Warning: New Jersey Supreme Court has Determined that Compliance with the Federal Cigarette Labeling and Advertising Act May Be Hazardous to the Tobacco Industry

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NOTES

WARNING: NEW JERSEY SUPREME COURT HAS DETERMINED THAT COMPLIANCE WITH THE FEDERAL CIGARETTE LABELING AND ADVERTISING ACT MAY BE HAZARDOUS TO THE TOBACCO INDUSTRY

In 1964, the United States Surgeon General released the first report scientifically linking cigarette smoking to lung cancer, bronchitis and emphysema.¹ In response,² some states adopted

cigarette packaging warning label requirements. Given the potential for inconsistent state regulations, Congress passed the Federal Cigarette Labeling and Advertising Act ("the Act") in 1965, in an attempt to establish uniformity. The Act requires that all ciga-


8 See Palmer, 825 F.2d at 622 (public response to Surgeon General's report was immediate and vocal); Cipollone v. Liggett Group, Inc., 789 F.2d 181, 184 (3d Cir. 1986) (members of federal and state government aware "cigarette smoking posed a significant health threat to Americans"), cert. denied, 479 U.S. 1043 (1987); Stein, supra note 1, at 643 (Surgeon General's report and dangerous effects of smoking highly publicized); Crist & Majoras, supra note 1, at 557 (same).

9 See Palmer, 825 F.2d at 622. After the health hazards of cigarette smoking were revealed to the public, several states adopted warning label requirements in order to protect and inform the citizens of their respective states. See id. "For example, the New York State legislature adopted the following label in June 1965: 'WARNING: Excessive Use Is Dangerous To Health.'" Id. at 622 n.1 (citing 1965 N.Y. Laws 470). See also Crist & Majoras, supra note 1, at 560 (states proposed varied regulations thereby spurring congressional involvement).

The warning label requirements created by the states were enacted against a background of litigation resulting from claims that smoking caused illness and/or death. See Wegman, Cigarettes and Health, 51 CORNELL L. REV. 678, 697-703 (1966). The 1950's and 1960's saw the first wave of litigation "none of which was resolved adversely to the [tobacco] manufacturer." Crist & Majoras, supra note 1, at 552. Courts and juries were simply hostile toward claims by smokers that others were responsible for their own choice to smoke. See id.

As late as 1986, one commentator stated that there was "little likelihood of waging a successful civil action against a cigarette manufacturer for a smoking related illness." Note, Liability of Cigarette Manufacturers for Smoking Induced Illnesses and Death, 18 RUTGERS L. REV. 165, 165 (1986). In fact, the record of defending such actions was impressive:

The tobacco industry proudly points to the fact that it has never paid a single dollar to a plaintiff for a smoking-related illness, either as part of an out of court settlement or as the result of a court ordered judgment. This phenomenal success rate is the envy of other industries. No other major manufacturer can boast of such a blanket immunity from litigation.

Id.

Subsequent to the first round of litigation, strict products liability theories were utilized in an attempt to reverse the successful defense of cigarette based claims. See Crist & Majoras, supra note 1, at 552. "[W]hat is new is the evolution of product liability law which now provides more liberal theories of recovery." Id. (quoting Edell, Warnings To Cigarette Manufacturers: This Litigation May Be Hazardous to Your Health, 1 PRODUCTS LIABILITY COMMENTARY & CASES (Callahan & Co. 1984)). However, as one authority observed, "[g]iven the present dimensions of products liability law, the rule of nonliability will probably continue." Id. (citing Garner, Cigarette Dependency and Civil Liability: A Modest Proposal, 53 S. CAL. L. REV. 1423, 1424-25 (1980)). The debate over state tort liability exists during a time when Congress has not prohibited production, sales or consumption of tobacco products. See Comment, The Liability of Cigarette Manufacturers for Lung Cancer: An Analysis of the Federal Cigarette Labeling and Advertising Act and Preemption of Strict Liability in Tort Against Cigarette Manufacturers, 76 KY. L. J. 569, 574 (1987-88).

Cigarette Labeling and Advertising Act

Cigarette packages and advertisements bear a congressionally mandated warning label in order to inform the public about the health hazards associated with smoking, while protecting commerce and the national economy through uniformity. The Act preempts state law "with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity


SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.
SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks To Your Health.
SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result In Fetal Injury, Premature Birth, And Low Birth Weight.
SURGEON GENERAL'S WARNING: Cigarette Smoking Contains Carbon Monoxide.


It is the policy of 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 about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and

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

Id.
with the [Act's] provisions."

While the regulation of health and safety traditionally has been a state function,\(^8\) federal legislation can preempt state law.\(^9\) Courts disagree as to whether the Act preempts the state common law tort of inadequate warning.\(^10\) A majority of the courts that have

\(^7\) 15 U.S.C. § 1334 (1988). This section, entitled "Preemption" 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 conformity with the provisions of this chapter.

\(^8\) See U.S. CONST. amend. X, providing: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Id.


\(^9\) See infra notes 14-21 and accompanying text (discussion of preemption law).


In International Paper, the Court found that although there was a savings clause in the Clean Water Act preserving state common law remedies, the application of numerous state
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examined this issue have found preemption of the state common law. However, recently, in Dewey v. R.J. Reynolds Tobacco Co., the New Jersey Supreme Court held that the Act did not bar such a claim.

Part I of this Note will discuss the statutory construction of the Act, reviewing both its language and legislative history. Part II will examine how prior courts had been consistent in denying relief for a common law claim of inadequate warning, and discuss the recent New Jersey decision in Dewey v. R.J. Reynolds Tobacco Co. Part III will synthesize cases involving the areas of federal preemption which have been decided by New York courts in an attempt to predict the future viability of inadequate warning claims under New York law. It will also serve to illustrate the kind of preemption analysis facing plaintiff’s attorneys throughout the country. Finally, this Note will suggest that the analysis of the Dewey court was faulty and that the decision will not necessarily pave the way for future claims of inadequate warning under state common law.

laws on a particular source would result in uncertainty, thereby undermining the Act’s goals of uniformity and efficiency. 479 U.S. at 496.

"Preemption often hinges 'on . . . question[s] of statutory construction and interpretation.'" Dewey, 121 N.J. at 78, 577 A.2d at 1243 (citing Palmer v. Liggett Group, 825 F.2d 620, 623 (1st Cir. 1987)). As such, it is submitted that the interpretation of legislation by different courts will necessarily vary as statutory interpretation involves an element of subjectivity. See Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (no “universal pattern to determine the meaning and purpose of every act of Congress”).

For a general discussion of the inconsistent nature of statutory interpretation, see Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 407, 407 (1989) (“Because [statutory] interpretation inevitably involves the application of ‘background norms’ — often controversial, value-laden, and not found in any text — the traditional theories [explaining statutory interpretation] are incomplete.”).


13 See id. at 94, 577 A.2d at 1251.
I. Statutory Construction

A. History of Preemption

Congress has the power, pursuant to the supremacy clause of the United States Constitution,\textsuperscript{14} to enact federal legislation which preempts state common and statutory law.\textsuperscript{18} Preemption occurs when it is the express intent of Congress\textsuperscript{16} or when it can be implied that Congress intended to pervasively "occupy the field."\textsuperscript{17}

\textsuperscript{14} U.S. Const., art VI, cl. 2. The supremacy clause provides:

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

Id.

\textsuperscript{15} See Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368 (1986) (supremacy clause provides Congress with power to preempt state law); Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 152 (1982) (preemption doctrine rooted in supremacy clause); Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981). "The underlying rationale of the preemption doctrine, as stated more than a century and a half ago, is that the Supremacy Clause invalidates state laws that 'interfere with or are contrary to, the laws of Congress . . . .'" Id. (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 211 (1824)). See also Edell & Walters, supra note 8, at 605-13 (history of preemption); Note, The Breadth of Section 514 of ERISA and the Preemptability of State Antisubrogation Laws, 5 St. John's J. Legal Comment 29, 32-34 (1989) (same).

While the supremacy clause gives Congress the power to enact federal legislation that preempts state law, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." Maryland v. Louisiana, 451 U.S. 725, 746 (1981).

\textsuperscript{16} See Hillsborough County Fla. v. Automated Medical Laboratories, Inc., 471 U.S. 707, 718 (1985) (Congress empowered to displace state law by express terms); Fidelity Fed. Sav., 458 U.S. at 152-53 (preemption may be express or implied); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (state laws must fall when Congress explicitly provides for preemption in pertinent statute); Crist & Majoras, supra note 1, at 568 (general discussion of express preemption).

\textsuperscript{17} See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). The Court proposed several ways by which congressional intent to preempt state law may be inferred. Id.

The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or 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. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objectives of the federal statute.

Id. (citations omitted). See Hirsch, Toward A New View of Federal Preemption, 1972 U. Ill. L.F. 515, 529 (when federal act is found to occupy particular field, Court has "regularly declared that the states are precluded from regulating that subject in any way"); Rothschild, A Proposed "Tonic" With Florida Lime to Celebrate Our New Federalism: How to Deal With The "Headache" Of Preemption, 38 U. Miami L. Rev. 829, 844 (1984) (example of clear legislative intent to preempt).
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The preemptive effect of a federal law may be triggered when the state law at issue conflicts with the federal law. The conflict must be "actual" and not merely "hypothetical" or "potential." An actual conflict is present when compliance with both laws is impossible, or when the state law stands as an obstacle to the federal law’s congressional purpose.

B. Plain Meaning

The two stated purposes of the Federal Cigarette Labeling and Advertising Act provide for adequately informing the public of the health hazards associated with smoking and protecting commerce and the national economy. Congress established national warning label requirements for all cigarette packages and adver-

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The Court, in Jones v. Rath Packing Co., 430 U.S. 519 (1977), points out that in order to determine whether a federal law and state law are in actual conflict, consideration must be given to the relationship "between state and federal laws as they are interpreted and applied, not merely as they are written." Id. at 526.

19 See infra notes 33 and 90.


21 See Hines v. Davidowitz, 312 U.S. 52, 67 (1941). The Court acknowledges that there is no distinct formula for determining congressional intent. See id. "[The Court's] primary function is to determine whether, under the circumstances of . . . [the] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" Id.; see, e.g., Michigan Canners & Freezers Ass'n, Inc. v. Agricultural Mkt. & Bargaining Bd., 467 U.S. 461, 469 (1984). In Michigan Canners, because the State of Michigan's Agricultural Marketing and Bargaining Act authorized producers' associations to engage in conduct that the Federal Agricultural Fair Practices Act of 1967 forbids, the Court found it represented an obstacle to the Federal Act and was therefore preempted. See id. at 478.

22 See supra note 6 (congressional declaration of policy).
tisements and ensured uniformity of the warning labels by expressly preempts the field. The Act's preemption provision provides that no additional statements relating to smoking and health shall be required on any cigarette package. In addition, the preemption provision specifically restricts state regulatory power by providing that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with . . . [the Act]."

Congress' failure to define state law has caused a dispute as to the breadth of the preemption provision. Historically, states have maintained the right to regulate matters relating to the health, safety and welfare of their citizens. In order to prevent a state from regulating in these areas, there must be a clear and definite manifestation by Congress to preempt such regulations. When determining whether Congress has preempted a state regulation, courts recognize a presumption against preemption. Arguably, "State law" is not a clear manifestation by Congress to preempt both statutory and common law, and therefore, a court

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23 See supra note 6 (Act's purpose). See also Palmer v. Liggett Group, Inc., 825 F.2d 620, 622 (1st Cir. 1987) (Congress set up uniform, nationally consistent system of cigarette warning labels to avoid conflicting state regulations); H.R. REP. No. 449, 89th Cong., 1st Sess. 1, reprinted in 1965 U.S. CODE CONG. & ADMIN. NEWS 2350, 2352 (Act's legislative history).

24 See Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 83, 577 A.2d 1239, 1245-46 (1990). "Although Congress clearly intended to occupy a field, as evidenced in both the preemption provision and the statement-of-purpose section of the Act, the court found that the scheme created is not 'so pervasive' nor the federal interest 'so dominant' to eradicate all [common law] claims." Id. (quoting Cipollone v. Liggett Group, Inc., 789 F.2d 181, 186 (3d Cir. 1986), cert. denied, 479 U.S. 1043 (1978)).

25 See supra note 7 (Act's preemption provision).

26 See supra note 7 (emphasis added).

27 See supra note 10 (comparing Cipollone and Dewey).

28 See supra note 8 (cases finding health and safety concerns traditionally within state police power).

29 See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear manifest purpose of Congress."). See also Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963) (when Congress seeks to preempt part of commerce it must be "unmistakably . . . ordained"); Reid v. Colorado, 187 U.S. 137, 148 (1902) (same).

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may conclude that the presumption has not been overcome.\textsuperscript{31} Additionally, the United States Supreme Court has suggested that Congress may be willing to tolerate the incidental regulatory pressure caused by state tort law.\textsuperscript{32} However, as a practical matter, whenever state courts determine that the federally mandated label is inadequate and impose penalties pursuant thereto, there is a conflict, neither "hypothetical" nor "potential."\textsuperscript{33}

Common law standards developed through the case law of the various states would result in multifarious labeling requirements which manufacturers would be compelled to follow in order to avoid liability in the future.\textsuperscript{34} That is, if state common law actions were permitted, manufacturers would be forced to amend their warning labels to comply with state common law standards, or pay damages each time a plaintiff brings a state action for inadequate warning.\textsuperscript{35} Such indirect regulation, through damage awards, can be as effective as direct statutory regulation.\textsuperscript{36}

\textsuperscript{33} Rice v. Norman Williams Co., 458 U.S. 654, 659 (1981) ("actual conflict" cannot be "hypothetical" or "potential").
\textsuperscript{34} See Palmer v. Liggett Group, Inc., 825 F.2d 620, 627 (1st Cir. 1987) (when damages awarded and verdict rendered against manufacturers, it compels manufacturer to conform to requirement promulgated by jury); Cipollone v. Liggett Group, Inc., 789 F.2d 181, 187 (3d Cir. 1986) ("duties imposed through state common law damage actions have the effect of requirements that are capable of creating an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."); cert. denied, 479 U.S. 1043 (1978).

Congress intended to avoid multifarious labeling requirements so as to minimize confusion in the industry. See H.R. REP. No. 449, 89th Cong., 1st Sess. 1, reprinted in 1965 U.S. CODE CONG. & ADMIN. NEWS 2350, 2352 (labeling requirements should be uniform, "otherwise, a multiplicity of State and local regulations pertaining to labeling of cigarette packages could create chaotic marketing conditions and consumer confusion"); Comment, supra note 3, at 578 (state law damage actions "would conflict with Congress' intent to have uniform warnings").

\textsuperscript{36} See supra note 34 (common law actions result in imposition of requirements).
Additionally, had Congress intended to preserve common law tort actions it could have expressly done so in the statute. For example, the Comprehensive Smokeless Tobacco Health Education Act of 1986 also requires manufacturers of smokeless tobacco to place warning labels on their products. In that Act, Congress made a deliberate distinction between statutory and common law, preempting only statutory law. Further, the Act provided that "[n]othing in this chapter shall relieve any person from liability at common-law or under State statutory law to any other person." It is submitted that Congress' failure to expressly preserve common law tort actions in the Federal Cigarette Labeling and Advertising Act evinces an intent to preempt both statutory and common law.

While Congress was focusing on developing a uniform national warning label requirement, it also had to consider the most effective means of informing the public of the health consequences related to cigarette smoking. It has been argued that Congress achieved a "carefully wrought balance" of purposes by mandating the inclusion of warning labels on cigarette packages, providing the precise wording to be used and expressly preempting any additional state requirements or prohibitions. Therefore, "State

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90 See 15 U.S.C. § 4406(b) (1988). Instead of using the general term "State law" in the preemption provision, Congress chose the words "State or local statute or regulation." Id.


92 See supra note 6 (stating Act's purpose and policy).

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law" must include both statutory and common law, as either type of regulation would offset the balance of interests Congress sought to protect.44

This balancing theory can be challenged however, on the ground that the statute also provides that the national economy is to be protected only to an extent "consistent with" the policy of warning the public of potential health hazards.45 Rather than an equilibrium between the two stated purposes, the implication is that the Act's primary objective is public health.46

C. Legislative History

As previously stated, the Federal Cigarette Labeling and Advertising Act was adopted after substantial research uncovered the many health hazards associated with cigarette smoking.48 The House Report accompanying the bill reveals that the principal purpose of the Act is to provide consumers with knowledge regarding these hazards so that they may make an informed choice.49 In addition, witnesses who appeared before the Surgeon General's Advisory Committee recognized the need for uniform


45 See supra notes 34-36 and accompanying text (regulation through damage awards can be as effective as regulation by state statutory law).

46 See Dewey, 121 N.J. at 87, 577 A.2d at 1248. "It is significant that the second goal, .... must be achieved 'consistent with' and not 'to the detriment of' the first and principal goal ...." Id. (citing H.R. Rep. No. 449, 89th Cong., 1st Sess. 1, reprinted in 1965 U.S. CODE & CONG. ADMIN. NEWS 2350).

47 See supra note 46 and accompanying text (Act's principal purpose is public health). In addition, as to the design defect claim, the court, in response to defendants' insistance upon congressionally struck balance, stated: "we find no legislative or judicial support for the proposition that Congress engaged in its own risk-utility analysis ...." Dewey, 121 N.J. at 93, 577 A.2d at 1251.

48 See supra notes 1-4 and accompanying text (discussing history of Act).

49 See H.R. Rep. No. 449, 89th Cong., 1st Sess. 1, reprinted in 1965 U.S. CODE CONG. & ADMIN. NEWS 2350, 2552. The committee believed that an individual has the "right to choose to smoke or not to smoke,"as well as the "right to know that smoking may be hazardous to his health." Id.
labeling requirements. Multifarious labeling requirements for consumer products sold in interstate commerce would result in substantial economic pressures affecting cigarette production, manufacturing and distribution, related employment, and generation of tax revenues. The focus on conflicting concerns within the legislative history supports the conclusion that with the adoption of the Act, Congress achieved a "carefully wrought balance" of the competing goals, not to be "superseded by the views of a single state."

Furthermore, as to the proper interpretation of "State law," in 1970, an amendment which would have expressly excluded state common law from the Act's preemptive scope was rejected by Congress. Thus, it is suggested that Congress retained the term "State law" in order to include common law and statutory law within the purview of the Act's preemption provision. In 1984, this same amendment was rejected a second time.

II. CASE LAW

A. The Prevailing Interpretation — Cipollone v. Ligget Group, Inc.

The United States Court of Appeals for the Third Circuit, in Cipollone v. Ligget Group, Inc., was the first to rule on the preemptive scope of the Federal Cigarette Labeling and Advertising Act. In Cipollone, the court held that state tort claims challenging the adequacy of warnings appearing on cigarette packages and

See id. at 2352. "There was general agreement among the witnesses appearing before the committee, . . . that if the committee took any action . . . such a requirement as to labeling should be uniform; . . . ." Id. (emphasis added).

See id. "The problem had broad implications . . . and involves far-reaching consequences for a number of sectors of our economy." Id.

See id. at 2354.

Palmer v. Liggett Group, Inc., 825 F.2d 620, 626 (1st Cir. 1987). See also supra note 43 (referring to cases finding Congress intended to balance Act's goals).


See Crist & Majoras, supra note 1, at 563-64 (citing, H.R. REP. No. 805, 98th Cong., 2d Sess. (1984)).


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in advertisements are preempted by the Act.\(^6\)

Initially, the *Cipollone* court examined the purposes of the Act as set forth in section 1331.\(^6\) The court concluded that the mandatory warning label was the means by which Congress struck a balance between the need to inform the public of the hazards of cigarette smoking and the need to protect commerce and the national economy.\(^6\) Accordingly, it held "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."\(^6\) Such claims would upset the congressionally set balance of purposes, and therefore, actually conflict with the Act.\(^6\)

Other federal courts of appeal faced with this issue have adopted the decision and reasoning of *Cipollone*.\(^6\) They agree that a claim based on failure to provide adequate warning is preempted by the Act.\(^6\) They also agree that cigarette manufacturers are not completely immune from tort liability.\(^6\) For example, a strict liability claim was not preempted in a later proceeding in *Cipollone*, since a risk-utility analysis does not deal directly with the

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\(^6\) See *Cipollone*, 789 F.2d at 187.

\(^6\) See supra note 6 (congressional declaration of policy and purpose of Act).

\(^6\) See *Cipollone*, 789 F.2d at 187.

\(^6\) *Id.*

\(^6\) See *id.* The court refers to several opinions where the Supreme Court recognizes "the regulatory effect of state law damage claims and their potential for frustrating congressional objectives." *Id.* See, e.g., *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) ("The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."). "Applying this principle, [the court concluded] that claims relating to smoking and health that result in liability for non-compliance with warning, advertisement, and promotion obligations other than those prescribed in the Act have the effect of tipping the Act's balance of purposes and therefore actually conflict with the Act." *Cipollone*, 789 F.2d at 187.

\(^6\) See *Pennington v. Vistron Corp.*, 876 F.2d 414, 420 (5th Cir. 1989) ("We join our sister circuits in holding that this claim [failure to provide adequate warning] is preempted."); *Raysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 234 (6th Cir. 1988) ("We agree with the Third Circuit . . . ."); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 625 (1st Cir. 1987) (same); *Stephen v. American Brands, Inc.* 825 F.2d 312, 315 (11th Cir. 1987) (same).

\(^6\) See supra note 11 and accompanying text (cases holding failure to warn claim preempted).

\(^6\) See *Cipollone*, 789 F.2d at 186 (Act does not eradicate all plaintiff's claims). The court preempted only those claims in "actual conflict" with the Act. *Id.* at 187.
advertising of cigarettes.\textsuperscript{66} Further, the Fifth and Sixth Circuits held that strict liability claims, applying the unreasonably dangerous standard, were not preempted by the Act.\textsuperscript{67} The First and Eleventh Circuit holdings were limited to failure to warn claims, since those courts did not address other theories of tort liability.\textsuperscript{68}

Similarly, at the state level, the Supreme Court of Minnesota, in \textit{Forster v. R.J. Reynolds Tobacco Co.},\textsuperscript{69} agreed with the above-mentioned circuits, that failure to warn claims directly conflict with the Act's purpose of "avoiding diverse, nonuniform, and confusing cigarette labeling and advertising regulations."\textsuperscript{70} However, the \textit{Forster} court did recognize that the cigarette manufacturer's advertising practices should not be immune from prosecution, stating that the Act does not provide a "license to lie."\textsuperscript{71} Thus, a misrepresentation claim, for example, is not preempted because the challenge is not to the adequacy of the federal warning, but to the veracity of the manufacturer's promotional statements.\textsuperscript{72}

\textsuperscript{66} See \textit{Cipollone v. Ligget Group, Inc.}, 893 F.2d 541, 582 n.52 (3d Cir. 1990), cert. granted, 111 S. Ct. 1386 (1991). The court found that a risk-utility claim is not preempted since such a claim "involves the basic decision to market the product," rather than cigarette advertising and promotional activity. \textit{Id.}

\textsuperscript{67} See \textit{Pennington}, 876 F.2d at 424; \textit{Roysdon}, 849 F.2d at 236. In \textit{Pennington}, the court found that the Act preempted state tort claims relating to cigarette labeling and promotional activities. \textit{Pennington}, 876 F.2d at 423. However, the Act was not so pervasive as to eliminate plaintiff's claim that cigarettes are unreasonably dangerous per se. \textit{Id.} Nevertheless, the court granted defendant summary judgment on the ground that plaintiff failed to create a substantial issue of fact as to an essential element of her cause of action; namely that decedent's cancer was caused by a defect in defendant company's cigarettes. \textit{See id.} at 427.

Similarly, in \textit{Roysdon}, plaintiff's claim that defendant's cigarettes were defective and unreasonably dangerous never got to the jury. \textit{See Roysdon}, 849 F.2d at 236. The court found that the health risks associated with smoking could be considered part of common knowledge and therefore, there was no issue of fact for the jury to decide. \textit{See id.}

\textsuperscript{68} See \textit{Palmer}, 825 F.2d at 629 ("state-based claim of inadequate warning preempted . . . by Act"); \textit{Stephen}, 825 F.2d at 313 (adopted \textit{Cipollone} decision but remanded case for discussion of plaintiff's various claims).

\textsuperscript{69} 437 N.W.2d 655 (Minn. 1989).

\textsuperscript{70} \textit{Id.} at 660.

\textsuperscript{71} \textit{Id.} at 662. The court found that plaintiff's cause of action for intentional misrepresentation was not preempted since such a claim is based on "affirmative statements made which are allegedly untrue." \textit{Id.} This is different, the court notes, from "fraudulent concealment of information which would really be a variation of the duty to warn and hence preempted." \textit{Id.}

\textsuperscript{72} \textit{See supra} note 71 (explaining difference between misrepresentation and fraudulent concealment).
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B. A Divergent Interpretation — Dewey v. R.J. Reynolds Tobacco Co.

Recently, in *Dewey v. R.J. Reynolds Tobacco Co.*, the Supreme Court of New Jersey held that the Act does not preempt state common law tort actions for failure to warn, fraud, misrepresentation or design defect. While the court acknowledged that the Act expressly prohibited any further state legislation concerning warning labels, it found that Congress neither expressly nor impliedly intended to preempt state common law tort actions.

In *Dewey*, plaintiff sued several tobacco companies alleging that her husband developed and later died from lung cancer, as a result of smoking defendants' cigarettes. The trial court upheld plaintiff's design defect claim, but dismissed the claims for fail-

79  See id. at 94, 577 A.2d at 1251.
80 The *Dewey* court pointed out that preemption of traditional state matters is not acceptable "unless it was the clear and manifest purpose of Congress."  Id. at 85, 577 A.2d at 1247 (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 (1963)). The court found no such intent by Congress.  See id. at 94, 577 A.2d at 1251.
81  See id. at 82-90, 577 A.2d at 1245-49. Although the court does not directly state that the Act explicitly prohibits additional state-imposed warnings, it can be inferred throughout the opinion.  See id. First, the court examined the *Cipollone* decision which explained that the Act's "preemption provision explicitly prohibits states . . . from requiring any additional warning . . .."  Id. at 82, 577 A.2d at 1245. The *Dewey* court implicitly agreed with this statement.  See id. at 85-88, 577 A.2d at 1247-48. The difference between the two opinions was rooted in whether or not common law tort actions were in actual conflict with the Act and thereby preempted.  See id. at 86, 577 A.2d at 1247. Moreover, the *Dewey* court implicitly recognized that regulation, in the form of injunctive or declaratory relief, was prohibited by the Act.  See id. at 90, 577 A.2d at 1249.
83  See *Dewey*, at 73, 577 A.2d at 1241. Claire Dewey filed suit, individually and as executrix of her husband's estate, against defendants R.J. Reynolds Tobacco Co., R.J. Reynolds Industries Inc., American Brands, Inc., and Brown & Williamson Tobacco Co.  See id. at 73, 577 A.2d at 1240-41. Brown & Williamson moved for summary judgment claiming that plaintiff's claims were preempted by the Act and that the complaint failed to state a cause of action under New Jersey substantive law.  See id.
84  See id. at 356, 523 A.2d at 717. Plaintiff's design defect claim was not preempted, as it does not necessarily assert that the cigarette manufacturer "bears any duty to warn."  Id. When a risk-utility analysis reveals that a product is unavoidably unsafe, "manufacturers cannot insulate themselves from liability merely by placing warnings on their products."  Id. at 357, 523 A.2d at 717 (citing O'Brien v. Muskin Corp., 94 N.J. 169, 183, 463 A.2d 298, 307 (1983)). As such, the court believed that plaintiff should be given the opportunity to prove the risks posed by cigarette use outweigh their usefulness.  See id. at 357-58, 523 A.2d
ure to warn, fraud and misrepresentation in advertising based on the ground that they were preempted by the Act.\textsuperscript{79} The dismissal of the claims was predicated upon the belief that the court was bound by the \textit{Cipollone} decision.\textsuperscript{80} In allowing the claim for design defect, the court asserted that "\textit{Cipollone} made clear that the regulatory scheme of the [cigarette] act and the federal interest involved was not so pervasive as to preclude all tort remedies which a plaintiff in smoking and health-related litigation may have under state law."\textsuperscript{81} The case was affirmed on appeal,\textsuperscript{82} but subsequently reversed by New Jersey's highest court.\textsuperscript{83}

The New Jersey Supreme Court found that although the Third Circuit's decision was to be accorded due respect,\textsuperscript{84} it reasoned at 717. Additionally, plaintiff did not have to prove the existence of a safer alternative, since a jury may conclude that the risks outweigh their utility. \textit{See id.}

On appeal, the appellate division affirmed the trial court's findings, subject to modifications made necessary by intervening law. \textit{See Dewey} v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 74, 577 A.2d 1239, 1241 (1990). The appellate division concluded, pursuant to comment i of the \textit{Restatement of Torts} § 402A, that the jury should not weigh the risks and utility inherent in cigarette smoking, since the dangers were within the contemplation of decedent as an ordinary consumer. \textit{See id.} at 74-75, 577 A.2d at 1241-42. However, plaintiff was entitled to present evidence regarding alternative design pertaining to defendant's cigarettes. \textit{See id.} at 75, 577 A.2d at 1242.


\textsuperscript{80} \textit{See Dewey}, 216 N.J. Super. at 353-54, 523 A.2d at 715. The trial court determined that it was bound by the Third Circuit's decision in \textit{Cipollone}, since "New Jersey courts have long adhered to the principle that when confronted with the interpretation and application of a federal statute, federal decisional law is binding upon the state court." \textit{Id.} at 353, 523 A.2d at 712 (citing Southern Pac. Co. v. Wheaton Brass Works, 5 N.J. 594, 76 A.2d 890 (1950), cert. denied, 341 U.S. 904 (1951)). Additionally, while there was dispute among federal district courts as to the preemptive effect of the Act on state common law tort actions, there was no such conflict among the federal circuit courts, as the Third Circuit's decision was the sole determination on this level. \textit{Id.} at 353-54, 523 A.2d at 712. Since this decision was the highest judicial authority at that time, the trial court found themselves bound by the Third Circuit's construction of the Act. \textit{Id.} at 354, 523 A.2d at 712.

\textsuperscript{81} \textit{Dewey}, 121 N.J. at 74, 577 A.2d at 1241 (1990). The trial court further noted that a plaintiff could pursue a design-defect claim by showing, under the "risk-utility" test, that the risks posed by cigarettes outweigh their utility. \textit{See id. See supra} notes 79-80 (discussing trial court's rationale).

\textsuperscript{82} \textit{See Dewey}, 121 N.J. at 74, 577 A.2d at 1241. \textit{See supra} note 79 (discussing appellate division modifications of trial court holding).

\textsuperscript{83} \textit{See Dewey}, 121 N.J. at 100, 577 A.2d at 1255.

\textsuperscript{84} \textit{See Id.}, 121 N.J. at 80, 577 A.2d at 1244. The \textit{Dewey} court found that the principle of "judicial comity" applied. \textit{See id.} "In general, principle of 'comity' is that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect." \textit{Black's Law Dictionary} 242 (5th ed. 1979). The court pointed out that judicial comity discourages
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that it was not bound by the decision because a lower federal court and a state court occupy coordinate positions in the judicial hierarchy when determining federal questions. Thus, the New Jersey Supreme Court undertook an independent analysis, examining the Act and the power of Congress, pursuant to the supremacy clause, to enact federal legislation which preempts state common and statutory law.

The court found no express congressional intent to preempt state common law tort actions, nor would it infer such intent in the absence of an unambiguous mandate, since this is an area traditionally defined by state law. Additionally, it found no indication that compliance with both the federal and state law was impossible. The court then examined whether the state law created an obstacle, thereby causing an actual conflict and frustrating the purpose of the Act. Essential to the court's holding was its find-
ing that, based on the Act's plain meaning and legislative history, the "principal purpose" was informing the public, while protecting commerce and the national economy was of secondary concern. The court focused on the language of the Act which provided that protection of commerce and the economy may be achieved only when "consistent with" protecting public welfare. The court thereby rejected the court's argument in Cipollone that the warning label, as mandated by the Act, represented a congressionally created balance between the Act's two purposes, which state tort claims would upset.

Instead, the New Jersey Supreme Court reasoned that a state common law tort action would further the primary goal of adequately informing the public, while any regulatory effect stemming from a damage claim would be merely incidental, and

1108 (4th Cir.), cert. denied, 488 U.S. 908 (1988). A court must first consider the purposes of the federal law in question and then assess the effect of state law on those purposes. See id. at 87, 577 A.2d at 1247. The effect, or conflict, "must be more than 'hypothetical' or 'potential'". Id. at 87, 577 A.2d at 1247-48 (citing Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982)).

91 See Caminetti v. United States, 242 U.S. 470, 485 (1917). The Caminetti Court stated that the meaning of a statute must first be sought in the language of the Act, "and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms." Id.

92 See Dewey, 121 N.J. at 87, 577 A.2d at 1248. See also H.R. REP. No. 449, 89th Cong., 1st Sess. 1, reprinted in 1965 U.S. CODE CONG. & ADMIN. NEWS 2350, 2350. The House Report states that the "[p]rincipal purpose of the bill is to provide adequate warning to the public of the potential hazards of cigarette smoking by requiring" warning labels. Id. But see U.S. CODE CONG. & ADMIN. News at 2354. The description of the bill, includes as its policy informing the public and protecting commerce and the national economy. See id. The language of the Act also provides for this dual purpose, placing no particular emphasis on either of the stated goals. See 15 U.S.C. § 1331 (1988) (declaration of Act's policy and purpose).

93 See Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 87, 577 A.2d 1239, 1248 (1990) (second goal must be achieved in manner "consistent with" first and principal goal).

94 See id. See also supra notes 46-47 and accompanying text (Dewey favors public awareness).

95 See supra note 92-93 and accompanying text (Act's principal purpose is public health; no evidence of balancing). But see supra notes 59-62 and accompanying text (discussing Cipollone court's analysis).

96 See Dewey, 121 N.J. at 87-88, 577 A.2d at 1248 (common law tort remedies will result in further information to public).

97 See id. at 90, 577 A.2d at 1249 ("Defendants overstate the regulatory pressure that state-law damage claims would generate"); infra note 100 (how manufacturers may alter conduct in response to judgment of liability).

The court also points out that state tort claims "advance a substantial goal apart from regulating behavior: to provide compensation to those injured by deleterious products when that result is consistent with public policy." Dewey, 69 N.J. at 90, 577 A.2d at 1249.
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therefore, not impair the goal of uniformity necessary for the protection of commercial and economic welfare. The court emphasized that exposure to liability, not in the form of injunctive or declaratory relief, does not dictate additional labeling requirements, and therefore, the Act's prohibition against further regulation is not breached. For example, a tobacco company may respond to state-imposed obligations by modifying its warning label, but it is not compelled to do so. Furthermore, the court noted that the Supreme Court of the United States had "suggest[ed] that Congress may be willing to tolerate the regulatory consequences of the application of state tort law even where direct state regulation is preempted." Finally, the court was "convinced that had Congress intended to immunize cigarette manufacturers from [liability], it knew how to

As such, "a New Jersey jury could decide that a cigarette manufacturer . . . ought to bear the costs of [plaintiff's] injuries that could have been prevented with a more detailed warning . . . ." Id. at 92, 577 A.2d at 1250. See Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 87-94, 577 A.2d 1239, 1248-51 (1990) (regulatory effect indirect and should be tolerated). See id. at 90, 577 A.2d at 1249 (citing Garner, Cigarette Dependancy and Civil Liability: A Modest Proposal, 53 S. CAL. L. REV. 1423, 1454 (1980) ("a damage award . . . requires only payment — it is not an injunction requiring the defendant to incorporate into its advertising a fixed legend different from the federally required label")).

See id. The Dewey court described several ways a manufacturer may choose to respond to a judgment of liability:

(1) [by] adding an additional warning (which would not be barred under the Cigarette Act because the preemption provision section provides that no statement shall be "required," hence, there is no prohibition against a manufacturer "voluntarily" saying more); or (2) [by] placing a package insert in the product, as has been done with a multitude of products; or (3) [by] simply choosing to do nothing and risking exposure to liability.

Id. But see Palmer v. Liggett Group, Inc., 825 F.2d 620, 627 (1st Cir. 1987) ("This 'choice of reaction' seems akin to the free choice of coming up for air after being underwater.").

Dewey, 121 N.J. at 89, 577 A.2d at 1249. The court commented on several cases where the regulatory effect of state damage actions was permitted. For example, in Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984), the Court held that although the Atomic Energy Act preempts state regulation of the safety aspects of nuclear power, an award of punitive damages for conduct related to radiation hazards was not preempted. Id. at 249-56. Note however, that in contrast to the Federal Cigarette Labeling and Advertising Act, the Atomic Energy Act contained an amendment which was based on state law remedies. See id. at 253-54.

In English v. General Electric Co., 110 S. Ct. 2270 (1990), the Court found plaintiff's state law claim for intentional infliction of emotional distress did "not lie within the preempted field of nuclear safety" protected by the Energy Reorganization Act. Id. at 2278-79. Again, as in Silkwood, the Court found congressional intent to preempt state law claims. See id.
do so with unmistakable specificity." Therefore, plaintiff’s claims were not preempted by the Federal Cigarette Labeling and Advertising Act.

It is submitted that Cipolle and its progeny have taken a more comprehensive approach, recognizing the entire scope of the Act, while Dewey places primary emphasis on health and safety aspects at the expense of commercial and economic concerns, thereby missing the Act’s full import.

III. Ramifications — A New York Perspective

The Dewey decision marked a drastic departure from preexisting case law concerning private tort actions based on the inadequacy of cigarette warning labels. It is submitted that this departure is likely to produce a wave of litigation throughout the states which have not yet considered the preemptive effect of the Federal Cigarette Labeling and Advertising Act. To date, the only state supreme courts that have ruled on this issue are those of Minnesota and New Jersey. The question facing plaintiffs’ attorneys around the country is whether the courts of the states in which they practice will adopt the approach taken by the ambitious New Jersey court, or follow those jurisdictions which have concluded that tort actions challenging the adequacy of cigarette warning la-

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\[\text{See id.}
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\[\text{Compare Dewey, 121 N.J. at 94, 577 A.2d at 1251 (1990) (holding actions based on inadequacy of warning label not preempted) with Cipolle v. Liggett Group, Inc., 893 F.2d 541, 582 (3d Cir. 1990) (Act preempts action challenging party’s actions in advertising or promotion of cigarettes), cert. granted, 111 S. Ct. 1386 (1991) and supra notes 11 and 63 (decisions in agreement with Cipolle). See generally Marcotte, Cigarette Decision, 76 A.B.A. J. 34 (Nov. 1990) (Dewey decision differs from five U.S. Courts of Appeal and Minnesota Supreme Court decisions).}
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\[\text{See Note, The Effect of Cipolle: Has the Tobacco Industry Lost its Impenetrable Shield?, 23 Ga. L. Rev. 763, 771 (1989). “Strict liability emerged during the 1960’s as the preferred theory under which to challenge manufacturers for product defects.” Id. One way to bring such an action is by alleging that a defective warning label made the product dangerous. See W. Prosse & W. P. Keeton, The Law of Torts § 99, at 698-702 (5th ed. 1984). This was the most appealing way for a smoker to bring a strict liability claim against a cigarette manufacturer. See Note, supra at 771.}
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\[\text{See Forster v. R.J. Reynolds Tobacco Co., 437 N.E.2d 655, 662 (Minn. 1989).}
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\[\text{See Dewey, 121 N.J. at 94, 577 A.2d at 1251.}
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\[\text{See id.}
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labels are preempted by the Act. To answer this question, it will be necessary for attorneys to examine the preemptive effect of other federal statutes upon tort law within their respective states. New York has been chosen as a test state because of its traditional role as a leader in tort law, particularly in the area of products liability. Based upon this examination, it is submitted that plaintiffs in New York will ultimately be left without a remedy, based on a failure to warn claim, and that this result may have a chilling effect on similar claims brought in other states.

Focusing initially on the trial court level, it appears that a plaintiff would be able to maintain such an action in at least one county of New York. Garcia v. Rivera, a case in the Supreme Court of Bronx County, involving provisions of the Federal Motor Carriers Safety Regulations, addressed the distinction between state statutory regulation and regulation by state common law. As in

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109 See supra note 11 (citing cases which found claims based on failure to warn preempted by Act).
110 See, e.g., infra notes 162-63 and accompanying text (examining areas of tort law in New York).
111 Cf. Green, Fifty Years of Tort Law Teaching, 61 Nw. U.L. Rev. 499, 500 (1966) (Judge Cardozo in McPherson v. Buick Motor Co. broke "all the barriers of 19th century tort law ... The horizons of tort litigation in [products liability] are no longer discernable.").
112 See, e.g. infra notes 162-63 and accompanying text (examining areas of tort law in New York).
114 49 C.F.R § 390-397 (1989). Under the Federal Motor Carriers Safety Regulations (FMCSR), state legislative regulations, if consistent with federal regulation, are not preempted. Garcia, 143 Misc. 2d at 795, 541 N.Y.S.2d at 886 (citing Specialized Carriers & Rigging Ass'n v. Commonwealth of Virginia, 795 F.2d 1152, 1156 (4th Cir. 1986)). The federal regulation states that parts 390-397 "are not intended to preclude States or subdivisions thereof from establishing or enforcing State or local laws relating to safety, ... which would not prevent full compliance with these regulations ... ." 49 C.F.R § 390.9 (1989).
115 See Garcia, 143 Misc. 2d at 793-96, 541 N.Y.S.2d at 885-86. Defendant Freuhauf asserted that there was "a distinction between state legislative regulation, which if not inconsistent [with the Act], is clearly not preempted, and common law tort claims." Id. at 796, 541 N.Y.S.2d at 886. The distinction is that state tort liability would undermine the purposes of the Act. Id. It is interesting that the defendant was seeking to distinguish state tort regulation in order to escape liability, while in Dewey, the court asserted the same distinction in order to impose liability. See Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 86, 577 A.2d 1239, 1247 (1990) (no indication that compliance with both state and federal law impossible).

It is submitted that there is an important difference between saying that a common law tort action is not preempted because this type of regulation is too incidental to cause a conflict, and saying that such a claim is not preempted because the nature of the specific claim is unrelated to the subject matter of the federal law. In the first instance, it is suggested that implied preemption can never occur no matter how directly related the tort is
Dewey, the *Garcia* court relied on the Supreme Court's analysis in *Silkwood v. Kerr-McGee Corp.*, which suggested that Congress was willing to tolerate the incidental regulatory effects of common law recovery in circumstances where direct regulation had been expressly preempted. The *Garcia* court concluded that the state tort liability did not, "jeopardize the effectiveness of the Federal regulation," nor was it impossible to comply with both the "federal regulation and State common-law standards of care." The court reached this conclusion notwithstanding defendant's argument that a standard of care established by state common law would disrupt Congress' efforts to establish a *uniform* safety design. As in *Dewey*, this court's concern for public safety and to the subject matter of the federal law. In the second instance, preemption depends on a comparison of the objectives between the competing law. The Third Circuit, in *Cipollone*, stated that "the test enunciated by this court for addressing a potential conflict between state and federal law requires us 'to examine first the purposes of the federal law and second the effect of operation of the state law on these purposes.'" *Cipollone* v. Liggett Group, Inc., 789 F.2d 181, 187 (3d Cir. 1986) (quoting *Finberg v. Sullivan*, 634 F.2d 50, 63 (3rd Cir. 1980) (en banc) (citing *Perez v. Campell*, 402 U.S. 637 (1971)), *cert. denied*, 479 U.S. 1043 (1987). It is submitted that regarding the Cigarette Labeling and Advertising Act, it is unlikely that courts taking the latter approach will reach the same conclusion reached in *Dewey*.

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117 See *id.* at 256. Although there is a tension between making safety regulation the exclusive concern of the federal law, and awarding damages for personal injury based on state law, it appears Congress was willing to tolerate this tension. *See id.* *See also Garcia*, 143 Misc. 2d at 796, 541 N.Y.S.2d at 886. The court stated that in *Silkwood*, although state regulations were preempted, "the Supreme Court let [an] award of punitive damages stand in spite of the fact that one of the purposes of punitive damages is to regulate standards of conduct." *Id.* *See Silkwood*, 464 U.S. at 256. *See also English v. General Elec. Co., 110 S. Ct. 2270, 2277 (1990) (employees state law claim for intentional infliction of emotional distress allowed although it bore some relation to Energy Reorganization Act.); *Pacific Gas & Elec. Co. v. Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) (punitive damages allowed to stand despite tension between compliance with federal regulations). *But see San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959) ("The obligation to pay compensation can be, ... a potent method of governing conduct ... [The] State's salutory effort to redress private wrongs ... cannot be exerted to regulate activities ... subject to the ... federal regulatory scheme.").


119 *Id.*

120 *Id.* at 794-96 (emphasis added). It appears that the defendant was seeking the type of policy balancing rejected by the *Dewey* court. *Dewey* v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 93, 577 A.2d 1239, 1251 (1990). *Cf. Comment, Common Law Claims Challenging the Adequacy of Cigarette Warnings Preempted Under the Federal Cigarette Labeling and Advertising Act of 1965: Cipollone v. Liggett Group, Inc., 60 St. John's L. Rev. 754, 768 n.57 (1986) (every piece of legislation can be considered a "careful balance," therefore, such a balance is meaningless). Contra *Cipollone*, 789 F.2d at 187 ("Congress has provided us with an ex-
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health superseded its concern for uniformity and commerce.\(^{121}\)

More recently, in *Little v. Dow Chemical Co.*,\(^{122}\) the Supreme Court for the County of Erie considered the viability of state common law actions where direct state regulation had been expressly preempted by an act of Congress.\(^{123}\) In *Dow Chemical*, a case involving the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"),\(^{124}\) plaintiff's tort actions based on claims of improper labeling and failure to warn were held to be preempted,\(^{125}\) even though no mention was made in FIFRA of common law actions.\(^{126}\)

\(^{121}\) Cf. Garcia, 143 Misc. 2d at 796, 541 N.Y.S.2d at 886. The court declared that, "[i]n the area of health and safety regulations, [there is] ... a presumption against preemption." *Id.* It should be noted however, that under FMCSR, the federal agency intended to supply only the minimum standards. *Id.* at 797, 541 N.Y.S.2d at 886.

Similar emphasis on public health can be found in *Tigue v. E.R. Squibb & Sons Inc.*, 136 Misc. 2d 467, 518 N.Y.S.2d 891 (Sup. Ct. N.Y. County 1987) (case involving marketing prescription drugs), aff'd, 139 A.D. 2d 431, 526 N.Y.S.2d 825 (1st Dep't 1988). Here, the need for product safety and efficacy was balanced against the possible burden on interstate commerce. *Tigue*, 136 Misc. 2d at 474, 518 N.Y.S.2d at 896-97. Where product safety is promoted through compensation to victims of wrongdoers and the burden on interstate commerce is the cost of the liability, ultimately passed on to consumers, the burden on commerce must give way. *Id.* at 475, 518 N.Y.S.2d at 897. Cf. *Berardi v. Getty Ref. & Mktg. Co.*, 107 Misc. 2d 451, 455-56, 435 N.Y.S.2d 212, 216 (Sup. Ct. Richmond County 1980) ("state's interest in fashioning rules of tort is paramount to any discernable federal interest except where the state acts arbitrarily.") (citing *Martinez v. California*, 444 U.S. 277 (1980)).

\(^{122}\) 148 Misc. 2d 11, 559 N.Y.S.2d 788 (Sup. Ct. Erie County 1990).

\(^{123}\) See id. at 13, 559 N.Y.S.2d at 790 ("State regulation of pesticide labelling is expressly preempted. No mention is made, however, of state common law negligence actions.").


\(^{125}\) See Dow Chemical, 148 Misc. 2d at 13-14, 559 N.Y.S.2d at 790-91. FIFRA provides, "[a] state shall not impose or continue in effect any requirements for labeling ... in addition to or different from those required under this subchapter." 7 U.S.C. § 136-v(b) (1988).

\(^{126}\) See Dow Chemical, 148 Misc. 2d at 13, 559 N.Y.S.2d at 790. The Dow Chemical court began its preemption analysis by reviewing the legislative history of FIFRA. *Id.* at 13, 559 N.Y.S.2d at 790-91. The court noted that there was no express preemption, given the language of the Act, nor was there implied preemption, given FIFRA's regulatory scheme which provided that "the intent of this provision is to leave to the States the authority to impose stricter regulation on pesticides' use than that required under the Act." *Id.* (quoting S. REP. No. 838, 92d Cong., 2d Sess. 30, reprinted in 1972 U.S. CODE, CONG. & ADMIN. NEWS 3993, 4021).

Secondly, the court reviewed prior case law which held that failure to warn claims were not preempted under FIFRA. *Id.* at 13-14, 559 N.Y.2d at 790-91. See, e.g., *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1542-43 (D.C. Cir.) (there is no preemption given that FIFRA is regulatory statute and no affirmative requirement on states to accept use of EPA pesticides, and that there is savings clause), cert. denied, 469 U.S. 1062 (1984).

Notwithstanding the legislative history, the existence of a savings clause, and a previous case to the contrary, the court found that preemption existed because such state tort claims...
The court found that the impact of state common law recovery, in terms of regulatory pressure, would conflict with the aims of FIFRA, thereby triggering preemption of the claims. As in Cipollone, the court found neither express nor implied preemption of the common law actions, but maintained its decision to dismiss under the "actual conflict" standard.

The Dow Chemical case is notable, as it is the only case in New York which refers to the Federal Cigarette Labeling and Advertising Act. In Dow Chemical, defendant relied on the First Circuit's decision in Palmer v. Liggett Group, Inc., in asserting that the common law was preempted under FIFRA. The Dow court, however, rejected defendant's contention that Palmer was controlling by distinguishing it on the ground that the Cigarette Labeling Act mandated the precise wording of the label, while under FIFRA, Congress required only minimum standards.

At the appellate level, the courts have not considered the pre-emption issue in terms of a statutory-common law dichotomy, would violate the purposes of FIFRA. See Dow Chemical, 148 Misc. 2d at 14, 559 N.Y.S.2d at 791.

127 Dow Chemical, 148 Misc. 2d at 13-14, 559 N.Y.S.2d at 790-91. The court was ultimately persuaded by the United States Supreme Court's decision in International Paper Co. v. Ouellette, 479 U.S. 481 (1987), which undermined the precedential value of Ferebee, because the impact of the state common law tort action in Ouellette was "too analogous to ignore." See Dow Chemical, 148 Misc. 2d at 14, 559 N.Y.S.2d at 791. The Dow Chemical court noted International Paper's argument that a state should not be allowed to do indirectly what it could not do directly. Id. It appears that in accepting this argument, the Dow Chemical court acknowledged that the statutory/common law dichotomy, as applied to pre-emption, is a distinction without meaning. See id. See also supra note 10 and accompanying text (discussing International Paper).

128 See Dow Chemical, 148 Misc. 2d at 14, 559 N.Y.S.2d at 791.
129 See id. at 13, 559 N.Y.S.2d at 790.
130 See id. at 14, 559 N.Y.S.2d at 791.
131 825 F.2d 620 (1st Cir. 1987).
132 See Dow Chemical, 148 Misc. 2d at 14, 559 N.Y.S.2d at 791.
133 See id.

134 See, e.g., Pennzoil Co. v. Carlson, 158 A.D.2d 206, 219, 558 N.Y.S.2d 754, 762 (4th Dep't 1990) (Petroleum Products Distribution Agreement examined side by side with New York's General Business Law to determine preemptive effect of federal law on state statutory claim); Stuto v. Coastal Dry Dock and Repair Corp., 153 A.D.2d 937, 940, 545 N.Y.S.2d 743, 746 (2d Dep't 1989) ("Congress did not 'intend that the negligence remedy authorized in the bill shall be applied differently in different parts depending on the law of the State in which the port may be located'"); Wolf St. Supermarkets, Inc. v. McPartland, 108 A. D.2d 25, 31, 487 N.Y.S.2d 442, 447 (4th Dep't 1985) (use of abusive language during picketing protected from defamation action only to degree there is not actual malice, so preemption is only partial); Editorial Photocolor Archives, Inc. v. Granger Collec-
but instead, have focused on the tangential nature of the tort action at issue in relation to the area of law actually preempted.\textsuperscript{135} If the tort action is too closely related to the subject matter actually preempted, the state action "must yield."\textsuperscript{136} This type of analysis seems more in accord with the reasoning in \textit{Cipollone} than with that of the \textit{Dewey} court.\textsuperscript{137}

The First Department, in \textit{Editorial Photocolor Archives, Inc. v. Granger Collections,}\textsuperscript{138} noted that the Federal Copyright Act expressly provides that individuals are no longer entitled to any rights under the copyright laws of any state,\textsuperscript{139} and that the purpose of preemption in the Act was to "bring some system of order into the protection of copyright interest[s]."\textsuperscript{140} However, the court held that plaintiff's claims did not involve a substantial copyright question.\textsuperscript{141} This enabled the state court to maintain jurisdiction over the claims.\textsuperscript{142}
The Fourth Department, in *Wolf Street Supermarkets, Inc. v. McPartland*, applied the same analysis in the area of labor relations law. Although the *Wolf* court dismissed plaintiff's claims for lack of proof, the court noted that "[s]tates are not required to yield jurisdiction when the conduct touches concerns deeply rooted in local feelings . . . or [if] State regulation . . . would implicate . . . Federal labor laws only peripherally."

New York's court of last resort has approached the preemption problem in much the same way as the intermediary courts, albeit with a seemingly greater willingness to preempt state court claim of unfair competition must relate to rights 'that are not equivalent to any . . . within the general scope of the copyright.'" *Id.* at 353, 464 N.Y.S.2d at 510 (Silverman, J., dissenting) (quoting Copyright Act 17 U.S.C. § 301(b)(3) (1988)).


See *id.* at 29-30, 487 N.Y.S.2d at 446-47. The court's analysis began with a statement that although state tort law damages for recognitional picketing is mostly preempted by the National Labor Relations Act § 8(b)(7)(c), the United States Supreme Court, in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), established that the presumption of preemption may be overcome if the conduct is deeply rooted in state tradition or would only indirectly affect the Federal Act. See *Wolf*, 108 A.D.2d at 29-30, 487 N.Y.S.2d at 446-47. The *Wolf* court also referred to the New York district court case of Palm Beach Co. v. Journeymen's and Production Allied Services of America and Canada International Union Local 157, 519 F. Supp. 705 (S.D.N.Y. 1981), which maintained that "[t]he task for the Court is thus to weigh the state's interest in applying its law of tortious interference with business relations against the federal interest in resisting application of that law, and to make its preemption decision according to the outcome of that balancing process." *Palm Beach Co.*, 519 F. Supp. at 712-13. The court noted that a classic example of when preemption would not take place would be "a case wherein the challenged conduct touches concerns deeply rooted in local feeling and responsibility." *Wolf*, 108 A.D.2d at 30, 487 N.Y.S.2d at 447 (quoting *Palm Beach Co.*, 519 F. Supp. at 713.).

*Wolf*, 108 A.D.2d at 30, 487 N.Y.S.2d at 447. If plaintiff had successfully made out a case for defamation (a showing of malice and special damages), his cause of action would not have been dismissed because defamation is only a "peripheral concern of the Federal labor laws . . . ." *Id.* at 31, 487 N.Y.S.2d at 448.

actions. For example, the court of appeals reversed the lower court's decision in *Editorial Photocolor*, finding the rights asserted by plaintiffs to be the equivalent of property rights protected by federal copyright laws."^{147} Similarly, in *Meyers v. Waverly Fabrics, Division of F. Schumacher & Co.*,^{148} the court of appeals determined that causes of action would be preempted if they were the mere equivalents of copyright infringements."^{149}

In the field of employee benefits law, the court of appeals in *Planned Consumer Marketing, Inc. v. Coats and Clark, Inc.*,^{150} was faced with determining the extent to which the Employee Retirement and Income Security Act^{151} ("ERISA") preempted state law.ERISA contains a supersedeure clause similar to the preemption clause found in the Federal Cigarette Labeling and Advertising Act.ERISA "shall supersede any . . . State laws insofar as they . . . relate to any employee benefit plan."^{152} However, unlike the preemption clause in the Federal Cigarette Labeling and Advertising Act, there was no doubt that "State laws" included both statutory law and common law, as ERISA specifically provided a definition of

147 *Editorial Photocolor*, 61 N.Y.2d at 521-22, 463 N.E.2d at 367, 474 N.Y.S.2d at 966. In a frank characterization of plaintiffs' claims the court stated, "Plaintiffs could not, by mis-casting their causes of action, secure the equivalent of copyright protection under guise of State law." *Id.* at 523, 463 N.E.2d at 368, 474 N.Y.S.2d at 967.


149 See *id.* at 78, 479 N.E.2d at 237-38, 489 N.Y.S.2d at 893. Plaintiff's claims included: breach of oral contract, misrepresentation through false labeling, unauthorized licensing, damages to reputation through the inferior quality of the product licensed, and interference with contract relations. *Id.* at 77, 479 N.E.2d at 237, 489 N.Y.S.2d at 892. Of these five causes of action, the latter three were preempted as "not different in kind from copyright infringement." *Id.* at 78, 479 N.E.2d at 238, 489 N.Y.S.2d at 893.


151 See 29 U.S.C. § 1001 (1988). As in the Cigarette Labeling Act, the purpose of ERISA was to provide uniformity. See 29 U.S.C. § 1001(a) (1988). The court in *Planned Consumer Marketing, Inc.*, noted that ERISA is "a 'comprehensive and reticulated statute' . . . adopted . . . to ensure that 'if a worker has been promised a defined pension benefit upon retirement — and if he has fulfilled whatever conditions are required to obtain a vested benefit . . . he actually receives it.' " *Planned Consumer Mktg., Inc. v. Coats And Clark, Inc.*, 71 N.Y.2d 442, 448, 522 N.E.2d 30, 33, 527 N.Y.S.2d 185, 188 (1988) (quoting Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 375 (1980)).

152 See *Planned Consumer Mktg.*, 71 N.Y.2d at 448-49, 522 N.E.2d at 34, 527 N.Y.S.2d at 189-90 (despite ERISA's supersedeure clause, "no court has held that ERISA precludes any State court action even where an ERISA plan is only tangentially implicated").


the term.\textsuperscript{155} The court, therefore, included common law within the meaning of state law.\textsuperscript{156} In determining whether the particular claim before it was preempted, the court did not focus on the incidental regulatory effects of the common law, as \textit{Dewey} had done,\textsuperscript{157} but once again, focused on whether the common law action was sufficiently related to the federal act to warrant preemption.\textsuperscript{158} In fact, the court held that state laws which result in regulation of employee benefit plans, even indirectly, are preempted.\textsuperscript{159}

Based on the disposition of preemption by New York courts regarding other federal acts, it is submitted that the New York Court of Appeals would follow the rule developed prior to \textit{Dewey}, in which state law claims based on failure to warn were preempted by the Act.\textsuperscript{160} In further support of this conclusion, it is noted

\begin{itemize}
  \item \textsuperscript{155} \textit{Id.} § 1144(c). "The term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." \textit{Id}.
  \item \textsuperscript{157} See supra notes 97 and 101 and accompanying text (\textit{Dewey} analysis of regulatory effect).
  \item \textsuperscript{158} See Planned Consumer Mktg., 71 N.Y.2d at 449-50, 552 N.E.2d at 34-35, 527 N.Y.S.2d at 189-90. The majority noted that "some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan. Only State laws that purport to regulate, directly or indirectly, the terms and conditions of employee benefit plans are preempted." \textit{Id}. In \textit{Planned Consumer Mktg.}, the five causes of action at issue involved New York Debtor and Creditor Law, Business Corporation Law and Estates Powers and Trusts Law, and therefore, were not preempted because the purpose of these state laws was to "inhibit the transfer of money in defraud of creditors, not to assess or regulate employee benefit plans." \textit{Id.} at 445, 552 N.E.2d at 32, 527 N.Y.S.2d at 187. See also Retail Shoe Health Comm'n v. Remnick, 62 N.Y.2d 173, 178, 464 N.E.2d 974, 976, 476 N.Y.S.2d 276, 278 (1984) (substance of claims against ERISA trustees for liability due to breaches of fiduciary duties fell within scope and preemption of ERISA), cert. denied sub nom., Remnick v. Malitz, 471 U.S. 1022 (1985).
  \item \textsuperscript{159} See Planned Consumer Mktg., 71 N.Y.2d at 450, 522 N.E.2d at 35, 527 N.Y.S.2d at 188. See also Sasso v. Vachris, 66 N.Y.2d 28, 32, 484 N.E.2d 1359, 1361, 494 N.Y.S.2d 856, 858 (1985) (term "relates to" as provided in ERISA's supersedure clause encompasses State laws that both directly and indirectly affect employee benefit plans). \textit{But see} Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 89-90, 577 A.2d 1239, 1249 (1990) (preemption of indirect regulation runs counter to analysis in \textit{Dewey}).
  \item \textsuperscript{160} See also 19 N.Y. Jur. 2d \textit{Conflict of Laws} § 8 (1982), "[T]here can be no conflict of authority, ... between a state and the United States ... the former being always subordinate and the latter paramount. A state law which contravenes a valid law of the United States is void." \textit{Id}. It is hard to imagine what could be more contravening than a state law which holds inadequate a warning label expressly provided by Congress to be adequate, and further, imposes penalties for compliance with that federal label. See also Palmer v. Liggett Group, Inc., 825 F.2d 620, 627 (1st Cir. 1987) (action under state law based on failure to warn would contravene Federal Cigarette Labeling and Advertising Act).
\end{itemize}
Cigarette Labeling and Advertising Act

that the New York State Constitution expressly recognizes the power of the legislature to alter the common law. The Court of Appeals has also held that the legislature may even abolish a common law right without providing a substitute remedy. It is asserted, that if a cigarette manufacturer had complied with a warning label mandated by the New York legislature, it would not have had to pay compensatory damages based on inadequate warning in a New York court. It is submitted that Congress has in effect replaced the authority of the state legislature on this issue. Therefore, an action in New York against a cigarette manufacturer, based on the inadequacy of the warning label, will likely be deemed abolished by the legislative Act of Congress.

CONCLUSION

Based on the foregoing, it appears that the Dewey court’s pre-emption analysis is faulty. The court disregards congressional intent to protect commerce and the national economy by focusing on the states’ traditional power in the area of health and welfare. However, it is well settled that Congress may preempt both state common and statutory law, pursuant to the supremacy clause. When Congress enacted the Federal Cigarette Labeling and Advertising Act it exercised this power.

In addition, it is suggested that there would be no need for predictions, or for courts to struggle with “the ready arsenal[s] of the canons of statutory construction,” if Congress would amend the Act by adding a provision defining “State law,” as it did in the

161 See N.Y. Const. art. I, § 14. “Such parts of the common law, and of the act of the legislature of the colony of New York, . . . shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same.” Id.

162 See Fearon v. Treanor, 272 N.Y. 268, 271-75, 5 N.E.2d 815, 817 (1936) (abolishing actions to recover damages for alienation of affections, criminal conversation, seduction and breach of promise to marry). The Fearon court stated that “[t]he Legislature, . . . must have in mind the general welfare . . . . If the subject is one within its jurisdiction, courts may not pass upon the wisdom of its action and substitute their judgment for that of the law making body.” Id. at 273-74, 5 N.E.2d at 817. See also Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 88 (1978) (Constitution does not require federal law to “either duplicate the recovery at common law or provide a reasonable substitue remedy.”).

163 See Dewey, 121 N.J. at 105, 577 A.2d at 1257 (Antell, P.J.A.D., dissenting) (Congressional ability to limit common law remedies).

164 Palmer, 825 F.2d at 623.
Comprehensive Smokeless Tobacco Health Education Act of 1986. Finally, it is suggested that in the future Congress should be aware of the need for clear expression in the area of preemption and provide either a savings clause or a definition of "State law." Such clarity is necessary because uniformity, often a primary goal of preemption, should not be frustrated by conflicting interpretations in the courts.

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