. *Id.*

15. *Id.* at 184.

16. *Id.* at 185 (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981)); *see also* English v. General Elec. Co., 110 S. Ct. 2270, 2275 (1990) (citing Jones v. Rath Packing Co., 430 U.S. 519, 525, *reh'g denied*, 431 U.S. 925 (1977)).

17. *Cipollone*, 789 F.2d at 185 (citing Jones v. Rath Packing Co., 430 U.S. 519, 525, *reh'g denied*, 431 U.S. 925 (1977)); *see English*, 110 S. Ct. at 2275. Express preemption is found in the language of a statute. *See Cipollone*, 789 F.2d at 185-86. Implied preemption exists where Congress intends to "occupy the field" in a given area of law or where state law "actually conflicts" with federal law. *Id.* at 185 (citing Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982) (state limitation on due-on-sale practices of federal savings and loans preempted due to conflict with federal due-on-sale regulations); Pacific

mention state common law claims,[18] and in light of the presumption against preemption,[19] the court found that the Cipollones' claims were not expressly preempted.[20]

The court found, however, that certain state law tort claims are impliedly preempted by the Act.[21] The court held that the Act preempts state law tort claims 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 . . . of cigarettes."[22] The court further held that state tort claims that necessarily depend upon "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" are preempted.[23] The determination of preemption was made by examining "the purposes of the federal law and . . . the effect of the operation of the state law on these purposes."[24] The court

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Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1982) (state law constraints on construction of nuclear energy plants based on economic concerns not preempted because no conflict with federal regulation of nuclear safety)). An "actual conflict" arises when "compliance with both federal and state regulations is a physical impossibility" or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (finding no impossibility of compliance with federal statute regulating quality of avocados and state statute regulating quality of avocados), *reh'g denied*, 374 U.S. 858 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1974) (holding state law requiring registration of aliens stood as obstacle to accomplishment and execution of federal statutory objectives)).

18. For the text of the Act's preemption clause, see *supra* note 10.

19. The general presumption against preemption was strengthened in this case because the Act regulates rights and remedies traditionally defined by state law. *Cipollone*, 789 F.2d at 186.

20. *Id.* at 185-86. The court noted that, in contrast, Congress expressly preempted state common law in the Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. § 1715z-18(e) (1988), the Copyright Act of 1976, 17 U.S.C. § 301(a) (1988) and the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a), (c)(1) (1988). *Cipollone*, 789 F.2d at 185-86 n.5.

21. *Id.* at 187. In determining the implied preemption question, the Third Circuit disregarded the legislative history of the Act because it found that "the language of the statute itself [was] a sufficiently clear expression of congressional intent." *Id.* at 186. The court concluded that although Congress had intended to "occupy *a* field," the scope of this field did not include the tort claims presented in the case. *Id.* In making this determination, the *Cipollone* court adopted a restrained view of Congress's intention to preempt because the rights and remedies of tort law are traditionally defined solely by state law. *Id.* The court found that the objectives of the Act and the obligations imposed by the Act do not show a purpose of exclusive federal control over all aspects of the cigarette and health issue. *Id.* The court found, however, that some of the state law tort claims "actually conflicted" with the Act. *Id.* at 187.

22. *Id.* (footnote omitted).

23. *Id.*

24. *Id.* (quoting Finberg v. Sullivan, 634 F.2d 50, 63 (3d Cir. 1980) (en banc)).

identified the purpose of the Act as the maintenance of the "carefully drawn balance between . . . warning the public of the hazards of cigarette smoking and protecting the interest of national economy."[25] The Third Circuit acknowledged the Supreme Court recognition of the regulatory effect of state law damage claims and their potential for frustrating federal objectives.[26] The court, therefore, 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 . . . [tip] the Act's balance of purposes and therefore actually conflict with the Act."[27]

The Court of Appeals for the Eleventh Circuit applied the rationale of *Cipollone* in *Stephen v. American Brands, Inc.*[28] In *Stephen*, the plaintiff alleged that cigarettes manufactured by the defendant caused the death of her husband.[29] The complaint alleged the failure of the defendant to provide adequate warnings of the dangers associated with cigarette smoking.[30] The defendant argued that the claims asserted against it were preempted by the Act.[31] The Eleventh Circuit adopted the rationale of *Cipollone* and held that the district court properly denied the plaintiff's motion to strike the preemptive defense.[32]

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25. *Id.* The court determined the purpose of the Act by examining § 1331 of the Act. *Id.*

26. *Id.* (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 (1980); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959)).

27. *Id.* In reaching this conclusion, the court analyzed the purposes of the Act given in § 1331 together with the preemption provision in § 1334 of the Act. *Id.* According to the court, Congress determined that "either a requirement of a warning other than that prescribed in section 1333 *or* a requirement or prohibition based on smoking and health 'with respect to the advertising or promotion' of cigarettes" would upset the "carefully drawn balance" in the Act. *Id.* (citing 15 U.S.C. § 1334 (1988)). The court remanded the case to the trial court for a decision as to which of the claims were in fact preempted by the Act. *Id.* at 188.

28. 825 F.2d 312 (11th Cir. 1987).

29. *Id.* at 313. The plaintiff's husband had smoked cigarettes manufactured by the defendant for over 50 years. *Id.*

30. *Id.*

31. *Id.* The district court denied the plaintiff's motion to strike the defendant's preemption defense. *Id.* The district court relied upon the Third Circuit's holding in *Cipollone* that the Act "preempt[s] tort claims which are premised on the adequacy of warnings on cigarette packaging or the propriety of a party's actions with respect to the advertising and promotion of cigarettes." *Id.* (quoting Stephen v. American Brands, Inc. (N.D. Fla. 1986) (1986 WL 15622)).

32. *Id.* The *Stephen* court based its holding on the rationale that if the preemption defense was good against any of the state law tort claims asserted against the cigarette manufacturer, the district court's denial of the motion to strike the defense was proper. *Id.* As the court adopted the *Cipollone* court's reasoning that the Act does preempt certain state law tort claims, the preemption defense was potentially good against the claims made in this case, and the district court's denial of the motion to strike the defense was proper. *Id.* The Eleventh Circuit declined to rule on the Act's preemptive effect on any particular

In *Palmer v. Liggett Group, Inc.*,[33] the First Circuit also addressed the issue of whether the Act preempts state law claims against a cigarette manufacturer for providing inadequate warnings about the dangers of cigarette smoking.[34] The First Circuit court concluded that the Act was intended "to strike a fair, effective balance" between two competing purposes: (1) informing the public of the hazards of cigarette smoking; and (2) protecting commerce and the national economy.[35] The court held that, where the warning given on a defendant's cigarettes complies with the Act, damage claims based on inadequate warnings would serve to excessively disrupt the delicate balance struck by Congress between these competing purposes and such claims should therefore be preempted by the Act.[36]

In *Roysdon v. R.J. Reynolds Tobacco Co.*,[37] the Sixth Circuit addressed the Act's preemption of failure to warn claims.[38] The Sixth Circuit court adopted the reasoning of the Third Circuit in *Cipollone* and the First Circuit in *Palmer* in finding that the Act does preempt claims against cigarette manufacturers where the warning given complies with the Act.[39]

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claim made by the plaintiff, declaring that the issue could "only be worked out after further procedures in the district court." *Id.*

33. 825 F.2d 620 (1st Cir. 1987).

34. *Id.* The plaintiff alleged that the defendant was liable for the death of her husband, who had smoked three to four packs of the defendant's cigarettes per day until his death. *Id.* at 622. The complaint alleged causes of action for negligence, breach of warranty and violations of the Massachusetts Consumer Protection Act. *Id.* The defendant cigarette manufacturer filed a motion to dismiss all inadequate warning claims on the ground that they were preempted by the Act. The district court denied the motion, stating that "Congress [could not have] meant, by its silence on the issue of common law claim preemption, to do away with all means of obtaining compensation for those hurt by inadequate cigarette warnings and advertising." Palmer v. Liggett Group, Inc., 633 F. Supp. 1171, 1173 (D. Mass. 1986), *rev'd*, 825 F.2d 620 (1st Cir. 1987).

35. *Palmer*, 825 F.2d at 626.

36. *Id.* It was inconceivable to the First Circuit that Congress intended to permit the "carefully wrought balance" between health protection and trade protection to be destroyed "by the views of a single state, indeed, perhaps of a single jury in a single state." *Id.*

37. 849 F.2d 230 (6th Cir. 1988). The plaintiff, who smoked the defendant's cigarettes for at least 37 years, alleged that the cigarettes caused his severe peripheral atherosclerotic vascular disease. *Id.* at 232. The district court dismissed the plaintiff's failure to warn claim. *Id.*

38. The *Roysdon* court also reviewed the viability of a products liability claim that the defendant's cigarettes were "defective and unreasonably dangerous." *Id.* at 235-36. The Sixth Circuit affirmed the district court's grant of a directed verdict for the defendant on this claim. *Id.* at 236. The court reasoned that a reasonable jury could not find that the cigarettes were defective. *Id.* Additionally, due to the widespread knowledge of the dangers of smoking, cigarettes were not unreasonably dangerous within the meaning of state law because they were not "dangerous to an extent beyond that which could be contemplated by the ordinary consumer who purchases [cigarettes] with the ordinary knowledge common in the community as to its characteristics." *Id.* (quoting TENN. CODE ANN. § 29-28-102(8) (1980)).

39. *Id.* at 234-35. For a discussion of the reasoning of the *Cipollone* court,

Finally, in *Pennington v. Vistron Corp.*,[40] the Fifth Circuit became the first federal court of appeals to address the issue of which specific state law claims are preempted by the Act.[41] The court held that the Act preempted all of the plaintiff's state law claims challenging the adequacy of the warnings placed on the defendants' cigarette packages after 1965.[42] The *Pennington* court also held that the Act preempted all claims based on a theory that tobacco companies have a duty to provide warnings in addition to the congressionally mandated warnings, or that question the propriety of advertising and promotional activities of tobacco companies.[43] The court concluded, however, that the Act does *not* preempt *all* state law tort claims arising after January 1, 1966 for injuries caused by cigarette smoking.[44]

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see *supra* notes 13-27 and accompanying text. For a discussion of the reasoning of the *Palmer* court, see *supra* notes 33-35 and accompanying text.

40. 876 F.2d 414 (5th Cir. 1989).

41. *Id.* at 418-19 n.4. The plaintiff filed a claim against numerous defendants, including two tobacco companies, alleging that the defendants' products caused or contributed to her husband's death, which resulted from cancer of the esophagus. *Id.* at 416. The plaintiff's husband had allegedly smoked cigarettes since 1954 that were manufactured by at least two of the defendant tobacco companies. *Id.* The district court granted the tobacco companies' motion for summary judgment for all claims of injury resulting from the decedent's smoking after 1965, reasoning that these claims were preempted by the Act. *Id.* After the plaintiff filed an amended complaint, the district court granted summary judgment on the plaintiff's nonpreempted claims against the tobacco companies, concluding that there was no genuine issue of material fact for trial. *Id.* at 416-17.

42. *Id.* at 421. The Act took effect on January 1, 1966, thereby preempting all state law tort claims based on warnings placed on cigarette packages after 1965. *Id.*

43. *Id.* at 417. The court thus rejected the plaintiff's claim that the defendant tobacco companies had a duty to educate the public about the risks of smoking in order to counterbalance the companies' promotional activities. *Id.* at 421.

44. *Id.* at 422-23. The court stated that "[n]othing in the Act indicates a congressional intention to supersede all state tort claims that challenge the health effects of cigarettes, especially in light of the presumption against preemption that applies to health and safety regulation by the states." *Id.* at 423. Specifically, the court decided that a claim under Louisiana law that cigarettes are unreasonably dangerous per se was not preempted. *Id.* Under Louisiana law, a product is unreasonably dangerous per se "if a reasonable person would conclude that the danger-in-fact of the product, whether foreseeable or not, outweighs the utility of the product." *Id.* at 420 (quoting Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110, 114 (La. 1986)). The *Pennington* court agreed with the *Cipollone* court that the scope of the Act was not "so pervasive" as to eradicate all tort claims. *Id.* at 423. Since this claim did not arise out of labeling and promotional activities, it was not preempted by the Act. *Id.* Nonetheless, the Fifth Circuit upheld the district court's grant of summary judgment on this claim because the plaintiff did not submit any proof that cigarette smoking caused her husband's death. *Id.* at 425-27.

III. DISCUSSION

In *Dewey v. R.J. Reynolds Tobacco Co.*,[45] the plaintiff, Claire Dewey, brought suit individually and as executrix of her husband's estate against four cigarette manufacturers, alleging that her husband had developed lung cancer from smoking the defendants' cigarettes from 1942 until shortly before his death in 1980.[46] The plaintiff's claims were based on theories of design defect, inadequate warning, and fraud and misrepresentation in advertising.[47] Defendant Brown & Williamson Tobacco Co. filed a motion for summary judgment alleging that the Act preempted the claims asserted against it.[48]

The trial court granted the defendant's motion to dismiss the plaintiff's causes of action for failure to warn and fraud and misrepresentation in advertising, holding that they were preempted by the Act.[49] The trial court, however, refused to dismiss the plaintiff's design defect claim on preemption grounds.[50]

The appellate court affirmed the trial court's finding of preemption of the failure to warn and fraud and misrepresentation in advertising claims, holding that the claims necessarily conflicted with "the Act's express limitations on conflicting state law and with the congressional purpose of preventing diversity in the cigarette labeling requirements of the several states."[51] The appellate court also rejected the defendant's argument that the Act preempted the plaintiff's claim that the defendant's

45. 121 N.J. 69, 577 A.2d 1239 (1990).

46. *Id.* at 73, 577 A.2d at 1240-41. The four defendants were R.J. Reynolds Tobacco Co., R.J. Reynolds Industries, Inc., American Brands, Inc. and Brown & Williamson Tobacco Co. *Id.*

47. *Id.* at 73, 577 A.2d at 1241.

48. *Id.* The plaintiff's husband had not smoked cigarettes manufactured by Brown & Williamson until 1977, 11 years after the enactment of the Act. *Id.* Brown & Williamson also asserted that the complaint was deficient as a matter of substantive law because New Jersey law bars the imposition of strict liability for a product "whose danger is contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965)). *See also* N.J. STAT. ANN. §§ 2A:58C-1-2A:58C-7 (West 1987).

49. Dewey v. R.J. Reynolds Tobacco Co., 216 N.J. Super. 347, 354-55, 523 A.2d 712, 716 (Law Div. 1986), *aff'd as modified sub nom.* Dewey v. Brown & Williamson Tobacco Corp., 225 N.J. Super. 375, 542 A.2d 919 (App. Div. 1988), *aff'd in part, rev'd in part sub nom.* Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 577 A.2d 1239 (1990). The trial court based its holding on the opinion of the Third Circuit in *Cipollone*. *Id.* at 355-56, 542 A.2d at 716-17.

50. *Id.* at 356, 523 A.2d at 717. The court cited *Cipollone* in concluding that the Act does not preempt all state law tort remedies that a plaintiff may have in smoking and health-related litigation. *Id.* at 355-56, 542 A.2d at 716-17.

51. Dewey v. Brown & Williamson Tobacco Corp., 225 N.J. Super. 375, 379-81, 542 A.2d 919, 921-22 (App. Div. 1988), *aff'd in part, rev'd in part sub nom.* Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 577 A.2d 1239 (1990). The court cited *Cipollone, Palmer* and *Stephen*, as well as Gunsalus v. Celotex Corp., 674 F. Supp. 1149, 1159 (E.D. Pa. 1987), in support of its conclusion. *Id.*

cigarettes were defectively designed.[52]

The Supreme Court of New Jersey reversed the appellate court's decision in part, concluding that neither the failure to warn claim nor the fraudulent advertising claim was preempted by the Act.[53] The court began its analysis of the preemption issue by rejecting the defendant's argument that the New Jersey Supreme Court was bound to adopt the holding by the Third Circuit in *Cipollone* that claims of the type brought by the plaintiff are preempted by the Act.[54] The court stated that decisions of a lower federal court are no more binding on a state court than they are on a federal court above it in the judicial hierarchy.[55] Although

52. *Id.* at 381-82, 542 A.2d at 922-23. The appellate court accepted the trial court's conclusion that a design defect claim does not frustrate Congress's objective in enacting the federal statute and "does not conflict with the Act's two-fold purpose of providing warning to the public and protecting national economic interests." *Id.* (citing *Dewey*, 216 N.J. Super. at 356, 523 A.2d at 717). The appellate court also rejected the defendant's claim that the design defect cause of action was eliminated by the New Jersey Products Liability Law. *Id.* at 384-86, 542 A.2d at 923-25. The court concluded that the legislature, in enacting the products liability statute, intended to subject pending cases to the then-existing common law of products liability. *Id.* at 385, 542 A.2d at 923 (citing N.J. STAT. ANN. § 2A:58C-8 (West 1987)). The court found that § 3a(2) of the New Jersey Products Liability Law codified § 402A comment i of the *Restatement (Second) of Torts* as part of the existing common law and, therefore, the principles of comment i were applicable to this case. *Id.* at 384, 542 A.2d at 924. Under comment i, for a product to be unreasonably dangerous the product "must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965). Comment i does not apply to claims involving injuries caused by a danger not inherent in well-made tobacco. *See id.* Although under comment i the plaintiff could not recover if the death of her husband was caused by the danger inherent in all cigarettes, the court did not dismiss the plaintiff's claim. *Dewey*, 225 N.J. Super. at 385-87, 542 A.2d at 924-25. The possibility of material issues concerning the defendant's cigarettes as the defendant designed them and the plaintiff smoked them precluded summary judgment as to the plaintiff's design defect claim. *Id.* at 387-88, 542 A.2d at 925-26.

53. Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 94, 577 A.2d 1239, 1251 (1990). As a preliminary matter, the court found that the plaintiff's complaint was sufficient to support a claim of design defect. *Id.* at 76-77, 577 A.2d at 1242. Although the complaint did not contain the words "design defect," it did allege that the tobacco products "were not reasonably fit, safe and suitable for human use at the time the products were placed in the stream of commerce" and that "[t]he unfitness, unsuitableness and unsafeness of the [d]efendants' products *along with* the failure of the [d]efendants to warn and/or convey an adequate warning caused the [p]laintiff's decedent to suffer serious, severe, disabling and permanent injuries and death." *Id.* at 76, 577 A.2d at 1242.

54. *Id.* at 79-80, 577 A.2d at 1243-44. In *Cipollone*, a plaintiff brought her state tort claims against cigarette manufacturers in federal court. The Third Circuit held that the Act preempts failure to warn claims and claims challenging the content of cigarette advertising. *Cipollone*, 789 F.2d at 187. For a discussion of the holding of *Cipollone*, see *supra* notes 13-27 and accompanying text.

55. *Dewey*, 121 N.J. at 79, 577 A.2d at 1244 (citing State v. Coleman, 46 N.J. 16, 37, 214 A.2d 393, 404 (1965), *cert. denied*, 383 U.S. 930 (1966) (quoting Note, *Authority in State Courts of Lower Federal Court Decisions on National Law*, 48 COLUM.

the court recognized that lower federal court decisions addressing the preemption of state claims under the Act should be accorded due respect, especially when they are in agreement, the court undertook an independent analysis of the preemptive effect of the Act.[56]

The court observed that the doctrine governing preemption of matters traditionally under state control mandates a finding of no preemption "unless [preemption] was the clear and manifest purpose of Congress."[57] The court found no such clear showing of congressional intent and held that the Act "neither expressly preempt[ed] common law remedies nor impliedly preempt[ed] those remedies by pervasively occupying the field of law."[58] Furthermore, the court found no indication that "compliance with both state and federal law [was] impossible."[59] The court then "parted company" with *Cipollone* and its progeny by declaring that "state law claims for inadequate warning [did not] 'actually conflict' with the purposes of the . . . Act" and therefore were not preempted.[60]

To determine whether a finding of preemption based on an actual

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L. REV. 943, 946-47 (1948))). The court gave the issue careful consideration because New Jersey precedent appeared to hold that the state's courts were bound by the federal courts' interpretations of federal statutes. *Id.* at 79, 577 A.2d at 1243. In Southern Pacific Co. v. Wheaton Brass Works, 5 N.J. 594, 76 A.2d 890 (1950), *cert. denied*, 341 U.S. 904 (1951), the Supreme Court of New Jersey had stated that the case before it required "consideration of the applicable provisions of the Interstate Commerce Act as construed by the federal courts whose decisions on federal problems are controlling." *Id.* at 598, 76 A.2d at 892. The *Dewey* court opined that this statement clearly referred only to "the binding nature of . . . United States Supreme Court cases and not of lower-federal-court cases." *Dewey*, 121 N.J. at 79, 577 A.2d at 1243. The court pointed out that in State v. Coleman, 46 N.J. 16, 214 A.2d 393 (1965), *cert. denied*, 383 U.S. 930 (1966), it had declined to follow the Third Circuit's federal constitutional analysis in United States *ex rel.* Russo v. New Jersey, 351 F.2d 429 (3d Cir. 1965). *Dewey*, 121 N.J. at 79, 577 A.2d at 1244. The court saw no reason to distinguish between the constitutional interpretation involved in *Coleman* and the statutory interpretation presently before the court. *Id.* at 79-80, 577 A.2d at 1244. For a further discussion of the binding effect on state courts of interpretations of federal law by the lower federal courts, see *infra* notes 114-19 and accompanying text.

56. *Dewey*, 121 N.J. at 80, 577 A.2d at 1244.

57. *Id.* at 85, 577 A.2d at 1247 (quoting Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 146 (1963)).

58. *Id.* at 86, 577 A.2d at 1247.

59. *Id.* (citing Pennington v. Vistron, 876 F.2d 414, 418-21 (5th Cir. 1989); Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 234 (6th Cir. 1988); Palmer v. Liggett Group, Inc., 825 F.2d 620, 625-26 (1st Cir. 1987); Cipollone v. Liggett Group, Inc., 789 F.2d 181, 185-87 (3d Cir. 1986), *cert. denied*, 470 U.S. 1043 (1987); Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655, 659-60 (Minn. 1989)). For a discussion of the cited cases, see *supra* notes 11-42 and accompanying text.

60. *Dewey*, 121 N.J. at 86, 94, 577 A.2d at 1247, 1251. The supreme court agreed with the rationale of the federal courts up to the point where they concluded that state law inadequate warning claims conflicted with the purposes of the Act. *Id.*

conflict was required, the court considered the purposes of the Act and evaluated the effect on these purposes of allowing state law tort claims.[61] The New Jersey court characterized the Act's goal of protection of trade and commerce as secondary to its goal of adequately informing the public of the hazards of cigarettes.[62] The court found that permitting state law tort claims against manufacturers of cigarettes would not "create an obstacle to the accomplishment and execution" of the purpose of informing the public of the dangers of cigarette smoking. Rather, such a policy would further this purpose.[63]

In determining whether allowing state law tort claims based on inadequate warnings against cigarette manufacturers would conflict with the federal goal of uniformity in labeling, the court examined the extent to which such claims have a regulatory effect by influencing the actions of cigarette manufacturers.[64] The court analogized to the holding of the United States Supreme Court in *Silkwood v. Kerr-McGee Corp.*[65] where the Court ruled that the Atomic Energy Act[66] did not preempt an award of punitive damages on a state law tort claim "even though the [a]ct exclusively regulated the field of nuclear safety."[67] The holding in *Silkwood* indicated to the *Dewey* court that "Congress may be willing to tolerate the regulatory consequences of the application of state tort law even where direct state regulation is preempted."[68]

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61. *Id.* at 86-91, 577 A.2d at 1247-49. The court noted that, unlike the determination of express or implied preemption, "the 'actual conflict' analysis is 'more an exercise of policy choices by a court than strict statutory construction.' " *Id.* at 86-87, 577 A.2d at 1247 (quoting Abbot by Abbot v. American Cyanamid Co., 844 F.2d 1108 (4th Cir. 1988)).

62. *Id.* at 87-88, 577 A.2d at 1248. The court based its conclusion on the language of § 1331 of the Act which states that the protection of trade and commerce "must be achieved 'consistent with' and not 'to the detriment of' " the goal of informing the public of the hazards of cigarette smoking. *Id.* (quoting 15 U.S.C. § 1331 (1988). The court also relied on House Report Number 449, which noted that "the Act's 'principal purpose' was to 'provide adequate warning to the public of the potential hazards of cigarette smoking by requiring the labeling of cigarette packages with the [warning].' " *Id.* at 87, 577 A.2d at 1248 (quoting H.R. REP. No. 449, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 2350). According to the court, the "secondary goal focuse[d] on the need for uniform labeling and advertising *regulations* as a way of protecting commerce and the national economy, but [did] not go so far as to restrict the rights of injured consumers." *Id.*

63. *Id.* at 87-88, 577 A.2d at 1248 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

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

65. 464 U.S. 238 (1984).

66. 42 U.S.C. §§ 2011-2296 (1988).

67. *Dewey*, 121 N.J. at 89, 577 A.2d at 1248-49.

68. *Id.* at 89, 577 A.2d at 1249 (citing Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 186 (1988) ("Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not.")). The court also pointed to a recent Supreme Court case, English v. General Electric Co., 110 S. Ct. 2270 (1990), where the Court held that a state law claim for

The *Dewey* court distinguished the preemptive effect of the Act on inadequate warning claims from the interpretation of the United States Supreme Court in *San Diego Building Trades Council v. Garmon*[69] of the preemptive effect of the National Labor Relations Act[70] on claims for business losses associated with union picketing.[71] In *Garmon*, the Supreme Court held that such claims were preempted, deciding that state regulation "can be as effectively exerted through an award of damages as through some form of preventative relief."[72] The New Jersey court found this language inapplicable to the present controversy due to the "presumption in favor of federal preemption" where the National Labor Relations Board was involved.[73]

Furthermore, the court found that state law damage claims have limited regulatory effect.[74] According to the court, an award of damages only indirectly provides an incentive for the manufacturer to change its behavior.[75] The manufacturer can choose to voluntarily add an additional warning on the outside of the package, place a warning on a package insert or do nothing and risk exposure to liability.[76]

The court pointed out that permitting state law tort claims advanced a substantial goal: providing compensation to "those injured by deleterious products when that result is consistent with public policy."[77]

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intentional infliction of emotional distress was not preempted by the Energy Reorganization Act. *Id.* at 2278.

69. 359 U.S. 236 (1959).

70. 29 U.S.C. §§ 157-158 (1988).

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

72. *Garmon*, 359 U.S. at 247.

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

74. *Id.* at 90, 577 A.2d at 1249.

75. *Id.* (citing Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146, 1154, *rev'd*, 879 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987); Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423, 1454 (1980)).

76. *Id.* The court declared that "[t]he decision . . . to choose whichever path is most prudent [] is up to the industry. . . . [A]s long as it continues to meet the requirements of Federal law, it is free to meet its state-imposed obligations to its customers as it sees fit." *Id.* (quoting Tribe, *Federalism with Smoke and Mirrors*, THE NATION, June 7, 1986, at 788).

77. *Id.* at 90-91, 577 A.2d at 1249. The court noted that in Ferebee v. Chevron Chemical Co., 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984), the United States Court of Appeals for the District of Columbia Circuit relied upon this goal in allowing an inadequate warning claim to be brought against an herbicide distributer who had complied with the labeling requirements of the Federal Insecticide Fungicide and Rodenticide Act (FIFRA). *Id.* at 91, 577 A.2d at 1250; *see* 70 U.S.C. § 136-136y (1988).

In *Chevron*, the estate of a federal agricultural worker sued the distributor of the herbicide paraquat for failure to label the substance in a manner which adequately warned that long-term exposure to the herbicide could cause lung disease. *Chevron*, 736 F.2d at 1532. Under FIFRA, the Environmental Protection Agency can authorize that paraquat be sold only when "the product, as labelled, will not cause 'unreasonable adverse effects on the environment.' " *Id.* at 1539 (quoting FIFRA, 7 U.S.C. § 136a(c)(5)(C)). The *Chevron* court found that the

The *Dewey* court declared that the state's citizens were entitled to an opportunity to persuade a New Jersey jury that a cigarette manufacturer, rather than an injured party, should bear the cost of injuries that could have been prevented by the provision of a label more detailed than that required by the Act.[78]

The New Jersey court also observed that if the Act impliedly preempted state law failure to warn claims because of their incidental regulatory effect, other federal labeling requirements aimed at uniform labeling should similarly preempt failure to warn claims.[79] The court pointed out, however, that compliance with the labeling requirements of the Food and Drug Administration on contraceptives does not shield manufacturers from liability,[80] nor does compliance with the labeling requirements of the Federal Hazardous Substances Act[81] insulate manufacturers of hazardous substances from liability based on inadequate warning.[82]

The *Dewey* court also rejected the contention that the Act preempts design defect claims because those claims would disturb the statutory

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FIFRA warning requirements did not preempt state law inadequate warning claims, stating that

> [d]amage actions typically . . . can have *both* regulatory and compensatory aims . . . . [I]t need not be the case . . . that [a] company can be held liable for failure to warn only if the company could actually have altered its warning . . . . [A state] could decide that, as between a manufacturer and an injured party, the manufacturer ought to bear the cost of compensating for those injuries that could have been prevented with a more detailed label than that approved by the EPA. [A state may decide] that, if it must abide by the EPA's determination that a label is adequate, [it] will nonetheless require manufacturers to bear the risk of any injuries that could have been prevented [if a more detailed label had been provided].

Id. at 1540-41.

78. *Dewey*, 121 N.J. at 92, 577 A.2d at 1250.

79. *Id.* at 92-93, 577 A.2d at 1250-51.

80. *Id.* at 93, 577 A.2d at 1251 (citing MacDonald v. Ortho Pharmaceutical Corp., 394 Mass. 131, 139, 475 N.E.2d 65, 70, *cert. denied*, 474 U.S. 920 (1985)). In *MacDonald*, the plaintiff alleged that the warnings provided to her with birth control pills were inadequate because they did not specifically warn of the potential danger of a stroke. *MacDonald*, 394 Mass. at 133-34, 475 N.E.2d at 67. The Supreme Court of Massachusetts held that "where a trier of fact could reasonably conclude that a manufacturer's compliance with FDA labeling requirements or guidelines did not adequately apprise oral contraceptive users of inherent risks, the manufacturer should not be shielded from liability by such compliance." *Id.* at 138-39, 475 N.E.2d at 70.

81. 15 U.S.C. §§ 1261-1277 (1988).

82. *Dewey*, 121 N.J. at 93, 577 A.2d at 1251 (citing Burch v. Amsterdam Corp., 366 A.2d 1079 (D.C. 1976)). In *Burch v. Amsterdam Corp.*, the District of Columbia Court of Appeals dismissed a summary judgment entered in favor of the seller of an extremely flammable mastic adhesive. 366 A.2d 1079 (D.C. 1976). The *Burch* court held that compliance with the statutory labeling requirements did not, as a matter of law, preclude liability for inadequate warnings. *Id.* at 1086-87.

balance between Congress's concern for the health of individuals and for the health of the tobacco industry.[83] The court was "convinced that had Congress intended to immunize cigarette manufacturers from packaging, labeling, misrepresentation, and warning claims, it knew how to do so with unmistakable specificity."[84]

Writing in partial dissent, Judge Antell disagreed with the majority's conclusion that the labeling requirement of the Act does not preempt state court product liability actions based on inadequate warnings.[85] Although Judge Antell agreed that the New Jersey Supreme Court was not bound by the holdings of federal courts of appeals, he questioned the court's decision not to follow the "unanimous determinations . . . of five federal Courts of Appeal and the Supreme Court of Minnesota."[86]

Judge Antell criticized the majority's characterization of the goal of protecting commerce and the nation's economy as secondary to the goal of informing the public of the hazards of cigarette smoking.[87] According to Judge Antell, by focusing on the goal of informing the public of the dangers of cigarette smoking, the majority overlooked the larger context of the declared congressional policy: to create a federal program to adequately inform the public *and* protect commerce and the national economy.[88] He also disagreed with the majority's opinion that Congress intended to prohibit only direct regulatory state acts, not

83. *Dewey*, 121 N.J. at 93, 577 A.2d at 1251.

84. *Id.* at 94, 577 A.2d at 1251. Additionally, the *Dewey* court found that § 3a(2) of the New Jersey Products Liability Law, enacted in 1987, did not retroactively insulate manufacturers from liability for design defects inherent in their cigarettes. *Id.* at 94-100, 577 A.2d at 1251-55. Since the newly codified product liability rules did not apply to actions instituted on or before the date of enactment, the court had to determine if § 3a(2) was a codification of existing common law, and thus applicable to the case, or a new rule to be applied only prospectively. *Id.* at 95, 577 A.2d at 1252. The court concluded that § 3a(2) of the New Jersey Products Liability Law differed from existing New Jersey common law and, therefore, was a new rule to be applied prospectively. *Id.* at 95-99, 577 A.2d at 1252-54. The court also refused to insulate cigarette manufacturers from liability as a matter of public policy. The court found that due to the tobacco manufacturers' attempts to saturate the public with information regarding the benefits of cigarette smoking, it was not clear that the public was fully aware of the dangers of cigarette smoking despite all the propaganda and warnings to the public. *Id.* at 99-100, 577 A.2d at 1254-55.

85. *Id.* at 100-01, 577 A.2d at 1255 (Antell, J., concurring in part, dissenting in part).

86. *Id.* at 101, 577 A.2d at 1255 (Antell, J., concurring in part, dissenting in part). For a discussion of the majority's view on the precedential value of lower federal court cases, see *supra* notes 54-56 and accompanying text.

87. *Dewey*, 121 N.J. at 102, 577 A.2d at 1256 (Antell, J., concurring in part, dissenting in part). In Judge Antell's opinion, the majority's holding was "vitally dependent" on this mischaracterization of the goals of the Act as primary and secondary. *Id.* at 103, 577 A.2d at 1256 (Antell, J., concurring in part, dissenting in part).

88. *Id.* (Antell, J., concurring in part, dissenting in part).

claims of injured consumers.[89] In Judge Antell's opinion, "the decision of the majority allow[ed] for the very chaos that the Act attempt[ed] to resolve."[90]

IV. ANALYSIS

A. *Critique of the* Dewey *Rationale*

The holdings of the federal courts of appeals on the preemption issue are more clearly reasoned than those of the New Jersey Supreme Court in *Dewey* and more likely to be sustained if reviewed by the United States Supreme Court. There is no doubt that permitting inadequate warning claims against cigarette manufacturers will further the congressional purpose of informing the public of the dangers of cigarette smoking.[91] This purpose is, however, only one of the objectives of the Act.

The Act's purpose section provides:

It is the policy of the Congress, and the purpose of this chapter,

89. *Id.* at 104-05, 577 A.2d at 1257 (Antell, J., concurring in part, dissenting in part). Judge Antell declared that it was "obvious that the congressional intent could not have been limited to protecting the industry from state regulatory action while leaving it open to the indirect regulation implicit in product liability suits based on claims of inadequate warning." *Id.* (Antell, J., concurring in part, dissenting in part). The dissent distinguished the cases relied upon by the majority in support of its position: Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984); MacDonald v. Ortho Pharmaceutical Corp., 394 Mass. 131, 475 N.E.2d 65, *cert. denied*, 474 U.S. 920 (1985); Ferebee v. Chevron Chemical Co., 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984); and Burch v. Amsterdam Corp, 366 A.2d 1079 (D.C. 1976). According to the dissent, the federal legislation involved in *Silkwood* contained no preemption provision, reserved significant regulatory control to the states and evidenced a clear congressional intent to retain state law tort remedies for those injured in nuclear accidents. *Dewey*, 121 N.J. at 106-07, 577 A.2d at 1258 (Antell, J., concurring in part, dissenting in part). Similarly, the regulation addressed in *MacDonald* had no preemptive provision and the FDA Commissioner had "noted that the boundaries of civil tort liability for failure to warn [were] controlled by applicable [s]tate law." *Id.* at 107, 577 A.2d at 1258 (Antell, J., concurring in part, dissenting in part) (quoting *MacDonald*, 394 Mass. at 139, 475 N.E.2d at 70). The dissent distinguished the *Chevron* case, which discussed the lack of preemptive effect of FIFRA, by noting that FIFRA clearly permits states to impose more stringent constraints on the regulated goods and does not specify the precise warning required. *Id.* at 107-08, 577 A.2d at 1258-59 (Antell, J., concurring in part, dissenting in part). Judge Antell found that in *Burch*, the claim of preemption under the Federal Hazardous Substance Act was rejected because, unlike the Act, there "was nothing in [the] statute from which federal preemption could be implied." *Id.* at 108, 577 A.2d at 1259 (Antell, J., concurring in part, dissenting in part). For a discussion of the majority's reliance on these cases, see *supra* notes 65-68, 77 & 80-82 and accompanying text.

90. *Dewey*, 121 N.J. at 108-09, 577 A.2d at 1259 (Antell, J., concurring in part, dissenting in part). Judge Antell also agreed with the majority's holding that § 3a(2) of the New Jersey Products Liability Act did not apply to this case. *Id.* at 101, 577 A.2d at 1255 (Antell, J., concurring in part, dissenting in part). For a discussion of this holding, see *supra* note 52.

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

> to establish a comprehensible 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.[92]

The *Dewey* majority concluded that the Act's goal of informing the public of the dangers of cigarette smoking was superior to its other goal of preventing the impediment of commerce and the national economy by diverse, nonuniform and confusing cigarette labeling and advertising regulations.[93] In reaching its conclusion, the *Dewey* court apparently assumed that the language—"this declared policy"—used in the second subsection of the Act's purpose section refers to the goal of informing the public. The statutory language, however, indicates otherwise.[94] The only "policy" mentioned in the purpose section of the Act prior to the words "this declared policy" is "the policy of Congress."[95] Therefore, "this declared policy" must refer to "the policy of Congress" which, according to the Act, is to establish through the Act "a comprehensible Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health."[96] Thus, contrary to the *Dewey* court's conclusion, the Act appears to require the protection of commerce and the national economy to the maximum extent consistent with the policy of Congress, rather than to the maximum extent consistent with the goal of informing the public. Under this con-

92. 15 U.S.C. § 1331 (1988).

93. *Dewey*, 121 N.J. at 87, 577 A.2d at 1248. In reaching this conclusion, the *Dewey* court relied upon its own paraphrasing of the Act and the legislative history of the Act. *Id.* The *Dewey* court paraphrased the second goal of the Act as the protection of "commerce and the national economy . . . to the maximum extent *consistent* with this declared policy [by] not imped[ing it with] diverse, nonuniform, and confusing cigarette labeling and advertising regulations." *Id.* (quoting 15 U.S.C. § 1331 (1988)). The court also relied on language in the legislative history stating that "the protection of trade and commerce[ ] must be achieved 'consistent with' and not 'to the detriment of' the first and principal goal [of] inform[ing] the public adequately that cigarettes may be hazardous to health." *Id.* (quoting H.R. REP. No. 449, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 2350).

94. For the text of the purpose section of the Act, see *supra* text accompanying note 92.

95. 15 U.S.C. § 1331 (1988).

96. *Id.*

struction of the Act's language, the goal of protection of commerce and the national economy need not be consistent with the goal of informing the public and thus neither goal of the statute can be construed as superior to the other.

Furthermore, the *Dewey* court incorrectly concluded that permitting inadequate warning claims against cigarette manufacturers would not violate the preemption section of the Act.[97] The preemption provision of the Act prohibits "state law" from imposing any requirement different than the warning label required by the Act.[98] "State law" necessarily includes case law, which can have a regulatory effect, as well as statutory law.[99] The New Jersey Supreme Court held that permitting inadequate warning claims would not indirectly regulate commerce and the national economy because it would not necessarily result in diverse, nonuniform and confusing warnings.[100] The court insisted that allowing such claims did not compel cigarette manufacturers to change their warnings; manufacturers could choose to do nothing and risk further liability.[101] As the *Palmer* court recognized, this choice "seems akin to the free choice of coming up for air after being underwater."[102]

In *San Diego Building Trades Council v. Garmon*,[103] the United States Supreme Court explicitly rejected the theory that damage claims do not have a regulatory effect.[104] The *Dewey* court indicated that the holding of *Garmon* applies only in the area of labor law, where preemption by federal law is presumed.[105]

Dewey notwithstanding, the United States Supreme Court has not expressly limited the applicability of its statement in *Garmon* that damage claims can have an impermissible regulatory effect to the area of labor law. Although in *Silkwood* the United States Supreme Court did indicate that punitive damages based on state law tort claims did not amount to impermissible state regulation, this holding was limited to claims under the Atomic Energy Act.[106] The Supreme Court's reasoning was based

97. For the text of the preemption section of the Act, see *supra* note 10.

98. 15 U.S.C. § 1334 (1988). For the text of this provision of the Act, see *supra* note 10.

99. *See* Palmer v. Liggett Group, Inc., 825 F.2d 620, 627 (1st Cir. 1987).

100. *Dewey*, 121 N.J. at 90, 577 A.2d at 1249. For a discussion of the court's reasoning, see *supra* notes 74-76 and accompanying text.

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

102. *Palmer*, 825 F.2d at 627.

103. 359 U.S. 236 (1959). For a discussion of the holding of *Garmon*, see *supra* notes 69-72 and accompanying text.

104. *Garmon*, 359 U.S. at 246-47.

105. *Dewey*, 121 N.J. at 88, 577 A.2d at 1248. For a discussion of the *Dewey* court's position, see *supra* note 73 and accompanying text.

106. *See* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256-58 (1984). In *Silkwood*, the Supreme Court reiterated its holding in Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 212 (1982), that under the Atomic Energy Act (AEA) "the Federal Government has occupied the entire field of nuclear safety concerns except the limited

on the fact that there was a clear congressional intent to preserve state tort remedies in the area of nuclear energy.[107] The Court made it clear that it was not suggesting "that there could never be an instance in which the federal law would preempt the recovery of damages based on state law."[108]

Contrary to the opinion of the *Dewey* court, it appears to be highly probable that permitting inadequate warning claims will have an indirect regulatory effect by forcing cigarette manufacturers to alter the warnings on cigarettes.[109] Thus, permitting inadequate warning claims will stand "as an obstacle to the accomplishment and execution" of the congressional objective of clear, uniform cigarette labeling and advertising.[110]

As the *Dewey* court noted, the Supreme Court has found that, in the absence of a clear congressional intent to preempt state tort claims in a

powers expressly ceded to the States." *Silkwood*, 464 U.S. at 249. Nonetheless, the Court found that this field was not so completely occupied as to preclude state tort remedies. *Id.* at 256. The Court also found that the award of damages under state tort law did not frustrate the federal legislative scheme. *Id.* at 256-57.

107. *Id.* at 256-58. Legislation passed subsequent to the AEA made it clear that the AEA did not preempt state tort damage claims. *See* Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (1957) (codified as amended at 42 U.S.C. §§ 2011-2296 (1988)). The Price-Anderson Act established an indemnification scheme under which operators of nuclear facilities could be required to obtain the maximum amount of insurance available. *Silkwood*, 464 U.S. at 251. The government would then provide indemnification for the next $500 million of liability. *Id.* The aggregate of these amounts would be the limit of liability for any one nuclear incident. *Id.*

108. *Id.* at 256. The majority in *Silkwood* disregarded any distinction between the preemption of awards of punitive damages and awards of compensatory damages. *Id.* at 263 (Blackmun, J., dissenting), 275-76 (Powell, J., dissenting). The dissenters felt that while compensatory damage claims were not preempted, punitive damage claims were. *Id.* at 285-86 (Powell, J., dissenting). The dissenters reasoned that since the purpose of punitive damages is to regulate the safety of the nuclear energy industries and the federal government has entirely occupied the field of nuclear safety, the AEA preempted punitive damage awards. *Id.* (Powell, J., dissenting). The dissent's argument regarding the importance of distinguishing compensatory damage from punitive damage claims where regulation is prohibited is analogous to the argument of the Fifth Circuit in *Pennington* that failure to warn claims be distinguished from other product liability claims in determining preemption of state law tort claims under the Act. *See* Pennington v. Vistron Corp., 876 F.2d 414, 422-23 (5th Cir. 1989). According to the *Pennington* court, the Act only preempts claims that challenge the health effects of cigarettes in regard to labeling and promotional activities since the language of the Act regulates only these two areas of cigarette sales. *Id.* at 423. For a further discussion of this argument, see *supra* note 43-44 and accompanying text.

109. *See* Palmer v. Liggett Group, Inc., 825 F.2d 620, 627 (1st Cir. 1987) (damages under inadequate warning claim effectively compel manufacturer to alter warning to conform with state's requirement). For a further discussion of this impact, see *supra* notes 100-02 and accompanying text.

110. Hines v. Davidowitz, 312 U.S. 52, 67 (1941); *see* Cipollone v. Liggett Group, Inc., 789 F.2d 181, 187 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987).

field which Congress has clearly occupied, indirect regulation by the state is neither direct nor substantial enough to merit a finding of preemption of such claims.[111] Neither the *Dewey* court nor the federal circuit courts of appeals, however, relied upon a theory of preemption due to clear occupation of the field by Congress. All of the federal courts of appeals have found that the Act preempts state tort inadequate warning claims because such claims conflict with the objectives of the Act.[112] In finding that state law tort claims are not preempted by the Act, the *Dewey* court found that such claims did not conflict with the stated objectives of the Act.[113] The Supreme Court, however, has never held that the regulatory effect of state tort claims is too indirect to cause a conflict with a clearly stated congressional objective. The *Dewey* court's reliance upon Supreme Court precedent regarding the regulatory effect of state law tort claims is therefore misplaced.

B. *Precedential Value of the Opinions of the Federal Courts of Appeals*

The *Dewey* court unanimously held that a state court is not obligated to follow the holdings of the lower federal courts on the interpretation of federal statutes.[114] The court stated, however, that in the interests of judicial comity such "lower federal-court decisions should be accorded due respect, particularly where they are in agreement."[115] Although the positions of many state courts are in accord with *Dewey* on this issue,[116]

111. *See* English v. General Elec. Co., 110 S. Ct. 2270, 2278 (1990) (although employers may be forced to deal with complaints of whistleblowers by altering radiological safety policies, "this effect is neither direct nor substantial enough to place petitioner's claim in the pre-empted field").

112. *Pennington*, 876 F.2d at 421 (successful inadequate warning claims conflict with uniform national warning requirement); Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 234 (6th Cir. 1988) (court did not address "occupation of field" theory since failure to warn claim conflicted with Act); *Palmer*, 825 F.2d at 626 (inadequate warning claims excessively disrupt congressional balance of purposes); Stephen v. American Brands, Inc., 825 F.2d 312, 313 (11th Cir. 1987) (inadequate warning claims actually conflict with Act); *Cipollone*, 789 F.2d at 187 (same). For a discussion of these cases, see *supra* notes 13-44 and accompanying text.

113. *Dewey*, 121 N.J. at 87-94, 577 A.2d at 1247-51. For a further discussion of the *Dewey* court's holding that state law tort claims do not conflict with the objectives of the Act, see *supra* notes 59-80 and accompanying text.

114. *Dewey*, 121 N.J. at 79-80, 101, 577 A.2d at 1243-44, 1255. For a discussion of the New Jersey Supreme Court's position on the precedential value of interpretations of federal legislation by lower federal courts, see *supra* notes 54-56 and accompanying text.

115. *Dewey*, 121 N.J. at 80, 577 A.2d at 1244.

116. Anderson v. Lester, 382 So. 2d 1019 (La. App. 1980) (decisions of lower federal courts construing federal statutes not binding, although persuasive), *cert. denied*, 450 U.S. 1045 (1981); Pope v. State, 284 Md. 309, 396 A.2d 1054 (1979) (decisions of federal courts of appeals construing federal constitution not binding upon state courts of appeals); Brown v. Palmer Clay Prods. Co., 290 Mass. 108, 195 N.E. 122 (1935) (state courts not bound by decisions of lower federal courts), *aff'd*, 297 U.S. 227 (1936); Rahn v. Warden, 88 Nev. 429,

others have held themselves bound by lower federal courts' interpretations of federal statutes, at least where the interpretations are in accord.[117] The United States Supreme Court has never taken a clear position on the issue. It is unlikely that the Supreme Court will ever resolve the question because "[w]hether a state decision relies on a federal court case or deliberately refuses to follow it, review by the Supreme Court will result in an independent determination on the merits, and not in a holding that the state was or was not required to adhere to the [lower] federal court ruling."[118]

Even accepting the New Jersey Supreme Court's position that it is not bound by lower federal court decisions, however, the court's decision in *Dewey* flies in the face of judicial comity. The decision is clearly at odds with the decisions of five federal courts of appeals, including the Third Circuit which encompasses the federal courts in New Jersey.[119]

C. *The Impact of* Dewey

The most blatant and detrimental impact of the New Jersey Supreme Court's decision in *Dewey* will be on the cigarette industry. If damages are awarded against cigarette manufacturers on claims for in-

498 P.2d 1344 (1972) (state supreme court not bound by decision of federal appellate court); State v. McDowell, 310 N.C. 61, 310 S.E.2d 310 (1984) (state courts should accord decisions of lower federal courts such persuasiveness as those decisions might reasonably command); State v. Pierce, 120 Vt. 373, 141 A.2d 419 (1958) (decisions of federal courts on fourth and fifth amendments to federal constitution not binding on state courts).

117. *See* Central of Ga. Ry. Co. v. Ramsey, 275 Ala. 7, 151 So. 2d 725 (1962) (decisions of appellate federal courts construing federal statutes binding on Alabama Supreme Court in absence of contrary holding by United States Supreme Court); Brownell v. Union & New Haven Trust Co., 143 Conn. 662, 124 A.2d 901 (1956) (interpretations of federal legislation by federal courts binding upon state courts); Nicol v. Tanner, 310 Minn. 68, 256 N.W.2d 796 (1976) (state courts bound to follow decisions of federal courts which are based upon federal constitutional, statutory or treaty laws); Darr v. Long, 210 Neb. 57, 313 N.W.2d 215 (1981) (pertinent opinions of federal courts binding upon state courts in administration and interpretation of federal legislative acts); Desmarais v. Joy Mfg. Co., 130 N.H. 299, 538 A.2d 1218 (1988) (New Hampshire state courts guided and bound by federal statutes and decisions of federal courts interpreting those statutes); Schreiber v. Republic Intermodal Corp., 473 Pa. 614, 375 A.2d 1285 (1977) (Pennsylvania courts bound by decisions of Third Circuit on federal constitutional issues until United States Supreme Court speaks on issue); Ford v. Wisconsin Real Estate Examining Bd., 48 Wis. 2d 91, 179 N.W.2d 786 (1970) (decisions of federal courts binding on state courts as to construction of federal constitution and statutes), *cert. denied*, 401 U.S. 993 (1971).

118. Note, *Authority in State Courts of Lower Federal Court Decisions on National Law*, 48 COLUM. L. REV. 943, 945 (1948).

119. *See* Pennington v. Vistron Corp., 876 F.2d 414 (5th Cir. 1989); Roysdon v. R.J. Reynolds, 849 F.2d 230 (6th Cir. 1988); Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987); Stephen v. American Brands, Inc., 825 F.2d 312 (11th Cir. 1987); Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987). For a discussion of the holdings in these cases, see *supra* notes 13-44 and accompanying text.

adequate warning, cigarette manufacturers will react in a manner that will avoid the imposition of further damage awards. Cigarette manufacturers will have two choices: (1) to stop selling cigarettes in New Jersey; or (2) to change the warning on cigarettes sold in New Jersey. Cigarette manufacturers will be reluctant to discontinue the sale of cigarettes in New Jersey. Therefore, cigarette manufacturers will be forced to change the warnings on cigarette packages sold in New Jersey by adding warnings in addition to those required by the Act. Each manufacturer will have its own opinion regarding what type of additional warnings will be considered adequate. This will result in non-uniform labeling—the precise situation that prompted Congress to initially adopt the Act.[120]

The conflict between the *Dewey* decision and the decisions of the federal courts of appeals will trigger yet another impact: the court's holding will possibly result in forum shopping.[121] New Jersey claimants who are injured by smoking cigarettes will choose to bring suit against the cigarette manufacturers in New Jersey state court, rather than federal court, attempting to secure large jury verdicts paid out of the deep pockets of the cigarette manufacturers. Since *Cipollone* precludes plaintiffs from bringing inadequate warning claims against cigarette manufacturers in the New Jersey federal courts, the only theoretical bases of strict liability that remain available to plaintiffs are those based on manufacturing flaws and design defects.[122] The possibility of a plaintiff re-

120. *See* 15 U.S.C. § 1331 (1988); *see also* H.R. REP. No. 449, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 2350. For a discussion of the text of the purpose section of the Act, see *supra* text accompanying note 92.

121. *See Dewey*, 121 N.J. at 101, 577 A.2d at 1255 (Antell, J., concurring in part, dissenting in part). Judge Antell pointed out that recognition of judicial comity discourages forum shopping. *Id.* (Antell, J., concurring in part, dissenting in part). Although the effects of conflicts between decisions of a state supreme court and the circuit court in whose jurisdiction the federal courts of the state fall are most evident in the criminal law context, civil cases are not immune to these effects. In State v. Coleman, 46 N.J. 16, 37, 214 A.2d 393, 402-04 (1965), *cert. denied*, 383 U.S. 950 (1966), the New Jersey Supreme Court acknowledged the problems created by the state court's refusal to follow the Third Circuit's holding in United States *ex rel.* Russo v. New Jersey, 351 F.2d 429 (3d Cir. 1965), *vacated*, 384 U.S. 889, *cert. denied*, 384 U.S. 1012 (1966). In *Russo*, the Third Circuit overturned convictions based on confessions made by the defendants while in police custody. *Id.* The defendants were not represented by counsel, had not requested counsel and had not been explicitly advised of their right to counsel. *Id.* Since New Jersey state courts refused to apply this standard, any defendant convicted in state court based on a confession obtained without effective waiver of counsel could seek habeas corpus relief in the New Jersey federal district court which would be bound to apply *Russo* and thus overturn the conviction. *Coleman*, 46 N.J. at 37, 214 A.2d at 404.

122. Under the New Jersey Products Liability Law, N.J. STAT. ANN. §§ 2A:58C-1 to 58C-7 (West 1987), there are three theories of products liability that may be pursued against a manufacturer or seller: (1) defective manufacturing; (2) defective design and (3) defective warning. *Id.* § 2A:58C-2; *see Dewey*, 121 N.J. at 94-95, 577 A.2d at 1252. For a discussion of *Cipollone*, see *supra* notes 13-27 and accompanying text.

covering on a design defect claim is negligible because to prove a design defect claim under the New Jersey Products Liability Law,[123] the claimant will have to show that "the characteristics of the [cigarettes] are [not] known to the ordinary consumer or user" and that the injury was caused by a defect in the defendant's cigarettes that was not "an inherent characteristic of the [cigarettes or] would [not] be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the class of persons for whom the product is intended."[124] In contrast, after the *Dewey* decision, plaintiffs bringing suit against cigarette manufacturers in New Jersey state courts need not rely on manufacturing defect or design defect claims. Rather, plaintiffs may bring an inadequate warning claim against cigarette manufacturers. Therefore, claimants will choose to bring suit against cigarette manufacturers in New Jersey state court, as opposed to federal court, to pursue inadequate warning claims.

The *Dewey* decision may also encourage forum shopping by claimants outside of New Jersey. By bringing an inadequate warning claim in a New Jersey state court, plaintiffs are guaranteed the benefit of the *Dewey* holding that inadequate warning claims are not preempted by the Act.[125] Furthermore, if the plaintiff can establish sufficient significant contacts with New Jersey to persuade the New Jersey court to apply New Jersey substantive law, the plaintiff will gain the benefit of one of the most liberal failure to warn laws in the country.[126] As a result, the already crowded New Jersey state court system may very well be flooded with these claims.

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123. N.J. STAT. ANN. §§ 2A:58C-1 to 58C-7 (West 1987).

124. *Id.* § 2A:58C-3(a)(2). Section 2A:58C-3a(2) parallels § 402A comment i of the *Restatement (Second) of Torts*. *See Dewey*, 121 N.J. at 97-98, 577 A.2d at 253-54. Comment i defines "unreasonably dangerous" and states that "[t]he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965). As an example, comment i provides that "[g]ood tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous." *Id.*

125. This federal constitutional question does not involve a conflict of laws question and New Jersey courts must follow the precedent of the Supreme Court of New Jersey on this preemption issue.

126. New Jersey's product liability law may be viewed as liberal because of the inability of defendants in failure to warn cases to rely on the state-of-the-art defense. *See* Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 204-05, 447 A.2d 539, 546 (1982) (state-of-the-art defense unavailable to defendants in asbestos case based on theory of failure to warn). In Feldman v. Lederle Laboratories, 97 N.J. 429, 479 A.2d 374 (1984), the Supreme Court of New Jersey declined to extend the holding of *Besheda* to inadequate warning claims against manufacturers of "drugs vital to health." *Id.* at 454-55, 479 A.2d at 387. The holding of *Feldman* does not, however, rule out the possibility that a New Jersey court would refuse to recognize the state-of-the-art defense in inadequate warning claims against cigarette manufacturers.

V. CONCLUSION

By permitting plaintiffs to bring inadequate warning claims against cigarette manufacturers, the *Dewey* court violates the purposes of the Act. To avoid the detrimental effects discussed in this article, it is highly probable that the United States Supreme Court will review the *Dewey* decision and, following the analysis of the five circuit courts of appeals that have addressed this issue, hold that the Act preempts state tort claims against cigarette manufacturers based on inadequate warning or fraud and misrepresentation in promotion. If the Supreme Court does not overturn the *Dewey* decision, cigarette manufacturers will have to reevaluate the feasibility of marketing cigarettes in New Jersey or modify the warnings placed on cigarette packages and advertisements. Furthermore, New Jersey's already crowded courts will have to deal with an increasing number of state law tort claims against cigarette manufacturers.

Donna M. Dever