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Tobacco Suits Today: Are Cigarette Plaintiffs Just Blowing Smoke?

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TOBACCO SUITS TODAY: ARE CIGARETTE PLAINTIFFS JUST BLOWING SMOKE?

I. INTRODUCTION

The Surgeon General has stated that cigarette smoking is the "chief, single, avoidable cause of death in our society and the most important public health issue of our time."[1] Over 200,000 people die each year in the United States as a result of cigarette smoking.[2] Consequently, numerous products liability suits have been filed against tobacco companies.[3] However, until the 1988 decision in *Cipollone v. Liggett Group, Inc.*,[4] no plaintiff had won a products liability suit against a tobacco company.[5]

The first wave of suits by cigarette smokers began in the 1950s. Although these suits were brought under a variety of legal theories,[6] none of the plaintiffs were victorious.[7] Cigarette manufacturers consistently avoided liability, primarily by claiming lack of foreseeability of the harmful effects of smoking,[8] showing that cigarettes were reasonably fit for

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1. Note, *Plaintiffs' Conduct as a Defense to Claims Against Cigarette Manufacturers*, 99 HARV. L. REV. 809, 810 n.5 (1986) (quoting Koop, U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING: CANCER: A REPORT OF THE SURGEON GENERAL, at xi (1982)).

2. Rust, *Smoke Alarms*, 7 CAL. LAW. 22, 25 (Oct. 1987). In comparison, car accidents are responsible for only 40,000 deaths per year. *Id.*

3. Approximately 100 cases are currently pending. Rosenblum, *Tobacco Trials Still Costly, Analysts Say*, 121 NEW JERSEY L.J. 1369 (1988).

4. 693 F. Supp. 208 (D.N.J. 1988).

5. Rust, *supra* note 2, at 22.

6. *See, e.g.*, Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963) (breach of implied warranty of fitness and negligence); Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962), *question certified*, 154 So. 2d 169 (Fla.), *rev'd and remanded on reh'g*, 325 F.2d 673 (5th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964), *rev'd and remanded*, 391 F.2d 97 (5th Cir. 1968), *aff'd per curiam on reh'g en banc*, 409 F.2d 1166 (5th Cir. 1969), *cert. denied*, 397 U.S. 911 (1970) (breach of implied warranty of fitness); Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961) (breach of implied warranty of fitness and negligent failure to warn); Cooper v. R.J. Reynolds Tobacco Co., 234 F.2d 170 (1st Cir. 1956), *remanded and reh'g granted*, 256 F.2d 464 (1st Cir. 1958), *cert. denied*, 358 U.S. 875 (1958) (fraud by false advertising); Albright v. R.J. Reynolds Tobacco Co., 350 F. Supp. 341 (W.D. Pa. 1972), *aff'd without opinion*, 485 F.2d 678 (3d Cir. 1973), *cert. denied*, 416 U.S. 951 (1974) (products liability).

7. Reasons given for these failures include favorable legal rulings and tenacious defense work. Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423, 1425 (1980).

8. *See, e.g.*, Green v. American Tobacco Co., 304 F.2d 70, 76 (5th Cir. 1962) ("defendant could not be held liable as an absolute insurer against consequences of which no developed human skill and foresight could afford knowledge"); *accord* Ross v. Philip Morris & Co., 328 F.2d 3, 10 (8th Cir. 1964) (cigarette manufacturer liable only if harmful effects of cigarettes

their intended use,[9] and by asserting affirmative defenses,[10] most often assumption of risk.

Undaunted by the failures of earlier plaintiffs, smokers began a second wave of suits in the 1980s. The predominant claim by modern plaintiffs has been that tobacco companies either failed to warn or inadequately warned the public of the risks associated with cigarette smoking.[11] In response, the tobacco industry has repeatedly claimed that failure to warn claims are preempted by the Federal Cigarette Labeling and Advertising Act,[12] (the "Act") which requires warnings on all cigarette packages. Only one court has held that claims based on injuries caused by smoking after 1966, when warnings were effected under the Act, are not preempted.[13] Every other modern court presented with this issue, including the court in *Cipollone*, has ruled that these claims are preempted by the Act. The unified judicial position on this issue is discouraging for present and future plaintiffs since a finding of preemption effectively bars many claims. In addition, a finding of preemption requires an apportionment of proof and damages between injuries caused by pre-1966 smoking and post-1966 smoking. As more time passes since the Act's adoption, plaintiffs should have an increasingly difficult time proving that their injuries were in fact caused by pre-1966 smoking. Furthermore, if a plaintiff continued to smoke after 1966, the cigarette manufacturer may assert an assumption of risk defense by claiming that continued smoking after being specifically warned of the dangers indicates a voluntary encountering of a known risk. As a consequence, the probability of an unsuccessful suit increases.

This Note explores the historical development of the present suits against cigarette manufacturers, and analyzes them in light of the Federal Cigarette Labeling and Advertising Act and current theories of liability. An examination of current theories, including failure to warn and breach of express warranty, supports the conclusion that the victory for the plaintiffs in *Cipollone* is not as promising as it initially appears.

II. The Evolution of Current Suits Against Cigarette Manufacturers

A. *The Early Cases*

In the 1950s and 1960s cigarette smokers began bringing suits against cigarette manufacturers seeking to recover damages for injuries allegedly

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could have been anticipated by use of developed human skill or foresight).

9. *See, e.g., Lartigue*, 317 F.2d at 39.

10. *See, e.g.*, Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479, 481 (3d Cir. 1965).

11. *See, e.g.*, Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146, 1149 (D.N.J. 1984), *rev'd in part and remanded*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 108 S. Ct. 487 (1987).

12. 15 U.S.C. §§ 1331-1340 (1982 & Supp. IV 1986).

13. *See* Forster v. R.J. Reynolds Tobacco Co., 423 N.W.2d 691 (Minn. Ct. App. 1988).

caused by smoking the defendant manufacturer's cigarettes. A variety of legal theories of liability were used in these suits including fraud, negligence, and breach of warranty.[14] Of all the suits brought, not a single plaintiff prevailed, nor did a single manufacturer settle a case.[15] Instead, the nature of the plaintiffs' theories allowed manufacturers to consistently prevail by asserting either lack of foreseeability or an affirmative defense such as assumption of risk.[16]

The judicial climate encountered by the earlier plaintiffs was unfavorable, since the theories of liability they used required them to overcome evidentiary burdens which they were consistently unable to meet. Three early cases alleging breach of warranty illustrate the typical problems encountered. In *Lartigue v. R.J. Reynolds Tobacco Co.*,[17] *Ross v. Philip Morris & Co.*,[18] and *Hudson v. R.J. Reynolds Tobacco Co.*,[19] the circuit courts consistently found in favor of the manufacturer. Since plaintiffs often alleged that the manufacturer's cigarettes were not fit for their intended use,[20] in order to recover, plaintiffs had to show that defendants knew or should have known that cigarettes were unsafe products which should be taken off the market.[21] Since the hazards of cigarette smoking arguably were not widely recognized at the time of these early suits, courts were reluctant to transform cigarette manufacturers into insurers or to proclaim cigarettes unreasonably unsafe. In these early cases, cigarette manufacturers primarily avoided liability by claiming unforeseeability of the cancer-causing effects of their products.

In *Lartigue*, the Fifth Circuit stated that "it cannot be said that cigarette smokers who started smoking before the great cancer-smoking debate relied on the tobacco companies' 'warranty' that their cigarettes had no carcinogenic element. Today, the manufacturer is not an insurer

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14. *See, e.g.*, Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964) (breach of implied warranty, negligence, fraud and deceit by false advertising); Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963) (breach of implied warranty of fitness, negligence); Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961), *rev'd and remanded*, 350 F.2d 479 (3d Cir. 1965), *cert. denied*, 382 U.S. 987 (1966), *modified per curiam*, 370 F.2d 95 (3d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967) (breach of implied warranty, negligence).

15. "Two hundred cases have been disposed of with no award." Rust, *supra* note 2, at 22.

16. *See infra* notes 47-84 and accompanying text.

17. 317 F.2d 19 (5th Cir. 1963).

18. 328 F.2d 3 (8th Cir. 1964).

19. 427 F.2d 541 (5th Cir. 1970).

20. *E.g.*, *Ross*, 328 F.2d at 7; *Lartigue*, 317 F.2d at 23.

21. The Fifth Circuit Court of Appeals found that cigarettes were reasonably fit for the purpose for which they were sold. *See* Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962), *question certified*, 154 So. 2d 169 (Fla. 1963), *rev'd and remanded on reh'g*, 325 F.2d 673 (5th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964), *rev'd and remanded*, 391 F.2d 97 (5th Cir. 1968), *aff'd per curiam on reh'g en banc*, 409 F.2d 1166 (5th Cir. 1969), *cert. denied*, 397 U.S. 911 (1970).

against the unknowable."[22] Similarly, in *Hudson*, the Fifth Circuit found for the manufacturer since the plaintiff failed to prove the foreseeability of the risks inherent in cigarette smoking.[23] In *Ross*, the Eighth Circuit held that when no developed human skill or foresight could afford knowledge of the relationship between cancer and smoking, state law would not hold the defendant absolutely liable as an insurer.[24]

The foreseeability factor clearly contributed to the courts' reticence to hold tobacco companies liable as insurers. However, two cases of this era provided glimmers of hope for plaintiff recovery. Presaging current theories of liability, the plaintiff in *Pritchard v. Liggett & Myers Tobacco Co.*[25] alleged negligent failure to warn and breach of implied warranty.[26] Specifically, Pritchard argued that Liggett & Myers was negligent in failing to warn him that certain substances alleged to cause cancer were present in Chesterfield cigarettes.[27] Despite expert testimony that a relationship between lung cancer and heavy smoking had been noted for many years prior to 1953,[28] the jury found on retrial that Liggett & Myers was not negligent in failing to warn Pritchard of the risk of contracting cancer.[29] In the first trial, the Third Circuit held that the facts supported the finding of a manufacturer's warranty of merchantability and of fitness for use "that Chesterfield cigarettes were reasonably fit and generally intended for smoking without causing physical injury."[30] Thus recovery under a warranty theory may have been possible. However, this line of proof was not pursued by the plaintiff.[31]

In *Green v. American Tobacco Co.*,[32] the issue of fitness for use resur-

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22. *Lartigue*, 317 F.2d at 39-40. For the problems a plaintiff encounters when attempting to show his reliance on a manufacturer's warranties, see *infra* notes 74-80 and accompanying text.

23. *Hudson*, 427 F.2d at 542.

24. *Ross*, 328 F.2d at 10.

25. 295 F.2d 292 (3d Cir. 1961), *rev'd and remanded*, 350 F.2d 479 (3d Cir. 1965), *cert. denied*, 382 U.S. 987 (1966), *modified per curiam*, 370 F.2d 95 (3d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967).

26. *Pritchard*, 295 F.2d at 296, 299.

27. *Id.* at 299.

28. *Id.* at 299-300.

29. *Pritchard*, 350 F.2d at 482.

30. *Pritchard*, 295 F.2d at 296.

31. The case may have been won on a theory of implied warranty; however, the plaintiff did not pursue a new trial, claiming that the problems of proof were "insurmountable." Garner, *supra* note 7, at 1427-28.

32. 304 F.2d 70 (5th Cir. 1962), *question certified*, 154 So. 2d 169 (Fla.), *rev'd and remanded on reh'g* 325 F.2d 673 (5th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964), *rev'd and remanded*, 391 F.2d 97 (5th Cir. 1968), *aff'd per curiam on reh'g en banc*, 409 F.2d 1166 (5th Cir. 1969), *cert. denied*, 397 U.S. 911 (1970). Appropriately, *Green* has been called "the longest and most nearly successful battle to hold a cigarette company liable for cigarette induced death and disability." Garner, *supra* note 7, at 1423. The litigation in *Green* took twelve years and included six appeals and two jury trials. *Id.*

faced. The jury found that Green's lung cancer was proximately caused by smoking Lucky Strikes, but rendered a verdict for American Tobacco because it could not have reasonably foreseen that smokers were in danger.[33] Although the ultimate resolution of the case was in favor of American Tobacco, *Green* provided a ray of hope for plaintiffs when, after a second trial, the Fifth Circuit reversed the jury verdict for American Tobacco, and held that Green was entitled to rely on implied assurances that the cigarettes were wholesome and reasonably fit for their intended purpose.[34] Therefore, American Tobacco could be held absolutely liable for Green's death.[35] Unfortunately for plaintiffs, this finding of liability was short-lived: the Fifth Circuit later overruled its own reversal and held for American Tobacco. Based in part on the absence of any Florida decision holding a manufacturer liable where there was no defect or adulteration in the product, the court reinstated earlier jury findings. Since it had previously been established that the Lucky Strikes smoked by Green were not adulterated nor more dangerous than other cigarette brands, the could held that cigarettes were reasonably fit and wholesome for the purpose for which they were sold and that the implied warranty did not include harmful effects that could not be foreseen.[36]

B. *The Federal Cigarette Labeling and Advertising Act*

Against a backdrop of consumer and judicial uncertainty regarding the risks associated with smoking, Congress promulgated the Federal Cigarette Labeling and Advertising Act.[37] In response to a growing awareness of the health threat posed to Americans, the Act was aimed at regulating the labeling and advertising of cigarettes. Originally adopted in 1965, the Act required that a cautionary legend appear on all packages of cigarettes reading: "Caution: Cigarette Smoking May be Hazardous to Your Health."[38] The congressional purpose of the Act was to adequately inform the public of the health risks associated with cigarette smoking and to ensure that this information was disseminated clearly through uniform labeling.[39] In addition to requiring this specific legend, the Act also in-

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33. *Green*, 391 F.2d at 99.
34. *Id.* at 106.
35. *Id.*
36. *Green*, 409 F.2d at 1166. The court affirmed the judgments of the lower court based upon the principles set out by Judge Simpson's dissent. See *Green*, 391 F.2d at 111, 113.
37. Pub. L. No. 89-92, 79 Stat. 282 (codified at 15 U.S.C. §§ 1331-1340 (Supp. I 1965 & Supp. V 1965-1969)).
38. 15 U.S.C. § 1333 (1970).
39. *Id.* § 1331. Section 1331 of the Code of 1970 provides that:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> (1) the public may be adequately informed that cigarette smoking may be hazard-

cluded a preemption provision barring the requirement of any other statement relating to health and smoking.[40]

In 1969, the Federal Trade Commission ("FTC") proposed a rule regulating cigarette advertising that required all advertisements to enumerate specific diseases caused by smoking.[41] At the same time, the Federal Communications Commission ("FCC") proposed a ban on radio and television advertising of cigarettes.[42] In 1970 in response to these proposals, Congress enacted a statutory ban on television and radio advertising,[43] and amended the necessary warning label. The new label required the following statement: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health."[44] The word "warning" replaced the word "caution," and the label firmly stated that smoking *is* dangerous; thus the tentative message of the 1965 warning was replaced by a definitive assertion of danger.

In 1984, the Act was amended a final time by the Comprehensive Smoking Education Act.[45] This Amendment requires that four explicit,

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ous to health by inclusion of a warning to that effect on each package of cigarettes; and

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

Id.

40. The Act provided that:

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

(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Pub. L. No. 89-92, § 5, 79 Stat. 282, 283 (codified at 15 U.S.C. § 1334 (Supp. I 1965 & Supp. V 1965-1969)).

For a discussion of the preemption issue as an affirmative defense to plaintiff recovery, see *infra* notes 85-136 and accompanying text. On this issue, Senator Magnuson stated that:

[Labeling requirements] should be uniform; otherwise, a multiplicity of State and local regulations pertaining to labeling of cigarette packages could create chaotic marketing conditions. Thus, the committee bill, by preempting the field, precludes any Federal, State, or local authority from requiring any warning statement other than that required by this bill on cigarette packages.

111 CONG. REC. § 13,893 (daily ed. June 16, 1965) (statement of Sen. Magnuson).

41. *See* 34 Fed. Reg. 7917 (1969) (proposed May 20, 1969).

42. *See* 34 Fed. Reg. 1959 (1969) (proposed Feb. 11, 1969).

43. 15 U.S.C. § 1335 (1970). The ban is still in effect today. 15 U.S.C. § 1335 (1982).

44. 15 U.S.C. § 1333 (1970). Additionally, Congress reiterated its preemptive intent, stating that "the committee feels that it is incumbent on the Congress to act on the reported legislation in order to prevent intrusion by the Federal Communications Commission and the Federal Trade Commission into basic areas of policymaking which it has reserved to itself." H.R. REP. No. 289, 91st Cong., 1st Sess. 5 (1969).

45. Pub. L. No. 98-474, 98 Stat. 2200 (1984) (codified as amended at 15 U.S.C. §§ 1331-1341 (1982 & Supp. IV 1986)).

rotational warnings be placed on cigarettes packages.[46] Reflecting the growing recognition of and concern for the health hazards of smoking, these new labels clearly warn of specific diseases caused by cigarette smoking.

C. *Modern Litigation*

As late as 1974, the problems of proof for a plaintiff in a suit against a tobacco company were thought to be "insurmountable."[47] As noted previously, a major obstacle for the earlier plaintiffs was their inability to prove that the tobacco companies could have reasonably foreseen the harmful effects of cigarette smoking.[48] However, the foreseeability hurdle of the early days has been removed by the widespread recognition that smoking is the primary cause of numerous diseases. At issue today is the extent of the manufacturer's duty to warn, the adequacy or inadequacy of the warnings given, and whether any warranties were breached. Specifically, plaintiffs allege that the warnings given are inadequate, that advertisements nullified the warnings given by discounting the risks associated with smoking, or that express warranties have been breached by misrepresentation of the risks of smoking.[49]

In recent litigation, plaintiffs have attempted to recover under a theory based on inadequate warning by asserting defective design claims. Plaintiffs are relying on section 402A of the Restatement (Second) of Torts to prove that the manufacturer's cigarettes are defective and unreasonably dangerous to the health of consumers.[50] Initially, design defect theories

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46. 15 U.S.C. § 1333(a)(1) (1982 & Supp. IV 1986). This section provides that:
It shall be unlawful for any person to manufacture, package, or import for sale or distribution within the United States any cigarettes the package of which fails to bear, in accordance with the requirements of this section, one of the following labels:
SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.
SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.
SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.
SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

47. *See* Garner, *supra* note 7, at 1427.

48. *See supra* notes 17-24 and accompanying text.

49. *See, e.g.*, Stephen v. American Brands, Inc., 825 F.2d 312 (11th Cir. 1987); Gunsalus v. Celotex Corp., 674 F. Supp. 1149 (E.D. Pa. 1987); Palmer v. Liggett Group, Inc., 633 F. Supp. 1171 (D. Mass. 1986), *rev'd*, 825 F.2d 620 (1st Cir. 1987); Roysdon v. R.J. Reynolds Tobacco Co., 623 F. Supp. 1189 (E.D. Tenn. 1985), *aff'd*, 849 F.2d 230 (6th Cir. 1988); Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146 (D.N.J. 1984), *rev'd in part and remanded*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 108 S. Ct. 487 (1987).

50. RESTATEMENT (SECOND) OF TORTS § 402A (1977); *see, e.g.*, Miller v. Brown & Williamson Tobacco Corp., 679 F. Supp. 485 (E.D. Pa. 1988); Gunsalus v. Celotex Corp., 674 F. Supp. 1149 (E.D. Pa. 1987); Roysdon v. R.J. Reynolds Tobacco Co., 623 F. Supp. 1189 (E.D. Tenn. 1985), *aff'd*, 849 F.2d 230 (6th Cir. 1988).

are attractive because the injured plaintiff is not required to prove "fault" by the defendant. The defect in the product itself is the fault upon which liability is based.[51] In cigarette suits the defect generally is said to be either the lack of a warning or an inadequate warning of the risks of smoking. However, design defect claims have consistently been unsuccessful, and courts continue to be reluctant to impose the duty of absolute insurer upon cigarette manufacturers. Ironically, this reluctance originally was founded on the "unknowable" nature of the risks associated with smoking. Now, the courts' reluctance to impose the duty is founded on the widespread knowledge of these same risks.

The problems for a plaintiff pursuing a defective design claim are numerous. First, comment i to section 402A of the Restatement (Second) of Torts states that "unreasonably dangerous" within the context of section 402A means that:

> The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. . . . *Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous.*[52]

A potential problem for plaintiffs is immediately apparent: comment i clearly states that good tobacco is not unreasonably dangerous. Although the meaning of "good tobacco" is somewhat ambiguous, it appears to mean tobacco unadulterated with contaminants or foreign objects.[53] Spe-

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Section 402A of the Second Restatement of Torts states:

> § 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
> (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
> (2) The rule stated in Subsection (1) applies although
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

51. E. SWARTZ, PROOF OF PRODUCT DEFECT § 2:1 (1985). A defect has been said to be "anything that is wrong with a product—which is causally connected with the injury complained of." *Id.*

52. RESTATEMENT (SECOND) OF TORTS § 402A comment i (1977) (emphasis added).

53. This meaning is derived from the explanation in comment i of § 402A. According to comment i, an example of tobacco that might be unreasonably dangerous is tobacco containing marijuana. Additionally, courts have not been hesitant to impose liability when foreign objects have been found in products. *See, e.g.*, Liggett & Myers Tobacco Co. v. Rankin, 246 Ky. 65, 54 S.W.2d 612 (1932) (worms); Pillars v. R.J. Reynolds Tobacco Co., 117 Miss. 490,

cifically, comment i states that good tobacco is not unreasonably dangerous simply because the effects of smoking are harmful.[54] In fact, early courts held that cigarettes were not unreasonably dangerous merely because the effects of smoking were harmful.[55] *Pritchard v. Liggett & Myers Tobacco Co.*[56] clearly expressed that an inquiry into an unreasonably dangerous condition is based upon the "purity" aspect of the product:

> If a man buys whiskey and drinks too much of it and gets some liver trouble as a result I do not think the manufacturer is liable unless (1) the manufacturer tells the customer the whiskey will not hurt him or (2) the whiskey is adulterated whiskey—made with methyl alcohol, for instance. The same surely is true of one who churns and sells butter to a customer who should be on a nonfat diet. The same is true, likewise, as to one who roasts and sells salted peanuts to a customer who should be on a no-salt diet. Surely if the butter and the peanuts are pure there is no liability if the cholesterol count rises dangerously.[57]

Thus, even under the strict liability theory of section 402A, liability is not easily proved by plaintiffs. As in past cases, illness caused by smoking a defendant's product does not necessarily mean that the product was defective. As late as 1988, the court in *Roysdon v. R.J. Reynolds Tobacco Co.*[58] stated that in order for the product to be defective, there must be evidence that the use of the defendant's cigarettes imposes greater risks than those known to be associated with smoking.[59]

Another factor bearing on the reluctance to hold manufacturers strictly liable may be the typically excessive consumption of cigarettes by the majority of plaintiffs. For example, the plaintiff in *Ross v. Philip Morris & Co.*[60] smoked between two and four packs of cigarettes a day.[61] The plaintiff in *R.J. Reynolds Tobacco Co. v. Hudson*[62] smoked a tin of Prince

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78 So. 365 (1918) (human toe); Corum v. R.J. Reynolds Tobacco Co., 205 N.C. 213, 171 S.E. 78 (1933) (fishhook). Judge Simpson, of the 5th Circuit, stated the proposition that:

> We are not dealing with an obvious, harmful, foreign body in a product. Neither do we have an exploding or breaking bottle case wherein the defect is so obvious that it warrants no discussion. Instead, we have a product (cigarettes) that is in no way defective. They are exactly like all others of the particular brand and virtually the same as all other brands on the market.

Green v. American Tobacco Co., 391 F.2d 97, 110 (5th Cir. 1968) (Simpson, J., dissenting).

54. RESTATEMENT (SECOND) OF TORTS § 402A comment i.

55. Plaintiffs have also failed to recover due to the preemption of state tort claims by the 1965 Federal Cigarette Labeling and Advertising Act. For a discussion of the preemption issue, see *infra* notes 85-136 and accompanying text.

56. 295 F.2d 292 (3rd Cir. 1961).

57. *Id.* at 302 (Goodrich, J., concurring).

58. 849 F.2d 230 (6th Cir. 1988).

59. *Id.* at 236.

60. 328 F.2d 3 (8th Cir. 1964).

61. *Id.* at 5.

62. 314 F.2d 776 (5th Cir. 1963).

Albert and two packs of Camel cigarettes every day,[63] and medical experts stated that his cancer was caused by "excessive" smoking.[64] The plaintiff in *Lartigue v. R.J. Reynolds Tobacco Co.*,[65] who began smoking when he was nine years old, smoked for fifty-five years. He smoked at least two packs a day, lighting one cigarette from the other, and even his wife termed him a "cigarette fiend."[66] In *Stephen v. American Brands, Inc.*,[67] the plaintiff smoked for fifty-four years.[68] In *Gunsalus v. Celotex Corp.*,[69] the plaintiff began smoking when he was eleven years old[70] and was warned as early as 1954 to stop smoking.[71] The extreme intemperateness of all these plaintiffs may make it difficult to hold the cigarette manufacturer to an insurer standard. Comment j of section 402A of the Restatement (Second) of Torts, states:

> [A] seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized. Again the dangers of alcoholic beverages are an example, as are also those of foods containing such substances as saturated fats, which may over a period of time have a deleterious effect upon the human heart.[72]

The excesses to which these plaintiffs smoked may leave a court and jury justifiably wary of allowing the plaintiff to escape responsibility for their own actions by forcing cigarette manufacturers into the role of absolute insurers.

Integrally related to claims of design defect are claims of failure to warn. In fact, some cigarette plaintiffs have alleged that the lack or inadequacy of a warning constitutes a design defect.[73] A duty to warn is said to exist when a manufacturer has superior knowledge, and "may reasonably foresee a danger of injury or damage to one less knowledgeable."[74] This duty persists unless an appropriate warning of the risks involved is given.[75] Furthermore, a manufacturer with a duty to warn also has a duty to insure that the warnings given are adequate.[76] A warning may be inad-

63. *Id.* at 778.
64. *Id.* at 779.
65. 317 F.2d 19 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963).
66. *Id.* at 22.
67. 825 F.2d 312 (11th Cir. 1987).
68. *Id.* at 313.
69. 674 F. Supp. 1149 (E.D. Pa. 1987).
70. *Id.* at 1151.
71. *Id.* at 1153.
72. RESTATEMENT (SECOND) OF TORTS § 402A comment j (1977).
73. *See, e.g.*, Cipollone v. Liggett Group, Inc., 649 F. Supp. 664, 669-71 (D.N.J. 1986).
74. 3 AMERICAN LAW OF PRODUCTS LIABILITY § 33:2 (3d ed. 1987).
75. *Id.*
76. *Id.* § 34:1.

equate if no specific risks are mentioned or if the warnings are ambiguous.[77] Thus, a warning may be inadequate if the language of the warning is not commensurate with the gravity of the harm likely to result from the danger.[78] Alternatively, a warning which might otherwise be sufficient may be nullified by a marketing plan which diminishes the importance of the warnings given.[79] Plaintiffs have historically failed to prevail on this latter theory[80] primarily because of their inability to prove justifiable reliance and a causal connection between the manufacturer's advertisements or representations and the alleged harm suffered.

Failure to warn theories have consistently met with difficulty, as evidenced by the lack of recovery by plaintiffs proceeding under this theory.[81] The most formidable problem presented is the possible preemption of all state claims arising from post-1966 smoking due to the promulgation of the Federal Cigarette Labeling and Advertising Act.[82] Thus, the failure to warn theory is completely unavailable to many plaintiffs who began smoking after 1966. Other significant problems presented by the theory include establishing that the tobacco companies knew of the dangers caused by smoking before 1966 and showing that the plaintiff was unaware of the dangers involved in smoking.

Ironically, modern plaintiffs are disadvantaged by being warned too well: widespread community knowledge of the risks associated with smoking coupled with the specific warnings required by the Act make the

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77. *See, e.g.*, Gunsalus v. Celotex Corp., 674 F. Supp. 1149 (E.D. Pa. 1987).

78. *See* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973) (asbestos manufacturer's duty to warn of foreseeable dangers extends to all users and consumers), *cert. denied*, 419 U.S. 869 (1974). The court stated that:

> [N]one of these so-called 'cautions' intimated the gravity of the risk: the danger of a fatal illness caused by asbestosis and mesothelioma or other cancers. The mild suggestion that inhalation of asbestos in excessive quantities over a long period of time '*may* be harmful' conveys no idea of the extent of the danger.

Id. at 1104 (emphasis in original).

79. Wrubel, *Liability for Failure to Warn or Instruct*, in CONSUMER PRODUCTS: GOVERNMENT REGULATION AND PRODUCT LIABILITY 11 (1984). Generally, a warning is said to be adequate when it is "reasonably calculated to reach the ultimate user of a product, a reasonably prudent consumer, or an ordinary user, and must be calculated to bring home to a reasonably prudent user of the product the nature and extent of the danger involved in using the product." 3 AMERICAN LAW OF PRODUCTS LIABILITY, *supra* note 74, § 34:4.

80. *See, e.g.*, *Gunsalus*, 674 F. Supp. 1149 (advertisements were not the kind upon which reasonable people would rely). *But see* Hon v. Stroh Brewery Co., Prod. Liab. Rep. (CCH) ¶ 11,609 (Dec. 21, 1987) (Stroh's marketing of its product would be an important consideration for the jury in determining whether an express warning was necessary to make the product safe for its intended purpose); Baldino v. Castagna, 505 Pa. 239, 478 A.2d 807 (1984) (jury may consider whether a manufacturer has nullified warning by promotion of its product).

81. Even the plaintiff in Cipollone v. Liggett Group, Inc., 693 F. Supp. 208 (D.N.J. 1988), the first plaintiff to recover in a product liability suit against a tobacco company, failed to recover on the failure to warn claim.

82. 15 U.S.C. §§ 1331-1341 (1982 & Supp. IV 1986).

plaintiff's failure to warn claim difficult to support.[83] A manufacturer generally is not held liable for harm caused by its product to a plaintiff who actually knew and appreciated the risk posed yet voluntarily proceeded to encounter that risk. Furthermore, the manufacturer's affirmative defense of assumption of risk is enhanced.[84]

III. Failure to Warn and the Preemption Bar: The Real Significance of *Cipollone v. Liggett Group, Inc.*

A. *Preemption by the Federal Cigarette Labeling and Advertising Act*

Although claims of lack of foreseeability of the dangers involved in smoking insulated defendants in earlier cases from failure to warn claims, the current widespread recognition of the risks posed by smoking prevents use of the lack of foreseeability defense. Instead, tobacco companies are relying on their compliance with the Federal Cigarette Labeling and Advertising Act[85] to preempt state tort claims. To date, this defense has succeeded against claims due to smoking after the effective date of the Act. Preemption thus creates serious problems for plaintiffs: it may extinguish a failure to warn claim altogether, and it presents difficulties in proving injuries and apportioning damages when a plaintiff is restricted to pre-1966 smoking related injuries. Since a finding of preemption effectively bars recovery for injuries resulting from post-1966 smoking, the viability of the preemption defense assumes ever-increasing importance.

Passage of the Act has had a profound effect on the outcome of every suit filed against a cigarette manufacturer since its adoption. In the latest wave of cigarette suits, the Act has consistently prevented plaintiffs from recovering for injuries that occurred as a result of smoking after the Act's adoption. The Act effectively prevents recovery on a failure to warn claim in two ways. First, the Act specifies explicit warnings which manufacturers must place on every package of cigarettes.[86] The specificity of these warnings has not only impeded a plaintiff's claim of failure to warn, but it also leaves the plaintiff vulnerable to the manufacturer's claim of assumption of risk. Second, the presence of the federally mandated warnings makes it uncertain whether a plaintiff may even bring a tort claim under state law, for the Act may preempt state claims based on failure to warn.

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83. As early as 1978, studies showed that 90% of the American public was aware that cigarette smoking was hazardous. Note, *supra* note 1, at 813-14.

84. Plaintiffs may be able to avoid this defense if they can show addiction. Addiction makes a plaintiff's decision to smoke less voluntary. Since the assumption of risk defense depends on voluntary activity by the plaintiff, a manufacturer's defense claims may then lose some of their force. Note, *supra* note 1, at 813-14. For a discussion of addiction as a possible theory of recovery, see generally Garner, *supra* note 7, at 1431.

85. 15 U.S.C. §§ 1331-1341 (1982 & Supp. IV 1986).

86. For the language required in the warnings, see *supra* note 46 and accompanying text.

The source of the preemption doctrine is found in the supremacy clause of the United States Constitution.[87] Congress may evince its desire to preempt by using express language of preemption,[88] or it may impliedly preempt a field.[89] Implied preemption may occur when, through the comprehensiveness of the regulatory scheme, Congress manifests an intent to completely occupy a given field.[90] Implied preemption may also occur when state law conflicts with federal law even though Congress has not displaced state law entirely.[91] Such a conflict may arise when it becomes physically impossible to comply with both federal and state regulations[92] or when state law presents an obstacle to the accomplishment of the full purposes and objectives of Congress.[93]

It is generally agreed that the Act does not expressly preempt state law tort claims.[94] Therefore, the Act must be examined to discern congressional intent in determining whether implied preemption exists. In section 1331 of the Act, Congress addressed the two, sometimes competing, goals of public health and protection of the national economy. Section 1331 provides that:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> (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.[95]

Congress has clearly expressed its purpose to not only adequately in-

87. U.S. CONST. art. VI, § 2.

88. *See, e.g.*, Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

89. *Id.*

90. Silkwood v. Kerr McGee Corp., 464 U.S. 238, 248 (1984).

91. *Id.* at 248 (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)).

92. *Id.*

93. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52 (1941).

94. *See, e.g.*, Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230 (6th Cir. 1988); Palmer v. Liggett Group, Inc., 635 F. Supp. 392 (D. Mass. 1984).

95. 15 U.S.C. § 1331 (1982). In 1984, Congress again amended § 1331(1), requiring warnings on cigarette advertisements. Section 1331(1) now provides that "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." 15 U.S.C. § 1331(1) (Supp. II 1984).

form the public of the hazards of cigarette smoking[96] but also to protect commerce by prohibiting "diverse, nonuniform, and confusing cigarette labeling." Thus, the information to be received by the public must be controlled in such a way as to prevent the impediment of commerce through diverse labeling and advertising requirements. The controlled approach to the dissemination of information to the public is reflected in the four rotational warnings most recently adopted by Congress for use in labeling cigarette packages. Through these four explicit warnings, Congress has expressed its view of what constitutes adequate warning. The articulation of the specific warnings accomplishes Congress' primary goal of informing the public of health hazards. The prohibition against requiring any other statement relating to smoking and health accomplishes the second expressed purpose of protecting commerce through uniform regulations. The preemption provision found in section 1334 of the Act appears to be the method Congress has chosen to insure that the second goal is met. Section 1334 provides that:

> (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.[97]

Although section 1334 clearly prohibits requiring statements other than those contained in section 1333, plaintiffs have argued that common law claims were not meant to be included under this category of preempted activities.

B. Cipollone v. Liggett Group, Inc.

1. Generally

On June 13, 1988, the jury in *Cipollone v. Liggett Group, Inc.*[98] returned the first verdict ever awarded against a tobacco company in a products liability suit.[99] Although hailed by some as the end of the to-

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96. The report issued by the Committee on Interstate and Foreign Commerce stated that: "The principal purpose of the bill is to provide adequate warning to the public of the potential hazards of cigarette smoking by requiring the labeling of cigarette packages with the [warning]." H.R. REP. No. 449, 89th Cong., 1st Sess. 1, *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 2350.

97. 15 U.S.C. § 1334 (1982).

98. 693 F. Supp. 208 (D.N.J. 1988).

99. This verdict represents the first award to a plaintiff in approximately 300 cigarette suits filed since 1954. Moss, *The (Smoking) Chain is Broken*, 74 A.B.A. J. 28 (August 1, 1988).

bacco companies' "winning streak,"[100] *Cipollone* may actually present severe obstacles to any subsequent victory by plaintiffs.

The plaintiff in *Cipollone*, who had smoked for over forty years, brought a state common-law products liability action against three tobacco companies[101] seeking to recover for the lung cancer she had allegedly contracted as a result of smoking the defendants' cigarettes. Rose Cipollone originally alleged claims of strict liability, including design defect and failure to warn, intentional tort, including the negligent or intentional advertising of products which neutralized the warnings actually given, negligence, and breach of warranty.[102] Early on, these claims were dealt a severe blow by the Third Circuit Court's finding of preemption by the Federal Cigarette Labeling and Advertising Act. As a result of this finding, the majority of Cipollone's claims were dismissed. Of the surviving claims, the jury awarded no money damages for the failure to warn claim even though they found the manufacturer, Liggett, liable for failing to warn. Damages were awarded to Mr. Cipollone on a finding that Liggett had breached express warranties made through advertisements to Mrs. Cipollone.[103]

The outcome of *Cipollone* is meaningful in several respects. The relatively small amount awarded may indicate that the jurors did not hold Liggett liable in any significant way. It is particularly notable that Rose Cipollone's estate failed to recover any damages, since the jurors found her primarily responsible for her illness. It appears that Rose Cipollone illustrates the principal problem modern cigarette plaintiffs encounter, that of being warned too well of the dangers of cigarette smoking. Since Rose Cipollone continued to smoke after she was aware of the potential hazards, the jury found that she had voluntarily encountered a known risk. Evident in the jury's finding is the difficulty of apportioning claims and damages between pre-1966 smoking and post-1966 smoking. The jurors appear to have considered Rose Cipollone's post-1966 behavior in determining damages for her pre-1966 failure to warn claim. However, in spite of these adverse findings, the jury did find that Liggett owed a duty to warn, and that it breached express warranties. These findings may help future plaintiffs, although the problem of plaintiff conduct will likely again hamper plaintiff recovery.

2. Preemption in *Cipollone*

The road to recovery in *Cipollone* was long and expensive. Almost four

100. *Id.*

101. The plaintiff originally named as defendants Liggett, Philip Morris, Inc., and Lorillard, Inc. All claims were dismissed against the latter two. *Cipollone*, 693 F. Supp. at 210.

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

103. *Cipollone*, 693 F. Supp. at 210.

years elapsed from the first proceeding to the recent jury award of $400,000, and plaintiff's counsel spent more than $2,000,000 in preparation.[104] The journey was also fraught with obstacles, the resolution of which may bode ill for future plaintiffs.

The first, and perhaps most important obstacle in the *Cipollone* proceedings, was the assertion by the defendants that the plaintiff's claims were preempted by the Federal Cigarette Labeling and Advertising Act.[105] After an exhaustive analysis of the Act, the district court concluded that the Act neither expressly nor impliedly preempted plaintiff's claims.[106] Central to this finding was the court's position that determination of the preemption question required analysis of the legislative history of the Act.[107] Consequently, both parties provided passages supportive of their respective positions,[108] but the court was persuaded by the plaintiff's arguments.

In the first proceeding, Rose Cipollone conceded that the Act precluded state and government regulation of labeling and advertising, but argued that her common law claims would not constitute regulation of cigarette labeling and advertising.[109] Instead, she argued that her claims constituted compensation for the harmful effects of smoking, and that therefore the claims should not be preempted.[110] Further, she stressed that had Congress intended to eliminate state claims, it would have clearly done so.[111] In response, the defendants asserted that had Congress intended to allow state claims, it would have provided a savings clause as it had done in many other statutes.[112]

In finding that the Act did not expressly preempt plaintiff's common-law claims, the court analyzed whether a conflict existed between the imposition of state tort liability and federal legislation by distinguishing "regulation" from "motivation." The court reasoned that "[t]ort liability . . . merely 'motivates' a . . . 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 imposes liability, and without dictating the form of such change."[113] Therefore, the court found that state tort liability was not inconsistent with the regulatory purposes of the federal Act.

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104. *See* Rosenblum, *supra* note 4, at 1369.
105. 15 U.S.C. §§ 1331-1341 (1982 & Supp. IV 1986).
106. Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146, 1170 (D.N.J. 1984).
107. *Id.* at 1154.
108. *Id.* at 1153-63.
109. *Id.* at 1153.
110. *Id.*
111. *Id.*
112. *Id.* at 1154.
113. *Id.* at 1156.

Although the court recognized that the legislative history of the Act indicates an intent "to avoid a 'maze of conflicting regulations' and deal with 'a product that is completely in interstate commerce,' "[114] the court also found that no implied preemption existed. The court agreed with Liggett that Congress intended to occupy a field, but stated that this field did not encompass state law products liability claims.[115] Rather, the court held that this field was limited to cigarette labeling and advertising. The intent to occupy did not extend to the problem of compensating "victims" of smoking.[116] The court further stated that the payment of compensation did not create an actual conflict with the Act.[117] Therefore, the district court held that the plaintiff had the right to present her claims for adjudication.[118]

In what has proven to be a significant ruling, the Third Circuit Court of Appeals reversed the district court's findings on the preemption issue.[119] Although the circuit court agreed with the district court that there was no express preemption in the Act,[120] it did find that implied preemption existed. Unlike the district court, the circuit court found it unnecessary to refer to the Act's legislative history to determine Congress' intent to preempt.[121] The court did agree that Congress intended to occupy a field. However, rather than conclude that this field was completely separate from the Cipollones' state tort claims, the court concluded that all of the state law claims which actually conflicted with the Act were preempted.[122]

In determining which claims actually conflicted, the circuit court examined the preemption provision of section 1334 in conjunction with the statement of purpose found in section 1331.[123] In contrast, the district court had examined these provisions independently.[124] The circuit court found that "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.' "[125] Citing several United States Supreme Court decisions,[126] the circuit court found that state law damage claims had a

114. *Id.* at 1164.
115. *Id.*
116. *Id.*
117. *Id.* at 1170.
118. *Id.* at 1171.
119. Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 108 S. Ct. 487 (1987).
120. *Id.* at 185.
121. *Id.* at 186.
122. *Id.* at 187.
123. *Id.*
124. *See Cipollone*, 593 F. Supp. at 1153-65.
125. *Cipollone*, 789 F.2d at 187.
126. *E.g.*, Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141 (1982); Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981); San Diego Bldg. Trades

regulatory effect, as well as the potential for frustrating congressional objectives. Consequently, the court concluded that successful claims resulting from smoking or noncompliance with warning obligations other than those prescribed in the Act would actually conflict with the Act.[127] A successful state claim would in effect heighten the requirements placed on manufacturers by punishing them despite compliance with federal standards.[128] Further, the court held that where the success of a state law claim depends on the assertion that a duty exists to provide warnings in addition to those required by the Act, the claims will be preempted as conflicting with the Act.[129]

The circuit court remanded the case to the district court for a determination of which claims were preempted, based upon the circuit court's rationale. The district court was instructed by the circuit court to hold as preempted all state claims relating to "advertising or promotion" or claims which necessarily depended on establishing that a greater duty to warn existed than that imposed by Congress.[130] The district court found preemption of all but one of the claims arising from post-1966 smoking. Preempted were the strict liability claims (including failure to warn and design defect),[131] intentional tort claims (including the claim that the manufacturers intentionally misled the public and/or deprived it of the information necessary to make an informed decision about smoking),[132] and the breach of express warranty claim.[133] The ramifications of such a

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Council v. Garmon, 359 U.S. 236 (1959).

127. Cipollone v. Liggett Group, Inc., 789 F.2d 181, 187 (3d Cir. 1986).

128. However, there are cases holding that mere compliance with a federal statute does not protect manufacturers from liability. *See, e.g.*, Ferebee v. Chevron Chem. Co., 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062 (1985) (labeling paraquat with the warning required under the Federal Insecticide, Fungicide, and Rodenticide Act does not preclude a jury from finding the defendant's warning inadequate); Stevens v. Parke, Davis & Co., 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973) (compliance with Food and Drug Administration warnings not sufficient to immunize manufacturer from liability); MacDonald v. Ortho Pharmaceutical Corp., 394 Mass. 131, 475 N.E.2d 65 (1985) (jury could conclude that warning was inadequate even though it complied with the labeling requirements of the Food and Drug Administration); Burch v. Amsterdam Corp., 366 A.2d 1079 (D.C. 1976) (compliance with labeling requirements of Federal Hazardous Substances Act does not immunize manufacturers from liability because defective warning was inadequate even though it complied with the labeling requirements of the Food and Drug Administration); *see also* RESTATEMENT (SECOND) OF TORTS § 288C (1977) ("Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions.").

129. *Cipollone*, 789 F.2d at 187. Since a plaintiff must allege that additional warnings are necessary for the manufacturer to properly discharge his duty to warn in order to circumvent the inevitable defense of assumption of risk, this holding effectively forecloses a plaintiff's recovery in a cigarette suit.

130. *Id.*

131. Cipollone v. Liggett Group, Inc., 649 F. Supp. 664, 669-72 (D.N.J. 1986).

132. *Id.* at 673-74.

133. *Id.* at 675.

finding are far-reaching. A majority of the plaintiff's claims may be summarily eliminated for injuries caused by smoking after the Act became effective. Thus, Mrs. Cipollone's case was severely limited by the preemption ruling.

The Third Circuit's preemption finding appears well-supported. Preemption by the Act has been unanimously found by other federal courts considering its applicability in products liability actions against cigarette manufacturers.[134] The Act specifies four explicit warnings to be used. It does not state that other warnings may be used in place of these four, or in addition to them. Instead, its parameters are specifically delimited by section 1334. In addition, the evolutionary process of the current warnings indicates that the Act represents congressional intent to set firm bounds in the area of cigarette labeling and advertising. The warnings required by the Act have changed three times since its original adoption.[135] As the evidence mounted on the risks associated with cigarette smoking, the required warnings changed in tone and content. The hesitancy of the first warning was replaced with disclosure of specific diseases caused by cigarette smoking. Old warnings were replaced when they no longer adequately informed the public of the health hazards.

Based on Congress' previous amendment of the Act, it appears that until the current warnings are again amended, they must be presumed to contain "adequate information" sufficient to accomplish the stated goals. Thus, plaintiffs who bring state claims based on inadequate warnings are attempting to impose, through state channels, more stringent requirements upon cigarette manufacturers than are imposed by the federal scheme. Since a state claim for compensation increases the requirements placed on manufacturers, state claims conflict with the scheme expressed in the federal Act. A successful state claim based on a failure to warn theory implies that warnings in addition to or different from those required by the Act are necessary. Thus, a state begins to encroach upon the boundaries of section 1334 by requiring supplemental warnings. Any state law that actually conflicts with federal law is preempted.[136] Therefore, state claims arising from post-warning smoking should be

134. *See, e.g.*, Stephen v. American Brands, Inc., 825 F.2d 312 (11th Cir. 1987); Semowich v. R.J. Reynolds Tobacco Co., No. 86-CV-118, 1988 U.S. Dist. LEXIS 9102 (N.D.N.Y. Aug. 18, 1988); Gunsalus v. Celotex Corp., 674 F. Supp. 1149 (E.D. Pa. 1987); Palmer v. Liggett Group, Inc., 633 F. Supp. 1171 (D. Mass. 1986), *rev'd*, 825 F.2d 620 (1st Cir. 1987); Roysdon v. R.J. Reynolds Tobacco Co., 623 F. Supp. 1189 (E.D. Tenn. 1985); Phillips v. R.J. Reynolds Tobacco Co., No. 1144, 1988 Tenn. App. LEXIS 312 (May 16, 1988). Only one court has ruled that preemption of state tort actions did not exist in a cigarette suit. *See* Forster v. R.J. Reynolds Tobacco Co., 423 N.W.2d 691 (Minn. Ct. App. 1988) (court refused to "strain to find implied preemption" when Congress did not explicitly preempt state tort actions).

135. For the language required by each of these warnings, see *supra* note 46.

136. *See supra* notes 90-92 and accompanying text; *see also* U.S. CONST. art. VI, § 2.

preempted.

3. Recovery in *Cipollone*

The Third Circuit's preemption finding was the most important loss for Rose Cipollone. The court's ruling drastically diminished her possible claims for recovery. She was left only with claims arising from the defendant's pre-1966 activity. Her potential for recovery was further curtailed when the jury found that her knowledge and awareness of the risks associated with cigarette smoking made her primarily responsible for her own death.[137]

Although Mrs. Cipollone began smoking at the age of sixteen,[138] the jury found that she was aware of the risks involved. Mrs. Cipollone had testified that she heard reports that smoking caused cancer,[139] yet she continued to smoke between one and two packs of cigarettes a day. She continued to smoke even after her cancer was diagnosed and her lung was removed. She stopped smoking only after her cancer had metastasized, and she was found to be fatally ill in 1983.[140] Based on these actions, the jury found that Rose Cipollone knew what she was doing and smoked because she wanted to smoke. In particular, a majority of the jury found it significant that Rose Cipollone did not stop smoking in 1966 when the federal warnings went into effect.[141] The jury found that Rose Cipollone had voluntarily and unreasonably encountered a known danger by smoking cigarettes and held her eighty percent responsible for her own death.[142] Under New Jersey law, this finding of responsibility barred Rose Cipollone from recovering on the failure to warn claim.[143] However, although she failed to recover monetary damages on the failure to warn claim, the jury did find that Liggett had a duty to warn consumers of the health risks of smoking, that Liggett failed to warn consumers, and that this failure to warn proximately caused Mrs. Cipollone's illness.[144] Although New Jersey's comparative fault law prevented Mrs. Cipollone from recovering on her failure to warn claim, the jury's finding that a duty to warn existed may prove important for plaintiffs of states without comparative fault laws.

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137. Cipollone v. Liggett Group, Inc., 693 F. Supp. 208, 210 (D.N.J. 1988). The defense presented evidence on the history of tobacco use, and each juror received a notebook of over 300 articles that Rose Cipollone might have read concerning the risks of cigarette smoking. *See* Singer, *They Didn't Really Blame the Cigarette Makers*, AM. LAW. 31, 32 (Sept. 1988).

138. Cipollone v. Liggett Group, Inc., 683 F. Supp. 1487, 1489 (D.N.J. 1988).

139. *Id.* at 1489.

140. *Id.* at 1490.

141. Singer, *supra* note 137, at 36.

142. *Cipollone* 693 F. Supp. at 210.

143. *Id.*

144. *Id.*

The recovery granted by the *Cipollone* jury was based on a breach of express warranty claim, founded on Mrs. Cipollone's contention that she read and relied on advertisements that misrepresented the risks of smoking.[145] Even though the jury found that Liggett breached express warranties made to Mrs. Cipollone, and that this breach proximately caused Mrs. Cipollone's cancer and death, the award was made to Mr. Cipollone rather than to Mrs. Cipollone's estate. Although apparently a promising victory, the presence of inconsistent findings and a controversial jury charge undermine the seeming win for cigarette plaintiffs. In effect, the jury found that Mrs. Cipollone sustained no damages from this breach of warranty, but that Mr. Cipollone, a non-smoker, did. The inconsistency of this finding makes the significance of the verdict questionable. Additionally, by expressly denying damages to the estate of Mrs. Cipollone, the injured smoker, the jury appears to have emphatically denied plaintiff recovery once again. The justification for the award to Mr. Cipollone is unclear. It has been suggested that the award represented either "straight sympathy"[146] for Mr. Cipollone, or simply a compromise among the jurors, the majority of whom felt strongly about not awarding Mrs. Cipollone any damages.[147]

Further clouding the impact of the verdict is the controversial jury charge from Judge Sarokin stating that "[t]he law does not require plaintiff to show that Rose Cipollone specifically relied on Liggett's warranties."[148] Although in an earlier proceeding the court had stated that reliance was an element of plaintiff's express warranty claim,[149] in the latest proceeding the court noted that it had reconsidered this prior position.[150] The change in position on this issue is significant. By eliminating the reliance requirement, Rose Cipollone's knowledge of the risks involved and her continued smoking would not operate to bar this claim. If, however, reliance was a requirement for a successful breach of express warranty claim, it seems likely that the plaintiff would not have recovered. The jury's reluctance to award damages on the failure to warn claim for actions which they found to be voluntary and unreasonable may have persisted in the breach of warranty claim. It appears probable that Mrs. Cipollone's smoking, which continued despite reports on the hazards of smoking and after the federal warnings became effective, would have prevented a finding of reliance and therefore precluded recovery.

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145. *Cipollone*, 683 F. Supp. at 1497-99.

146. Adler, *Confusing Conclusion to* Cipollone, 121 NEW JERSEY L.J. 1368 (1988).

147. *See* Singer, *supra* note 137, at 36-37.

148. *Cipollone*, 693 F. Supp. at 212.

149. *Cipollone*, 683 F. Supp. at 1497.

150. *Cipollone*, 693 F. Supp. at 213.

IV. Conclusion

The uncertainty surrounding the reliance charge and the likelihood that the case would have been resolved differently, had reliance been required, undermines the significance of the award granted. The significance of the award is further undermined by the fact that damages were awarded to Mr. Cipollone, a non-smoker, rather than to Mrs. Cipollone, the injured smoker. Thus, *Cipollone* may not be the important tort liability win for cigarette plaintiffs that it initially appeared to be. Instead, it is the leading judicial statement on the preemption issue, and it is this issue which makes *Cipollone* significant in the area of tobacco litigation. Ironically, although *Cipollone* is the first case to award damages to a plaintiff, it is also the case whose sweeping preemption rulings establish severe, possibly "insurmountable," obstacles for future plaintiffs in tobacco suits.

Milby Amott McCarthy