
Carol L. Moore
LUCKY STRIKE FOR TOBACCO
PLAINTIFFS:
DEWEY v. R.J. REYNOLDS TOBACCO CO.

The history of tort litigation against cigarette manufacturers for smoking-related injuries has been a disappointing one for plaintiffs. Of the nearly 350 such suits that have been litigated


More recent cases reflect changes in the development of products liability law. See Note, After Cipollone, supra, at 1036. Many plaintiffs are now suing tobacco companies on a strict liability theory in addition to the traditional bases. See, e.g., Pennington v. Vistron Corp., 876 F.2d 414, 416 (5th Cir. 1989) (alleging strict liability for causing or contributing to death from esophageal cancer); Semowich v. R.J. Reynolds Tobacco Co., No. 86-CV-118 (N.D.NYS. Nov. 15, 1988) (LEXIS, Genfed library, Dist file) (alleging strict liability and negligence based on failure to warn, design defect, and breach of warranty); Gunsalus v. Celotex Corp., 674 F. Supp. 1149, 1151-52 (E.D. PA. 1987) (claims of negligence, breach of warranty, negligent and fraudulent misrepresentation, and state statutory violation, in addi-
since the 1950’s, only one has resulted in an award of damages, and that verdict was overturned on appeal. The tobacco industry’s formidable arsenal of defenses has been bolstered by the difficulties plaintiffs faced in establishing a definitive causal link between long-standing cigarette smoking and the later development of dis-

ation to strict liability claim based on design defect, risk-utility, and “good samaritan” liability; Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146, 1149 (D.N.J. 1984) (alleging liability on bases of strict liability, negligence, intentional tort, and breach of warranty), rev’d, 789 F.2d 181 (3d Cir. 1986), cert. denied, 479 U.S. 1043 (1987). Strict liability theory provides that a manufacturer that sells its products in a defective or dangerous condition is liable to persons who are injured thereby despite all possible care taken in the preparation and sale of the product. See Restatement (Second) of Torts § 402A (1965). This theory is based on the premise that as between a manufacturer and an injured consumer, the manufacturer is better able to bear the risk of loss. See O’Brien v. Muskin Corp., 94 N.J. 169, 179, 463 A.2d 298, 303 (1983) (strict liability policy considerations include easing burden of proof on plaintiff by not requiring proof of negligence); Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 205, 447 A.2d 539, 547 (1982) (manufacturers and distributors best able to allocate risk of loss by including cost in price of product). Most states have adopted strict liability. See After Cipollone, supra, at 1036. The plaintiff in a strict liability case must prove that the product was defective; the defect existed at the time it left the defendant’s hands; and the defect resulted in injury to a foreseeable user. O’Brien, 94 N.J. at 179, 463 A.2d at 303. The duty of a manufacturer to a foreseeable user includes warning of risks inherent in the product; thus, a strict-liability claim may be premised on a failure to warn. See id. at 180, 463 A.2d at 303. A product may be defective by reason of a deviation from the manufacturer’s standards for that product, or by reason of its design. See id. at 180-81, 463 A.2d at 304. “Risk-utility” and “consumer expectations” are two standards used to measure the “defectiveness” of a product. See id. at 181-82, 463 A.2d at 304. See generally Garner, supra, at 1428-29 (applicability of strict liability to tobacco litigation); Note, Plaintiffs’ Conduct as a Defense to Claims Against Cigarette Manufacturers, 99 Harv. L. Rev. 809, 811-16 (1986) [hereinafter Note, Plaintiffs’ Conduct] (tobacco companies’ use of affirmative defenses to strict liability claims).


3 Cipollone, 693 F. Supp. at 208. The jury returned a $400,000 verdict based on the plaintiff’s express warranty claim. Id. at 210. The jury also found that the defendant had negligently failed to warn Rose Cipollone of the health risks of smoking, and that such failure was a proximate cause of her death. Id. However, because it found that the plaintiff was 80% responsible for her injury, by having voluntarily exposed herself to a known risk, she could not recover for the failure-to-warn claim under New Jersey’s comparative liability law, N.J. Stat. Ann. § 2A:15-5.1. Cipollone, 693 F. Supp. at 210.

4 Cipollone v. Liggett Group, Inc., 893 F.2d 541, 583 (3d Cir. 1990), cert. granted, No. 90-1038 (Mar. 25, 1991). The circuit court concluded that the district court had improperly instructed the jury on the express warranty claim by failing to require a finding that the express warranties were part of the basis of the bargain. Id. at 564-70. Further, the circuit court ruled that the defendant should have been permitted to come forward with proof that although Rose Cipollone had “read, seen, or heard the advertisements at issue,” she did not believe the statements contained therein. Id. at 569.
and by the voluntary nature of smoking itself, which gives rise to the affirmative defense of assumption of risk. In the 1980's, however, the no-proof-of-causation defense began to falter in light of mounting scientific evidence that cigarette smoking causes or contributes to a host of diseases and disabling conditions. In re-

---

5 See Levin, supra note 1, at 200-02; Note, After Cipollone, supra note 1, at 1022. The plaintiff must establish as an essential element of a claim for negligence or other torts that the defendant's act caused the plaintiff's injury. W. KEETON, D. DOBBS, R. KEETON & C. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 263 (5th ed. 1984) [hereinafter PROSSER & KEETON]. Negligence entails the defendant's posing an unreasonable risk of harm to a plaintiff; to be actionable, the harm must be foreseeable. Id. § 43, at 280. As cancer and other smoking-related diseases may take 20 or more years to develop, establishing proof of both causation in fact and foreseeability of harm proved insurmountable to early plaintiffs. See Hudson v. R.J. Reynolds Tobacco Co., 427 F.2d 541, 541 (5th Cir. 1970) (plaintiff alleged to have contracted lung and pharyngeal cancer from smoking defendant's cigarettes, but lost because, inter alia, his claims "negated scientific foreseeability"); Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19, 22-23 (5th Cir.) (despite chemical studies, epidemiological studies, reports of animal experiments, pathological evidence, reports of clinical observations, and testimony of renowned doctors, jury evidently did not believe that plaintiff's 55 years of smoking caused his cancer), cert denied, 375 U.S. 865 (1963).

6 See PROSSER & KEETON, supra note 5, § 68, at 486-92. To assert the defense of assumption of risk, the defendant must establish that the plaintiff knew of both the presence and the nature of the risk, and that his choice to incur it was "free and voluntary." Id. at 487.

7 Note, After Cipollone, supra note 1, at 1041. Until the release of the 1964 Report of the Surgeon General's Advisory Committee on Smoking and Health, there was little public awareness of the risks of smoking. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL, EXECUTIVE SUMMARY 11 (1989) [hereinafter 1989 SURGEON GENERAL'S REPORT, EXECUTIVE SUMMARY]. The Surgeon General's Report concluded that cigarette smoking is a cause of lung cancer in men (and possibly in women), and causes an increased risk of developing emphysema. Id. at 8. A second report issued in 1967 concluded that "[t]he case for cigarette smoking as the principal cause of lung cancer is overwhelming," and suggested a link between smoking and coronary heart disease. Id. Since 1964, a total of 20 Surgeon General's Reports have been issued, detailing the connection between cigarette smoking and cardiovascular disease; chronic obstructive lung disease; cancer of the mouth, esophagus, and bladder; and problems in pregnancy, including low birthweight, spontaneous abortion, prematurity, stillbirth, and neonatal death. Id. at 8-10. Relationships between smoking and cancer of the pancreas, kidney, larynx, pharynx, and possibly stomach and cervix also have been established. See See, Cigarette Smoking, Nicotine Dependence, and Treatment, 152 W. J. MED. 578, 579 (1990). "[S]moking also increases the risk of peripheral vascular disease, spontaneous pneumothorax, peptic ulcers, periodontal disease," and other conditions. Id. Synergistic effects between smoking and asbestos, alcohol, and oral contraceptives also have been identified. 1989 SURGEON GENERAL'S REPORT, EXECUTIVE SUMMARY, supra, at 9. Cigarette smoking caused the death of 390,000 Americans in 1985, id. at 12, and of an estimated 2.5 million people worldwide annually. Kicking the Habit: No Smoking Day Around the World, CANCER MAG. 6, 6 (Spring 1990). The 1988 Surgeon General's Report was devoted to the subject of nicotine addiction. See U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION: A REPORT OF THE SURGEON GENERAL (1988); see also infra notes 85-87 (discussion of addiction issues).
response, tobacco companies shifted their focus to the potential protections afforded them by the preemption provision of the Federal Cigarette Labeling and Advertising Act of 1965 (the “Act”). This Act requires that every package of cigarettes carry a label warning of the health risks associated with smoking, and prohibits states from imposing additional or different labeling requirements. The preemption argument holds that state tort claims challenging the adequacy of the warning violate the Act by effectively requiring tobacco companies to strengthen their warning labels in order to protect themselves from tort liability. Five federal circuit courts of appeal and one state supreme court have concluded that the Act, in accordance with the supremacy clause of the federal Constitution, preempts state tort claims against tobacco companies.

---


10 15 U.S.C. § 1334 (1988). This preemption section 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.

Id.

The Act also requires the Federal Trade Commission (“FTC”) to report annually to Congress concerning the effectiveness of cigarette labeling, current practices and methods of cigarette advertising and promotion, and any recommendations for further legislation that the FTC may deem appropriate. Id. § 1337(b). The Act confers jurisdiction on federal district courts to enjoin violations of the Act. Id. § 1339. Violators are guilty of a misdemeanor and are subject to a fine of not more than $10,000. Id. § 1338.

12 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 Author-
based on failure to warn or inadequate warning.\textsuperscript{13} Recently, however, in \textit{Dewey v. R.J. Reynolds Tobacco Co.},\textsuperscript{14} the New Jersey Supreme Court held that the Act does not preempt state tort claims challenging the adequacy of the warning.\textsuperscript{15} Similarly, the \textit{Dewey} court found that claims based on misrepresentation and design defect are not preempted.\textsuperscript{16} In so ruling, the New Jersey court concluded\textsuperscript{17} that it was not bound by \textit{Cipollone v. Liggett Group, Inc.},\textsuperscript{18} in which the Third Circuit held that the Act preempts state claims relating to the adequacy of the warning on cigarette packages or the propriety of a cigarette company’s promotional

\textit{Id.; see Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824) (“the act of Congress . . . is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it”).


\textsuperscript{14} 121 N.J. 69, 577 A.2d 1239 (1990).
\textsuperscript{15} Id. at 94, 577 A.2d at 1251.
\textsuperscript{16} Id. at 100, 577 A.2d at 1255.
\textsuperscript{17} Id. at 78-80, 577 A.2d at 1243-44.
In Dewey, Claire Dewey, the widow of a man who died in 1980 of lung cancer allegedly caused by cigarette smoking, brought a products liability suit against the cigarette manufacturers whose products her husband had smoked from 1942 until shortly before his death. The complaint alleged design defect, inadequate warning, and fraud and misrepresentation in advertising. During discovery, defendant Brown & Williamson Co. learned that Mr. Dewey did not begin smoking its Viceroy brand cigarettes until 1977, eleven years after the Act was enacted. Brown & Williamson moved for summary judgment on the theory that the Act preempted the claim. The trial court granted the motion with respect to the first and second counts of the complaint, concluding that it was bound by the Third Circuit's interlocutory decision in Cipollone. The appellate division affirmed, and both the plaintiff and Brown & Williamson appealed.

The New Jersey Supreme Court, in an opinion by Justice Clifford, reversed the decision, holding, inter alia, that the Act did not preempt plaintiff's failure-to-warn and misleading-advertising claims. The court found that the congressional purpose of pro-

---

19 Cipollone, 789 F.2d at 187.
20 Dewey, 121 N.J. at 73, 577 A.2d at 1240-41. The defendants were R.J. Reynolds Tobacco Co., R.J. Reynolds Industries, Inc., American Brands, Inc., and Brown & Williamson Tobacco Co. Id.
21 Id. at 73, 577 A.2d at 1241.
22 Id.
23 Id.
24 Id. Count one alleged general theories of design defect, including inadequate warning; count two alleged fraud and misrepresentation in advertising. Id.
25 Id. at 73-74, 577 A.2d at 1241; see supra text accompanying notes 18-19 (holding of Cipollone decision).
27 Dewey, 121 N.J. at 76, 577 A.2d at 1242.
28 Id. at 94, 577 A.2d at 1251. The court also held that New Jersey courts are not bound by the decisions of lower federal courts, id. at 80, 577 A.2d at 1244, and that the New Jersey Products Liability Law, N.J. STAT. ANN. § 2A:58C-3a(2) (West 1987), did not apply retroactively to bar the plaintiff's design defect claim. Dewey, 121 N.J. at 94-97, 577 A.2d at 1251-53. With regard to the former issue, the lower court had adverted to the established principle in New Jersey that when faced with the interpretation of a federal statute, the state courts are bound by federal court decisions, unless there are conflicting opinions among the district courts. Dewey v. R.J. Reynolds Tobacco Co., 216 N.J. Super. 347, 353-54, 523 A.2d 712, 715 (Law Div. 1986). Since the Third Circuit was the highest federal court to have ruled on the preemption question, Cipollone, 789 F.2d at 181, the lower court in Dewey concluded that it was bound by that court's decision. Dewey, 216 N.J. Super. at 354, 523 A.2d at 715. The supreme court, however, concluded that New Jersey law provides that New Jersey courts are bound only by United States Supreme Court rulings and not those of the
tecting commerce through uniform labeling requirements was second-
ary to the Act's principal goal of protecting the health of the public, and that allowing state tort claims furthers that goal. The court concluded that there was no actual conflict between the state claims and the Act because the response of manufacturers to the indirect regulatory effect of state tort law claims is entirely discretionary and thus does not amount to a state requirement. Finally, the court noted that state tort actions “advance a substantial goal apart from regulating behavior”: compensating injured plaintiffs when that goal accords with public policy. The court determined that the question of allocating the cost of smoking-related injuries could properly be decided by a jury, and that New Jersey plaintiffs are at least entitled to the opportunity to bring their claims.

lower federal courts. Dewey, 121 N.J. at 79, 577 A.2d at 1244. It quoted an earlier decision which noted that “[d]ecisions of a lower federal court are no more binding on a state court than they are on a federal court not beneath it in the judicial hierarchy.” Id. at 79-80, 577 A.2d at 1244 (quoting State v. Coleman, 46 N.J. 16, 37, 214 A.2d 393, 404 (1965) (in turn quoting Note, Authority in State Courts of Lower Federal Court Decisions on National Law, 48 COLUM. L. REV. 943, 946-47 (1948))). The court stated that New Jersey courts are to be guided in their decision making by the principle of “judicial comity.” Dewey, 121 N.J. at 80, 577 A.2d at 1244. But see id. at 101, 577 A.2d at 1255 (Antell, J., concurring in part, dissenting in part) (Judge Antell's separate opinion contains interesting analysis of majority's application of this principle: “[s]o much for comity”).

The Act's statement of policy and purpose 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 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.

[A] New Jersey jury could decide that a cigarette manufacturer, rather than an injured party, ought to bear the cost of injuries that could have been prevented with a more detailed warning label than that required under the Cigarette Act. . . . We think that our citizens are entitled at least to the opportunity to present such a claim.

Id.
In a dissenting opinion, Judge Antell argued that, contrary to the majority's analysis, protection of trade and commerce is not a "secondary goal" of the Act. Judge Antell reasoned that the Act's dual purposes reflect a carefully crafted balance of interests. The indirect regulation that occurs as a consequence of tort suits based on inadequate warning claims, Judge Antell maintained, is proscribed by the Act's preemption provision because it would upset the congressionally prescribed balance and thus "actually conflict" with the federal statute.

This Comment will suggest that the New Jersey Supreme Court was correct in concluding that the Federal Cigarette Labeling and Advertising Act does not preempt state tort claims against cigarette manufacturers challenging the adequacy of the warnings. First, this Comment will examine the public policy considerations that favor adoption of the Dewey rationale by other courts. It will then consider the ramifications of the decision for future tobacco litigants, particularly in light of the conflict that Dewey has created between the state and federal courts.

I. PRESERVING STATE TORT CLAIMS

The New Jersey Supreme Court undertook its analysis of the preemption question with a review of the principles governing preemption analysis. Congress has the power to preempt state law where it has expressly declared its intention to do so in clear and

---

34 Id. at 102-03, 577 A.2d at 1256 (Antell, J., concurring in part, dissenting in part).
37 Id. at 105-06, 577 A.2d at 1257-58 (Antell, J., concurring in part, dissenting in part) (quoting Third Circuit Court of Appeals in Cipollone).
38 See Cipollone, 893 F.2d at 541; Marcus & Lambert, Tobacco Liability Case Nears High Court, Wall St. J., Mar. 4, 1991, at B6, col. 3. The plaintiff in Cipollone sought Supreme Court review of the appellate decision overturning the jury award of $400,000 in his wife's smoking-related death. Although the Supreme Court had refused certiorari at the time of that decision, 479 U.S. 1043 (1987), the plaintiff argued that the New Jersey Supreme Court's decision in Dewey creates a federal-state conflict and thus merits reconsideration of the preemption question. Marcus & Lambert, supra. In an unusual move, the defendant tobacco companies supported the plaintiff's petition for certiorari, concluding that "it is an appropriate time to have the Supreme Court resolve the conflict once and for all." Id. The defendant tobacco company in Dewey declined to seek Supreme Court review of the decision.
unmistakable language. Preemption also may be implied, where Congress has enacted a federal scheme so pervasive that it completely occupies a field of law, where state law directly conflicts with federal law so that compliance with both is an impossibility, or where the state law poses "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." In the absence of a clear and unambiguous congressional mandate, there is a presumption against preemption of matters traditionally under state control. Where Congress has not expressly declared its intention, the preemption question is "largely a matter of statutory construction."

Agreeing with other courts that had previously construed the Act, the Dewey court concluded that there was neither express nor implied preemption by reason of a federal statutory scheme pervasively occupying the field of law. The court conceded that compliance with both state and federal law is not impossible. It disagreed, however, with the conclusion that "state-law claims for inadequate warning 'actually conflict' with the purposes of the Cigarette Act." The indicia of actual conflict is the frustration of congressional purpose; thus, in analyzing whether state tort claims actually conflict with the Act, the New Jersey Supreme Court looked to the Act's statutory purpose.

The Act's statement of policy and purpose indicates that the Act is intended both to inform the public of the health hazards of smoking and to protect commerce and the national economy by ensuring uniform labeling requirements. The statute provides further that commerce and the national economy are to be "pro-

---

40 See Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). This assures that the federal-state balance "will not be disturbed unintentionally by Congress or unnecessarily by the courts." Id.  
45 L. Tribe, American Constitutional Law § 6-25, at 480 (2d ed. 1988). The Dewey court also pointed out that the actual-conflict analysis also involves policy choices by the court. Dewey, 121 N.J. at 86-87, 577 A.2d at 1247.  
46 Dewey, 121 N.J. at 86, 577 A.2d at 1247.  
47 Id.  
48 Id.  
49 Id.  
50 Id. at 87, 577 A.2d at 1247.  
tected to the maximum extent consistent with . . . [the] declared policy” of informing the public of the health risks of smoking. The New Jersey Supreme Court interpreted this language to mean that the goal of protecting commerce and the national economy by ensuring uniformity in labeling is subordinate to the principal goal of informing the public of the dangers of cigarette smoking. It concluded that allowing state tort claims would further rather than impair the goal of informing the public of smoking-related risks.

The court next looked to the effect of tort claims on the Act’s secondary goal of ensuring uniform regulations. It rejected the defendant’s argument that the allowance of state tort claims would result in a medley of inconsistent state labeling requirements. Such an argument, it asserted, is “premised not on a clear showing of congressional intent but rather on dubious inferences and assertions.” The Dewey court determined that while tort actions may have an incidental regulatory effect, they are primarily compensatory and not regulatory in nature, and do not “impose” a greater warning requirement on companies than that required by the Act. The court noted that expanding the warnings is but one of

---

53 See Dewey, 121 N.J. at 87, 577 A.2d at 1248; H.R. Rep. No. 449, 89th Cong., 1st Sess., reprinted in 1965 U.S. CODE CONG. & ADMIN. NEWS 2350 (“principal purpose of the bill is to provide adequate warning to the public”); see also Levin, supra note 1, at 234-35 (use of word “consistent” is limitation on protection afforded tobacco industry); Comment, Products Liability, supra note 13, at 885 (statutory use of language indicates “hierarchy of purpose”).
54 Dewey, 121 N.J. at 87-88, 577 A.2d at 1248.
55 Id. at 88-94, 577 A.2d at 1248-51.
56 Id. at 86, 577 A.2d at 1247. Defendants argued that any manufacturer faced with the prospect of tort liability would be forced to change its warning label because “it is unthinkable that any manufacturer would not immediately take steps to minimize its exposure to continued liability.” Id. at 88, 577 A.2d at 1248 (quoting Palmer v. Liggett Group, Inc., 825 F.2d 620, 627-28 (1st Cir. 1987)). The “incidental regulatory pressure” exerted by damage awards, defendants claimed, would conflict with the congressional goal of uniform regulations. Id. According to the Dewey court, however, “[d]efendants overstate[d] the regulatory pressure that state-law damage claims would generate.” Id. at 90, 577 A.2d at 1249. Thus, the court “refuse[d] to accept that assumption as the foundation for an ‘unambiguous Congressional mandate’ to preempt state common law.” Id. Furthermore, the court stated that where preemption is premised on actual conflict, the conflict “must be more than ‘hypothetical’ or ‘potential.’” See id. at 87, 577 A.2d at 1247-48 (quoting Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982)); see also Kim, supra note 1, at 798 (absence of clear congressional intent creates strong presumption against preemption; thus, results in cigarette cases are “anomalous”).
57 See Dewey, 121 N.J. at 90, 577 A.2d at 1249. Similarly, the Massachusetts district court concluded that a lawsuit, the purpose of which is to compensate the victim of the defendant’s wrongful act, is not a “regulation” or “requirement” under the Act. See Palmer
the options available to cigarette manufacturers, who also have the option of enclosing a package insert, or of taking no corrective action at all and risking exposure to liability. While the prospect of tort liability may impose a burden on defendants, the court reasoned that it cannot be said to impose a requirement. Thus the court concluded that allowing tort challenges to the labels would not conflict with the Act's secondary goal of providing for uniform labeling. The Dewey decision is supported by lower state and federal court decisions that had come to the same conclusion.

In reaching its decision, the Dewey court emphasized traditional federalism concerns which underlie every preemption question. Courts addressing preemption questions are concerned with preserving the sovereignty of the states, particularly where pre-
emption represents an intrusion into areas of traditional state concern. Tort law is one of the areas historically viewed as falling within the scope of a state’s police powers of protecting people from harm and aiding them in obtaining redress when harm is inflicted. Eliminating state tort claims is a harsh, extreme result, and it is a fundamental principle of preemption analysis that a finding of preemption is improper without clear and unequivocal evidence of congressional intent in support of preemption. The need for judicial restraint is even more compelling when the finding of preemption would leave plaintiffs entirely without a remedy. It is submitted that the Dewey analysis properly balances the state’s interests with those of the federal government in recognizing the viability of state tort claims.

II. FURTHERING THE PURPOSE OF THE ACT

The Third Circuit was widely criticized for its interlocutory decision in Cipollone, which effectively immunized tobacco companies from suit and left many plaintiffs without a remedy. Although the district court on remand followed the Cipollone decision...


64 See Cipollone, 593 F. Supp. at 1152-53; Forster, 423 N.W.2d at 694; Dewey, 121 N.J. at 90-91, 577 A.2d at 1249-50.


66 See Silkwood, 464 U.S. at 251; Cipollone, 593 F. Supp. at 1153; Forster, 423 N.W.2d at 696; Dewey, 121 N.J. at 90-91, 577 A.2d at 1249-50. Arguably, plaintiffs whose failure-to-warn claims are preempted can still pursue claims based on negligence, fraud, and warranty, but often these alternative bases are closely bound up with labeling and advertising issues, thereby effectively depriving plaintiffs of a remedy. Comment, Tobacco Under Fire, supra note 1, at 662.

67 See, e.g., Kim, supra note 1, at 798 (Cipollone court’s preemption decision is seemingly at odds with Supreme Court’s trend toward emphasizing federalism); Comment, Common Law Claims, supra note 13, at 769 (Third Circuit’s construction stands in opposition to legislative history of Act and impedes purpose of warning of health hazards); Comment, Products Liability, supra note 13, at 892 (“Cipollone was wrongly decided”).

In a concurring opinion in the Cipollone decision reversing the jury award, the chief judge of the Third Circuit Court of Appeals stated: “I believe that our interlocutory ruling on the preemptive effect of the Labeling Act . . . was wrong as a matter of law, and should be overruled by the court in banc.” Cipollone, 893 F.2d at 583 (Gibbons, C.J., concurring).
sion, it did so reluctantly. A number of lower courts subsequently rejected its rationale as flawed, only to be reversed on appeal. The New Jersey Supreme Court, in Dewey, became the first state court of last resort to reject the preemption argument. In light of the considerable criticism of Cipollone and its progeny, other courts—both state and federal—are likely to follow the Dewey court's lead, thereby opening the door to plaintiffs with post-1965 failure-to-warn or misleading-advertising claims. Such an eventual-ity will advance the congressional goal of informing the public of the health risks of smoking. Cigarette-related litigation may also bring to light additional information about risks associated with smoking. Furthermore, the publicity attending major trials will increase public awareness of the issue. Thus, far from posing an obstacle to the congressional purpose, the Dewey decision will help further that purpose without unduly burdening tobacco companies.

III. IMPLICATIONS OF Dewey

In finding that Congress did not intend to preclude state com-
mon-law claims against cigarette companies, the Dewey court opened the door to plaintiffs who would have been frozen out of court under the Cipollone rationale. In New Jersey state courts, plaintiffs injured by cigarette smoking may now attack the adequacy of the warnings, as well as the content of the companies' advertising. That does not mean, however, that the New Jersey

---

68 Cipollone, 649 F. Supp. at 667 (“[d]espite this court's vehement disagreement... it is duty bound to follow the dictates of a superior court”).


70 See Garner, supra note 1, at 1424.

71 See Cipollone, 593 F. Supp. at 1169.

72 See Daynard, Tobacco Liability Litigation as a Cancer Control Strategy, 80 J. NAT'L CANCER INST. 9, 10 (Mar. 2, 1988).

73 Id. The costs of defending large numbers of suits will likely be passed on to consumers in the form of higher prices, which will have the beneficial effect of reducing consumption. See id. at 9. The decision also may provoke Congress to strengthen the existing warning labels or at least clarify its intent with respect to tort claims by amending the Act to include a savings clause.

74 See, e.g., Tobacco Firms Hit by Ruling, Chicago Tribune, July 27, 1990, at C1. The attorney representing Claire Dewey stated that the ruling reinstates six other smoker-death cases he has pending in New Jersey. See id. “It opens up a whole new horizon for us... It gives us back the full arsenal of the theories of liability that we had when we started.” Id.

75 See Dewey, 121 N.J. at 99-100, 577 A.2d at 1254-55. Tobacco companies' advertising
Supreme Court has given plaintiffs an unfair advantage; rather, it has merely begun to level the playing field, which up until now has been tilted overwhelmingly in favor of tobacco companies.\textsuperscript{76}

\textit{Dewey} is subject to the criticism that it will “open the floodgates of litigation.” Such a charge is somewhat disingenuous, however, because the number of tobacco lawsuits filed has been kept artificially low by the extremely onerous legal, financial, and emotional burdens plaintiffs have had to bear in asserting their personal injury claims.\textsuperscript{77} It seems that the real issue is not so much that \textit{Dewey} will open the floodgates of litigation as that they have remained too long closed to large numbers of persons whose health, lives, and livelihoods have been devastated by the acts of the tobacco companies in promoting and distributing their lethal, albeit legal, products.

Allowing state tort claims may also create a risk of imposing

\textsuperscript{76} Tobacco companies enjoy virtually unlimited financial resources which enable them vigorously to combat every effort to impose liability and enable them to endure protracted litigation, whereas plaintiffs' economic and emotional resources are soon exhausted. See Daynard, \textit{supra} note 72, at 11 (cigarette companies are able to defend products liability cases with “unprecedented ferocity”). Furthermore, cigarette companies have reaped the benefits of jurors' tendency to blame the victims of cigarette-induced illnesses for having brought on their illnesses themselves. \textit{Id.} at 12; \textit{see also} Note, \textit{Plaintiffs' Conduct, supra} note 1, at 810 n.8 (“popular view seems to be that the smoker is the cause of her own demise”).

\textit{Legal Warfare}, supra note 75, § 1, at 1, col. 6 [hereinafter \textit{Legal Warfare}] (recognizing plaintiffs' assertions that advertisements undermine warnings).

\textsuperscript{77} It is a matter of considerable irony that the tobacco industry, having lobbied vociferously against the Act when it was first enacted, should now claim the Act as a shield against suits by members of the public whose health and well-being the Act was primarily designed to promote and protect. See Garner, \textit{supra} note 1, at 1429 (“while intended as a warning to smokers, the label has also served as a windfall to the tobacco industry”).
an economic burden on tobacco companies. However, tort liability for failure to warn is a burden carried by virtually every other product manufacturer, including most others subject to federal labeling requirements. There appears to be no cognizable reason tobacco companies should be immune from such liability, and the Dewey court so concluded.

Although the Dewey decision frees plaintiffs to challenge the adequacy of the warning labels, that is far from an assurance that plaintiffs will prevail on their claims. Plaintiffs are still faced with the tobacco companies' extensive battery of defenses, among the most formidable of which is the assumption-of-risk argument. Cigarette smokers are engaging, at least initially, in a voluntary activity of which the risks are generally well known. Plaintiffs challenging the adequacy of the warning will be hard pressed to deny their knowledge and voluntary assumption of the risks associated with cigarette smoking. In recent years, however, plaintiffs in-

---


79 See Garner, supra note 1, at 1423-24 (recognizing susceptibility of "automobile, drug, and machine tool industries, as well as various consumer products industries" to products liability suits and labeling tobacco industry's immunity a "judicially created phenomenon").


81 See Garner, supra note 1, at 1424.

82 See supra notes 5-6 and accompanying text (discussion of tobacco companies' defenses).

83 See Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 236 (6th Cir. 1988) ("normal use of cigarettes is known by ordinary consumers to present grave health risks"); Palmer v. Liggett Group, Inc., 825 F.2d 620, 627 (1st Cir. 1987) ("cigarette smoking, at least initially, is a voluntary activity"); Garner, supra note 1, at 1429 ("days when the plaintiff could honestly claim that he did not know that cigarettes are injurious are over"); Note, Plaintiffs' Conduct, supra note 1, at 813-14 (90% of public knows of health hazards). But see Daynard, supra note 72 (while tobacco industry depicts smokers as having knowingly and voluntarily accepted risks of smoking, it still refuses to acknowledge link between smoking and various diseases, thus its position "is essentially that 'anyone foolish enough to believe us deserves the disease he gets' "); Garner, supra note 1, at 1429 (smokers have not been warned of all risks of smoking, including risk of addiction); Levin, supra note 1, at 224 (while general dangers are known, specific dangers are not). The FTC has found the health warnings to be ineffective in explaining the true extent of the risks faced by smokers. Edell & Gisser, Cipollone v. Liggett Group, Inc.: The Application of Theories of Liability in Current Cigarette Litigation, 85 N.Y. St. J. Med. 318, 319 (1985).

84 See Note, After Cipollone, supra note 1, at 1054-55. Rose Cipollone, for example, was
creasingly have been raising the claim that they were addicted to cigarettes, thus their conduct in continuing to smoke did not constitute a "voluntary" assumption of a known risk. Significantly, deprived of a damage award on her negligence claim as the jury found that she had contributed to her injuries. Cipollone, 693 F. Supp. at 208.

The issue is particularly acute now in New Jersey, where despite the broad language of the court's opinion in Dewey, the number of plaintiffs who might succeed will be limited by the New Jersey Products Liability Act. See N.J. Stat. Ann. § 2A:58C-3a(2) (West 1987); N.J. Supreme Court Bars Defense of Pre-Empion in Smoker's Suit, N.Y.L.J., July 27, 1990, at 1. This Act, passed in 1987, limits the liability of manufacturers of defective products where the inherent risks of the product are generally well known among its ordinary users. Id.

See Cipollone, 593 F. Supp. at 1149 (plaintiff alleged that she was addicted to cigarettes, which negated the effect of any warnings); Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655, 657 (Minn. 1989) (plaintiff alleged that by time he learned smoking was unhealthy, he was addicted and could not stop).

The scientific evidence that cigarettes are addictive, and not merely "habituating," has been mounting since the 1960's, see Garner, supra note 1, at 1432-34, though anecdotal reports of the addictive properties of tobacco have existed for centuries. Id. at 1444 n.155. The American Psychiatric Association established a diagnosis of "tobacco dependence" in its 1980 diagnostic manual; the diagnosis was later changed to "nicotine dependence" in 1987. Diagnostic and Statistical Manual of Mental Disorders (DSM-III) (3d ed. rev. 1987). Similarly, the International Classification of Diseases has a diagnosis of "tobacco use disorder," which is defined as "tobacco dependence." 1 INT'L CLASSIFICATION OF DISEASES (9th rev. Clinical Modification 1978). The 1988 Surgeon General's Report on nicotine addiction concluded that: "1. Cigarettes and other forms of tobacco are addicting. 2. Nicotine is the drug in tobacco that causes addiction. 3. The pharmacologic and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine." U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION: A REPORT OF THE SURGEON GENERAL 9 (1988) [hereinafter 1988 SURGEON GENERAL'S REPORT] (emphasis omitted).

It has been said that virtually anyone who smokes at all could become dependent on cigarettes. Russell, Realistic Goals for Smoking and Health: A Case for Safer Smoking, 1 LANCET 254, 254 (1974). Most people continue to smoke not because they want to but because they are addicted. See Garner, supra note 1, at 1432; Russell, supra, at 255. But see Glushman, Stetner, & Walsh, Heavy Smokers, Smoking Cessation, and Clonidine, 259 J. A.M.A. 2863, 2863 (1988) ("[s]mokers may continue to smoke primarily because they derive positive effects from smoking and not because they experience withdrawal symptoms"). Data from 1967 indicated that about 75% of smokers wanted to or had tried to quit smoking; only 25% of those succeeded in quitting permanently. Russell, supra, at 255. More than 90% of current smokers are interested in quitting smoking, but more than 80% of smokers who try to quit fail on their first attempt. Id. at 578-79.

Most smokers started smoking as children or teenagers. 1988 SURGEON GENERAL'S REPORT, supra, at 399 (onset of smoking greatest during junior high school years); Garner, supra note 1, at 1433 (smoking addiction occurs most often at high school level). Due to lack of maturity or understanding, these minors arguably cannot be said to have "assumed the risk": by the time they were old enough to make an informed decision as to whether or not to continue smoking, they were addicted and could not stop. Levin, supra note 1, at 224-25 ("by the time their 'understanding' matures, addiction renders any new information relatively useless"); Russell, supra, at 255 (85% of teenagers who smoke more than single cigarette become regular smokers). Many of the plaintiffs in recent suits against tobacco compa-
LUCKY STRIKE FOR TOBACCO PLAINTIFFS

the warning labels mandated by Congress do not warn of the risk of addiction. Some commentators believe that the addiction argument offers plaintiffs their best chance for recovery against tobacco companies. Until Dewey, however, such an argument was difficult to raise and sustain.

CONCLUSION

Dewey v. R.J. Reynolds Tobacco Co. is likely to have a profound impact on the area of tort litigation against cigarette manufacturers and distributors. It has reopened a door that many had believed closed, and significant numbers of plaintiffs and their attorneys are now poised to walk through. While the Dewey court did not reach the merits of Mrs. Dewey’s claim, and the decision’s direct impact is limited to New Jersey plaintiffs, the case is significant for the signal it sends that the days of cigarette company hegemony may be numbered. It is submitted that in light of the extraordinarily high personal, economic, and social costs of cigarette smoking, this would be a favorable result. This Comment has suggested that the New Jersey Supreme Court correctly interpreted the Act’s preemption provisions in allowing tobacco plaintiffs’ failure-to-warn claims to go forward. Public policy considerations favor adoption of the Dewey court’s no-preemption rationale in other jurisdictions. The foreseeable increase in litigation will fur-

nies began smoking at an early age. See, e.g., Cipollone, 893 F.2d at 548 (Rose Cipollone started smoking at age of 16); Kotler v. American Tobacco Co., 731 F. Supp. 50, 51 (D. Mass. 1990) (George Kotler was 11), aff’d, 926 F.2d 1217 (1st Cir. 1990). Gunsalus v. Celotex Corp., 674 F. Supp. 1149, 1151 (E.D. Pa. 1987) (John Gunsalus was 11); Forster, 437 N.W.2d at 656 (John Forster was 15); Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19, 22 (5th Cir.) (Frank Lartigue was 9), cert. denied, 375 U.S. 865 (1963).

See supra note 9 (current language of warning labels quoted). The original bills submitted to Congress which ultimately became the Comprehensive Smoking Prevention Education Act contained the following language: “Warning: Cigarette smoking may cause Death from heart disease, cancer, or emphysema,” and “Warning: Cigarette Smoking is addictive and will injure your health.” Comprehensive Smoking Prevention Education Act: Hearings on H.R. 5653 and H.R. 4957 before the Subcomm. on Health and the Environment of the House of Representatives Comm. on Energy and Commerce, 97th Cong., 2d Sess. 3, 8-9 (1982) (emphasis added). The words “death” and “addictive” were deleted from the final version of the bill, apparently as a result of intense lobbying by the tobacco industry. Waxman, The Comprehensive Smoking Education Act, 85 N.Y. St. J. Med. 363, 363-64 (1985); Tobacco-Addiction-Death Link Shown But Labels Don’t Tell It, 255 J. A.M.A. 987, 987 (1986). Levin believes the warning labels are inadequate notwithstanding the addiction issue. Levin, supra note 1, at 201 n.47.

See Garner, supra note 1, at 1423-25; Levin, supra note 1, at 225.
ther the congressional goal of informing the public of the dangers of cigarettes while protecting the state-created compensation rights of citizens.

Carol L. Moore