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# PREEMPTION: BREATHING NEW LIFE INTO AN OLD GIANT

Gary V. Weeks\*

Herein is not only a great vanity, but a great contempt of God's good gifts, that the sweetness of man's breath, being a good gift of God, should be willfully corrupted by this stinking smoke . . . A custom loathsome to the eye, hateful to the nose, harmful to the brain, dangerous to the lungs, and in the black, stinking fume thereof nearest resembling the horrible stygian smoke of the pit that is bottomless.\*\*

## I. THE CONTROVERSY

### A. Introduction

In recent years, plaintiffs' attorneys have pursued corporate giants with unprecedented success.<sup>1</sup> Changes in the law of strict liability, comparative negligence, state of the art, and other theories of liability<sup>2</sup> have provided this new breed of giant-killers with the courage of a shepherd-boy with conviction and with an arsenal of arms with which to slay the corporate goliath. However, unlike the case of David and Goliath, I Samuel 17:31-54 (approximately 1000 B.C.), these giant killers prefer not to stand alone before the corporate giant, but rather, shoulder to shoulder.<sup>3</sup>

While sophisticated strategy coupled with the "sling-shot" of strict liability has felled many a corporate giant, the tobacco industry

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\*\* James I of England (1566-1625).

1. This success, of course, parallels the development of the modern products liability law. While *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), gave birth to the modern concept of products liability, it was not until the late 1950s and early 1960s that the generalized theories of strict manufacturer liability were developed and popularized.

2. Edell, *Cigarette Litigation: The Second Wave*, 22 TORT & INS. L.J. 90, 92 (1986).

3. Edell explains: "No longer do we find sole practitioners trying these cases, but rather larger firms with the financial, technical, and manpower resources necessary to go the distance. Groups of law firms have joined together to litigate these cases collectively. The extent of this cooperation and coordination of effort among plaintiffs' counsel has reached national proportion." *Id.*

has been relatively successful at avoiding the sting of the shepherd-boy's stone.<sup>4</sup> In the initial confrontations, this corporate giant simply relied on its superior size and strength to overpower its opponents.<sup>5</sup> But twenty years of observing its corporate kin fall one by one has taught this puffing philistine that size and strength may no longer be enough. And so, not surprisingly, the tobacco companies have reemerged on the field of battle dressed in new and formidable protective armor. The most promising and powerful piece of this protective garb has been thus far the impenetrable breast-plate of preemption.<sup>6</sup>

## B. Issue and Inferences

This paper explores the merits of the tobacco companies' preemption defense. More particularly, this paper considers whether the Federal Cigarette Labeling and Advertising Act ("Labeling Act") preempts claims against tobacco companies based on failure to warn adequately of the health effects of cigarette smoking. The pervading import of this issue upon present and future tobacco litigants is stated in succinct and summary fashion by the court in *Palmer v. Liggett Group, Inc.*<sup>7</sup>

The District Court, the defendants, and the plaintiffs agree that the issue of the Act's preemptive force controls the disposition of virtually the entire case. If the Labeling Act is found to preempt state

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4. See Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423 (1980), reporting tobacco companies' perfect record of never having lost or settled a product liability case (except for those based on the presence of foreign object in product). On June 3, 1988, a federal district court jury found the Liggett Group partially liable for the death of Rose Cipollone, and awarded Antonio Cipollone, husband, \$400,000.00 in damages. The jury found that Liggett, prior to 1966, had failed to warn consumers of the health risks of smoking. This was the first time a cigarette company had been successfully sued for damages in a personal injury case. See *Cipollone v. Liggett Group, Inc.*, 693 F. Supp. 208 (D.N.J. 1988).

5. Edell, *supra* note 2, at 91-92. "[I]t is clear that the many appeals and retrials placed extraordinary financial burdens on plaintiffs' counsel, resulting in many voluntary dismissals. The only decision that actually discusses the impact of the manner in which the cases had been defended is the unpublished decision of *Thayer v. Liggett & Meyers*, No. 5314 (W.D. Mich. Feb. 19, 1970). In that case, the judge observed that 'the facts themselves mock the mandatory jury instruction that individuals and corporate institutions are always equal before the court . . . [T]he magnitude of the impact of the disparity in resources between . . . [the] parties through a sophisticated and calculated exploitation of the situation by the defendant, approaches a denial of due process which would compel the granting of a new trial. The question, unfortunately, is now moot because plaintiff cannot afford further proceedings.'"

6. On the issue of preemption the score presently stands: Tobacco Companies 4; Plaintiffs 0. See *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987); *Roysdon v. R.J. Reynolds*, 623 F. Supp. 1189 (D.C. Tenn. 1985).

7. 825 F.2d at 620.

law actions, either expressly or impliedly, the Palmers lose. If Congress did not intend for the Act to be so preemptive, Liggett loses the appeal.<sup>8</sup>

In short, preemption provides tobacco companies with a potential<sup>9</sup> absolute defense to plaintiffs' claims based on failure to warn.<sup>10</sup> Given that other theories of tort recoveries have not been successful,<sup>11</sup> preemption could sound the death knell to any hope of recovery by plaintiffs for damages attributable to cigarette smoking.<sup>12</sup>

## II. THE CONSTITUTION

### A. Supremacy Clause

A federal system, without qualification or explication, inherently embodies principles of conflict and confusion. No doubt, it was the recognition of the potential for conflict between state and federal government, and the resulting confusion such conflict would engender upon a citizenry attempting to serve two masters,<sup>13</sup> that caused the constitutional framers to give birth to the supremacy clause.<sup>14</sup> This clause provides that:

This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

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8. *Id.* at 622.

9. Obviously, the tobacco companies have so far been able to actualize the potentiality of preemption. However, the Supreme Court has yet to speak the last word on this issue.

10. In *Cipollone*, 789 F.2d at 187, the Third Circuit stated:

[W]e hold 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. We further hold that where the success of a state law damage claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages, such claims are preempted as conflicting with the Act.

11. See Note, *Preemption of Recovery in Cigarette Litigation: Can Manufacturers Be Sued for Failure to Warn Even Though They Have Complied with Federal Warning Requirements?* 20 LOY. L.A.L. REV. 867 (1987) (citing Garner, *supra* note 4, at 1425).

12. See Note, *supra* note 11, at 868 (estimating health care cost and lost productivity at fifty billion dollars). See also Note, *Tobacco Under Fire: Developments in Judicial Responses to Cigarette Smoking Injuries*, 36 CATH. U.L. REV. 643 (1987).

13. Luke 16:13 ("No servant can serve two masters . . .").

14. U.S. CONST. art. VI, cl. 2.

## B. Preemption

The doctrine of preemption has its roots in the supremacy clause of the Constitution.<sup>15</sup> These roots can be traced to the venerable case of *Gibbons v. Ogden*<sup>16</sup> where the Chief Justice Marshall wrote:

The nullity of any act, inconsistent with the constitution, is produced by the declaration, that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State Legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.<sup>17</sup>

Borrowing from the language of *Gibbons v. Ogden*,<sup>18</sup> one can state the doctrine of preemption as follows: In every case where state law *interferes with* or *is contrary to* federal law, the federal law is supreme, and the state law must yield to it.<sup>19</sup> Application of this doctrine in any particular case requires the court to determine first whether the state law interferes with or is contrary to federal law.<sup>20</sup> One commentator described the problem as "largely one of statutory construction"<sup>21</sup> and, therefore, one that "cannot be reduced to general formulas."<sup>22</sup> However, the United States Supreme Court has developed a number of principles applicable to the doctrine of preemption and useful in ascertaining congressional intent to preempt state authority.

### 1. *Express Preemption*

The first, and perhaps most obvious principle of preemption is that Congress may preempt state law by including an express statement of preemption in the statute.<sup>23</sup> Every court to hear the tobacco

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15. *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 152 (1982).

16. 22 U.S. (9 Wheat.) 1 (1824).

17. *Id.* at 210-11.

18. *Id.*

19. *Id.* (emphasis supplied).

20. I.e., whether a particular federal law preempts a particular state law. *Id.*

21. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* at 377 (1978).

22. *Id.*

23. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

companies' express preemption defense has rejected it.<sup>24</sup>

## 2. *Implied Preemption*

If a court cannot find preemption in the express language of the statute itself, a court may yet find congressional intent to preempt state law. In *Silkwood v. Kerr-McGee Corp.*,<sup>25</sup> the court identified two general ways in which implied preemption may be found.<sup>26</sup> First, a court may give implied preemptive effect to a statute if it determines that Congress intended to "occupy the field" in a particular area.<sup>27</sup> The United States Supreme Court has explained this preemption principle as follows:

Congress' intent to supersede state law altogether may be inferred because "[t]he scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it," because "the Act of Congress 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," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose."<sup>28</sup>

Implied preemption may also be found in instances where state law, although not totally displaced, actually conflicts with federal law.<sup>29</sup> A conflict exists when "compliance with both federal and state regulations is a physical impossibility"<sup>30</sup> or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>31</sup> In these situations, state law is preempted only to the extent it actually conflicts with federal law.<sup>32</sup>

Preemption, one must remember, is only a means to an end: the peaceful co-existence of state and federal authority within the framework of federalism. While the supremacy clause decidedly tips the scales in favor of federal law, some recognized safeguards exist that

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24. See note 6 for circuit court cases deciding that Labeling Act does not expressly preempt state common law tort claims based on failure to warn.

25. 464 U.S. 238 (1984).

26. *Id.* at 248.

27. *Id.*

28. *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

29. *Silkwood*, 464 U.S. at 248.

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

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

32. *In re Quanta Resources Corp.*, 739 F.2d 912, 915 (3d Cir. 1984) (citing *Stellwagen v. Clum*, 245 U.S. 605, 613 (1918)).

prevent the unnecessary encroachment on and usurpation of state power.<sup>33</sup>

The first safeguard is in the form of a presumption "that Congress did not intend to displace state law."<sup>34</sup> This presumption is particularly powerful if the state law involved is state common law, since common law is often embedded in many generations of judicial development<sup>35</sup> and concerns areas "traditionally regarded as properly within the scope of state superintendence."<sup>36</sup> State common law tort actions fall within the parameters of this more powerful presumption.<sup>37</sup> When applying the principles of preemption, a court must be mindful of the presumption against preemption.<sup>38</sup>

Next, "[p]re-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'"<sup>39</sup> Where a conflict between state and federal law does exist, state law should be displaced, but only to the extent that it actually conflicts with federal law.<sup>40</sup>

### III. THE CONGRESS

#### A. Federal Cigarette Labeling and Advertising Act

In 1964, the Surgeon General of the United States reported that cigarette smoking posed a significant health threat to Americans that warranted remedial action by Congress.<sup>41</sup> Congress responded in 1965 by passing the Labeling Act.<sup>42</sup> Three sections of the Labeling Act are particularly relevant to the issue of preemption. Section 1333 of the Labeling Act prescribes the exact warning label that is required to appear on each cigarette package. It provides:

It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement:

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33. One might designate these safeguards as "precursory principles of preemption."

34. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

35. *Iconco v. Jensen Construction Co.*, 622 F.2d 1291, 1296 (8th Cir. 1980).

36. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963).

37. *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1542 (D.C. Cir. 1984).

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

39. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981).

40. *In re Quanta Resources Corp.*, 739 F.2d 912, 915 (3d Cir. 1984) (citing *Stellwagen v. Clum*, 245 U.S. 605, 613 (1918)).

41. 1965 U.S. CODE CONG. & ADMIN. NEWS 2350, 2351.

42. Codified at 15 U.S.C. §§ 1331-40 (1982 & Supp. 1986).

“Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health.” Such statement shall be located in a conspicuous place on every cigarette package and shall appear in conspicuous and legible type, in contrast by typography, layout, or color with other printed matter on the package.<sup>43</sup>

As amended in 1970,<sup>44</sup> the Labeling Act expressly stated the policy reasons behind the prescribed warning. Section 1331 provides:

It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

- (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
- (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.<sup>45</sup>

The Labeling Act also contains a preemption provision. Section 1334 provides:

**(a) Additional statements**

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) State regulations**

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 con-

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43. See 15 U.S.C. § 1333 (1982). The 1965 Act required that the following warning be conspicuously placed on cigarette packages: “Caution: Cigarette Smoking May Be Hazardous To Your Health.” In 1969, the required warning was strengthened to read: “Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health.” *Id.* In 1984, this warning was replaced with four rotational warnings required on all cigarette packages, advertisements, and billboards. These warnings state:

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 Rate.

Surgeon General’s Warning: Cigarette Smoke Contains Carbon Monoxide.

15 U.S.C. § 1333(c) (Supp. IV 1986).

44. 15 U.S.C. § 1331 (1982).

45. *Id.*



formity with the provisions of this chapter.<sup>46</sup>

## B. Comprehensive Smokeless Tobacco Health Education Act

Recently, Congress passed the Comprehensive Smokeless Tobacco Health Education Act of 1986 ("Smokeless Act").<sup>47</sup> The Smokeless Act requires the manufacturers of smokeless tobacco products to place warning labels on the packages informing the public of the health risks associated with the use of the product.<sup>48</sup>

The Smokeless Act, like the Labeling Act, contains a preemption clause which is designed to effect uniform labeling practices. Section 4406 of the Smokeless Act provides:

### (a) Federal action

No statement relating to the use of smokeless tobacco products and health, other than the statements required by section 4402 of this title, shall be required by any Federal agency to appear on any package or in any advertisement . . . of a smokeless tobacco product.

### (b) State and local action

No statement relating to the use of smokeless tobacco products and health, other than the statements required by section 4402 of this title, shall be required by any State or local statute or regulation to be included on any package or in any advertisement . . . of a smokeless tobacco product.<sup>49</sup>

In addition, section 4406(c) specifically provides that "[n]othing in this chapter shall relieve any person from liability at common law or under State statutory law to any other person."<sup>50</sup>

## IV. THE CASES

Recently, federal courts have decided four significant cases<sup>51</sup> that address the preemption issue. Even though plaintiffs' attorneys have

46. 15 U.S.C. § 1334 (1982).

47. Smokeless Tobacco Act, Pub. L. No. 99-252 (codified at 15 U.S.C. §§ 4401-08 (Supp. IV 1986)).

48. See 15 U.S.C. § 4402(a) (Supp. 1986) requiring the rotation of the following warnings to be placed on all smokeless tobacco products:

Warning: This Product May Cause Mouth Cancer.

Warning: This Product May Cause Gum Disease And Tooth Loss.

Warning: This Product Is Not A Safe Alternative To Cigarettes.

49. 15 U.S.C. § 4406(a), (b) (Supp. IV 1986).

50. *Id.* at § 4406(c) (Supp. IV 1986).

51. *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987); *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986); *Roysdon v. R.J. Reynolds*, 623 F. Supp. 1189 (D.C. Tenn. 1985).

armed themselves with more powerful offensive weapons and strategies,<sup>52</sup> in three of these four cases the cigarette colossi's preemptive protection has ultimately proved too formidable a defense.

A. *Cipollone v. Liggett Group, Inc.*

In *Cipollone v. Liggett Group, Inc.*<sup>53</sup> the plaintiff brought a state common law product liability suit against three cigarette companies premised on theories of strict liability, negligence, intentional tort, and breach of warranty.<sup>54</sup> The plaintiff maintained, among other things, that the defendants had failed to adequately warn consumers of the potential health risks associated with cigarette smoking.<sup>55</sup> The cigarette companies responded to this challenge by arguing that state law claims based on inadequate warnings were preempted by section 1334 of the Labeling Act.<sup>56</sup> In scholarly fashion<sup>57</sup> Federal District Court Judge Sarokin disagreed with the defendants and held that section 1334 of the Labeling Act did not preempt plaintiff's state common law right to pursue her claim based on failure to warn.<sup>58</sup>

On appeal, the United States Court of Appeals for the Third Circuit reversed Judge Sarokin<sup>59</sup> and held that because state law claims based on failure to warn would "actually conflict" with the goals and purposes of the Labeling Act, they were impliedly preempted.<sup>60</sup>

B. *Roydson v. R.J. Reynolds Tobacco Co.*

In *Roydson v. R.J. Reynolds Tobacco Co.*<sup>61</sup> a Tennessee district court, in a less scholarly but more succinct fashion, held that the tobacco company's compliance with the provisions of the Labeling Act precluded a state common law tort claim for failure to warn.<sup>62</sup> This court, like the *Cipollone* opinions, found that the Labeling Act did not expressly preempt common law tort actions based on inadequacy of

52. See *supra* text accompanying notes 2-3.

53. 593 F. Supp. 1146 (D.N.J. 1984), *rev'd*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987).

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

55. *Id.*

56. *Id.* at 1148.

57. See Note, *supra* note 11, at 886 n.124.

58. 593 F. Supp. at 1170-71.

59. *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987).

60. 789 F.2d at 187.

61. 623 F. Supp. 1189 (E.D. Tenn. 1985), *rev'd*, 825 F.2d 620 (1987).

62. *Id.* at 1191.

warnings.<sup>63</sup> However, the court reasoned that such actions, by exposing tobacco manufacturers to potential tort damages, would be inconsistent with the policy and purpose of the statute as set forth in section 1331.<sup>64</sup> By permitting state common law tort suits based on a failure to warn, the state, the court reasoned, could achieve indirectly (*i.e.*, the placing of more stringent warning labels on cigarette packages and advertising), what it could not achieve directly (*i.e.*, legislation requiring more stringent warning labels).<sup>65</sup> Because one of the stated policies of the Labeling Act is to bring uniformity into the area of cigarette warning labeling, any duty imposed by the court upon a tobacco manufacturer beyond that congressionally mandated would be incompatible with the intent of the legislature as expressed in section 1331.<sup>66</sup>

### C. *Palmer v. Liggett Group, Inc.*

Shortly after the Third Circuit reversed *Cipollone*,<sup>67</sup> a federal court again considered the merits of the preemption defense. In *Palmer v. Liggett Group, Inc.*,<sup>68</sup> Federal District Judge Mazzone agreed with both the district and appellate courts in *Cipollone* that the Labeling Act did not expressly preempt state law tort claims.<sup>69</sup> However, Judge Mazzone rejected the appellate court's position in *Cipollone* that the Labeling Act impliedly preempted the failure to warn action. Rather, like Judge Sarokin before him, Judge Mazzone concluded that "Congress did not intend to preempt common law remedies for injuries caused by inadequate warnings in cigarette labeling and advertising."<sup>70</sup>

On appeal, the United States Court of Appeals for the First Circuit considered Judge Mazzone's opinion "thoughtful" and "detailed"<sup>71</sup> but wrong.<sup>72</sup> Contrary to the district court's ruling, the appellate court held that state common law actions based on the theory of inadequate warnings would excessively disrupt the balance of purpose between health protection and trade regulation set by Congress under the Labeling Act, and consequently, the Labeling Act im-

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63. *Id.* at 1190.

64. *See supra* text accompanying note 45.

65. 623 F. Supp. at 1191.

66. *Id.*

67. 789 F.2d 181 (3d Cir. 1986).

68. 633 F. Supp. 1171 (D. Mass. 1986), *rev'd*, 825 F.2d 620 (1st Cir. 1987).

69. *Id.* at 1174.

70. *Id.* at 1179.

71. *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 625 (1st Cir. 1987).

72. *Id.* at 629.

pliedly preempted these actions where the warning given complied with the Act.<sup>73</sup> So, Judge Mazzone's decision, like that of Judge Sarokin, provided only an ephemeral victory to the plaintiffs on the preemption issue.

#### D. *Stephen v. American Brands, Inc.*

In *Stephen v. American Brands, Inc.*,<sup>74</sup> the United States Court of Appeals for the Eleventh Circuit affirmed the district court's decision, which denied plaintiff's motion to strike the defendant's preemption defense to a state law action for failure to warn.<sup>75</sup> In *Stephen* the court summarily dismissed the plaintiff's appeal by "adopt[ing] the decision and reasoning of the Third Circuit in *Cipollone v. Liggett . . .*"<sup>76</sup>

### V. THE CONFUSION

Resolving the issue of whether the Labeling Act preempts state common law tort claims has required the courts to ascertain congressional intent (in this case, to preempt or not to preempt) through an evaluation and interpretation of the language of the congressional mandate. So, the question before the courts in each of the four cases was: Whether Congress intended to preempt state common law tort claims based on failure to warn when it passed the Labeling Act. The facts of each particular case are relevant only insofar as they generate this issue. Using *Cipollone* as the paradigm case, a review of the reasoning of the district and appellate courts that produced inconsistent conclusions will help demonstrate the source of the confusion and disagreement on the issue of preemption.

#### A. Express Preemption

In *Cipollone*,<sup>77</sup> the defendants maintained that the preemption provision of the Labeling Act expressly preempted the state law claims since (1) state tort law has a clear regulatory effect and Congress recognized this by not including a "savings clause" in the Act, and (2) state tort law constitutes a state imposed *requirements* or *prohibition*, expressly forbidden by the Act.<sup>78</sup> The district court rejected

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73. *Id.* at 626.

74. 825 F.2d 312 (11th Cir. 1987).

75. *Id.* at 313.

76. *Id.*

77. 593 F. Supp. 1146.

78. *Id.* at 1154-55.

both arguments.

As to the absence of a savings clause, the district court agreed with the plaintiff that state law claims would not constitute a regulation of cigarette labeling or advertising, and had Congress held a contrary belief, it could have easily included a provision in the Labeling Act extinguishing state causes of action.<sup>79</sup> Also, the district court determined that state tort law was not encompassed within the terms "requirement or prohibition" and, as such, were not expressly preempted.<sup>80</sup> While the district court acknowledged that tort actions may have some regulatory effect, the district court stated that "the primary and unquestionable effect of a finding of tort liability is to 'shift the burden of losses 'to' those who are in a position to either control the danger or make an equitable distribution of the losses when they occur.'"<sup>81</sup> The district court concluded by stating:

The question of express preemption and the legal issues raised thereby ought not, under the preemption principles previously enunciated . . . be resolved so as to displace traditional state common law remedies unless Congress' expression of its desire to do so is crystal clear. Congress' words reveal far less clarity; it did not expressly preempt the common law claims asserted here.<sup>82</sup>

In agreeing with the district court on this point the appellate court said:

Because we are constrained by the presumption against preemption, we cannot say that the language of section 1334 clearly encompasses state common law. We find support for this determination in Congress' failure to include state common law explicitly within section 1334, as it has in numerous other statutes. Indeed in the absence of a preemption provision encompassing state common law, the Supreme Court has relied generally on principles of implied preemption in evaluating whether a statutory scheme preempts state common law.<sup>83</sup>

## B. Implied Preemption

The district court next considered whether congressional intent to "occupy the field" or an "actual conflict" between the claim and

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79. *Id.*

80. *Id.* at 1155-56.

81. *Id.* at 1155 (quoting *Henningsen v. Bloomfield Motor, Inc.*, 32 N.J. 358, 379, 161 A.2d 69, 81 (1960)).

82. *Id.* at 1156.

83. 789 F.2d at 185-86 (citations omitted).

the Labeling Act impliedly preempted the plaintiff's state law claim.<sup>84</sup> The defendants based their implied preemption arguments on three aspects of the legislative history of the Labeling Act. The district court summarized the defendants' contentions as follows:

First, they [defendants] state that Congress made it absolutely clear that the Act was not meant as a prohibition of cigarette manufacture, sale or use. Citing the legislative history, defendants point to congressional concern with the moral and economic effects of such a prohibition, as well as to evidence that cigarette smoking actually enhances psychological and social well-being. Second, defendants point to Congress' desire to enact a uniform national policy with respect to the relationship between smoking and health, in part in order to protect the aforesaid values. And third . . . defendants [contend] that Congress intended that only the statement prescribed in § 1333 appear on cigarette packages; thus, they argue, no court may impose a greater duty to warn and, indeed, no cigarette company may voluntarily utilize a different warning.<sup>85</sup>

Plaintiff's response to the defendants' arguments was that the legislative history of the Labeling Act simply "assume[d] the continued existence of common law tort actions against cigarette companies," and that "Congress could not have intended and did not intend, to deprive prospective plaintiffs of the remedy at law here sought."<sup>86</sup> In support of their respective positions, both plaintiff and defendants marshalled forth the Act's legislative history.

### 1. *Occupation of the Field*

The district court acknowledged that Congress "intended to occupy a field,"<sup>87</sup> but, after a careful review of the Act's language and legislative history, decided that "the field it occupied does not encompass the common law products liability claims here asserted."<sup>88</sup> The Labeling Act, according to the district court, expressly restricted the occupied field to "cigarette labeling and advertising with respect to any relationship between smoking and health."<sup>89</sup> Since products liability involves issues beyond the scope of this occupied field, and Congress manifested no intent to extend the field to exclude traditional

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84. 593 F. Supp. at 1157.

85. *Id.* (for overview of legislative history of Labeling Act on which defendants relied see 1157-60).

86. *Id.* at 1160. (for overview of legislative history of Labeling Act on which plaintiff relied see 1160-63).

87. *Id.* at 1164.

88. *Id.*

89. *Id.* (quoting 15 U.S.C. § 1331 (1982)).

state law remedies, the district court concluded that implied preemption was improper.<sup>90</sup>

In reviewing the district court's opinion the appellate court agreed that the plaintiffs' state law claim was not preempted by Congress' intention to "occupy the field."<sup>91</sup> The appellate court, on this issue, wrote:

In determining the scope of this field, we observe that the Cipollones' tort action concerns rights and remedies traditionally defined solely by state law. We therefore must adopt a restrained view in evaluating whether Congress intended to supercede [sic] entirely private rights of action such as those at issue here. In light of this constraint, we cannot say that the scheme created by the Act is "so pervasive" or the federal interest involved "so dominant" as to eradicate all of the Cipollones' claims. Nor are we persuaded that the object of the Act and the character of obligations imposed by it reveal a purpose to exert exclusive control over every aspect of the relationship between cigarettes and health.<sup>92</sup>

## 2. *Actual Conflict*

The "conflict" between the district and appellate courts' decisions in *Cipollone* is whether an "actual conflict" exists between state tort law and the Labeling Act. According to the district court, an actual conflict exists "either where compliance with state and federal law is a 'physical impossibility' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"<sup>93</sup>

Noting the two-fold purpose of the Labeling Act,<sup>94</sup> the district court first determined that compliance with both federal and state law was not a "physical impossibility." In rejecting the defendants' argument that state common law may impose labeling requirements on manufacturers inconsistent with the Act, the district court pointed out (1) that common law liability does not impose requirements upon any party, but rather gives the party a choice of continuing in its conduct and risking liability or altering its conduct to reduce such risk; and (2) that the Act did not prohibit the manufacturer from placing additional information in its warning, but only prohibited it from not including the prescribed information. Compliance with both state

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90. *Id.*

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

92. *Id.* (citations omitted).

93. 593 F. Supp. at 1166 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

94. See *supra* text accompanying notes 44-45.

and federal law, the district court concluded, was not a “physical impossibility” for the cigarette manufacturers.<sup>95</sup>

Finally, the district court reasoned that the existence of state common law claims did not stand as an obstacle to the execution of Congress’ intent in passing the Labeling Act. In drawing this conclusion, the district court found these reasons persuasive:

- (1) that state common law claims existed prior to the passage of the Act and were assumed to have survived its implementation,<sup>96</sup>
- (2) that Congress’ intention that the cigarette industry survive and that consumer autonomy be respected is not undermined by the imposition of liability upon cigarette companies,<sup>97</sup> and
- (3) that Congress’ intention to provide uniform labeling practices would not be undermined, since state law tort claims are permitted in other areas where federal labeling is mandated.<sup>98</sup>

Given that the district court could find no “actual conflict” between the state law claims and the Labeling Act, it concluded that the Act did not impliedly preempt such claims.

The appellate court disagreed with the district court and concluded that the purposes of the Act, as stated in section 1331, represent a carefully drawn balance between providing the public with adequate warnings of the health risks associated with cigarette smoking and protecting the interests of the national economy.<sup>99</sup> State common law claims, like those asserted by the Cipollones, have the effect of tipping the Act’s balance of purposes and, consequently, actually conflict with the Act.<sup>100</sup> Therefore, the court held:

- [1] 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 [and] . . .
- [2] that where the success of a state law damage claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages, such claims are preempted as conflicting with the Act.<sup>101</sup>

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95. 593 F. Supp. at 1167-68.

96. *Id.* at 1168.

97. *Id.*

98. *Id.* at 1169.

99. 789 F.2d at 187.

100. *Id.*

101. *Id.* (footnote omitted).



In reaching this decision the appellate court disregarded the Act's legislative history, finding "the language of the Act itself a sufficiently clear expression of congressional intent without resort to the Act's legislative history."<sup>102</sup> Also conspicuously absent from the appellate court's analysis is any meaningful reference to two prior decisions<sup>103</sup> that should have some precedential impact on the court's decision.

The *Cipollone* saga illustrates the problems courts encounter in attempting to capture the ever elusive intent of Congress and the confusion surrounding the preemption issue as it relates to the Labeling Act. The appellate court chose to simply avoid these problems, ignore the confusion, and find in the language of the statute what others could not—a clear intent by Congress to preempt state law claims. Unless the language of the statute supports this decision, one can only conclude that this court has reasoned by judicial fiat. By replacing a well-reasoned district court decision with the dogmatic assertion that one need not look beyond the language of the statute to discover congressional intent, the appellate court has not eliminated but engendered confusion.

## VI. THE CLARIFICATION

In resolving the question of whether Congress intended to preempt state law claims based on failure to warn when it passed the Labeling Act, a court should consider five factors: the state of the law prior to the Act; the language of the statute; the legislative history of the statute; the principle of stare decisis; and the passage of related legislation.

### A. Prior Law

Prior to the passage and subsequent amendment of the Labeling Act, a number of products liability claims based on state common law had been brought against cigarette manufacturers.<sup>104</sup> Included among these were claims on failure to warn.<sup>105</sup>

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102. *Id.* at 186.

103. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062 (1984).

104. *See Edell, supra* note 2, at 90 n.2; *see also Cipollone*, 593 F. Supp. at 1161-62.

105. *Pritchard v. Liggett & Meyers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961), *aff'd on rehearing*, 350 F.2d 479 (3d Cir. 1965), *cert. denied*, 382 U.S. 987 (1966), *modified*, 370 F.2d 95 (3d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967).

## B. Statutory Language

The language of the statute is silent as to the status of state law claims after passage of the Labeling Act.<sup>106</sup> The Labeling Act contains no clause that expressly preempts these claims, nor does it contain a "savings clause" that preserves them.<sup>107</sup>

## C. Legislative History

The legislative history of the Labeling Act reveals that Congress was aware of the existence of state law claims prior to the passage of the Labeling Act.<sup>108</sup> Yet neither the final committee report nor the statute expressly address the issue.<sup>109</sup> However, in *Cipollone*, both plaintiff and defendant marshalled forth the Labeling Act's legislative history in support of their respective positions.<sup>110</sup>

## D. Stare Decisis

Two cases,<sup>111</sup> relied on by the district court in *Cipollone* but not addressed in the appellate court's decision, provide precedential support in favor of disallowing the defendants' preemption defense.

In *Silkwood v. Kerr-McGee Corp.*,<sup>112</sup> the defendant argued that tort claims based on inadequate safety would have a regulatory effect and, consequently, would conflict with Congress' purpose of regulating the field of nuclear safety. The Supreme Court disagreed. Recognizing the tension between the compensatory and regulatory nature of state tort law remedies, the Court decided that Congress assumed that state tort law principles would survive passage of the Price-Anderson Act unless expressly preempted and also decided that Congress intended to stand by both concepts and tolerate whatever tension existed between them.<sup>113</sup> In his dissent, Justice Blackmun, joined by Justice Marshall stated that "[w]hatever compensation standard a State imposes . . . [the defendant] remains free to continue operating under federal standards and to pay for the injury that results."<sup>114</sup> This result, the Court concluded, would neither frustrate nor conflict

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106. 15 U.S.C. §§ 1331-40 (1982 & Supp. 1986).

107. See *supra* text accompanying notes 41-50.

108. 593 F. Supp. at 1162 (citing 111 CONG. REC. 16,543-16,544 (1965)).

109. *Id.*

110. *Id.* at 1159-63.

111. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062 (1984).

112. 464 U.S. 238 (1984).

113. *Id.* at 256.

114. *Id.* at 264 (Blackmun, J., dissenting).

with congressional purposes.<sup>115</sup>

In *Ferebee v. Chevron Chem. Co.*,<sup>116</sup> Ferebee sued Chevron, a producer of the chemical paraquat, for failure to warn of the dangers of this insecticide. The defendant claimed that its compliance with federal labeling laws<sup>117</sup> insulated it from tort liability for failure to warn. The federal statute provided, a "State shall not impose or continue in effect any requirements for labeling . . . in addition to or different from those required under this subchapter."<sup>118</sup> The United States Court of Appeals for the District of Columbia held that state remedies were not inconsistent with the Act, since compliance with both state and federal law was not impossible.<sup>119</sup> The manufacturer, according to the court, could continue to comply with federal law and pay damages to injured plaintiffs or could seek more comprehensive labeling requirements.<sup>120</sup>

*Chevron*, like *Cipollone*, involved a federal warning statute, the absence of an express preemption provision, and a plaintiff claiming inadequate warning. Given these similarities, the appellate court in *Cipollone* should have considered the merits of the *Chevron* decision.

#### E. Related Legislation

On February 27, 1986, Congress enacted the Comprehensive Smokeless Tobacco Health Education Act of 1986.<sup>121</sup> A comparison of the Smokeless Act with the Labeling Act reveals substantial similarities between the two Acts' patterns and purposes. However, section 4406(c) of the Smokeless Act specifically states that "[n]othing in this chapter shall relieve any person from liability at common law or under State statutory law to any other person."<sup>122</sup> The timing of the passage of the Smokeless Act coupled with this "savings clause" prompted one writer to conclude:

The inclusion of subsection (c) in the Smokeless Tobacco Act reflects Congress' view that tort recoveries, based upon an inadequate warning in smokeless tobacco cases, would not "conflict" with the accomplishment of that act's purposes. If that is so, why

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115. *Id.* at 256.

116. 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062 (1984).

117. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq.* (1982).

118. *Id.* at § 136v(b).

119. 736 F.2d at 1541.

120. *Id.*

121. 15 U.S.C. §§ 4401-4408 (Supp. IV 1986). *See also* text accompanying notes 48-50.

122. 15 U.S.C. § 4406(c) (Supp. IV 1986).

should a contrary conclusion be reached regarding similar claims in the cigarette litigation?

When Congress reexamined and reenacted the Cigarette Labeling Act in October 1984, and in August 1985, without amending the preemption provision, the only judicial interpretation on record regarding the impact of tort liability on the accomplishment of the Act's purposes was Judge Sarokin's. This is extremely important, because "Congress is presumed to be aware of judicial interpretation . . . when it reenacts a statute without change." This presumption is further buttressed by the fact that when the Smokeless Tobacco Act was enacted, Judge Hull's decision in *Roysdon v. R.J. Reynolds*, which came to an opposite conclusion on the preemption issue, had been decided. Congress, faced with these conflicting interpretations, felt it necessary to clarify its intent and did so by including subsection (c) in the Smokeless Tobacco Act.<sup>123</sup>

These considerations strongly suggest that the clarity the appellate court in *Cipollone* found in the language of the statute was nothing more than a chimera masquerading as congressional intent. Given that no court has privileged access to the collective mind of Congress, any analysis of the preemption issue that fails to take into account these relevant considerations will appear superficial and ultimately prove unsatisfying. If the circuit courts are truly convinced that Congress intended to deny plaintiffs the right to pursue cigarette companies for injuries caused by their product, then they should provide reasons why this is so.

## VII. THE CORRECTION

Correction of the preemption issue must come either from the United States Supreme Court or Congress. At this point neither option seems very promising.

The plaintiff in *Cipollone* petitioned the Supreme Court for writ of certiorari on four bases:

- (1) that the decision affects the state's authority to provide tort remedies;
- (2) that the decision conflicts with other federal and state court opinions;
- (3) that the decision conflicts with the decision in *Silkwood v. Kerr-McGee Corp.*; and
- (4) that the resolution of the preemption question would promote speedy and consistent determination of the preemption issue in other product liability actions involving cigarettes and other

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123. Edell, *supra* note 2, at 101-03 and n.82-84.

products.<sup>124</sup>

The Court denied the writ.<sup>125</sup> Since then, both the First and Eleventh Circuits have handed down opinions on the preemption issue that are in agreement with the Third Circuit's decision in *Cipollone*.<sup>126</sup> Given this present unanimity of agreement, it is not likely that the Supreme Court will grant certiorari to consider this issue.<sup>127</sup> A contrary decision by one of the remaining circuits would, however, almost surely guarantee that the Supreme Court would hear the issue.

Of course, Congress could resolve the preemption issue by simply declaring its intent in passing the Labeling Act. An amendment to the Labeling Act either expressly preempting or preserving state law claims would certainly clear the air on this issue.<sup>128</sup> Absent a clear statement of legislative intent, it remains the lot of the courts to decide the preemption question.<sup>129</sup>

### VIII. THE CONCLUSION

Ostensibly, a determination by the Supreme Court or a declaration by Congress that the Labeling Act does not preempt state common law tort claims based on inadequacy of warning does not mean that plaintiffs will automatically win. Rather, it means that plaintiffs' cases regarding cigarette manufacturers' failure to adequately warn consumers of the health risks associated with cigarette smoking will be heard. Whether those cases have merit is altogether a different question.<sup>130</sup> This writer suggests that given the language of the Labeling Act, its legislative history, prior precedent, and other related legislation, it would appear that Congress intended for plaintiffs injured by tobacco products to have their day in court. Not only does this result comport with what appears to be the intent of Congress, it also coincides with our sense of right. Absent a showing of good reasons to the

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124. See Note, *supra* note 11, at 911 n.288.

125. 108 S. Ct. 487 (1987).

126. *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987).

127. Apparently, it was the hope that a conflict among the circuits would be the impetus to the Supreme Court's granting a second petition for writ of certiorari. See *Gidmark, A Tobacco Activist Predicts Success By End of '87*, NAT'L. L.J., Dec. 1, 1986, at 9, Col. 4; see Note, *supra* note 11, at 911 n.288.

128. See Note, *Tobacco Under Fire: Developments in Judicial Responses To Cigarette Smoking Injuries*, 36 CATH. U.L. REV. 643, 665 (1987).

129. *Id.* at 665 n.164.

130. For a discussion of the merits of plaintiffs' cases based on the theory of inadequacy of "warning," see *Edell, supra* note 2, at 102.

contrary, these injured plaintiffs deserve the opportunity to present their best case against the tobacco companies.

Thus far, the appellate courts' decisions have only had the effect of depriving plaintiffs with tobacco related injuries from pursuing claims against cigarette companies based on failure to warn. It is possible, however, that these decisions might have a spillover effect into other areas of products liability litigation. The recognition of this danger prompted one legal scholar to write:

It is the broader ramifications of the Third Circuit's ruling that are most ominous. That court's view of preemption has the burning force of a prairie fire, and it is hard to see what structures of state compensation would survive the ensuing conflagration. Food, drugs, cosmetics and toxic substances are all governed in some manner by Federal warning laws. If innocent people are injured because of inadequate warnings, or because advertisements downplay the product's dangers, are all of them barred by Federal law from pursuing tort claims in state court? If so, the circuit court's ruling is cause for a knowing snicker in corporate board rooms across the country.

It is true that such litigation is highly controversial. Like the cigarette cases, the food and drug cases have been criticized by some as excessive and wasteful. But in our Federal system, reform of litigious excesses should ordinarily come from the states. If state legislatures and courts decide to act to limit or constrain recovery, that is their prerogative. For a Federal appellate court to draw a cloak of immunity over such cases is to overstep its place in our Federal scheme.<sup>131</sup>

For now, at least the Cipollones, Palmers, Roysdons, and Stephensens have taken their "last puff."<sup>132</sup> It would appear that in doing so they have breathed new life into an old giant.

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131. Tribe, *Federalism With Smoke and Mirrors*, THE NATION 788, 790 (June 7, 1986).

132. See *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 629 (1st Cir. 1987), where the court appropriately designates its holding as "The Last Puff."

