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Torts-- Federal Preemption of State Common Law-- Federal Cigarette Labeling & Advertising Act

Elizabeth Price Foley
Florida International University College of Law

Elizabeth C. Price
Florida International University College of Law

TORTS—FEDERAL PREEMPTION OF STATE COMMON LAW—FEDERAL CIGARETTE LABELING AND ADVERTISING ACT

Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992).

After forty-two years of smoking, Rose Cipollone, age fifty-eight, died of lung cancer.[1] Approximately one year prior to her death, Mrs. Cipollone and her husband Antonio[2] filed a diversity complaint in the Federal District Court for the District of New Jersey[3] against three cigarette manufacturers,[4] alleging Mrs. Cipollone's injuries were caused by smoking and asserting theories of strict liability, breach of express warranty, negligence, and intentional tort.[5] All three defendants defended the action on grounds, *inter alia*, that the Federal Cigarette Labeling and Advertising Act[6] [hereinafter the 1965 Act] preempted all of the plaintiff's common law claims.[7]

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1. Mrs. Cipollone began smoking in 1942, at the age of sixteen, Cipollone v. Liggett Group, Inc., 893 F.2d 541, 548 (3d Cir. 1990), and died on October 21, 1984. *Id.* at 551.

2. After Mr. Cipollone's death in January 1990, the Cipollone's son, Thomas, continued the suit as executor of his parent's estate. Petition for Writ of Certiorari, Cipollone v. Liggett Group, Inc., 6.1 TOBACCO PRODUCTS LITIG. REP. 3.1, 3.2; *see also* Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2614 (1992).

3. The original complaint was filed on August 1, 1983. *Cipollone*, 893 F.2d at 552.

4. The manufacturers are: Liggett & Myers, manufacturer of Chesterfield and L & M cigarettes, which Mrs. Cipollone smoked from 1942 to 1968, Brief for Petitioner, Cipollone v. Liggett Group, Inc. (No. 90-1038), 6.1B TOBACCO PRODUCTS LITIG. REP. (TPLR, Inc.), 3.37, 3.48-3.49 (U.S. 1990); Philip Morris, manufacturer of Virginia Slims and Parliament brands, which Mrs. Cipollone smoked from 1968 to 1974, *Cipollone*, 893 F.2d at 551; and Lorillard, Inc., manufacturer of True brand, to which Mrs. Cipollone switched in 1974 on the recommendation of her doctor who, unsuccessful in his efforts to get Mrs. Cipollone to quit, considered the True brand safer because it was advertised as "low tar." *Id.*

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

6. Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) (current version at 15 U.S.C. §§ 1331-1340 (1988)). The 1965 Act required the following warning label to be affixed to every package of cigarettes: "Caution: Cigarette Smoking May be Hazardous to Your Health." 15 U.S.C. § 1333 (1970).

The Act was amended in 1969 to require a new warning: "Warning: The Surgeon General Has Determined that Cigarette Smoking is Dangerous to Your Health." 15 U.S.C. § 1333 (1976).

The Act was again amended in 1984 to provide that the following four warnings were to be used on a rotating basis:

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart

The plaintiff moved to strike the federal preemption defense.[8] Defendant Loew's Theatres, Inc. (Lorillard) moved for judgment on the pleadings.[9] The district court held that the federal law did not preempt any of the plaintiff's claims, thereby granting plaintiff's motion to strike and denying defendant's motion for judgment on the pleadings.[10]

The district court granted permission to make interlocutory appeal[11] to the United States Court of Appeals for the Third Circuit on the issue of federal preemption. The Third Circuit reversed, holding that "the Act preempts those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes."[12] The Third Circuit further held that any of plaintiff's claims that "necessarily depend on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress required . . . ." were preempted as conflicting with the federal law.[13]

Confronted with this cryptic mandate, the district court, on remand, determined that the Third Circuit holding necessitated preemption of plaintiff's post-1965 fraudulent misrepresentation, express warranty, conspiracy to defraud, and negligent and strict liability failure to warn claims.[14] However, plaintiff's pre-1966 and post-1965 claims based upon defective design,[15] negligent testing

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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.

15 U.S.C. § 1331 (a)(1) (1988).

Mrs. Cipollone quit smoking sometime in 1983, approximately two years following her lung cancer diagnosis. *Cipollone*, 893 F.2d at 551. Therefore, the adequacy of the warnings provided by the 1984 Amendments were not in issue in the litigation. Cipollone v. Liggett Group, Inc., 789 F.2d 181, 184 (3d Cir. 1986).

7. *Cipollone*, 593 F. Supp. at 1149.

8. *Id.*

9. *Id.* Motion for judgment on the pleadings was made pursuant to Fed. R. Civ. P. 12(c).

10. *Id.* at 1171.

11. Pursuant to 28 U.S.C. § 1292(b) (1988).

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

13. *Id.*

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

15. To the extent that the plaintiff wished to proceed under a risk/utility theory of defective design, as opposed to a consumer expectations analysis, the plaintiff's claim was not preempted. *Id.* at 670-71. In a subsequent ruling, however, the district court determined that, based upon the New Jersey Products Liability

and research,[16] and intentional interference with third parties' decisions to publish smoking research data[17] survived the preemptive blade.

Following a four-month trial, a jury awarded the plaintiff $400,000[18]—the first award ever obtained in a tobacco liability case—[19] based upon a finding that Defendant Liggett had breached express warranties contained in pre-1966 advertisements.[20] Both parties appealed this judgment.[21]

The court of appeals set aside the verdict and remanded for a new trial on various issues.[22] Ironically, Chief Judge Gibbons, in a concurring opinion, announced his belief that the Third Circuit's

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Act, N.J. Stat. Ann. § 2A:58C (West 1986), no action could lie against a cigarette manufacturer based upon an unreasonably dangerous design defect theory as a matter of law. Cipollone v. Liggett Group, Inc., No. 83-2864, 1987 U.S.Dist. LEXIS 9936 (D.N.J. Oct. 27, 1987). The Third Circuit later reversed this ruling, on grounds that there was insufficient evidence to conclude that an ordinary consumer would have known of the inherently hazardous propensities of cigarettes. *Cipollone*, 893 F.2d at 578. This question was thus considered appropriate for the jury. *Id.*

16. *Cipollone*, 649 F. Supp. at 672-73. New Jersey case law recognized a distinct duty to adequately conduct testing and research. Feldman v. Lederle Laboratories, 479 A.2d 374 (N.J. 1984). Because this duty is independent of the duty to adequately warn, the district court held that it did not conflict with the federal law. *Cipollone*, 649 F. Supp. at 673.

17. *Id.* at 674. The district court reasoned that if the defendant acted to prevent third parties from publishing information about the dangers of smoking, such action would not constitute a "promotion" activity within the meaning of the federal law's preemption provision. *Id. See also* 15 U.S.C. § 1334(b) (1988).

18. *Cipollone*, 893 F.2d at 555. Interestingly, the $400,000 award was compensation for Mr. Cipollone. Under New Jersey's 50/50 comparative negligence law, the jury's finding that Mrs. Cipollone was 80% responsible for her injuries precluded recovery for her estate. *Id.* at 554-55.

19. "Smoker's Survivors Drop Landmark Suit," CHI. TRIB., November 6, 1992, at p.4.

20. The $400,000 award was based upon pre-1966 advertisements because the district court had determined that express warranty claims based upon advertisements after the effective date of the Act (January 1, 1966) were preempted. *Cipollone*, 649 F. Supp. at 675.

21. *Cipollone*, 893 F.2d at 555. The defendants appealed on grounds that various jury instructions were erroneous. The plaintiffs appealed, *inter alia*, the denial of prejudgment interest and the trial court's allowance of consideration of Mrs. Cipollone's post-1965 behavior for purposes of assessing comparative fault. *Id.*

22. Issues to be resolved on remand included: the merits of plaintiff's risk-utility design defect claim; whether Mrs. Cipollone had heard, read, or seen the advertisements in issue; whether Mrs. Cipollone had believed the safety assurances in defendant's advertisements; how much prejudgment interest plaintiff was entitled; and when plaintiff discovered facts giving rise to her claim for purposes of the statute of limitations. *Cipollone*, 893 F.2d at 583. In addition, the circuit court determined that the district court erred in permitting the jury to consider Mrs. Cipollone's post-1965 conduct in assigning comparative fault pursuant to the New Jersey Comparative Fault Act, N.J. Stat. Ann. § 2A:15-5.1 (West 1986). *Id.* at 559.

earlier preemption ruling "was wrong as a matter of law, and should be overruled by the court *en banc*."[23] Plaintiff's petition for rehearing *en banc* was denied.[24]

Plaintiff then petitioned for and was granted a writ of certiorari by the United States Supreme Court,[25] seeking final determination of the preemptive scope of the Federal Cigarette Labeling and Advertising Act.[26] On certiorari to the United States Supreme Court, *held*, reversed in part and affirmed in part. The Federal Cigarette Labeling and Advertising Act preempts state common law claims based upon post-1968 failure to warn (negligent or strict liability) if based on advertising or promotion; however, the Act does not preempt claims based upon design or manufacturing defects, fraudulent misrepresentation or conspiracy to misrepresent, express warranty, negligent research or testing (if not based on advertising or promotion), or pre-1969 failure to warn.[27] *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992).

Effective January 1, 1966, the Federal Cigarette Labeling and Advertising Act[28] required cigarette manufacturers to affix to every package of cigarettes the following message: "Caution: Cigarette Smoking May Be Hazardous to Your Health."[29] The purpose of the federal law was two-fold: 1) to adequately inform the public about the dangers of cigarette smoking, and 2) to protect commerce and the national economy by preventing states from imposing non-uniform and confusing labeling and advertising regulations.[30]

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23. *Id.* at 583.

24. Plaintiff's petition for rehearing was denied on August 30, 1990. Petition for Writ of Certiorari, Cipollone v. Liggett Group, Inc., 6.1 TOBACCO PRODUCTS LITIG. REP. 3.1.

25. Cipollone v. Liggett Group, Inc., 111 S. Ct. 1386 (1991).

26. 15 U.S.C. §§ 1331-40 (1988).

27. The effective date of the preemption section of the 1969 Act is July 1, 1969. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87, 90 (1970). Four Justices, Stevens, Rehnquist, White, and O'Connor, would preempt negligent testing claims only if such claims were based upon a defendant's advertising or promotion. *Cipollone*, 112 S. Ct. at 2622. Three Justices, Blackmun, Kennedy, and Souter, believed the federal law did not preempt any design defect claims. *Id.* at 2631-32.

28. Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282.

29. 15 U.S.C. § 1333 (1970).

30. 15 U.S.C. § 1331 (1988). The full text of the Declaration of Policy is as follows:

> DECLARATION OF POLICY
>
> Sec. 2. 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—

In order to fulfill the latter of the two purposes, the 1965 Act contained a section entitled "Preemption" that provided:

> (a) No statement relating to smoking and health, other than the statement required by Section 4[31] 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.[32]

In 1969, with the Federal Trade Commission (FTC) considering tough new warnings for cigarette advertisements[33] and the Federal Communications Commission (FCC) proposing to ban cigarette ads on radio and television,[34] Congress passed the Public Health Cigarette Smoking Act of 1969[35] [hereinafter the 1969 Act]. The 1969 Act required a new, tougher statement on each package of cigarettes: "Warning: The Surgeon General Has Determined that Cigarette Smoking is Dangerous to Your Health."[36] In addition, the 1969 Act amended subsection (b) of the 1965 Act's preemption section to read as follows: "(b) No requirement or prohibition based on smoking or health shall be imposed under State law with respect to advertising or promotion of cigarettes the packages of which are labeled in conformity with the provisions of this Act."[37]

Thus, three significant changes were made to subsection (b) of the preemption section. First, the word "statement" was replaced with the broader phrase, "requirement or prohibition." Second, the phrase "relating to" was replaced with "based on." Third, the phrase

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> (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, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

Id.

31. Section 4 was codified at 15 U.S.C. § 1333 (1970).

32. Pub. L. No. 89-92, 79 Stat. 282 (1965) (current version at 15 U.S.C. §§ 1331-1340 (1988)).

33. *See* 34 Fed. Reg. 7917 (1969). Notice that the 1965 Act did not require the cautionary statement to appear in cigarette advertisements, but only on cigarette packages. The FTC's 1969 proposal was a revitalization of a 1964 proposal that many believe was the impetus for passage of the 1965 Act. The proposed warning read as follows: "CAUTION—CIGARETTE SMOKING IS A HEALTH HAZARD. The Surgeon General's Advisory Committee on Smoking and Health has found that cigarette smoking contributes substantially to mortality from certain specific diseases and to overall death rates." *See* 29 Fed. Reg. 8324 (1964); 29 Fed. Reg. 530 (1964).

34. *See* 34 Fed. Reg. 1959 (1969).

35. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) (codified at 15 U.S.C. § 1331-40 (1976)).

36. 15 U.S.C. § 1333 (1976).

37. 15 U.S.C. § 1334 (1976).

"required in the advertising" was replaced with "imposed under State law with respect to advertising or promotion." Subsection (a) of the Act's preemption section was conspicuously left untouched.[38] Precisely what Congress intended these changes (or lack thereof) to mean is, essentially, what all the fuss has been about.

To fully understand the debate, a brief overview of preemption doctrine is necessary. The doctrine of preemption is the offspring of Article VI, clause 2 of the Constitution, the so-called "Supremacy Clause."[39] While the Supremacy Clause declares federal laws supreme, the United States Supreme Court has proclaimed that federal laws should be presumed not to displace authority traditionally left to the states[40] unless such intent is "clear and manifest."[41]

Congressional intent to preempt can be either express or implied.[42] When a federal statute containing a plain statement explicitly provides for preemption, courts will presume that Congress intended to preempt;[43] the scope of such preemption is the only remaining question.[44] If, however, Congress is silent on the issue of preemption, courts may imply preemption in two circumstances: (1) when the federal law is so pervasive or the federal interest so compelling that it can

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38. Subsection (a) reads as follows: "(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." 15 U.S.C. § 1334(a) (1988).

39. "[T]he Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the . . . Law of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl.2.

40. Maryland v. Louisiana, 451 U.S. 725, 746 (1981). With regard to health and safety matters, which have traditionally been the province of the states, the Supreme Court has explicitly stated that there is a "presumption that state or local regulation of matters relating to health and safety is not invalidated under the Supremacy Clause . . . [T]he regulation of health and safety matters is primarily, and historically, a matter of local concern." Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 471 U.S. 707, 708 (1985).

41. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see also* Florida Lime and Avocado Growers v. Paul, 373 U.S. 132, 142 (1963) (intent to preempt must be "unmistakeable" such that "the nature of the regulated subject matter permits no other conclusion.").

42. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983); Fidelity Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-53 (1982); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

43. *See* Greogry v. Ashcroft, 111 S. Ct. 2395, 2404 (1991) (express preemption "must be plain to anyone reading the Act"); California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 282 (1987) (no need to infer congressional intent to preempt if express language provides therefor); Malone v. White Motor Corp., 435 U.S. 497, 505 (1978) (explicit preemption language provides reliable indicium of intent to preempt).

44. Seven Justices in *Cipollone* agreed that once express preemption is found, the only remaining question for the court is the intended scope of the preemptive language. *Cipollone*, 112 S. Ct. at 2618 (plurality opinion); *Cipollone*, 112 S. Ct. at 2625 (concurrence in part, dissent in part).

be said Congress intended to "occupy the field" to the exclusion of the states,[45] or (2) when state law would "actually conflict" with the federal law.[46]

The first case to explicitly address the issue of the Federal Cigarette Labeling and Advertising Act was *Banzhaf v. FCC*[47] In *Banzhaf*, numerous broadcasters and the Tobacco Institute[48] challenged an FCC order requiring all radio and television stations that accepted cigarette advertisements to also devote substantial air time to anti-cigarette messages.[49] The challengers claimed the 1965 Act preempted the FCC's authority to issue such ruling.[50] The Court of Appeals for the District of Columbia Circuit rejected the preemption argument, reasoning that preemption would require a finding that "Congress legislated to curtail the potential flow of information lest the public learn too much about the hazards of smoking for the good of the tobacco industry and the economy."[51]

The *Banzhof* court believed the 1965 Act was "aimed at the relatively narrow specific issue" of regulating cigarette labeling and advertising,[52] and that while Congress may have decided the federal warning to be adequate, there was no compelling evidence that Congress believed the warning alone provided adequate information to the public.[53] Accordingly, the District of Columbia Circuit held that the 1965 Act did not preempt the authority of the FCC to require broadcasters to air anti-cigarette messages.[54]

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45. *See Florida Lime & Avocado Growers*, 373 U.S. at 146; *Rice*, 331 U.S. at 230.

46. English v. General Elec., 110 S. Ct. 2270, 2275 (1990); Pacific Gas & Elec. Co. v. Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190, 204 (1982); Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

"Actual conflict" preemption occurs in two situations: (1) where it is "physically impossible" to comply with both state and federal law, or 2) where the state law would obstruct achievement of the full purposes of the federal law. Maryland v. Louisiana, 451 U.S. 725, 747 (1981); *Florida Lime & Avocado Growers*, 373 U.S. at 142-43; *see also* Transcontinental Gas Pipeline Corp. v. State Oil & Gas Bd. of Miss., 474 U.S. 409 (1986) (state gas pipeline was impliedly preempted because it undermined purposes of Natural Gas Policy Act); McDermott v. Wisconsin, 228 U.S. 115 (1913) (state syrup labeling law held impliedly preempted because it made compliance with Federal Food, Drug, and Cosmetic Act physically impossible).

47. 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied* 396 U.S. 842 (1969).

48. The Tobacco Institute is a tobacco industry trade association founded in 1958 to lobby federal, state, and local governments. Brief for Petitioner, Cipollone v. Liggett Group, Inc. (No. 90-1038), 6.1B TOBACCO PRODUCTS LITIG. REP. (TPLR, Inc.) 3.37, 3.73 (U.S. 1990).

49. *Banzhaf*, 405 F.2d at 1085.

50. *Id.* at 1087.

51. *Id.* at 1089.

52. *Id.*

53. *Id.* at 1090. "[W]e find no sufficiently persuasive evidence that Congress hoped to impede the flow of adequate information for fear that, if the public knew all the facts, too many of them would stop smoking." *Id.*

54. *Id.* at 1091.

Close on the heels of the *Banzhaf* decision was the passage of the 1969 Act and its corresponding change in the preemption language relating to advertising and promotion.[55] Thus, cases arising after the passage of the 1969 Act were governed by the 1969 Act's broader preemption language, thereby limiting the precedential value of the *Banzhaf* decision. Indeed, it is the preemption language of the 1969 Act—not the 1965 Act—that has spawned so much confusion and disagreement.

The United States District Court for the District of New Jersey was the first court to address the preemptive scope of the 1969 Act, in *Cipollone v. Liggett Group, Inc.*[56] After concluding that the 1969 Act did not expressly preempt state tort claims,[57] the court analyzed whether Congress intended to implicitly preempt such claims. After a thorough review of legislative history, the district court rejected implied preemption on three grounds: (1) while Congress admittedly intended to "occupy the field," the field was limited to labelling and advertising and did not extend to state common law, particularly in the absence of alternate federal remedies,[58] (2) no actual conflict based upon "physical impossibility" existed because the 1969 Act did not proscribe the imposition or use of additional warnings,[59] and (3) no actual conflict based on obstruction of purpose could be found because imposing liability upon manufacturers would actually serve to further the Act's stated purpose of adequately informing the public of the hazards of smoking.[60]

This district court opinion was the first crack in the cigarette manufacturers' previously impenetrable armor.[61] Momentum was

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55. The 1969 Act amended subsection (b) of the preemption provision to read as follows, "(b) No requirement or prohibition based on smoking or health shall be imposed under State law with respect to advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." Public Health Cigarette Smoking Act of 1969, 84 Stat. 87, 87 (1970) (codified at 15 U.S.C. §§ 1331-40).

56. 593 F. Supp. at 1154.

57. *Id.*

58. *Id.* at 1163-64. *Accord*, Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984) (Atomic Energy Act did not preempt award of punitive damages under state law even though the Act provided for exclusive federal regulation of nuclear safety because "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Id.* at 251).

59. *Cipollone*, 593 F. Supp. at 1166-68.

60. *Id.* at 1169.

61. The district court decision in *Cipollone* was the first litigated loss for cigarette manufacturers. While many plaintiffs had brought products liability claims before, none had recovered. *See, e.g.*, Green v. American Tobacco Co., 409 F.2d 1166 (5th Cir. 1969), *cert. denied*, 397 U.S. 911 (1970); Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479 (3d Cir. 1965), *cert. denied*, 382 U.S. 987 (1966); Ross v. Philip Morris Co., 328 F.2d 3 (8th Cir. 1964); Largique v. R.J. Reynolds Tobacco

stalled, however, when the cigarette manufacturers garnered a victory on the preemption issue in the District Court for the Eastern District of Tennessee in *Roysdon v. R.J. Reynolds Tobacco Co.*,[62] which held that continued viability of the state failure to warn claims would be incompatible with congressional intent to provide uniform labeling.[63] Thus, when permission for interlocutory appeal was granted in *Cipollone*, national focus quickly shifted to the Third Circuit as the next important battleground on preemption.

In April 1986, the Third Circuit issued its decision, holding that the 1969 Act preempted all state common law actions "relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to advertising and promotion of cigarettes."[64] On remand, the district court reluctantly concluded that the Third Circuit's holding required preemption of plaintiff's post-1965 intentional tort, express warranty, and failure to warn claims.[65]

Other circuit courts quickly followed the Third Circuit's lead. In *Stephen v. American Brands, Inc.*,[66] the Eleventh Circuit held that the lower court had properly denied the plaintiff's motion to strike preemption as an affirmative defense to his failure to warn claim.[67] The First Circuit, in *Palmer v. Liggett Group, Inc.*,[68] reversed the district court's determination[69] of no preemption, on grounds that permitting state common law suits would excessively disrupt the delicate "balance of purposes" set forth by Congress.[70] According to the First Circuit, the exposure of cigarette manufacturers to common law liability would frustrate the stated purpose of protecting commerce, thereby impermissibly tipping the balance of purposes in favor of adequately informing the public.[71]

The *Palmer* court's articulation of a "balance of purposes" test for identifying actual conflict and implied preemption of common

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Co., 317 F.2d 19 (5th Cir. 1963), *cert. denied*, 375 U.S. 865 (1963); R.J. Reynolds Tobacco Co. v. Hudson, 314 F.2d 776 (5th Cir. 1963); Cooper v. R.J. Reynolds Tobacco Co., 234 F.2d 170 (1st Cir. 1956), *cert. denied*, 358 U.S. 875 (1958); Albright v. R.J. Reynolds Tobacco Co., 350 F. Supp. 341 (W.D. Pa. 1972), *aff'd* 485 F.2d 678 (3d Cir. 1973), *cert. denied* 416 U.S. 951 (1974); Fine v. Philip Morris, Inc., 239 F. Supp. 361 (S.D.N.Y. 1964); Mitchell v. American Tobacco Co., 183 F. Supp. 406 (M.D. Pa. 1960).

62. 623 F. Supp. 1189 (E.D. Tenn. 1985), *aff'd*, 849 F.2d 230 (6th Cir. 1988).

63. *Id.* at 1190-91.

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

65. *Cipollone*, 649 F. Supp. at 675.

66. 825 F.2d 312 (11th Cir. 1987).

67. *Id.* at 313.

68. 825 F.2d 620 (1st Cir. 1987).

69. Palmer v. Liggett Group, Inc., 693 F. Supp. 1171 (D. Mass. 1986).

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

71. *Id. See also Cipollone*, 789 F.2d at 187 (The Third Circuit stated that

law claims was soon adopted by the Fifth[72] and Sixth[73] Circuits, the Minnesota Supreme Court,[74] and numerous lower courts.[75]

It should be noted, however, that courts that have embraced the "balance of purposes" test have restricted the scope of implied preemption to failure to warn claims. Design defect,[76] misrepresentation,[77] and breach of warranty[78] have generally been held viable claims beyond the reach of preemption.

With the First, Third, Fifth, Sixth, and Eleventh Circuits in agreement that the federal law preempted common law failure to warn claims, the issue appeared to be, in judicial parlance, well settled. But in July 1990 the Supreme Court of New Jersey, in *Dewey v. R.J. Reynolds Tobacco Co.*,[79] cut against this considerable weight of authority and provided the cigarette industry a stunning blow: it held that the federal law did not preempt any common law causes of action.[80] The *Dewey* court rejected the notion that actual conflict

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"[t]he Act represents a carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of [the] national economy.").

72. *Pennington v. Vistron Corp.*, 876 F.2d 414 (5th Cir. 1989). The *Pennington* court determined that "[a] state court jury verdict concluding that the warnings selected by Congress do not sufficiently protect the citizens of a state from the risks of smoking would clearly upset this carefully balanced federal scheme."

73. Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 234-35 (6th Cir. 1988) (state common law failure to warn claims impliedly preempted as actually conflicting with the 1965 Act's delicate balance of purposes).

74. Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655, 658 (Minn. 1989) (any state claims based upon adequacy or effect of cigarette advertising or promotion impliedly preempted as actually conflicting with federal law's stated purpose of balancing protection of health and commerce).

75. *See, e.g.*, Rosers v. R.J. Reynolds Tobacco Co., 557 N.E.2d 1045, 1051 (Ind. Ct. App. 1990) (post-1965 failure to warn claim impliedly preempted because allowing the claim would thwart purpose of promoting labeling uniformity); Hite v. R.J. Reynolds Tobacco Co., 578 A.2d 417, 419 (Pa. Super. Ct. 1990) (claims based on adequacy of warning or advertising and promotion impliedly preempted because allowing the claims would upset balance of purposes); Phillips v. R.J. Reynolds Industries, Inc., 769 S.W.2d 488, 490 (Tenn. Ct. App. 1988) (failure to warn claim impliedly preempted under *Palmer* court's balance of purposes analysis), *appeal denied*, 1989 Tenn. LEXIS 219 (Tenn. 1989).

76. *See Rogers*, 557 N.E.2d at 1051 (negligent and strict liability design defect claims "do not thwart the Act's purpose of promoting uniformity"); *Hite*, 578 A.2d at 420 (design defect claim not preempted because not based on adequacy of warnings or advertising and promotion); *Forster*, 437 N.W.2d 661 (defective design claim not preempted if unrelated to adequacy of warning).

77. *See Forster*, 437 N.W.2d at 661-62 (misrepresentation claim not preempted because any conflict with federal warning is "indirect and self-imposed" by manufacturer. *But cf.* Kotler v. American Tobacco Co., 926 F.2d 1217, 1223 (1st Cir. 1990) (intentional misrepresentation claim preempted under *Palmer* holding), *vacated*, 112 S. Ct. 3019 (1992); *Rogers*, 557 N.E.2d at 1055 (fraud claim held preempted because based on manufacturer's advertising and promotion).

78. *See Forster*, 437 N.W.2d at 662 (breach of express and implied warranty claims not preempted if unrelated to duty to warn).

79. Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239, 1251 (N.J. 1990).

80. *Id.* at 1251.

preemption could be found using the "balance of purposes" test.[81] Noting that legislative history revealed the Act's "principal purpose" to be informing the public,[82] and that permitting common law recovery would further such purpose, the New Jersey Supreme Court reasoned that any resulting impairment of the Act's "secondary" purpose—protection of commerce—would be incidental.[83] The *Dewey* court also emphasized that permitting state tort claims served another purpose that Congress could not reasonably have intended to foreclose: compensating victims injured by harmful products.[84] Invoking the strong presumption against preemption, the *Dewey* court concluded that if Congress had intended to leave those injured by cigarettes without a remedy, "it knew how to do so with unmistakeable specificity."[85]

The renegade decision in *Dewey* inspired imitation by the Texas Court of Appeals in *Carlisle v. Philip Morris, Inc.*[86] In a feisty opinion that labeled the federal circuit court of appeals reasoning "flawed,"[87] the *Carlisle* court concurred with the *Dewey* court's determination that the primary purpose of the federal law was to inform the public of the hazards of smoking.[88] Thus, permitting common law recovery would further this overarching purpose,[89] not frustrate any perceived "balance of purposes." Other significant factors weighing against preemption included an absence of alternate remedies, a paucity of legislative history indicating intent to preempt, and the existence of a savings clause in a subsequent law regulating smokeless tobacco.[90]

It was against this backdrop of bitter disagreement between state courts and federal circuit courts that the United States Supreme Court granted certiorari in the *Cipollone* case.

The *Cipollone* decision represents an uneasy compromise between states clamoring to retain the right to adjudicate common law claims

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81. *Id.* at 1258.

82. *Id.* at 1248 (citing H.R. Rep. No. 449, 89th Cong., 1st Sess., reprinted in 1965 U.S. Code Cong. & Admin. News 2350); *accord* Comment, *Inadequate Warning Claims Preempted by Cigarette Labeling Act: Palmer v. Liggett Group, Inc.*, 34 LOY. L. REV. 419, 430 (1988).

83. *Dewey*, 577 A.2d at 1248-49.

84. *Id.* at 1249.

85. *Id.* at 1251.

86. 805 S.W.2d 498 (Tex. Ct. App. 1991).

87. *Id.* at 515.

88. *Id.* at 509-11.

89. *Id.* at 509.

90. *Id.* The Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252, 100 Stat. 30, codified at 15 U.S.C. § 4401-4408 (1988), contained an explicit savings clause that provided: "Nothing in this . . . [Act] shall relieve any person from liability at common law or under State statutory law to any other person." 15 U.S.C. § 4406(c) (1988).

and the tobacco industry's persuasive preemption argument. Unfortunately, the Court's decision is a hodge-podge of preemptions unlikely to fully satisfy anyone. Plaintiffs have been stripped of their most promising theory of recovery, that of strict or negligent failure to warn.[91] The tobacco industry, on the other hand, has been stripped of preemptive protection against design defect, express warranty, or intentional tort claims.

Several unusual aspects of the *Cipollone* decision warrant discussion. First, the Supreme Court's decision, unlike every other reported case except one,[92] rested on a finding of express—not implied—preemption.[93] Thus, the Court's analysis focused on the intended scope of the express preemption rather than whether an upset of the Act's "balance of purposes" would create an actual conflict necessitating implied preemption.[94] The Court's express preemption analysis, inherently dependent upon semantical nuances, stitched together what Justice Blackmun described as a "crazy quilt of preemption."[95]

Under express preemption analysis, the language of the 1965 Act was sufficiently narrow that seven justices agreed it did not preempt failure to warn claims.[96] The revised preemption language provided by the 1969 Act, on the other hand, was, in the eyes of six Justices, sufficiently broad to indicate an express intent to preempt failure to warn claims.[97] Interestingly, seven Justices also agreed that negligent research or testing claims were beyond the preemption's tenacles, provided such claims are unrelated to advertising or promotional activities.[98]

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91. Perhaps recognizing the futility of proceeding without a failure to warn theory, Thomas Cipollone voluntarily dismissed with prejudice his remaining claims on November 5, 1992. "Cipollone Family Drops Landmark Cigarette Suit," WASH. POST, November 6, 1992 at B1. The apparent impetus for the dismissal was the decision by the Cipollone's law firm, Budd, Larner, Gross, Rosenbaum, Greenberg & Sade, to withdraw from the case. *Id.* The firm reportedly incurred between $500,000 and $1 million in expenses pursuing the case. John H. Kennedy, "Suit Against Tobacco Firms Ends," THE BOSTON GLOBE, November 6, 1992 at p.67.

92. Forster v. R.J. Reynolds Tobacco Co., 423 N.W.2d 691 (Minn. Ct. App. 1988) (federal law provided for express preemption, but scope of such express preemption does not encompass state common law claims), *aff'd in part and rev'd in part*, 437 N.W.2d 655 (Minn. 1989) (en banc). This finding of express preemption was overruled by the Minnesota Supreme Court, which believed the Act provided for only implied preemption. *Forster*, 437 N.W.2d at 660.

93. *Cipollone*, 112 S. Ct. at 2618.

94. *Id.* at 2618-20.

95. *Id.* at 2631. (Blackmun, J., concurring in part and dissenting in part).

96. *Id.* at 2619. The seven Justices are Stevens, Rehnquist, White, O'Connor, Blackmun, Kennedy, and Souter. Justices Scalia and Thomas believed the 1965 Act did preempt failure to warn claims. *Id.* at 2635-37.

97. *Id.* at 2621-22. (Stevens, Rehnquist, White, and O'Connor); *see also id.* at 2637 (Scalia and Thomas). Justices Blackmun, Kennedy and Souter believed the 1969 Act did not preempt failure to warn claims. *Id.* at 2627.

98. *Id.* at 2622, 2627. Justices Scalia and Thomas believed that both the 1965

Design defect claims are also beyond the preemptive scope of both the 1965 and 1969 Acts.[99] While at first blush this may seem an important victory for plaintiffs, in reality the design defect theory may not hold much promise in the case of cigarettes. In those states that have adopted Section 402A of the *Restatement (Second) of Torts*, several courts have held that cigarettes are not "unreasonably dangerous" as a matter of law.[100] The root of this position is Section 402A's comment i, which states:

> The article sold must be dangerous to an extent beyond that 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.[101]

Thus, plaintiffs may face the formidable task of establishing that an ordinary consumer would not have known of the hazards of cigarette smoking in order to recover under a defective design theory—a task that is virtually impossible given the fact that warning statements have appeared on every package of cigarettes since January 1, 1966, the effective date of the 1965 Act.[102]

Act and the 1969 Act preempted negligent testing or research claims. *Id.* at 2635-37.

99. Four Justices, Stevens, Rehnquist, White, and O'Connor, while not explicitly addressing design defect claims, stated that any claim not based on advertising or promotion would survive preemption. *Id.* at 2621. Three other Justices, Blackmun, Kennedy, and Souter, while also not explicitly addressing design defect claims, expressed a belief that neither the 1965 Act nor the 1969 Act preempted any common law claims. *Id.* at 2626-27.

100. *See, e.g. Roysdon*, 849 F.2d at 236 (under Tennessee law, cigarettes are not unreasonably dangerous because the amount of information available to public regarding health hazards associated with smoking in the ten-year period preceding Plaintiff's complaint precluded existence of a jury question); *Hite*, 578 A.2d at 421 (plaintiff precluded under Pennsylvania law from pursuing risk-utility design defect claim because inherent danger of cigarettes were within contemplation of ordinary consumer), *appeal denied*, 593 A.2d 842 (Pa. 1991); *see also* Gunsalus v. Celotex Corp., 674 F. Supp. 1149, 1158-59 (E.D. Pa. 1987) (applying Pennsylvania law); *cf. Dewey*, 577 A.2d at 1253-55 (although current New Jersey law, which includes comment i, precludes recovery under risk-utility theory against cigarette manufacturer, the law cannot be given retroactive application). *But see* Kotler v. American Tobacco Co., 685 F. Supp. 15, 20 (D. Mass. 1988) (whether cigarettes are defective is a question of fact for the jury), *aff'd*, 926 F.2d 1217 (1st Cir. 1990), *vacated*, 112 S. Ct. 3019 (1992); *Rogers*, 557 N.E.2d at 1053 (under Indiana law, it cannot be said as a matter of law that tobacco products are insulated from unreasonably dangerous product categorization under comment i).

101. RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965).

102. Some courts have hinted at a willingness to consider a design defect claim based upon the theory that a better or safer alternative design was available. *See, e.g., Rogers*, 557 N.E.2d at 1053, n.8 ("a design defect which renders the product

The Supreme Court in *Cipollone* also left intact plaintiff's theories of express warranty[103] and fraudulent misrepresentation.[104] The Court's reasoning regarding these claims, however, is a poorly disguised attempt to pick and choose preemptions that are politically tolerable.

With regard to express warranty, the Court's decision hinged upon the argument that an express warranty is a voluntary undertaking by the warrantor, not a "requirement or prohibition . . . imposed under State law" within the meaning of subsection (b) of the 1969 Act's preemption section.[105] Justices Scalia and Thomas took issue with this narrow reading of the preemption language, arguing that because state law attaches liability to breach of an express warranty, such liability constitutes a "requirement or prohibition . . . imposed under State law," thereby preempting any claim based on such breach.

Under Justice Scalia's argument, the fact that a warranty is voluntarily undertaken is of no consequence.[106] If the state provides a remedy, the warranty is transformed into a requirement imposed under state law, and preemption attaches. Such an argument, though perhaps logical, leads to absurd consequences. For example, imagine a cigarette manufacturer as an inducement to use its product, voluntarily promises to pay Smith $100,000 should Smith ever contract a smoking-related illness. Smith develops a smoking-related illness, and the cigarette manufacturer refuses to pay as promised. The cigarette manufacturer's breach of its contractual obligation is clearly a situation for which state law provides a remedy. Therefore, under Justice Scalia's argument, the imposition of liability for the contractual breach constitutes a "requirement or prohibition . . . imposed under State law" and Smith's contractual claim is preempted by the federal law. It seems absurd to believe Congress intended the Act's

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more addictive than it could be or addictive when it need not be at all may render the cigarette unreasonably dangerous in conjunction with its harmful qualities."); *cf. Hite*, 578 A.2d at 421 (although risk-utility theory precluded under Pennsylvania law, question of whether better design theory was viable not reached because plaintiff did not assert such theory), *appeal denied*, 593 A.2d 842 (Pa. 1991).

103. All nine Justices agreed that the 1965 Act did not preempt express warranty claims. *Cipollone*, 112 S. Ct. at 2622-2626, 2635. With regard to the 1969 Act, however, Justices Scalia and Thomas believed express warranty claims were preempted. *Id.* at 2637.

104. As with express warranty, the Court unanimously agreed that the 1965 Act did not preempt fraudulent misrepresentation claims. *Id.* at 2623-24, 2627, 2635. Regarding the 1969 Act, however, Justices Scalia and Thomas believed it preempted fraudulent misrepresentation claims. *Id.* at 2637.

105. *Id.* at 2622.

106. *Id.* at 2635-36. *See generally* Cohen v. Cowles Media Co., 111 S. Ct. 2513, 1527-18 (1991) (promissory estoppel constitutes a "state action" under the Fourteenth Amendment because it is a legal obligation for which state law provides a remedy).

preemption to sweep so broadly. Indeed, as the Minnesota Supreme Court acknowledged in *Forster*, such broad interpretation of the preemption language would effectively give cigarette manufacturers a "license to lie."[107] Perhaps because the ramifications of such an approach would be so unpalatable, a majority of the Court refused to accept Justice Scalia's argument.

With regard to fraudulent misrepresentation, the plurality[108] engaged in creative statutory interpretation to hold that the Act did not preempt such claims because they are not "based on smoking and health" within the meaning of subsection (b) of the preemption section.[109] Rather, the plurality insisted, misrepresentation claims spring from the more general "duty not to deceive."[110]

Such semantical gerrymandering essentially begs the important policy question of congressional intent. Indeed, under the Court's reasoning, post-1968 failure to warn claims would likewise not be preempted because they could be said to spring from the general duty to adequately inform and are therefore not "based on smoking and health" within the meaning of the preemption section. The Court's fleeting emphasis on the "based on smoking and health"[111] language smacks of desperation. But employing such narrow construction served two useful purposes. First, it avoided putting the Court in the uncomfortable position of proclaiming that Congress intended to allow cigarette manufacturers to escape liability for intentional misconduct. Second, it allowed the Court to reach an acceptable conclusion without having to delve into the sticky policy decisions underlying the language.

Another fascinating aspect of the *Cipollone* decision is its exclusive reliance on subsection (b) of the preemption section that relates only to advertising and promotion.[112] Although the Court never acknowledges it, subsection (a) of the preemption section, relating to cigarette packaging, was left untouched by the 1969 Act amendments.[113] Thus, an intriguing question arises: What is the preemptive effect, if any, of subsection (a)?

The Court did provide some helpful hints to answering this question. The plurality determined that the 1965 Act's preemption

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107. *Cipollone*, 112 S. Ct. at 2635-36.

108. *Forster*, 437 N.W.2d at 662.

109. It should be noted that three other Justices (Blackmun, Kennedy, and Souter) believed that fraudulent misrepresentation was not preempted because the Act did not preempt any common law claims. *Cipollone*, 112 S. Ct. at 2631.

110. *Id.* at 2624.

111. *Id.* at 2617, 2621-24.

112. *See supra* note 53 for the full text of subsection (b) as amended by the 1969 Act.

113. *See supra* note 36 for the full text of subsection (a), which has never been amended by Congress.

language, presumably including both subsections (a) and (b), "only preempted state and federal rulemaking bodies from mandating particular cautionary statements and *did not preempt state law damage actions.*"[114] In addition, Justices Blackmun, Kennedy, and Souter, in a separate opinion,[115] concluded that "*none* of petitioner's common law claims are preempted by the 1965 Act."[116]

Thus, it appears that seven Justices agree that subsection (a) does not preempt any common law causes of action. What, practically speaking, does this mean? It could mean that a plaintiff could bring a claim of inadequate warning based solely on the packaging and such claim would not be preempted. Alternatively, a lower court faced with a subsection (a) claim could reason that *Cipollone* is not of precedential value because it did not directly address subsection (a)'s preemptive scope. Or perhaps a lower could could even determine that subsection (a) was implicitly repealed by the 1969 Act.

The most reasonable conclusion seems to be that subsection (a) does not preempt claims based solely on packaging inadequacies. The repeal by implication argument holds little water because it is apparent that subsections (a) and (b) deal with completely different situations: subsection (a) deals with packaging while subsection (b) deals with advertising and promotion. While the two categories undeniably overlap to some extent, this overlap does not eradicate the need to address the two issues separately. Indeed, in segregating packaging preemption from advertising and promotion preemption, Congress recognized what ordinary people recognize: people often ignore the puffery associated with cigarette advertisements and promotions. Cigarette packages, on the other hand, are something quite different. They are the last ditch medium to convey warnings before the smoker peels away the aluminum foil, plucks the cigarette from the package, and brings it to his lips. Perhaps the dichotomy in preemption language between subsections (a) and (b) reflects this basic understanding.

Indeed, the 1965 Act's original subsection (b) language did not require any warning statements at all in cigarette ads and promotions. It was not until the passage of the 1969 Act and its corresponding change to the language of subsection (b) that the Federal Trade Commission obtained authority to require warnings in print advertisements.[117] Thus, while Congress was clearly willing to provide broader preemption protection for advertising and promotion activities, it indicated that it was not willing to do so for packaging when it refused to amend subsection (a) in 1969.

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114. *Cipollone*, 112 S. Ct. at 2619 (emphasis added).
115. *Id.* at 2625 (concurring in part and dissenting in part).
116. *Id.* at 2626 (emphasis added).
117. *Id.* at 2617. *See also* In re Lorillard, 80 F.T.C. 455 (1972).

The apparent differential treatment in preemptive scope between packaging and advertising and promotion could plausibly reflect Congress' understanding that its statutorily prescribed package warnings, though adequate at the time the law was passed, would not remain adequate as scientific knowledge expanded. State tort law would, therefore, continue to play a large role in performing the adequacy assessement. The broader preemptive protection afforded advertising and promotional activities, on the other hand, was an indication of congressional confidence in the FTC as the exclusive watchdog for fraudulent advertisements and promotions.[118]

Whatever the explanation for the disparate treatment of packaging preemption and advertising and promotion preemption, the Supreme Court in *Cipollone* did not even acknowledge its existence. Failure to do so leaves many questions unanswered, the most significant of which is the preemptive scope of subsection (a). Given, however, the broad language in *Cipollone* regarding the lack of preemptive effect of the 1965 Act, plaintiffs' attorneys would be well advised to consider subsection (a) in crafting their complaints.

Perhaps the most intriguing aspect of the *Cipollone* decision is found not in what the Court said, but in what the decision says about Congress and things to come. Congress sat silently on the sidelines as the courts grappled with the complex policy issues raised by *Cipollone* and its sister cases. Congress could have chosen to amend the Act and clarify its intent. Instead, it chose to let the judicial branch do its dirty work, foisting upon the courts the tough policy decisions it could not—or would not—make itself. The result of Congress' "pass the buck" mentality is *Cipollone*, a decision perhaps best described as judicial pin-the-tail-on-the-donkey policy-making.

The judicial branch should not be the dumping ground of misfit federal laws. Given the growing use of preemption as an affirmative defense in areas of federal involvement, Congress can now be irrefutably presumed to know the importance of addressing this issue explicitly. Assuming, however, that Congress continues to take the path of silence or ambiguity, what are the courts to make of such silence or ambiguity? Or more precisely, which is to be the more reasonable inference—that silence or ambiguity evinces an intent to preempt, or that silence or ambiguity evinces an intent not to preempt?

The answer to this question necessarily depends on the courts' deference to states' rights and, ultimately, what courts think the

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118. The 1965 Act conferred upon the FTC the authority to regulate "unfair or deceptive acts or practices in the advertising of cigarettes." 15 U.S.C. § 1336 (1988). It also required the FTC to make annual reports and recommendations on the effectiveness of cigarette labeling and current practices in cigarette advertising and promotion. 15 U.S.C. § 1337 (1988).

"burden of revelation" should be. The *Cipollone* decision indicates that the present Supreme Court believes Congress bears a heavy burden of revelation. Congress therefore bears the burden of revealing an intent *not* to do X, rather than simply bearing the burden of revealing an intent to do X. If Congress wishes to preserve common law claims in the future, it had better unambiguously provide a savings clause.

Whether Congress should fairly have to bear this burden is debatable. Certainly from the standpoint of legislative economy, requiring Congress to provide a laundry list of the things legislation was *not* intended to do is inefficient. But it is largely a burden that has been self-imposed: Congress' inability to make tough policy decisions has forced the courts to make these decisions for it. *Cipollone* may well mark the beginning of a new era of judicial activism by default, producing half-hearted political compromises, devoid of policy.

Elizabeth C. Price

Appendix A

Preemptive Scope of Federal Cigarette Labeling and Advertising Act *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992)

		pre-1969	*post-1968*[1]
I.	*Failure to Warn*		
	A. Strict Liability	not preempted	preempted (if based on advertising or promotion)
	B. Negligent	not preempted	preempted (if based on advertising or promotion)
	C. Neutralization	not preempted	preempted (if based on advertising or promotion)
II.	*Negligent Research or Testing*	not preempted	not preempted (if not based on advertising or promotion)
III.	*Express Warranty*	not preempted	not preempted
IV.	*Fraudulent Misrepresentation*	not preempted	not preempted
V.	*Conspiracy to Misrepresent*	not preempted	not preempted
VI.	*Design or Manufacturing Defect*	not preempted	not preempted

1. The effective date of the preemption section of the 1969 Act is July 1, 1969. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87, 90 (1970).