Campbell Law Review

Volume 10
Issue 3 *Summer 1988*

Article 4

January 1988

Constitutional Law - Preemption of State Common Law Actions against Cigarette Manufacturers by the Federal Cigarette Labeling and Advertising Act: Have Smokers Taken Their Last Puff to Hold Tobacco Companies Liable under a State Tort Claim? - Palmer v. Liggett Group, Inc.

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NOTES

CONSTITUTIONAL LAW — PREEMPTION OF STATE COMMON LAW ACTIONS AGAINST CIGARETTE MANUFACTURERS BY THE FEDERAL CIGARETTE LABELING AND ADVERTISING ACT: HAVE SMOKERS TAKEN THEIR LAST PUFF TO HOLD TOBACCO COMPANIES LIABLE UNDER A STATE TORT CLAIM? — *Palmer v. Liggett Group, Inc.*

INTRODUCTION

Over a hundred suits against cigarette manufacturers are still pending, but recent decisions may have slammed the door on these tobacco liability cases.[1] In 1964, the United States Surgeon Gen-

1. With attorneys for both sides claiming victory in recent tobacco liability trials, the fate of other tobacco liability cases is unclear. In Horton v. American Brands, docket no. 9050 (Circuit Ct., Holmes County), plaintiff sought 17 million dollars in damages for the death of Horton, who died after thirty years of smoking. On January 29, 1988, Holmes County Circuit Judge Gray Evans declared a mistrial in the *Horton* case. *Horton* was the first case to be tried in a state with a comparative-fault law and one of the few tobacco liability cases to be tried before a jury. After deliberating for eight hours over a two-day span, the jury announced it was deadlocked 7-5 in favor of the defendant. Nine votes were required for a verdict. There were mixed opinions on whether the mistrial was a victory for the industry or a positive omen for the plaintiffs. The tobacco industry considered it a victory since the industry was not found liable in a state with a comparative fault law. Others considered the result as a positive omen for plaintiffs since it was the first time in the history of tobacco litigation that a jury failed to rule in favor of the tobacco company. *See* Horton v. American Brands, Greensboro News and Record, Jan. 30, 1988, at A2, col. 4 (Circuit Ct., Holmes County, Mississippi, Jan. 29, 1988).

A recent jury verdict in Cipollone v. Liggett Group, docket no. 83-2846 (D.N.J.), *on remand from the Third Circuit*, 782 F.2d 181 (3d Cir. 1986), for resolution of certain issues, keeps the fate of tobacco liability cases engulfed in a cloud of smoke. The verdict in Cipollone marks the first time in over three hundred cases since 1954 that a tobacco company has lost even a single claim and has been held liable for damages. In Cipollone, the plaintiff brought fraud and conspiracy claims against three tobacco companies—Liggett Group Inc., Phillip Morris Inc., and Lorillard Inc.—on behalf of his wife, Rose Cipollone, who died from

eral released a report that was one of the first documents to scientifically link cigarette smoking to the occurrence of lung cancer, bronchitis, and emphysema.[2] The public response to this report led several states to enact mandatory warning labels for cigarette packages sold within the state.[3] Recognizing the potential confusion and conflict likely to result if each state enacted its own labeling requirements, Congress stepped in and enacted the Federal Cigarette Labeling and Advertising Act (the "Act").[4] The Act's

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lung cancer after forty-two years of smoking. Because Rose Cipollone had smoked only Liggett brands before 1966, Liggett Group Inc. also faced additional charges of failure-to-warn and warranty charges. On June 13, 1988, a federal jury found the Liggett Group liable for failure to warn of the health risks of smoking before the warnings were required in 1966 and for misleading the public through advertisements before 1966. The jury concluded that Liggett's Advertising slogans before 1966 such as L&Ms were "Just What the Doctor Ordered" misled the public by suggesting that smoking was safe. The jury awarded Mr. Cipollone $400,000 in damages but did not award damages to Mrs. Cipollone's estate because it found Mrs. Cipollone was mostly responsible for her death. The Liggett Group was also charged with guaranteeing safety by express warranty in advertisements. However, the jury concluded that Mrs. Cipollone knew enough from reading and other notifictions to have "unreasonably encountered a known danger" by insisting on smoking before 1966. The jury concluded that Rose Cipollone was eighty percent responsible for her death and Liggett Group was twenty percent responsible. Under the New Jersey law, Mrs. Cipollone was not entitled to damages unless the tobacco company was fifty percent to blame.

Attorneys for the Cipollones were the first to obtain and introduce in court confidential tobacco studies on the dangers of smoking. These secret studies were the basis of the fraud and conspiracy claims. However, the jury, not swayed by these confidential reports, dismissed the fraud and conspiracy charges. Therefore, Phillip Morris Inc. and Lorillard Inc. were exonerated of any blame in Rose Cipollone's death. The impact that these confidential documents will have on pending cases remains unclear because each case has its own merits and each jury may not reach the same verdict. *See* WINSTON-SALEM JOURNAL, June 14, 1988, at 1, col. 3.

A Philadelphia jury concluded in Gunsalus v. American Tobacco Company, a case involving tobacco and asbestos, that the American Tobacco Company was not liable in a former shipyard worker's long cancer death. However, the jury did find that the Company should have put warning labels on cigarette packs before 1966. No damages were awarded because the cigarettes were not a substantial factor in the death. *See* WINSTON-SALEM JOURNAL, June 25, 1988, at 1, col. 1.

2. U.S. DEP'T OF HEALTH, EDUCATION, & WELFARE, SMOKING AND HEALTH, REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (January 11, 1964) [hereinafter 1964 SURGEON GENERAL'S REPORT].

3. *See, e.g.*, N.Y. GEN. BUS. LAW § 399 (McKinney 1984): New York state legislation requiring label: "WARNING: Excessive Use Is Dangerous to Health."

4. Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79

purpose was to establish a uniform, nationally consistent system to regulate cigarette warning labels and the advertising and promotion of cigarettes.[5] After the passage of the Act, cigarette manufacturers successfully fought liability suits on the ground that the Act preempts state law damage actions relating to smoking and health that challenge either the adequacy of the warning[6] or the propriety of a party's actions "with respect to the advertising and promotion of cigarettes."[7]

In *Palmer v. Liggett Group, Inc.*,[8] the First Circuit Court of

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Stat. 282 (1965) [hereinafter 1965 Act] (codified as amended by the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) at 15 U.S.C. §§ 1331-1340 (1982) [hereinafter 1969 Act]). In 1984, Congress further amended the Act by the Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200 (1984) [hereinafter 1984 Act] (codified at 15 U.S.C. §§ 1331-1341 (Supp. IV 1986)).

5. The Act as amended by the 1969 Act included the following statement of purpose:

> 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
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> (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.

1969 Act, § 1331, *supra* note 4.

In October, 1984, part (1) was amended with an added reference to uniform notices in cigarette advertising. Paragraph (1) of § 1331 now reads:

> (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 . . . .

1984 Act, § 1331(1), *supra* note 4.

6. *See, e.g.*, Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146 (D.N.J. 1984), *rev'd and remanded*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 907 (1987); *accord*, Roysdon v. R.J. Reynolds Tobacco Co., 623 F. Supp. 1189 (E.D. Tenn. 1985), *appeal docketed*, No. 86-56072 (6th Cir., Jan. 20, 1986). On June 14, 1988, the Sixth Circuit holding that warning labels on cigarettes preempt most aspects of tobacco liability dismissed Roysdon's fifty-five million dollar liability suit. Roysdon, No. 86-5072 (6th Cir. Tenn. 1988).

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

8. 825 F.2d 620 (1st Cir. 1987). It should be noted that, because the amendments of the 1984 Act took effect after Joseph Palmer's death, they are not con-

Appeals held that the Act preempted a suit for damages against cigarette manufacturers and distributors on a state common law theory of inadequate warnings.[9] The *Palmer* decision established that the mandated federal warning labels on cigarette packages are sufficient to protect tobacco companies from smokers' claims that the label fails to warn adequately of health dangers. The *Palmer* court reasoned that allowing the Palmers to bring suit under state law would excessively disrupt the calibrated balance between health protection and trade regulation hammered out by Congress in the Act.[10] The Eleventh Circuit, in *Stephen v. American Brands, Inc.*,[11] recently made a similar ruling.

This Note will examine the Act and the scope of its preemption provision. In addition, this Note will illustrate how the *Palmer* court analyzed prior cases to elevate the immunity of cigarette manufacturers and will also review the status of the law prior to and after *Palmer*. The main thrust of this Note is how the *Palmer* decision, by driving another nail in the preemption coffin for state common law claims against cigarette manufacturers, effectively slammed the lid on these cigarette manufacturer liability suits and requires dismissal of future suits based on inadequate warning labels.

THE CASE

On August 26, 1980, Joseph C. Palmer of Newton, Massachusetts, died at age forty-nine, allegedly from lung cancer.[12] On August 19, 1983, Ann M. Palmer, individually and as administrator of her late husband's estate, and her mother-in-law filed this diversity action in the District Court of Massachusetts.[13] The Palmers brought a state common law action against Liggett Group, Inc.,[14] and Liggett and Myers Tobacco, Inc.,[15] alleging that "liability should be imposed on Liggett because of its failure to warn ade-

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trolling in this case.

9. *Id.* at 626.

10. *Id.*

11. 825 F.2d 312 (11th Cir. 1987). *See also* Roysdon, No. 86-5072 (6th Cir. Tenn. 1988).

12. *Palmer*, 825 F.2d at 622.

13. *Id.* For the district court's opinion, *see* Palmer v. Liggett Group, Inc., 633 F. Supp. 1171 (D. Mass. 1986).

14. Liggett Group, Inc., is a Delaware corporation.

15. Liggett and Myers Tobacco Co., Inc., is a tobacco company of Durham, North Carolina.

quately of the health consequences of cigarette smoking."[16] The Palmers' original complaint stated three causes of action: violation of the Federal Hazardous Substance Act[17]; common law negligence in not making cigarettes safer and in failing to provide adequate warnings; and breach of implied warranties of merchantability and fitness.[18] Later, plaintiffs amended their complaint by adding a claim under the Massachusetts Consumer Protection Act[19] alleging defendants' conduct caused substantial injury to consumers and constituted an unfair trade practice.[20] The trial judge dismissed the claim under the Federal Hazardous Substances Act because cigarettes do not fall within the definition of hazardous substances under the statute.[21] The bottom line to the Palmers' suit was that Liggett was negligent in failing to give adequate warnings about the dangers of cigarette smoking and that this negligence proximately caused Mr. Palmer's death.[22]

Liggett answered with a motion to dismiss all inadequate warning claims on the ground that the Act preempted these claims.[23] The district court denied Liggett's motion to dismiss.[24] The district court judge held that the preemption issue involved a "controlling question of law"[25] and certified *sua sponte* the issue of preemption to the United States Court of Appeals for the First Circuit.[26]

Judge Brown, Senior Circuit Judge, reviewed the construction of the Act, the effect of preemption on the claim, and the opinion of the district court.[27] The United States Court of Appeals for the

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16. *Palmer*, 825 F.2d at 622.

17. 15 U.S.C. §§ 1261-1276 (1982 and Supp. IV 1986).

18. MASS. ANN. LAWS ch. 106, § 2-314 *et seq.* (Law. Co-op 1984).

19. MASS. ANN. LAWS ch. 93A (Law. Co-op 1985).

20. *Palmer*, 633 F. Supp. at 1172, n.1.

21. *Id.*

22. *Palmer*, 825 F.2d at 622.

23. *Id.* The district court, in analyzing the Act, concluded 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*, 633 F. Supp. at 1173. In arriving at this conclusion, the district court relied heavily on Judge Sarokin's analysis employed in the district court opinion of Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146 (D.N.J. 1984), *rev'd and remanded*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 907 (1987).

24. *Palmer*, 825 F.2d at 622. *See* 28 U.S.C. § 1292(b) (Supp. II 1984).

25. *Palmer*, 825 F.2d at 622.

26. *Id.*

27. *Id.* at 621. The court of appeals, holding that the Act impliedly pre-

First Circuit reversed and remanded the decision of the district court, holding that the Act preempted the Palmers' smoking- and health-related claims challenging the adequacy of the federally mandated warning labels or the propriety of Liggett's advertising and promotion of its cigarettes.[28] Underlying the court's decision was deference to the congressional declaration in the Act that packages of cigarettes be uniformly labeled and a balance be struck between the government's concern for the national health policy through education and the priority of the trade and commerce aspects of the tobacco industry.[29]

BACKGROUND

The doctrine of preemption[30] is rooted in the Supremacy Clause of the United States Constitution.[31] Chief Justice Marshall first recognized the preemption doctrine in *Gibbons v. Ogden*.[32] Preemption "is compelled whether Congress' command is explicitly stated in the statute's language or is implicitly contained in its structure and purpose."[33]

The release of the Surgeon General's report in 1964[34] linking smoking to cancer and other diseases produced a public outcry. State governments, rushing to protect their citizens, proposed their

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empted the Palmers' claims, decided not to overturn that part of the lower court's decision which concluded that 15 U.S.C. § 1334 did not expressly preempt the Palmers' claims. *Id.* at 625.

28. *Id.* at 625. *See supra* note 5 for text of the Act's policy and purpose provisions.

29. *Palmer*, 825 F.2d at 621.

30. Preemption is defined as the "[d]octrine adopted by [the] U.S. Supreme Court holding that certain matters are of such a national, as opposed to local, character, that federal laws preempt or take precedence over state laws." BLACK'S LAW DICTIONARY 1060 (5th ed. 1979).

31. U.S. CONST. art. VI, cl. 2. The supremacy clause provides:

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

32. 22 U.S. (9 Wheat) 202 (1824). *See also* Fidelity Fed. Sav. and Loan Ass'n v. De La Cuesta, 458 U.S. 141, 152-53 (1982) (supremacy clause is foundation of preemption doctrine).

33. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977), *reh'g denied*, 431 U.S. 925 (1977).

34. 1964 SURGEON GENERAL'S REPORT, *supra* note 2.

own separate cigarette warning legislation.[35] This resulted in diverse and conflicting health warnings throughout the United States. Congress responded by establishing a comprehensive nationwide system of cigarette labels with the passage of the Act in 1965.[36]

The Act mandates that a conspicuous specific warning label appear on all cigarette packaging.[37] The original Act set forth the following warning label: "Caution: Cigarette Smoking May Be Hazardous to Your Health."[38] Since the Act's inception, the language of the warning labels has been amended twice in recognition of the fact that the link between smoking and health hazards has become more firmly developed through scientific research and testing. In 1969, Congress changed the warning label by requiring the following language: "Warning: The Surgeon General Has Determined that Cigarette Smoking is Dangerous to Your Health."[39] In 1984, Congress replaced the previous warning and adopted four rotational warnings to be employed by each cigarette manufacturer in an alternating sequence quarterly.[40]

The purpose of requiring a uniform system of labeling was to allow Congress to achieve its objective of striking a balance be-

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35. *See supra* note 3 for an example.

36. 1965 Act, *supra* note 4.

37. *Id.* The 1984 amendments added the requirement that a warning label also be placed on cigarette advertisements. 1984 Act, § 1331, *supra* note 4.

38. 1965 Act, § 1333, *supra* note 4.

39. 1969 Act, § 1333, *supra* note 4.

40. 1984 Act, § 1333, *supra* note 4. Although the 1969 warning controlled the disposition of this case, the 1984 warnings are set out below for informative purposes since the Palmers relied on the 1984 warnings to show the inadequacy of the prior warnings. The 1984 rotational warnings are:

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.

1984 Act, § 1333(a) and (c), *supra* note 4. *See also* 1984 Act, § 1331(a)(1), *supra* note 4 (embodying the requirement that one of these four explicit warning labels appears in rotation on cigarette packages and cigarette advertisements).

tween two policies: protection of the public health through adequate warnings and protection of the national economy through uniform labeling requirements.[41] To enforce the goal of uniformity of labeling, Congress in 1965 drafted a specific preemption provision in section 1334, which provided:

> (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 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.[42]

In 1969, Congress amended subparagraph (b) of section 1334 to provide that:

> (b) No requirement or prohibition based on smoking and health shall be imposed under state law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.[43]

The United States Supreme Court employs several general principles of preemption to determine whether Congress intended to prevent state authority from enacting its own separate legislation in a particular area. These principles focus on whether Congress preempts the state law by either express statement[44] or an implicit barrier to state regulation.[45] Courts often divide implied preemption into subcategories to describe situations that trigger implied preemption. Generally, the courts label these subcategories as either "fully occupied," "conflict," "impossibility," or "frustration of purpose."

Implied preemption occurs when Congress "occupies" the field in a particular area. Congress may occupy a particular field in three ways. First, "[t]he scheme of the federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[46] Second, "the Act of Con-

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41. 1969 Act, § 1331, *supra* note 4. *See supra* note 5 for text of policy and purpose provision.

42. 1965 Act, § 1334, *supra* note 4.

43. 1969 Act, § 1334, *supra* note 4. The 1969 Act also deleted § 1334(c)-(d) of the 1965 Act.

44. Jones v. Rath Packing Co., 430 U.S. 512, 525.

45. Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983).

46. Fidelity Fed. Sav. and Loan Ass'n v. De La Cuesta, 458 U.S., 141, 153 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

gress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[47] Third, Congress occupies a field when "the object sought to be obtained by the federal law and the character of the obligations imposed by it may reveal the same purpose."[48]

Where Congress has not fully occupied a given field, implied preemption may still occur if there is a "conflict" between the federal and state regulation. The state law will be impliedly preempted "to the extent that it actually conflicts with a federal law."[49] Such a conflict arises when "compliance with both the federal and state regulations is a physical impossibility"[50] or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[51]

However, in applying these preemption principles to a specific area, a court must consider the overriding presumption that "Congress did not intend to displace state law."[52] Because our federalist system is designed to prevent the federal government from overstepping its bounds, federal courts are reluctant to imply a congressional intent to preempt state law absent explicit statutory language.[53] However, every circuit court that has addressed the preemption issue has concluded that the state law tort claims attacking both the adequacy of the congressionally mandated warning label and the propriety of the tobacco manufacturer's advertising and promotion of its cigarettes are preempted.[54] In reaching

47. *Id.*

48. *Id.*

49. Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 204 (1983). *See also* Free v. Bland, 369 U.S. 663 (1962).

50. Florida Lime & Avocado Growers Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

51. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

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

53. *Id. See also* City of Milwaukee v. Illinois, 451 U.S. 304, 316 (1981) (federalism creates a presumption against preemption of state law, including common law).

54. *See, e.g.,* Stephen v. American Brands, Inc., 825 F.2d 312 (11th Cir. 1987); *Cipollone*, 789 F.2d 181. For a district court decision holding state law claims are preempted see Roysdon v. R.J. Reynolds Tobacco Co., 623 F. Supp. 1189 (E.D. Tenn. 1985). The Sixth Circuit has also recently joined the First, the Third, and the Eleventh Circuits in holding that warning labels on cigarettes preempt most state law claims based on inadequate warnings. Roysdon, No. 86-5072

their conclusions, the courts looked to the history and language of the Act. Most courts generally approach the preemption question by ascertaining whether the claim is barred by either express preemption or one of the subcategories of implied preemption.[55] Although courts agree that the preemption analysis is the appropriate method for resolving these claims, the courts have not reached a uniform final result. *Palmer* gave the First Circuit a prime opportunity to clarify the scope and impact of the Act on state tort claims.

ANALYSIS

In *Palmer v. Liggett Group, Inc.*,[56] the Court of Appeals for the First Circuit held that the Act preempted the Palmers' smoking- and health-related claims challenging the adequacy of the federal warning on cigarette packages and the propriety of Liggett's advertising and promotion of cigarettes.[57] Giving deference to the congressional policy, the court concluded that introduction of such state claims would excessively disrupt the calibrated balance that Congress achieved through a uniform cigarette labeling system.[58] Circuit Judge Brown, writing for the court,[59] reviewed the language and history of the Act[60] and then scrutinized the district court's opinion[61] by employing the express and implied preemption analysis. The court, after concluding that the Palmers' state claims were impliedly preempted, addressed the remaining contentions raised by the Palmers on appeal.[62] First, the court rejected the Palmers' contention that, if the court preempted their state-based tort suit, it would "effectively — and wrongly — leave plaintiffs like the Palmers without any remedy for their injuries."[63] Second, the court addressed and rejected the Palmers' contention, with which the district court agreed, that "the effect of compensatory awards on

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(6th Cir. Tenn. 1988).

55. *See, e.g., Cipollone*, 789 F.2d 181; *Roysdon*, 623 F. Supp. 1189.

56. 825 F.2d 620.

57. *Id.* at 621.

58. *Id.*

59. Circuit Judge Bownes and Circuit Judge Torruella joined Senior Circuit Judge Brown's opinion.

60. *Palmer*, 825 F.2d at 622-25.

61. *Id.* at 625-6; *Palmer*, 633 F. Supp. 1171 (relying heavily on the analysis used by the district court in *Cipollone*, 593 F. Supp. 1146).

62. 825 F.2d at 626-28.

63. *Id.* at 626-27.

defendants' behavior is indirect and not regulatory in nature."[64] Finally, the *Palmer* court dismissed as unpersuasive[65] the analogies of the present case to the *Ferebee v. Chevron Chemical Co.*[66] and *Silkwood v. Kerr-McGee Corp.*[67] cases. Recognizing that this case turned on a question of statutory construction and interpretation, the *Palmer* court looked to the actual words of the Act to discern the Act's meaning and effect.[68]

A. *Preeminence of Preemption*

The *Palmer* court, recognizing that preemption is strictly construed because of the presumption against it, decided to base its decision on implied preemption.[69] The *Palmer* court did not overturn the district court's conclusion that the preemption provision[70] was not explicit enough to expressly preempt state-based claims.[71] However, the language of the preemption provision indicates that a court possibly could rule that a state tort claim based on inadequate warnings is expressly preempted. The Act expressly states that no smoking and health warning other than that drafted by Congress shall be required.[72] This explicit language leads to the conclusion that any additional warning requirements imposed by the states would be in direct contravention of the Act. Most pre-

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64. *Id.* at 627.

65. *Id.* at 628.

66. 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984).

67. 464 U.S. 238 (1984).

68. 825 F.2d at 623.

69. *Id.* at 625.

70. 1969 Act, § 1334, *supra* note 4. The language of this provision as originally enacted provided:

> (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.

1965 Act, § 1334, *supra* note 4.

In 1969, section (b) was amended to read:

> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of the chapter.

1969 Act, § 1334, *supra* note 4.

71. 825 F.2d at 625.

72. 1969 Act, § 1334, *supra* note 4.

emption arguments have focused on the fact that the Act does not include either a clause explicitly preempting state claims[73] or a savings clause[74] expressly preserving the state tort claims. Thus, the discussions surrounding the lack of explicit reference to state common law are significant only because of the presumption against preemption.[75]

The United States Supreme Court recognizes that Congress may preempt state common law as well as statutes or regulations.[76] The legislative history of the Act's preemption provision supports express preemption of state common law claims. The Senate version of the preemption provision specified that the Act's preemption provision would only apply to "State statute or regulation."[77] Congress rejected the Senate's version[78] and used the much broader phrase "under State law."[79] Many decisions of the United States Supreme Court also support express preemption, holding that common law is a form of "state law."[80] Therefore, the *Palmer* court could have concluded that the Palmers' state claim was expressly preempted since the legislative history indicates that the term "state law" encompasses "state common law." Instead, the court decided not to delve into the legislative history to determine congressional intent but simply to acknowledge that the preemption provision reads "no requirement . . . shall be imposed under State law" and not that "[s]tate-based tort claims are hereby preempted."[81] Therefore, the court left open the question of whether a

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73. *See, e.g.*, Copyrights Act of 1976, 17 U.S.C. § 301(a) (Supp. II 1978); Employer Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a) & (c)(1) (1976); Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. §§ 1715z-17(d), 1715z-18(e) (Supp. II 1984).

74. *See, e.g.*, Occupational Safety and Health Act of 1970, 29 U.S.C. § 653(b)(4) (1982).

75. 789 F.2d at 185-86 n.5.

76. *See, e.g.*, Chicago & Northwestern Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981). *See also*, Sperry v. Florida, 373 U.S. 379, 403 (1963) (congressional authority to preempt state law applies equally to both the legislative and judicial branches of state governments).

77. *See* H.R. REP. No. 897, 91st Cong., 2d Sess. 2-3 (1970); S. REP. No. 556, 91st Cong. 1st Sess. 16 (1969); 115 CONG. REC. 38, 732 (1969).

78. *Id.*

79. *Id. See also* 1969 Act, § 1334(b), *supra* note 4.

80. Sperry v. Florida, 373 U.S. 379, 403; Fidelity Fed. Sav. and Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153; San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246-7 (1959).

81. 825 F.2d at 625. *But see Cipollone*, 789 F.2d at 185 (court stated section 1334 does not provide for express preemption of the Cipollone's state common law

state tort claim could be expressly preempted.

Next, the *Palmer* court turned its attention to whether the Palmers' claims were impliedly preempted. Although the district court divided implied preemption into four subcategories — occupation of the field, conflict, impossibility, and frustration of purpose — the appellate court stated that such labels were not necessarily helpful or determinative in ascertaining preemption.[82] Rather, "the gist of preemption is whether Congress (expressly) did or (impliedly) meant to displace state law or state law concepts in enacting the federal law."[83] Instead of trying to fit the Act into one of these pre-cast molds, the *Palmer* court determined that the critical inquiry was the effect that suits like that brought by the Palmers would have on the federal scheme Congress laid out in the Act.[84] Thus, regardless of the label attached to the claim, if the state law excessively disrupts the congressionally declared scheme, the state law will be preempted.[85]

Congress clearly declared its reasons for enacting the Act through the actual words in both the statement of purpose[86] and the preemption provision.[87] Congress's purpose was two-pronged. It wanted first to inform the public that "cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes"[88] and, second, simultaneously to provide that "commerce and the national economy . . . [be] protected to the maximum extent consistent with this declared policy" and not be impeded "by diverse, nonuniform, and confusing cigarette labeling and advertising regulations . . . ."[89] As stated by the *Palmer* court, "in drafting the Act, Congress had two policies — health protection (through education) and trade protection — to implement, but only one purpose: to strike a fair, effective balance between these two competing interests."[90]

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claims).

82. 825 F.2d at 625.

83. *Id.* at 625-26.

84. *Id.* at 626.

85. *Id.*

86. 1969 Act, § 1331, *supra* note 4. *See supra* note 5 for text of purpose provision.

87. 1969 Act, § 1334, *supra* note 4. *See supra* note 70 for text of preemption provision.

88. 1969 Act, § 1331(1), *supra* note 4.

89. 1969 Act, § 1331(2), *supra* note 4.

90. 825 F.2d at 626.

The *Palmer* court focused its attention on the language of section 1331, which measured the relative weight of these two policies: "the federal warning should protect commerce 'to the maximum extent' consistent with its health policy."[91] The language of section 1331(2) indicates that the policy to protect commerce could be viewed as subordinate to the health policy. Congress, carefully weighing these two policies, crafted a warning that would protect commerce but would not impinge on the health policy to warn the public that smoking is hazardous to health. Noting that Congress had fought a hard, bitterly partisan battle in striking the fragile balance, the *Palmer* court concluded that the effect of allowing a state-based tort claim would excessively disrupt the calibrated balance struck by Congress.[92] Writing for the First Circuit, Judge Brown stated, "[i]t is inconceivable that Congress intended to have that carefully wrought balance of national interests superseded by the views of a single state, indeed, perhaps of a single jury in a single state."[93]

The *Palmer* court abandoned the categorical labeling approach used by other courts[94] to determine if a state claim is impliedly preempted. Instead, in determining that the Palmers' claims were impliedly preempted, the court chose to ascertain the intent of Congress by focusing on the actual language of the Act and by examining the impact a state tort claim would have on Congress's intent. Therefore, the *Palmer* court's analysis in determining that Congress intended to supersede the state law in the cigarette labeling and advertising area is consistent with the Act.

B. *Remaining Contentions*

The *Palmer* court did not stop after holding that the Palmers' claims were impliedly preempted; it further addressed other issues raised on appeal.[95] The court took advantage of the opportunity to

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91. *Id.* At the time the Act was originally adopted, tobacco ranked third in agricultural export products and fifth among all cash crops and supported some 750,000 farming families. *See* 825 F.2d at 622 n.2. *See also* 111 CONG. REC. 13,950, 13898 (1965) (remarks of Senators Ervin and Bass).

92. 825 F.2d at 626.

93. *Id.* at 626.

94. *See, e.g.*, San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236; Stephen v. American Brands Co., 825 F.2d 312 (11th Cir. 1987); *Cipollone*, 593 F. Supp. 1146, *rev'd and remanded*, 634 F.2d 186 (3d Cir. 1987); Finberb v. Sullivan, 634 F.2d 50 (3d Cir. 1980); *Palmer*, 633 F. Supp. 1171 (D. Mass. 1986).

95. 825 F.2d at 626-28.

clarify some of the confusion in cigarette smokers' suits by characterizing the nature of the activity involved, examining the effect of compensatory damage awards, and distinguishing cases on which smokers primarily relied.

First, the *Palmer* court rejected the Palmers' argument that by dismissing the state-based tort claims the court would "effectively — and wrongly" leave the plaintiffs without a remedy for their injuries.[96] The Palmers premised their argument by relying on Justice White's statement in *Silkwood* that "it is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."[97] The Palmers argued that, if the Act were read to preempt state tort claims, the court would give the Act an impermissible interpretation because state tort compensation is traditionally left to state regulation.[98]

The *Palmer* court rejected this argument for several reasons. The court distinguished smokers' claims from other claims held not to be preempted: "cigarette smoking, at least initially, is a voluntary activity."[99] Those cases the Palmers relied on in which state tort claims were not preempted involved victims who had little or no choice in their participation in the regulated fields.[100] A second reason for the court's rejection of the argument was that the United States Supreme Court often dismisses suits, leaving parties without a remedy by finding state law is preempted.[101] Even if the federal law eliminates state remedies, there is no constitutional mandate that the federal law "either duplicate the recovery at common law or provide a reasonable substitute remedy."[102] The

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96. *Id.* at 626-27.

97. *Id.* at 626-27 (quoting Silkwood v. Kerr-McGee Corp., 464 U.S. at 251).

98. 825 F.2d at 627.

99. *Id.* However, some commentators have suggested that a possible theory to hold cigarette companies liable is to assert failure of cigarette companies to warn of the addictive quality of cigarette smoking. *See* Garner, *Cigarette Dependency and Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423 (1980).

100. 825 F.2d at 627. *See, e.g., Silkwood*, 464 U.S. 238 (1984) (nuclear energy development); United States Construction Workers v. La Burnum Construction Corp., 347 U.S. 656 (1954) (employment).

101. 825 F.2d at 627. *See* Kalo Brick and Tile Co., 450 U.S. 311 (finding that Interstate Commerce Act preempts a state common law action for damages against a railroad); Farmer Union v. WDAY, 360 U.S. 525 (1959) (finding that the Federal Communications Act preempts state libel claim against a radio station).

102. 825 F.2d at 627 (quoting Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 88 (1978)).

Palmer court's holding leads to the logical conclusion that state tort claims involving injuries sustained by a person who voluntarily chose to smoke should be dismissed.

Since *Palmer* and its predecessors involved victims who began smoking and became addicted after Congress required the warning label, one open question is what the appellate courts would decide if a smoker who began smoking and became addicted prior to the Act seeks to bring a state tort claim. In the leading case of *Green v. American Tobacco*,[103] the plaintiffs sued on theories of breach of implied warranty and negligence. Even though the *Green* case preceded the Act, the tobacco company still prevailed. The *Green* case and others that followed it during the late 1950s and early 1960s employed doctrines of foreseeability and assumption of the risk to exclude tobacco companies from liability.[104] The outcome of these cases suggests that a suit brought today by or on behalf of someone who smoked before passage of the Act would still be unsuccessful on the merits since the tobacco company could use as a defense the assumption of the risk.[105] As to the preemption issue, if the Act were not in effect at the time the person began smoking and became addicted, then the courts should not be able to rely on the Act to preempt state tort claims based on inadequate warnings or failure to warn.[106] Allowing the state tort claim in this situation would not violate the policy of the Act because it would not cause tobacco companies to change their warning labels.

Second, the *Palmer* court rejected the Palmers' contention that a compensatory damage award would only indirectly affect a

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103. 304 F.2d 70 (5th Cir. 1962), *question certified on rehearing*, 154 So. 2d 169 (Fla.), *rev'd and remanded*, 325 F.2d 673 (5th Cir. 1963), *rev'd and remanded on rehearing*, 391 F.2d 97 (5th Cir. 1968), *rev'd per curiam*, 409 F.2d 1166 (5th Cir. 1969) (en banc), *cert. denied*, 397 U.S. 911 (1970).

104. Comment, *Products Liability — Can It Kick the Smoking Habit?*, 19 AKRON L. REV. 269, 273-80 (1985-86).

105. While assumption of the risk may be an effective defense when the victim is a smoker, it may not be effective in a case involving a non-smoking victim.

106. *See* Comment, *supra* note 104, at 290 for discussion of a 1985 case where a California jury found that the tobacco company was not liable for the death of a sixty-nine-year-old man who allegedly had smoked a Reynold's brand of cigarette since he was a teenager. The trial judge in that case ruled that the 1964 Surgeon General's report was inadmissible as hearsay and plaintiff's attorney could not pursue the role of advertising. *But see Cipollone*, docket no. 83-2864 (D.N.J.) (attorneys for plaintiffs are allowed to present evidence that tobacco companies helped cause Rose Cipollone's death by their failure to warn before 1966). *See* Winston Salem Journal, Feb. 2, 1988, at 5, col. 6. *See supra* note 1.

cigarette manufacturer's behavior and would not be regulatory in nature.[107] By challenging the adequacy of the label required by the Act in a state action, the plaintiff would be claiming that the tobacco companies owe consumers a duty to place a more stringent warning on its cigarette packages. Thus, requiring a more stringent label would be regulating the tobacco manufacturer's conduct. The Act expressly states that no other warning other than that required by the Act shall be required.[108] The *Palmer* court recognized the logical conclusion that compensatory awards would cause the tobacco manufacturer to change the warning requirements. "If a manufacturer's warning that complies with the Act is found inadequate under a state tort theory, the damages awarded and verdict rendered against it can be viewed as state regulation: the decision effectively compels the manufacturer to alter its warning to conform to different state law requirements as 'promulgated' by a jury's findings."[109] If the *Palmer* court allowed the Palmers' suit and the jury subsequently determined the federal warning to be inadequate, in effect a single state judiciary could impose additional, nonuniform, diverse, and confusing label requirements. Therefore, the state judiciary could indirectly accomplish what fifty state legislatures could not do directly in contravention of the Act.[110] The Act's preemption provision expressly prohibits "state law," not just "statutory law," from imposing any "requirement or prohibition" different from the precise language of the Act's warning label.[111]

Although the Palmers and those similarly situated have maintained that compensatory awards would not compel the manufacturer to change its label because the choice of reaction would be entirely the manufacturer's prerogative,[112] this argument lacks logic since it would be ridiculous for the manufacturer not to take steps to prevent further liability. The *Palmer* court accurately summarized the cigarette manufacturer's position when it stated "[t]his 'choice of reaction' seems akin to the free choice of coming up for air after being underwater [sic]."[113] Further, the United States Supreme Court acknowledged the regulatory nature of com-

107. 825 F.2d at 627.
108. 1969 Act, § 1334, *supra* note 4.
109. 825 F.2d at 627.
110. *Id.* at 628. *See* 15 U.S.C. §§ 1331(2) and 1334.
111. 1969 Act, § 1334, *supra* note 4.
112. 825 F.2d at 627.
113. *Id.*

pensatory awards in *San Diego Building Trades Council v. Garmon*.[114] The *Garmon* Court stated that: "[r]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."[115] Thus, labeling a state requirement as a "choice" does not reduce its impact on Congress's purpose. Allowing a jury to find the federal warning inadequate forces the cigarette manufacturers that sell on a national scale either to craft a warning that meets the requirements of each of the fifty states' diverse tort laws or have fifty separate warnings. This result directly contravenes the expressed purpose of the Act to provide a uniform system to protect the national economy and commerce.[116]

Third, the *Palmer* court took the opportunity to distinguish the *Silkwood*[117] and *Ferebee*[118] cases, on which the Palmers and the district court relied.[119] District courts have misconstrued the *Silkwood* opinion to find that the Act does not preempt state common law claims.[120] *Silkwood* involved the preemptive effect of the Atomic Energy Act (AEA)[121] on state tort claims seeking punitive damages for tortious acts of nuclear power plants. The *Palmer* court found significant the fact that the AEA contains no preemption provison whatsoever.[122] The AEA expressly reserved significant authority to the states,[123] unlike the Act's sweeping preemp-

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114. 359 U.S. 236.

115. *Id.* at 247. *See also* International Paper Co. v. Ouellettes, 107 S. Ct. 805 (1987) (Vermont law required more stringent standards than those required by the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1982 and Supp. III 1985)). Thus, the mill in Ouellette could comply with the Clean Water Act and pay state law tort damages or change its behavior to comply with both the federal law and the more stringent state law. However, the United States Supreme Court ruled that Vermont law was preempted because it upset the balance addressed by the [Clean Water] Act).

116. 1969 Act, § 1331(2), *supra* note 4.

117. 464 U.S. 238 (1984).

118. 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062 (1984).

119. 825 F.2d at 628.

120. *See, e.g., Cipollone*, 593 F. Supp. 1146 (D.N.J. 1984), *rev'd and remanded*, 789 F.2d 181 (3d Cir. 1986).

121. 42 U.S.C. §§ 2011-2284 (1982 & Supp. III 1985).

122. 825 F.2d at 628.

123. *See, e.g.*, 42 U.S.C. § 2019 (AEA does not affect state authority with respect to generation, sale, or transmission of electric power through the use of federally licensed nuclear facilities); 42 U.S.C. § 2021(b) (federal-state agreements authorized so that states may assume regulatory authority over certain nuclear

tion provision, which fails to provide any role for states in cigarette labeling and advertising. Further, the AEA has been amended[124] to allow explicitly the continuation of state common law actions for injuries caused by nuclear operations. Therefore, reliance on *Silkwood* as authority that state common law actions are not preempted under the Act is misplaced. The only issue decided by *Silkwood* was whether punitive damages were preempted.[125]

Ferebee,[126] the other preemption case relied on by the district court, held that Maryland tort claims were not preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[127] FIFRA imposes an entirely different regulatory scheme than that imposed by the Act.[128] Under FIFRA, each manufacturer can draft its own warning and, if approved by the Environmental Protection Agency (EPA), the warning can be used even though another manufacturer may use a different label.[129] Further, *Ferebee* was distinguishable because the statute involved permitted states to impose more stringent constraints on the use of EPA-approved pesticides than those imposed by the EPA.[130] In contrast, the Act explicitly applies only to cigarettes, mandates specific language of the warning, and prohibits any state from playing any role in cigarette warnings.[131]

While the *Palmer* court addressed most of the issues raised in the district court, it failed to address the impact, if any, of the Smokeless Tobacco Legislation.[132] The district court indicated that this legislation supported the Palmers' suit.[133] However, since the First Circuit did not address this issue, the question remains open on what impact, if any, the Smokeless Tobacco Legislation would

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materials); 42 U.S.C. § 2021(k) (section does not affect state authority to regulate activities for purposes other than protection against radiation hazards).

124. Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (1957) (codified as amended at 42 U.S.C. § 2210 (1982 & Supp.)) *See* Silkwood v. Kerr-McGee, 464 U.S. at 251-256.

125. 464 U.S. 238.

126. 736 F.2d 1529.

127. 7 U.S.C. §§ 136-136y (1982 & Supp. IV 1986).

128. 825 F.2d at 628-29 n.13.

129. 7 U.S.C. § 136.

130. 825 F.2d at 628-29 n.13.

131. *Id. See generally* 15 U.S.C. § 1331.

132. Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252, 100 Stat. 30 (1986) (codified as modified at 15 U.S.C. §§ 4401-4408 (Supp. IV 1986)).

133. 633 F. Supp. at 1177 n.4.

have on state tort claims not involving smokeless tobacco.

CONCLUSION

In *Palmer v. Liggett Group, Inc.*,[134] the United States Court of Appeals for the First Circuit held that the federally mandated warning labels on cigarette packages are sufficient to protect tobacco manufacturers from smokers' claims that the labels fail to warn adequately about the harmful effects of cigarette smoking. After reviewing the Act and placing primary emphasis on the actual language used in the purpose provision and the preemption provision, the *Palmer* court determined that the Palmers' state tort claims were impliedly preempted.

By holding that the Palmers' state tort claims were preempted, the court preserved that delicate balance between the public health interest and the national economy that Congress expressly drafted into the Act. After reaching the decision, the *Palmer* court took the opportunity to address remaining contentions raised on appeal to clarify the confusion surrounding smokers' common law claims against tobacco companies. The *Palmer* decision, by giving deference to Congress's intent for enacting the Act, effectively laid to rest smokers' common law claims based on the theory of inadequate warnings in the preemption coffin. Thus, *Palmer* clearly established that, whether the smokers' claims are based on state statutory law or state common law, tort claims on the theory of inadequate warnings should be dismissed.

Lora B. Greene

134. 825 F.2d 620.