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COMMON LAW CLAIMS CHALLENGING ADEQUACY OF CIGARETTE WARNINGS PREEMPTED UNDER THE FEDERAL CIGARETTE LABELING AND ADVERTISING ACT OF 1965: 

**CIPOLLONE v. LIGGETT GROUP, INC.**

In 1965, Congress enacted the Federal Cigarette Labeling and Advertising Act ("Act"), which requires that manufacturers place a warning on cigarette packages informing the public that cigarette smoking may be hazardous to health. The Act expressly preempts

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2 See id. at 15 U.S.C. § 1333. The original Act of 1965 required that a warning be conspicuously placed on cigarette packages: "CAUTION: Cigarette Smoking May Be Hazardous To Your Health." See id. This warning was changed in 1969 to read: "WARNING: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health." See 15 U.S.C. § 1333 (as amended). Finally, after repeated requests from the Federal Trade Commission ("FTC") Congress again amended its warning so as to make it more effective. See 15 U.S.C. § 1333 (a)-(d) (1982 & Supp. 1986). This amendment, based upon a successful Swedish system, see H.R. REP. No. 805, 98th Cong., 2d Sess. 12, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3725, provides that every cigarette package, advertisement and billboard must have one of the following four warnings:

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


Congress included an express statement of its policy under the Act in section 1331, which provides that:

1) [T]he 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; an

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

the states from imposing “requirements or prohibitions” with respect to the advertising or labeling of cigarette packages when they have been labeled in conformity with the provisions of the Act.\(^3\)

Although federal law supersedes conflicting state law under the preemption doctrine,\(^4\) it has remained unclear whether section

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\(^3\) See 15 U.S.C. § 1334 (1982). The section provides:

a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

b) No 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 labelled in conformity with the provisions of this chapter.

\(^4\) Preemption may be found in the express language of the federal statute or may be implicitly contained in its structure. See Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982). It is well recognized that state common law may be preempted if Congress’ intent to do so is clear. See Sperry v. Florida, 373 U.S. 379, 403 (1963). The United States Supreme Court has identified several methods for determining whether Congress intended to preempt state law. Id. First, Congress can expressly provide for the exclusivity of the federal statute or regulation by an explicit statement barring state law on the subject. See Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). Since the scope of the preemption clause may be difficult to ascertain even with an express statement, it has been asserted that “even unambiguous statements of statutory intent require analysis.” See 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 (1983); see also L. Tribe, AMERICAN CONSTITUTIONAL LAW 377 (1978) (preemption is function of statutory analysis and construction). Moreover, the Supreme Court has held that mere expressions of the “comprehensive nature” of a federal regulatory scheme does not permit the inference that Congress intended to preempt state law. See Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 712-13 (1985); accord De Canas v. Bica, 424 U.S. 351, 359-66 (1976)(Congress’ creation of comprehensive scheme does not bar states from identifying additional needs or imposing further requirements.).

Secondly, a court may imply congressional intent to preempt state law. See Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984). The Supreme Court has observed that in a given area, “[t]he 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.” Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Finally, where a federal statute or regulation has not entirely precluded the operation of state law, state law may be preempted to the “extent that it actually conflicts with federal law.” See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm’n, 461 U.S. 190, 204 (1983). A state law will actually conflict with federal law when “‘compliance with both federal and state regulations is a physical impossibility . . . .’” Id. at 204 (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)). Actual conflict will also be found when the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Hines v. Davidowitz, 312 U.S. 52, 67-68 (1941).

\(^4\) See U.S. CONST. art. VI, cl. 2. The preemption doctrine is based upon the Supremacy Clause of the Constitution, which 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-
1334 of the Act precludes a state common law tort claim challenging the sufficiency of cigarette warning-labels. Recently, in Cipollone v. Liggett Group, Inc., the Court of Appeals for the Third Circuit held that a state tort claim challenging the sufficiency of cigarette warning labels creates an impermissible obstacle to the full purposes of Congress, and thus is preempted by section 1334 of the Act.\(^7\)

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5 See generally Garner, Cigarette Dependency And Civil Liability: A Modest Proposal, 53 S. CAL. L. REV. 1423, 1453-54 (1980)(although no litigation has clarified preemptive extent of section 1334, author proposes that common law claims are not preempted by section 1334). Common law claims challenging the adequacy of advertising and labeling practices had been brought against cigarette manufacturers prior to the passage of the 1965 Act. See, e.g., Green v. American Tobacco Co., 409 F.2d 1166 (5th Cir. 1969) (en banc) (implied warranty of fitness for use under Florida law not extended to lung cancer victim where cigarettes not found to be "defective") cert. denied, 397 U.S. 911 (1970); Pritchard v. Liggett & Myers Tobacco Co., 370 F.2d 95 (3d Cir. 1966) (reversing jury verdict for defendants in common law claim for negligent failure to warn and breach of warranty of fitness under Pennsylvania law), cert. denied, 386 U.S. 1009 (1967); see also Comment, Products Liability—Can It Kick The Smoking Habit?, 19 AKRON L. REV. 269 (1985) (discussion of plaintiff's claims challenging cigarette manufacturers in products liability suits). One commentator has marvelled at the civil immunity enjoyed by the tobacco industry, noting that "lawyers for the tobacco industry do not settle out of court." See Garner, supra, at 1425-26.

7 See id. at 187. Two district courts have recently considered whether common law liability is preempted under the Act. Compare Roysdon v. R.J. Reynolds Tobacco Co., 623 F. Supp. 1189, 1191 (E.D. Tenn. 1985)(common law claims preempted under section 1334)
In *Cipollone*, the plaintiff filed a state tort claim in the United States District Court for the District of New Jersey, alleging that she developed lung cancer after forty years of smoking cigarettes manufactured by the defendant-companies. The fourteen-count complaint averred, *inter alia*, that the defendants’ warnings, with respect to the health and safety of cigarette smoking, were inadequate to fully warn the plaintiff of the hazards of smoking. The defendants asserted that plaintiff’s claims challenging the sufficiency of the warnings were preempted by section 1334 of the Act. The plaintiff moved to strike the defendants’ preemption defenses, while the defendants Lorillard and Phillip Morris moved for judgment on the pleadings. Writing for the district court, Judge Sarokin held that section 1334 of the Act did not preempt the plaintiff’s common law rights to seek damages based upon the inadequacy of the defendants’ labeling practices.

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*See Cipollone, 593 F. Supp. at 1149. Plaintiffs included three separate claims in their complaint based on strict liability, alleging that the cigarettes were unsafe, defective, and did not carry adequate warnings of smoking hazards. Id. Plaintiffs also alleged that the defendants negligently failed to warn of the hazards of smoking and negligently advertised in such a way as to “neutralize” the existing warnings. Id. Plaintiffs additionally claimed that defendants intentionally deprived the public of scientific and medical reports which reflected the inherent dangers of cigarette smoking (intentional tort) and intentionally failed to adequately warn plaintiffs of those dangers. Id. Finally, plaintiffs asserted that defendants breached their implied warranty of fitness in selling a defective product. Id. Mr. Cipollone claimed loss of comfort, companionship and consortium of his wife. Id. at 1149 n.1.*

*See Cipollone, 789 F.2d at 183.*

*See *id.*

*See Cipollone, 593 F. Supp. at 1170-71. Judge Sarokin granted plaintiff’s motion to strike the defenses and denied defendant’s motion for judgment on the pleadings, reasoning that the legislative history of the Act did not demonstrate a clear congressional intent to preempt state tort claims. See *id.* at 1163. The Supreme Court has held that there is “[a] basic assumption that Congress did not intend to displace state law.” Maryland v. Louisiana, 451 U.S. 725, 746 (1981). Applying the recognized guidelines to ascertain congressional intent to preempt state law, *see supra* note 3, Judge Sarokin found that there was no express language in the Act to preempt state common law. *See Cipollone, 593 F. Supp. at 1155. In addition, the court reasoned that while Congress intended to “occupy the field” of cigarette labeling and advertising, it did not intend to occupy the separate field of state tort.*
On appeal, the Third Circuit reversed in part the ruling of the district court.\(^\text{13}\) Writing for the court, Judge Hunter noted that although the federal scheme created by the Act was not "so dominant as to eradicate all of [the plaintiff's] state law claims," \(^\text{14}\) section 1334 preempts those common law claims which challenge either the adequacy of cigarette warning labels or the propriety of the advertising or promotion of cigarettes.\(^\text{15}\) Applying the same preemption analysis as the district court,\(^\text{16}\) Judge Hunter determined that the Act represented a "carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of [the] national economy."\(^\text{17}\) The court reasoned, however, that an award of damages could have the regulatory effect of imposing "requirements" on cigarette manufacturers,\(^\text{18}\) thereby "creating an obstacle" to the

remedies to compensate injured plaintiffs. See id. at 1164. Judge Sarokin ruled that compliance with the Act and allowing common law claims was neither "physically impossible," id. at 1167, nor was it an "obstacle to congressional purposes." Id. at 1169.

In dicta, the district court noted that the Surgeon General's warning fixes the minimum legal requirement for cigarette manufacturers, and that mere compliance with the minimum standard will not immunize cigarette manufacturers from liability when congressional intent to do so is not "crystal clear." See id. at 1156. In support of its reasoning, the court cited Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1542 (D.C. Cir.), cert. denied, 469 U.S. 1062 (1984) wherein the District of Columbia Circuit held that compliance with an Environmental Protection Agency approved warning label under the Federal Insecticide, Fungicide and Rodenticide Act was a minimum requirement and would not preclude the operation of state tort claims challenging the sufficiency of the warning. See Cipollone, 693 F. Supp. at 1153; see also Brochu v. Ortho Pharmaceutical Corp., 642 F.2d 652, 658 (1st Cir. 1981)(drug manufacturers liable under state tort law for failure to warn despite compliance with FDA approved "uniform" label).

\(^\text{13}\) See Cipollone, 789 F.2d at 188.
\(^\text{14}\) Id. at 186.
\(^\text{15}\) See id. at 188. Judge Hunter agreed with the district court that Congress only intended to occupy the field of labeling, and not state common law. See id. at 186. He therefore concluded that plaintiffs could still sue under state common law, as long as those claims did not challenge the sufficiency of defendants' labels. See id. at 188.
\(^\text{16}\) See supra notes 3 and 12. The Third Circuit, however, did not determine whether compliance with both the Act and state common law was a "physical impossibility." See Cipollone, 789 F.2d at 187.
\(^\text{17}\) Cipollone, 789 F.2d at 187. In determining whether a state law is in "actual conflict" with federal law, it is necessary to initially determine the purposes of the federal law and effect of the state law on those purposes. See Perez v. Campbell, 402 U.S. 637, 644 (1971); Finberg v. Sullivan, 634 F.2d 50, 63 (3d Cir. 1980) (en banc). Judge Hunter relied solely upon the express statement of Congress regarding its policy under the Act. See Cipollone, 789 F.2d at 187; supra note 2. (express statement of policy underlying Act found in section 1331).
\(^\text{18}\) See Cipollone, 789 F.2d at 187; see also San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959)(statutory claim for compensation can have regulatory effect and therefore may be preempted by federal act); Dawson v. Chrysler Corp., 630 F.2d 950, 962
full purposes of Congress. Judge Hunter declared that to expose cigarette manufacturers to liability under state tort law for inadequate warning labels would tip the “balance of purposes” Congress sought to preserve, and thus “actually conflict” with section 1334 of the Act.\footnote{Cipollone, 789 F.2d at 187 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).}

The Cipollone court held that an injured plaintiff alleging the inadequacy of a cigarette manufacturer’s warning label may not recover in tort when the manufacturer has complied with the provisions of the Act.\footnote{See Cipollone, 789 F.2d at 187.} It is submitted that the Third Circuit, in applying the principles of obstacle conflict to its preemption analysis, failed to adhere to the congressional intent underlying the Act. This Comment will examine the legislative history of the Act, and will suggest that Congress intended that common law tort claims would survive the passage of the Act. Furthermore, it will be asserted that the court’s conflict analysis was based on inference and speculation, and is therefore insufficient to warrant preemption of state common law. Finally, this Comment will assert that the approach to conflict analysis typified by Hines v. Davidowitz\footnote{312 U.S. 52 (1941). Under the Hines analysis, the determination of whether a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” involves a two-pronged test Hines, 312 U.S. at 67-68. The court is required to “examine first the purposes of the federal law and second the effect of the operation of the state law on these purposes.” Finberg v. Sullivan, 634 F.2d 50, 63 (3d Cir. 1980)(en banc)(citing Perez v. Campbell, 402 U.S. 637 (1971)).} be abandoned, as it encourages the creation of hypothetical conflicts between state and federal law based on discretionary determinations of congressional “purpose.”

**THE LEGISLATIVE HISTORY AND CONGRESSIONAL PURPOSE**

The legislative history of the Federal Cigarette Labeling and Advertising Act demonstrates that the Act and its amendments are...
intended to promote public safety by requiring that adequate warnings of the hazards of cigarette smoking be placed on all cigarette packages and advertisements. In 1964, the Surgeon General's Advisory Committee Report concluded that the hazards of cigarette smoking were of sufficient importance to necessitate remedial action on a federal level. Following this report, Congress passed the Act in favor of public safety, despite debate which threatened the passage of legislation regarding cigarettes. Pursuant to Federal Trade Commission ("FTC") reports on the effectiveness of the warning provisions, Congress later amended the

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One basic objective of each of these bills is the same - to protect the health of consumers and prospective consumers of cigarettes. H.R. 3014 and H.R. 4007 have the additional stated objective of protecting commerce and the national economy. While we would ordinarily strongly support both objectives, we feel that . . . the proposed means of attaining the latter objective may be incompatible with the health protection objective. Under such circumstances we believe that the public health interest must prevail.


25 See generally H.R. Rep. No. 805, 98th Cong., 2d Sess. 7, reprinted in 1984 U.S. Code Cong. & Admin. News 3720 (summary of legislative history of 1965 Act and its amendments). The House debate centered primarily on the adequacy of protection for the public in the warnings proposed by both the House and the Senate. See id. at 3721. However, fearful that Congress would adjourn without having made provision for a cigarette warning requirement, a compromise was reached because, in the words of one House member, "in spite of the fact that this was not everything we wanted, it was better than not coming up with some legislation in 1965." 111 Cong. Rec. 16,543 (July 13, 1965) (comments of Rep. Springer); see also id. (comments of Rep. Harris, expressing fear that it would be "years" before warnings would be required if Congress did not act in 1965).

26 See H.R. Rep. No. 805, 98th Cong., 2d Sess. 8, reprinted in 1984 U.S. Code Cong. & Admin. News 3721. Pursuant to section 1337, see supra note 2, the 1967 FTC report stated that "there is virtually no evidence that the warning statement on cigarette packages required by Congress has had any significant effect." H.R. Rep. No. 805, 98th Cong., 2d Sess. 9,
Act to increase public awareness of the hazards of smoking through strengthened cautionary labeling. Finally, Congress sought to further the ultimate remedial purposes of the Act by passing the Comprehensive Smoking Education Act of 1984, which strengthened the amended warnings and mandated the dissemination of research to the public concerning smoking and its adverse effects. In reaching its decision, the *Cipollone* court relied solely upon the express statement of Congress as to the policy underlying the Act. It is submitted that the *Cipollone* court erred in dismissing the legislative history of the Act, which points clearly to the repre-

reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3721. The 1968 FTC report expressed its dissatisfaction with the adequacy of Congress' warning and further urged that Congress should ban all broadcast advertising of cigarette smoking. See 1984 U.S. CODE CONG. & ADMIN. NEWS at 3722.

27 See Public Health Cigarette Smoking Act, Pub. L. No. 91-222 (codified as amended at 15 U.S.C. § 1333 (1982)); supra note 2 (warning provision of 1969 amendment). In addition, the 1969 amendment banned the broadcast advertising of cigarettes in response to the depiction of cigarette smoking as a “harmless,” pleasurable activity. See 15 U.S.C. § 1335 (1982); H.R. Rep. No. 805, 98th Cong., 2d Sess. 8, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS. 3718, 3721. Despite the increased public awareness of the hazards of cigarette smoking, subsequent FTC reports concluded that the public needed more education as to the ill effects of smoking, and that such could only be remedied on a comprehensive federal scale. See id. at 3724. FTC reports in 1977 and 1979 recommended that still stronger warnings be required on cigarette packages, including statistics detailing tar and nicotine levels. See id. In 1981, the FTC published a Staff Report on cigarette advertising, and concluded that “[a]dditional action was needed” to supply the public with greater information regarding the hazards of smoking. Id.


29 See supra note 2 (text of amended warning label). Section 1341(a)-(c) established an Interagency Committee on Smoking and Health to collect, analyze and disseminate information regarding smoking and its adverse effects and to make recommendations to Congress where necessary. See id. at § 1341.

30 See *Cipollone*, 789 F. 2d at 187; supra note 2 (text of congressional policy in section 1331). Express statements of congressional policy are often efforts at political conciliation, and as such cannot be read in a vacuum. See Rothschild, supra note 3, at 844, 850. The “politics” of the situation will often determine the “precision” of the legislative draft finally enacted, thus even unambiguous statements of policy require analysis. See id. Any preemption analysis of the purpose behind an act should, therefore, take into consideration the legislative history of the act. See *Cipollone*, 593 F. Supp. at 1167 n.15. It is suggested that the *Cipollone* court’s interpretation of Blum v. Stenson, 465 U.S. 886 (1984), and Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977), see *Cipollone*, 789 F.2d at 186, as supporting its refusal to resort to legislative history in its preemption analysis is in error. While both cases recognize that discretion must be used in any analysis of legislative history, the Supreme Court makes extensive use of the legislative history in both cases to ascertian the congressional intent and purpose behind the federal laws involved. See Piper, 430 U.S. at 25; *Blum*, 465 U.S. at 896; see also L. Tribe, supra note 3, at 377 (question of whether federal law preempts state action is “largely one of statutory construction”).
dial purpose of increasing public safety through its warning provisions. The Third Circuit compounded this error by precluding the possibility of common law tort liability, which would motivate manufacturers to provide more effective warning-labels in furtherance of the remedial purposes of the Act.31

LEGISLATIVE RECOGNITION OF COMMON LAW CLAIMS

It is suggested that while the legislative history of the Act reveals a congressional intent to preempt state legislative regulation of cigarette advertising, it does not require the abolition of common law remedies for a plaintiff injured by inadequate warnings. Congressional hearings on the regulation of the cigarette industry have made frequent reference to the adverse effects of conflicting state statutes, but have been silent as to the preemption of common law claims.32 Common law claims challenging the sufficiency of a manufacturer's warning provisions existed prior to the Act, and congressional debates indicate that such claims were to remain viable.33 In addition, while Congress made express provi-

31 See Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1541-42 (D.C. Cir.), cert. denied, 469 U.S. 1062 (1984). "[T]he specter of damage actions may provide manufacturers with added dynamic incentives to continue to keep abreast of all possible injuries stemming from use of their product so as to forestall such actions through product improvement." Id. See also Cipollone, 593 F. Supp. at 1169 (payment of compensation will aid in exposing unknown dangers of cigarette smoking).

32 See generally Hearings on H.R. 643 Before the House Committee on Interstate and Foreign Commerce, 91st Cong., 1st Sess. 13,901 (1969) (statement of Sen. Moss.) Congress contemplated avoiding the "maze of conflicting regulations" which might have resulted if remedial response to hazards of smoking were left to individual states. See id. The "maze" that Congress sought to avoid, however, was the likelihood of states and municipalities "passing different regulations requiring the manufacturers to have different labels." Id. (statement of Rep. Fountain)(emphasis added). Joseph Cullman III, Chairman of the Tobacco Institute, expressed similar fears as to the great difficulty the industry would have complying with different state legislative enactments. See id. It is submitted, however, that the conspicuous absence of any reference to the preemption of state common law claims, see 15 U.S.C. § 1334(b), (1982), evidences Congress' intention to preclude only state and local legislatures from passing conflicting labeling laws.


Frequent references to the defense of "assumption of risk" evidence Congress' recognition that plaintiffs' state-created right to common law remedies would be preserved under the Act. See 111 Cong. Rec. 16,543-44 (1965). It was stated that:

The legislative record makes it clear that passage of this law and compliance by the manufacturer in no way effects the right to raise the defense of "assumption of risk" and the legal requirement for such a defense to prevail; nor does it shift the
sion for the criminal enforcement of the Act, the conspicuous absence of a civil remedy strengthens the presumption that Congress did not intend to preempt traditional state tort law. Inasmuch as the legislative history of the Act recognizes common law claims as distinct from state regulation, the Third Circuit’s expansive reading of section 1334 is unjustified.

Recent legislation enacted by Congress in the field of uniform tobacco warnings has expressed congressional intent that such warnings co-exist with common law tort claims rather than preempt them. This legislation, the Comprehensive Smokeless Tobacco Health Education Act of 1986 ("Act of 1986"), requires manufacturers of smokeless tobacco to inform the public of its adverse health effects by placing warning-labels on their products.

See 15 U.S.C. § 1338 (1982). Violations of the Act are subject to a fine of not more than $10,000. Id. The district courts are invested with jurisdiction to prevent and restrain violations upon the application of the Attorney General, acting through the several U.S. Attorneys in their districts. See id. at § 1339.

The Supreme Court has held that when two distinct areas of the law are implicated, preemption is improper. See, e.g., Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 240-47 (1984) (the regulatory scheme of Price-Anderson Act does not preempt separate state common law claims); Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm’n, 461 U.S. 190, 190 (1983) (the Atomic Energy Act does not preempt traditional state powers to regulate utilities). It is asserted that Congress has recognized that common law claims exist apart from state legislation in the field of cigarette labeling. See infra note 37. The presumption against preemption is thereby strengthened. See Silkwood, 464 U.S. at 246.


See 15 U.S.C. § 4402(a) (Supp. 1986). The section requires the rotation of the following warnings to be placed on all smokeless tobacco products by the manufacturer, packager or seller of such product:
While the Act of 1986 promotes uniform labeling practices by a preemption provision, it expressly preserves the right of a plaintiff to challenge such a warning-label under traditional state common law. It is asserted that this statute presents persuasive evidence that Congress did not envision common law tort liability as posing obstacles to the legislative purposes of the Act.

HYPOTHETICAL CONFLICTS DO NOT WARRANT PREEMPTION

Since congressional intent to preempt state law must be “clear and manifest,” the Supreme Court has ruled that the presence of potential or “hypothetical” conflict between state and federal law will not warrant a finding of preemption. While state tort claims

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WARNING: This Product May Cause Mouth Cancer.
WARNING: This Product May Cause Gum Disease And Tooth Loss.
WARNING: This Product Is Not A Safe Alternative to Cigarettes.
40 See 15 U.S.C. § 4406 (Supp. II 1986). The preemption clause found in this section is almost identical to that used in the Federal Cigarette Labeling and Advertising Act. Section 4406 provides:
(a) Federal Action
No statement relating to the use of smokeless tobacco products and health, other than the statements required by section 4402 of this title, shall be required by any Federal agency to appear on any package or in any advertisement . . . of a smokeless tobacco product.
(b) State and Local Action
No statement relating to the use of smokeless tobacco products and health, other than the statements required by section 4402 of this title, shall be required by any state or local statute or regulation to be included on any package or in any advertisement . . . of a smokeless tobacco product.
41 See 15 U.S.C. § 4406(c) (Supp. II 1986). The pertinent language states that “[n]othing in this chapter shall relieve any person from liability at common law or under state statutory law to any other person.” Id.
42 See Palmer v. Liggett Group, Inc., 633 F. Supp. 1171, 1179 (D. Mass 1986). Judge Mazzone suggests that Congress was well aware of the Cipollone case and acted consciously in preserving common law claims in section 4406(c) of the Act of 1986. See id. at 1179-80; see also 132 Cong. Rec. S1124 (1986)(statement of Sen. Kennedy)(Congress does not “intend to preempt product liability suits in state or federal courts based on failure to warn.”). Judge Mazzone concluded that “[i]t seems certain . . . that Congress believes that allowing products liability suits involving the adequacy of cigarette warnings will not frustrate its objective of uniform warnings.” Palmer, 633 F. Supp. at 1179.
44 See Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982). In Rice, the Court stated that, “[t]he existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute.” Id. In this case, which arose in the antitrust context, the Court held the state statute was not preempted by federal laws "simply because the state
challenging the sufficiency of warnings may have an ancillary regulatory effect.\textsuperscript{48} It is asserted that the Third Circuit erred in classifying such claims as "requirements" in its conflict analysis.\textsuperscript{48} Common law liability merely creates "some probability" that manufacturers will change their warnings, a matter left entirely to their own discretion.\textsuperscript{48} Moreover, since manufacturers may choose not to alter their labels without incurring statutory liability, the mere possibility of a common law claim makes no imposition on cigarette manufacturers.\textsuperscript{48}


\textsuperscript{49} See Cipollone, 789 F.2d at 187. The court relied on Dawson v. Chrysler Corp., 630 F.2d 950, 962 (3d Cir. 1980), cert. denied, 450 U.S. 959 (1981), to establish that common law liability has the "effect" of imposing requirements on manufacturers. See Cipollone, 789 F.2d at 187. It is asserted that this reliance is misplaced. Not only did the Dawson court mention a "requiremental effect" purely in dicta, see Dawson, 630 F.2d at 962, but the court there upheld a state common law claim, refusing to find that it created an obstacle to congressional purposes. See id. Moreover, it is clear that the mere possibility of a "regulatory effect" does not warrant a finding of preemption. See Rice 468 U.S. at 659; see infra note 48. Nor does this potential "effect" rise to the "immediate constitutional repugnancy" which the Supreme Court has traditionally found necessary to preempt state law. See Goldstein v. California, 412 U.S. 546, 554-55 (1973).


A damages award, however, 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. The labeling acts do not prohibit a manufacturer from warning of undisclosed health risks. The only prohibition is against a state agency passing a law requiring cigarette companies to use a different label. See also Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1541 (D.C. Cir.) (verdict against Chevron "is not equivalent to a direct regulatory command that Chevron change its label"), cert. denied, 469 U.S. 1062 (1984).

Moreover, there would be nothing inconsistent with the provisions of the Act if a manufacturer were to add an additional warning to that which Congress has required, since section 1334 of the Act only makes it unlawful to omit the required warning. See supra note 2; Cipollone, 593 F. Supp. at 1167. Many courts have held that the congressional labeling requirements pertaining to warnings are "minimum" requirements only and will not release manufacturers from liability merely because Congress established a "comprehensive" regulatory scheme. See supra note 16; see also Hubbard-Hall Chem. Co. v. Silverman, 340 F.2d 402, 405 (1st Cir. 1965)(where Congress had not occupied field of state tort remedies, Dep’t. of Agriculture-approved label did not release state from potential tort liability for failure to warn.).

\textsuperscript{48} See Cipollone, 593 F. Supp. at 1160. The only "requirement" imposed upon cigarette manufacturers faced with common law liability suits would be the payment of damages to
The Third Circuit's assumption that a state common law action poses an "obstacle" to "protecting the interests of national economy" is based on speculation and hypothesis. The Cipollone court does not support its conclusion with any statistical information pertaining to the economic well-being of the tobacco industry, nor any other analytical evidence. The court's conclusory approach ignores the reality that common law liability exists side by side with federal regulation in a number of other industries, without disastrous economic consequences. Congress has often recognized the coexistence of common law claims within a uniform regulatory scheme, and thus the imposition of common law liability does not frustrate congressional efforts towards labeling uniformity.

successful claimants. See id. The success of a claim challenging the adequacy of warning labels and advertising practices is purely a matter of speculation and as such cannot warrant preemption. See Rice, 458 U.S. at 659 (1982); see also Jones v. Rath Packing Co., 430 U.S. 519, 545 (1977)(Rehnquist, J., dissenting)(unwarranted speculation does not demonstrate conflict necessary to displace traditional state law).

The Supreme Court has also recognized the coexistence of state damage claims and a federal regulatory scheme, stating that, "[w]hatever compensation standard a [state imposes, whether it be negligence or strict liability, a licensee remains free to continue operating under federal standards and to pay for the injury that results." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 264 (1984)(Blackmun, J., dissenting).

See Cipollone, 789 F.2d at 187. While the Third Circuit held that common law liability stands as an obstacle to Congress' carefully drawn balance of purposes under the Act, see id., the court did not mention whether a common law claim would obstruct "warning the public of the hazards of cigarette smoking" or "protecting the interests of national economy." Id. It is suggested that the imposition of common law liability would not frustrate the interests of the national economy, which has successfully absorbed the imposition of common law liability on every other major industry in the nation.

See id. While Judge Hunter notes that a state law may actually conflict with federal law when "compliance with both . . . is a physical impossibility," id. at 185, (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)), the court does not determine whether such conflict exists here. See Cipollone, 789 F.2d at 185. The district court, however, in applying this analysis, found that the payment of damages is wholly consistent with fulfilling the labeling requirements under the Act. See Cipollone, 593 F. Supp. at 1167.

See Garner, supra note 5, at 1423. The food, drug automobile and machine tool industries have been exposed to civil liability as well as federal regulation. See id.

The *Cipollone* analysis is representative of the inadequacies of the "obstacle conflict" approach set forth in *Hines v. Davidowitz*. In *Hines*, the Supreme Court declared that its "primary function" was to determine whether, under the circumstances of a particular case, the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." The Court, however, claimed that "there cannot be any rigid formula . . . to determine the meaning and purpose of every act of Congress." Such a determination of whether a state law stands as an obstacle to congressional purposes, therefore, inevitably involves a highly discretionary analysis, which allows an antagonistic court to infer an expedient "conflict" through hypothesis. It is suggested that the discretionary nature of the obstacle conflict analysis warrants its abandonment, as it offers little guidance to lower courts which need sound legal reasoning rather than arbitrary determinations to confront this confusing area of the law.

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53 312 U.S. 52 (1941).
54 *Id.* at 67-68. Justice Black concluded that the Federal Alien Registration Act of 1940 ("Act of 1940"), when considered in connection with other laws regulating immigration and naturalization, was intended by Congress to be a single, comprehensive and uniform scheme for the regulation of all aliens, thus rendering invalid a Pennsylvania state law which imposed additional or auxiliary requirements for the registration of aliens. *See id.* at 74. The Court in dicta stated that where Congress provides a "complete scheme of regulation," the states cannot, "inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." *Id.* at 66-67.
55 *Id.* at 67. The *Hines* court made use of the legislative history of the Act of 1940 and the scope of other federal laws regulating alien admissions in concluding that Congress sought a "uniform national registration system." *Id.* at 74. In dissent, Justice Stone indicated that the majority did not offer any evidence to show that the state legislation "conflicted" with the federal law. *Id.* at 77 (Stone, J., dissenting). It is submitted that the *Hines* majority did not base its holding on a "conflict" analysis, but rather found that Congress intended to "occupy the field" of alien registration regulation. *See id.* at 78. (Stone, J., dissenting). The *Cipollone* court's analysis is likewise void of any evidence of "conflict" with federal law in its preemption of state common law claims. *See supra* note 54 and accompanying text.
56 *See* Rothschild, *supra* note 3, at 854. In considering whether a statute's purpose is frustrated, courts may proceed in an abstract fashion, hypothesizing "situations that produce a conflict between the state and federal legislation." *Id.* This criticism is particularly valid where a court, finding state law to frustrate a federal purpose, bases its premise on "unproved factual speculation." *See* Jones v. Rath Packing Co., 430 U.S. 519, 543-49 (1977)(Rehnquist, J., dissenting). The court in *Cipollone* "accepts appellant's assertion" that a common law claim will pose an "obstacle" to federal purposes, without resort to the legislative history of the Act or supporting statistics regarding the effect on the national economy. *See Cipollone*, 789 F.2d at 187; *supra* note 53.
Legislative enactments are the result of political bargaining and compromise, thus giving rise to stated congressional purposes which are often inconsistent. It is submitted that a court employing the highly discretionary Hines analysis might focus disproportionate attention on one congressional objective. This analysis could lead to a result-oriented approach whereby a court strikes down a state common law claim as "tipping" the "careful balance of purposes" of Congress, disregarding the overall policy underlying the legislation.

A less discretionary approach to conflict analysis is found in Florida Lime & Avocado Growers, Inc., v. Paul. In Florida Lime, the Supreme Court focused on whether compliance with both state and federal law was a "physical impossibility." The Court held that the test of whether federal law preempts state law "is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." Such a test will base judicial decisions on an objective standard, thus freeing the lower courts from the highly discretionary determination of whether state law frustrates congressional purposes. Finally, it is asserted that the Florida

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87 Rarely, it is submitted, will a state law advance all the purposes of a federal regulatory scheme since congressional purposes in a given act may be competing and inconsistent as they are here. See Palmer v. Liggett Group, Inc., 633 F. Supp. 1171, 1174 (D. Mass. 1986). A court might classify the competing political interests present in every piece of federal legislation as a "careful balance," and thereby claim that the state law stands as an "obstacle" to federal purposes. Conversely, it is suggested that a court in favor of the state law might focus only on those "purposes" of the federal legislation which are furthered by the state law, and determine that there is no conflict. Applying the Cipollone analysis, it is therefore submitted that another court, recognizing that common law claims would further the ultimate remedial purposes of the Act, could have found the state law completely consistent with the federal regulation test as applied by the Third Circuit. It is suggested that the leeway given courts in determining the "purposes" of a federal statute under the Hines test will allow judges to mold their reasoning to ultimately conform with their personal views on preemption. See Rothschild, supra note 3, at 854.

89 Id. at 142-43.
90 Id. at 142. The Court concluded that where no irreconcilable conflict existed between the federal and state regulation as to the marketability of avocados, the federal statute imposed only minimum standards of quality which states could strengthen by imposing their own, more stringent requirements. See id. at 148.
91 The Florida Lime test allows less subjectivity in the "actual conflict" determination, thereby precluding those "hypothetical conflicts" often developed by antagonistic courts. See Rothschild, supra note 3, at 837. As a result, it is submitted that the Florida Lime test will also provide lower courts with clear guidelines as to when state law actually conflicts with federal law. This will eliminate the confusion surrounding the competing and often inconsistent applications of both Hines and Florida Lime in Supreme Court analysis of
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Lime analysis gives greater deference to the presumption that Congress did not intend to leave injured victims without a remedy.\(^6\)

CONCLUSION

In Cipollone, the Third Circuit has determined that state common law claims challenging the adequacy of cigarette warning labels are preempted under section 1334 of the Act. This construction stands not only in opposition to the legislative history of the Act and its amendments, but significantly impairs Congress' express intention of assuring that the public is adequately warned of the hazards of cigarette smoking. Moreover, the court's ruling effectively leaves injured plaintiffs without a remedy for violation of their state-created rights absent clear congressional intent to do so. Finally, the Cipollone court has contributed to the growing confusion surrounding preemption and conflict analysis, which threatens further uncertainty in the lower courts. The Third Circuit's refusal to recognize state common law claims challenging the adequacy of cigarette warning labels under the Act supports the groundless immunity uniquely enjoyed by the tobacco industry.

Robert C. Carlsen

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\(^6\) See Iconco v. Jensen Constr. Co., 622 F.2d 1291, 1296 (8th Cir. 1980). Courts have presumed that Congress did not intend to preempt state law when such a result would affect generations of judicial development; state tort law is one example of a judicially-developed area. See id. It is submitted that this presumption is particularly strengthened when, as here, the Act is silent as to civil remedies and state common law is plaintiff's sole means of recovery. The Supreme Court has stated in an analogous situation that the failure of Congress to provide a federal remedy makes it "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984) (Blackmun, J., dissenting); see also United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656, 663-64 (1954).

The end result of the Third Circuit's holding is to leave plaintiff Cipollone without recourse to seek compensation for the violation of a state created right. See Cipollone, 593 F. Supp. at 1153.