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# Cigarette Litigation and Products Liability: Did Someone Win the War or Have the Battle Lines Just Been Drawn - Cipollone v. Liggett Group, Inc.

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# CIGARETTE LITIGATION AND PRODUCTS LIABILITY: DID SOMEONE WIN THE WAR OR HAVE THE BATTLE LINES JUST BEEN DRAWN?

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

*Lawrence A. Schemmel*

## I. INTRODUCTION*

The average American consumer is bombarded daily with advertisements from network and cable television, radio, billboards, newsprint, and home mailings that try to sell everything from Lean Cuisine to Calvin Klein Jeans. Since the beginning of newsprint media, and more recently since the advent of radio and television, the consuming American public has been exposed to ever-increasing efforts of advertisers and manufacturers to sell their products. Toward this end, manufacturers sponsor public and private events, athletic contests, and media shows, to name a few.

During the early 1950s, one of the more popular radio shows of the time was *Arthur Godfrey and His Friends*. The show was sponsored, in part, by the Chesterfield brand of cigarettes, manufactured by Liggett Group, Inc.[1] The January 8, 1953, show promoted Chesterfield brand cigarettes to its listeners (text read by Mr. Godfrey):

> [A] medical specialist is making . . . examinations . . . every two months. Now they've gone, I think, as far as 8 months. That's so far, 8 months. What they did was get a group of people from various walks of life . . . . And 45% of this group smoked Chesterfields for an average of over 10 years. After 8 months, the medical specialist reports he has observed no adverse effects whatever on the noses, the throat, the sinuses, the ears, or other organs from smoking Chesterfields. That's – that seems to me to [mean] mildness, real mildness. You've been wondering about whether or not smoking does things to you which you don't want to do? Well, why don't you smoke Chesterfields. Here's a guy watchin' a lot of people and nothin' happened to them yet. We've been smokin' 'em a long time. Of course, we were always this way. You can't judge by us. But they're good, very fine, and I never recall seein'

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* Editor's Note: Cites throughout this Note refer to the Cigarette Labeling and Advertising Act of 1965 and the Public Health Cigarette Smoking Act of 1969. The Public Health Cigarette Smoking Act is codified within the Cigarette Labeling Act. For clarity, the various provisions of the acts relied upon in cases cited throughout this Note have been referred to the initial citation contained in footnote three which contains the subsequent history of both acts. When necessary, specific references to sections and volume editions have been added to subsequent citations.

1. Cipollone v. Liggett Group, Inc., 893 F.2d 541, 549 (3d Cir. 1990), *aff'd in part, rev'd in part*, 112 S. Ct. 2608 (1992).

on anybody's gravestone – He Smoked Too Much, did you? I never did. So Chesterfield's for you, regular or king size.[2]

Mr. Godfrey probably never realized the power of his and others' radio promotions of cigarettes on the American public. The truth is that use of the product he endorsed has created litigation of considerable magnitude, with high stakes on both sides. The issue of liability of cigarette manufacturers to smokers, notwithstanding the manufacturers' compliance with federal warning requirements, is one that has sparked controversy between two powerful, opposing factions. The average American has most likely at least been exposed to cigarettes and is somewhat familiar with tobacco smoke's potential physical effects on the human body, even if one has never smoked. The current debate concerning liability for those effects focuses on interpretation of a 1965 federal statute and a 1969 amended version, and whether these statutes allow state common law tort claims for physical damages to smokers from smoking cigarettes, despite manufacturers' warning labels.[3]

The United States Supreme Court faced this issue in *Cipollone v. Liggett Group, Inc.*[4] Prior to this decision, certain federal courts held that state law claims were preempted by federal statutes, thus disallowing claims for damages.[5] Other state courts determined that these federal statutes did not preempt common law claims, thus allowing the claims to stand.[6] The Supreme Court, in resolving the conflict, determined that state law damage actions based on failure to warn and omissions or inclusions in advertising were preempted.[7] It also concluded that claims based on express warranty, intentional fraud, misrepresentation, or conspiracy were not preempted.[8] The decision was based on congressional intent and statutory interpretation of certain sections of each of the two statutes involved.[9] In remanding the case for determination of the merits of those claims not preempted,[10] the Court may have promoted continued litigation in this particular case. But more importantly, it may also have struck a perfect balance between protecting the interests of both parties to the controversy by defining the guidelines of what must be proven to recover in products liability claims involving these and other similar products.

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2. *Id.* at 550 n.2.

3. *Id.* at 546 (discussing Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, 79 Stat. 282, 282-84 (codified as 15 U.S.C. §§ 1331-1339 (Supp. III 1965-67)) (current version at 15 U.S.C. §§ 1331-1340 (1988 & Supp. IV 1992) *amended by* Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87, 87-89 (1970) (codified as amended at 15 U.S.C. §§ 1331-1340 (1970)) (current version at 15 U.S.C. §§ 1331-1340 (1988 & Supp. IV 1992)) [hereinafter Cigarette Act].

4. 112 S. Ct. 2608 (1992).

5. *See* Pennington v. Vistron Corp., 876 F.2d 414 (5th Cir. 1989); Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230 (6th Cir. 1988); Stephen v. American Brands, Inc., 825 F.2d 312 (11th Cir. 1987); Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987).

6. *See* Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655 (Minn. 1989); Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239 (N.J. 1990).

7. *Cipollone*, 112 S. Ct. at 2625.

8. *Id.* The Federal Cigarette Labeling and Advertising Act of 1965 does not preempt any state law damage claims. *Id.* (construing Cigarette Act, *supra* note 3). The 1969 Act does not preempt claims based on express warranty, intentional fraud, misrepresentation, or conspiracy. *Id.* (construing Cigarette Act, *supra* note 3).

9. *Id.* at 2616-25.

10. *Id.* at 2625.

Section II of this Note will discuss the factual background of *Cipollone* and prior lower court decisions. Next, it will show how the Court supported its decision in the instant case by its interpretation of prior Supreme Court cases, federal statutory law, and congressional intent. Then the Note will discuss the instant case, concentrating on the basis of the Court's holding, followed by an analysis of the Court's reasoning and possible implications of the Court's opinion. Finally, the Note will summarize the effect of the *Cipollone* decision, specifically on the debate over cigarette manufacturers' liability to consumers and, more generally, on the issues of liability claims involving similar controversial products.

## II. FACTS

Rose D. Cipollone was born in 1925 and began smoking Chesterfield brand cigarettes in 1942.[11] In 1955, Mrs. Cipollone stopped smoking Chesterfields and switched to L & M filter cigarettes, also made by Liggett.[12] In 1968, she started smoking the Virginia Slims brand, made by Philip Morris.[13] In the early 1970s, Mrs. Cipollone began smoking Parliament, another Philip Morris cigarette.[14] Then in 1974, she switched brands from Parliament to True, made by Lorillard, Inc.[15] Except during her first pregnancy in the 1940s, Mrs. Cipollone smoked between one and two packs of cigarettes each day from 1942 until the early 1980s.[16]

In 1981, Mrs. Cipollone was diagnosed with lung cancer but continued to smoke against her doctor's advice until June, 1982, when one lung was removed.[17] She secretly continued to smoke until she quit in 1983 when her cancer was diagnosed as being terminal.[18]

In August, 1983, Rose and her husband, Antonio Cipollone, filed suit in federal district court in New Jersey against Liggett, Philip Morris, and Lorillard.[19] The complaint sought damages for suffering and monetary costs from Mrs. Cipollone's lung cancer allegedly caused by smoking the defendants' cigarettes.[20] Mrs. Cipollone died in October, 1984, before the case went to trial.[21] Mr. Cipollone, as his wife's executor, and on his own behalf, filed a third amended complaint in May of

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11. Cipollone v. Liggett Group, Inc., 893 F.2d 541, 548 (3d Cir. 1990), *aff'd in part, rev'd in part*, 112 S. Ct. 2608 (1992).

12. *Id.* at 550.

13. *Id.* at 551.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 552.

20. *Id.* Mrs. Cipollone testified in her deposition that she smoked Chesterfields to imitate glamorous movie stars in cigarette advertisements. *Id.* at 548. She also testified that she read magazines, listened to the radio, and watched television, all during the years she smoked Chesterfields. *Id.* Mrs. Cipollone said that she remembered all the advertising in magazines, billboards, and newspapers, as well as promotions about recessed and miracle filter tips and "just what the doctor ordered" phrases in print. *Id.* at 551. She testified that she was led to believe, by the advertising, that the cigarettes were safe and would not hurt her. *Id.* at 550.

21. *Id.* at 551.

1985, upon which the case was tried.[22] The complaint included fourteen counts for damages under several bases of recovery and relied on theories of strict liability, negligence, express warranty, and intentional tort.[23] The manufacturers moved for summary judgment,[24] contending that both the Federal Cigarette Labeling and Advertising Act of 1965 and the Public Health Cigarette Smoking Act of 1969 protected them from liability based on their post-1965 conduct.[25] The district court, in a pretrial ruling, held that the statutes established "a uniform warning which would prevail throughout the country," and, thus, the "cigarette manufacturers would not be subjected to varying requirements from state to state."[26] Initially, this signaled a valid preemption defense for the manufacturers.[27] The court, however, allowed the common law actions to stand, despite the difficulty of proving that the warnings were inadequate.[28] The court believed the opportunity to be heard was so important that it should not be preempted by the federal statutes.[29] The court ultimately granted a motion to strike the manufacturers' preemption defense.[30]

The United States Court of Appeals for the Third Circuit granted an interlocutory appeal on the preemption question.[31] In reversing the lower court, the court of appeals rejected the manufacturers' argument that state common law actions were expressly preempted by the federal statutes, but accepted their argument that such

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22. *Id.* at 552. However, evidence was introduced at trial showing Mrs. Cipollone was aware of the health risks associated with smoking: she switched brands thinking newer ones were safer, she was told repeatedly by her husband and family of the health dangers and possibility of cancer, she developed a bad cough, and she began to make novenas to Saint Jude asking his help in preventing cancer. *Id.* at 551.

23. *Id.* Summarized, the alleged liability consisted of:

1. Failure to warn claim – Strict tort liability (and negligence) since the manufacturers failed to warn adequately (or negligently failed to warn adequately) of the health effects of smoking.
2. Design defect claim – Strict tort liability since the manufacturers marketed defectively-designed cigarettes instead of alternatively-designed, safer cigarettes.
3. Risk-utility claim – Strict tort liability since the health risks of the cigarettes exceeded their social utility.
4. Express warranty claim – Breach of an express warranty concerning the health effects of smoking.
5. Fraudulent misrepresentation claim – Fraud and misrepresentation in advertising of cigarettes from 1940 to 1983.
6. Conspiracy to defraud claim – Conspiracy to defraud the public concerning the health effects of smoking.

*Id.* at 552.

24. *Id.*

25. Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2614 (1992). The 1965 statute required health warnings to be placed on cigarette packages and was enacted due, in part, to the Surgeon General's report on the hazards of smoking cigarettes. *Id.* at 2616 (discussing Cigarette Act, *supra* note 3). The 1969 statute amended and strengthened the prior Act, particularly by its banning of cigarette advertising in any Federal Communications Commission electronic communication media. *Id.* at 2616-17 (discussing Cigarette Act, *supra* note 3, § 1335).

26. Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146, 1148 (D.N.J. 1984), *rev'd*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 1171.

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

state actions conflicted with federal law.[32] The court determined that Congress's intent of balancing the purposes of warning of the hazards of smoking and protecting national economic interests would be upset by state common law actions for damages based on noncompliance with warnings, advertisements, and promotions other than those allowed in the federal statutes.[33] The court did not specify the claims that were preempted.[34] The Supreme Court then denied a petition for certiorari,[35] and the Third Circuit remanded the case to the district court to determine which claims were preempted and which claims were suitable for trial.[36]

The district court held that the claims of failure to warn, express warranty, fraudulent misrepresentation, and conspiracy to defraud were preempted by the 1965 and 1969 federal statutes to the extent that the claims relied on the manufacturers' advertising, promotional, and public relations efforts after January 1, 1966, which was the effective date of the 1965 Act.[37] The court also held that the plaintiff's design defect and risk-utility claims were not preempted by federal law but were barred on other grounds.[38] The district court limited jury deliberations to the fraudulent misrepresentation claim against each defendant, the conspiracy to defraud claim against each defendant, the failure to warn claim against Liggett, and the express warranty claim against Liggett.[39] After a four-month trial, the jury deliberated four and one-half days before reaching a verdict by answering special interrogatories.[40] The jury rejected the fraudulent misrepresentation and conspiracy to defraud claims against all the defendants, but found that Liggett had breached its duty to warn and its express warranties prior to 1966.[41] No damages were awarded on the failure to warn claim because Mrs. Cipollone had "voluntarily and unreasonably encountered a known danger by smoking cigarettes."[42] The jury found that Mrs. Cipollone was eighty percent responsible for her own

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32. *Id.* at 187. The court held that the 1965 Act preempted state law damage actions related to smoking and health that challenged the adequacy of the package's warning or the propriety of actions concerning the advertising of cigarettes. *Id.* The court also held that where state law damage claims' success depended on the assertion that a party had the duty to provide a warning to the public, in addition to the congressionally-mandated package warning, such claims were preempted since they conflicted with the Act. *Id.*

33. Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2614-15 (1992) (citing *Cipollone*, 789 F.2d at 187).

34. *Id.* at 2615.

35. Cipollone v. Liggett Group, Inc., 479 U.S. 1043 (1987).

36. *Cipollone*, 789 F.2d at 188.

37. Cipollone v. Liggett Group, Inc., 649 F. Supp. 664, 669, 673-75 (D.N.J. 1986) (citing Cigarette Act, *supra* note 3), *cert. denied*, 479 U.S. 1043 (1987).

38. Cipollone v. Liggett Group, Inc., 893 F.2d 541, 553 (3d Cir. 1990), *aff'd in part, rev'd in part*, 112 S. Ct. 2608 (1992). The district court denied the risk-utility claim since it was barred by the New Jersey Products Liability Act. *Id.* (citing New Jersey Products Liability Act, N.J. STAT. ANN. §§ 2A:58C-1 to -7 (West 1987)). *See also* Cipollone v. Liggett Group, Inc., 683 F. Supp. 1487, 1493-95 (D.N.J. 1988). The district court barred the design defect claim on the ground that the plaintiff failed to present enough evidence that the defendants' failure to market an alternatively-designed cigarette when it was feasible to do so in the mid-1970s was a proximate cause of Mrs. Cipollone's death. *Cipollone*, 893 F.2d at 553. This ruling was not challenged on appeal. *Id.*

39. *Cipollone*, 893 F.2d at 553.

40. *Id.*

41. *Id.* at 554.

42. *Id.*

injuries.[43] Also, no damages were awarded to Mrs. Cipollone's estate on the breach of warranty claim.[44] The jury, however, awarded Mr. Cipollone $400,000 as compensation for damages he suffered from Liggett's breach of express warranty.[45]

In June of 1988, Mr. Cipollone moved for a new trial on the issue of Mrs. Cipollone's damages and for an amended judgment that included prejudgment interest.[46] Mr. Cipollone contended that his wife's damages were substantial and that the district court's jury instructions unfairly allowed the jury to consider her post-1965 smoking in setting her comparative fault percentage.[47] Two days later, Liggett moved for judgment notwithstanding the verdict[48] or a new trial on the grounds of alleged error in the district court's jury instructions on express warranty and in its interrogatories.[49] The district court denied all motions.[50] Both parties appealed.[51] A three-judge panel of the United States Court of Appeals for the Third Circuit affirmed in part, reversed in part, and remanded the case.[52] The court of appeals held, in specifically affirming the district court's preemption

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43. *Id.* New Jersey comparative fault law barred recovery if the plaintiff was more than 50% at fault. *Id.*

44. *Id.* at 555.

45. *Id.*

46. *Id.*

47. *Id.*

48. A judgment notwithstanding the verdict is defined as a judgment entered by order of court for one party although there has been a verdict for the other party. BLACK'S LAW DICTIONARY 1055 (6th ed. 1990).

49. Cipollone v. Liggett Group, Inc., 893 F.2d 541, 555 (3d Cir. 1990), *aff'd in part, rev'd in part*, 112 S. Ct. 2608 (1992).

50. Cipollone v. Liggett Group, Inc., 693 F. Supp. 208 (D.N.J. 1988), *aff'd in part, rev'd in part*, 893 F.2d 541 (3d Cir. 1990), *aff'd in part, rev'd in part*, 112 S. Ct. 2608 (1992).

51. *Cipollone*, 893 F.2d at 555. Liggett contended that the district court made the following errors in its jury instructions: (1) the jury should have been instructed that Mrs. Cipollone's nonreliance on the advertisements would preclude recovery under express warranty, (2) the jury should have been instructed that a buyer's actual knowledge of a warranty breach bars recovery on an express warranty claim under assumption of risk or contributory fault, and (3) the jury was erroneously instructed on the failure to warn claim, particularly since the jury was not instructed on a but-for causation requirement. *Id.*

Liggett also contended that the court erred in failing to grant a judgment notwithstanding the verdict on express warranty since (1) the jury found Mrs. Cipollone voluntarily encountered a known danger by smoking, and thus established a lack of proximate cause, (2) the plaintiff did not prove Mrs. Cipollone's cancer was proximately caused by breach of express warranty, and (3) the evidence did not support a finding that any Liggett advertisement warranted health effects in the future from smoking for forty years. Finally, Liggett contended error in granting plaintiff partial summary judgment on the defendant's affirmative defenses under the statute of limitations. *Id.*

In his appeal, Mr. Cipollone contended (1) the jury charge and interrogatories on the failure to warn issue erroneously allowed the jury to consider Mrs. Cipollone's post-1965 smoking to determine her comparative fault percentage, (2) the district court erroneously struck the risk-utility claim by applying the New Jersey Products Liability Act, (3) the district court erred by not awarding prejudgment interest, and (4) the district court erred by preempting the intentional tort claims (fraudulent misrepresentation and conspiracy to defraud). Mr. Cipollone also said he would not press his other contentions if he won on the breach of express warranty and prejudgment interest claims. *Id.*

Philip Morris's cross-appeal alleged that Mr. Cipollone's intentional tort claims were preempted and were mooted by the jury verdict. *Id.* Lorillard contended that, considering Mr. Cipollone's agreement to be satisfied with a breach of express warranty verdict and prejudgment interest, the appeals court's assumption of jurisdiction over the appeal relative to the claims against it (Lorillard) and Philip Morris violated the United States Constitution Article III "case or controversy" requirement. *Id.* Lorillard also contended that the Federal Labeling Act preempted the intentional tort claims. *Id.* at 555-56 (discussing Cigarette Act, *supra* note 3).

52. *Cipollone*, 893 F.2d at 583.

rulings, that Mr. Cipollone's state law claims were preempted by the 1965 and 1969 federal statutes.[53] The case was remanded for a new trial to determine the issues that were unresolved and those that were reversed.[54] Chief Judge Gibbons filed a concurring opinion and, by doing so, asserted the importance of the preemption issue on the efficient resolution of the litigation.[55] Since other federal courts of appeal had agreed with the Third Circuit's opinion on the preemption question,[56] while the Supreme Courts of Minnesota and New Jersey had held that the federal statutes did not preempt similar claims of damages from cigarette smoking, the United States Supreme Court granted certiorari to resolve the federal preemption conflict.[57]

Mr. Cipollone died after the court of appeals' decision; the Cipollones' son, Thomas, as executor of both his mother's and father's estates, continued the litigation.[58] The Supreme Court affirmed in part and reversed in part the court of appeals' decision, and remanded the case for further proceedings.[59] The Court held that state law damage claims under the Federal Cigarette Labeling and Advertising Act of 1965 were actionable since the 1965 Act did not preempt these claims.[60] The Court, however, disallowed two claims under the Public Health Cigarette Smoking Act of 1969.[61] The first claim preempted by the 1969 Act was the manufacturers' failure to warn.[62] The second claim preempted was the manufacturers' dilution of federally-mandated health warnings, but only when the manufacturers' advertising omitted important information or included misleading facts or

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53. *Id.* The claims were preempted by the 1965 and 1969 Acts to the extent that the claims relied on the manufacturers' advertising, promotional, and public relations activities after the 1965 Act's effective date. *Id.* at 559 (construing Cigarette Act, *supra* note 3).

54. *Id.* The court of appeals held that (1) the jury should not have been allowed to determine comparative fault percentage based on Mrs. Cipollone's post-1965 behavior, considering federal preemption of claims against manufacturers based on post-1965 marketing campaigns, (2) the district court erred on the express warranty claim by not allowing the manufacturers to prove that Mrs. Cipollone did not believe the advertisements, (3) that granting the defense motion for directed verdict on the claim that cigarettes' risk outweighed their social utility was error, (4) if, at retrial, Mr. Cipollone prevailed on the breach of express warranty claim, he should also be awarded prejudgment interest, (5) summary judgment for Mr. Cipollone may have been in error since there existed an issue of material fact as to whether the action was barred by the statute of limitations, and (6) the intentional tort claims were preempted. *Id.* at 559, 574, 578-79, 581-82.

55. *Id.* at 583. The Chief Judge stressed his opinion that the court of appeals' interlocutory ruling on preemption by the Federal Labeling Act, Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987), was confusing to the litigation. *Id.* He said that:

> Had the district court proceeded to trial before presenting us with an opportunity to confuse things by an indeterminate and erroneous ruling on preemption, this case would today be far closer to resolution. Instead there will now be a new trial, and a new appeal, and the Supreme Court may still tell the parties that our views on preemption are wrong, and they should try again.

*Id.*

56. Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2613 (1992). The First, Fifth, Sixth, and Eleventh Circuits came to a similar conclusion. *Id.* at 2613 n.2.

57. *Id.* at 2613.

58. *Id.* at 2614.

59. *Id.* at 2625.

60. *Id.* (construing Cigarette Act, *supra* note 3).

61. *Id.*

62. *Id.* (construing Cigarette Act, *supra* note 3).

opinions.[63] Finally, the Court held that the 1969 Act did not preempt claims of express warranty, intentional fraud and misrepresentation, or conspiracy, and thus allowed these claims to be actionable if proven.[64]

## III. Background and History

### *A. A Historical Analysis of Early Cigarette Litigation*

As technological advances have exponentially multiplied over the past hundred or so years, the concept of products liability emerged to hold manufacturers and sellers financially accountable for the safety of their products.[65] Initially, negligence and express and implied breach of warranty theories of recovery dominated products liability claims.[66] Eventually, due in part to limitations of warranty under contract law's privity requirement, strict liability was developed as an alternative method for holding manufacturers and sellers responsible for product-related injuries.[67] Cigarettes, a product manufactured from tobacco and intended for bodily use, became included in the realm of products covered by strict liability concepts.[68]

Tobacco was first introduced to the civilized world around 1560 by the French Ambassador to Portugal, Jean Nicot, who touted the new American herb as one with healing powers.[69] By the early 1600s, it was already suspected of being not curative, but harmful. King James I of England wrote that tobacco was " 'a custome lothsome to the eye, hateful[l] to the [N]ose, harmful[l] to the [b]raine, dangerous to the [L]ungs, and, in the black[e] stinking fume thereof, ne[e]rest resembling the horrible St[i]gian [s]moke of the [p]it that is bottom[e]less[e].' "[70] In 1542, Pope Urban VII ordered the excommunication of persons using tobacco on church property, by declaring that "[t]he use of . . . tobacco has gained so strong a hold on persons of both sexes . . . that . . . during the actual celebration of holy mass, they do not shrink from taking tobacco through the mouth or nostrils, thus soiling the alter linen and infecting the church with its noxious fumes . . . ."[71] By the mid-1800s, scientific studies began to show no positive health effects of tobacco and, by the early 1900s, research turned up evidence that there might even be a correlation between smoking and illness.[72] But, tobacco use

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63. *Id.* (construing Cigarette Act, *supra* note 3).

64. *Id.* (construing Cigarette Act, *supra* note 3).

65. Peter F. Riley, *The Product Liability of the Tobacco Industry: Has* Cipollone v. Liggett Group *Finally Pierced the Cigarette Manufacturers' Aura of Invincibility?*, 30 B.C. L. REV. 1103, 1106 (1989).

66. *Id.* at 1110.

67. *Id.*

68. *Id.* at 1111.

69. Jef I. Richards, *Clearing the Air About Cigarettes: Will Advertisers' Rights Go Up in Smoke?*, 19 PAC. L.J. 1, 4 (1987).

70. *Id.* (quoting A Counterblaste to Tobacco (1604), *quoted in* Consumer Protection Gains and Setbacks, EDITORIAL RES. REP. 70 (1978) *and reprinted in* A ROYAL RHETORICIAN (Robert S. Rait ed. 1900)).

71. Emmanuel Nneji, *Products Liability: Breaking Through the Cocoon of the Cigarette Industry*, 9 IN PUB. INTEREST 43 (1989).

72. Richards, *supra* note 69, at 5.

continued to be a popular habit for millions of people in the United States and around the world despite all the negativism of the distant past. As a result, tobacco played a significant role in early American economic development.[73]

By 1950, nearly one of every two Americans smoked regularly.[74] At that time, there was not a risk-sensitivity to products liability litigation.[75] In fact, the cigarette was surrounded by some mystique that was enhanced through advertising in magazines and on radio and television by movie stars and celebrities.[76] Even though cigarettes had been regarded as somewhat unhealthy, the only product injury lawsuits of the day involved the occasional exploding soda bottle, food contaminated with foreign objects, and similar unusual situations.[77]

Within the next three years, *The Journal of the American Medical Association* and other publications of scientific findings began linking smoking and lung cancer.[78] *The Reader's Digest* helped to enlighten and inform the public by summarizing these findings in simple terms that most everyone could understand.[79] In 1953 and 1954, cigarette consumption fell two years in a row for the first time ever.[80] Simultaneously consumers launched the first assault of cigarette litigation against the manufacturers.[81] Approximately 100 to 150 suits were filed in 1953 and 1954 but were eventually dropped.[82] This was due mainly to contingency fee-based plaintiffs' attorneys fighting and losing quickly to cigarette companies that vowed to spare no cost and that maintained a no-settlement philosophy in defending their industry.[83] The tobacco companies, well aware that the financial stakes were high, pooled their considerable resources to create almost insurmountable legal barriers against plaintiffs.[84] The manufacturers' success in obtaining summary judgment was the usual result of their strategy in making certain a cigarette plaintiff never got to a jury.[85] Of the early cases, only ten made it far enough to be of any consequence to future efforts by plaintiffs to win their cases: four were voluntarily

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73. Douglas N. Jacobson, *After* Cipollone v. Liggett Group, Inc.: *How Wide Will the Floodgates of Cigarette Litigation Open?*, 38 AM. U. L. REV. 1021, 1025 (1989). The government today derives huge benefits from the industry, and likewise actively supports the industry in its efforts toward producing nearly 20% of the world's tobacco. *Id.* at 1026. In addition, some of the largest companies in the United States have been (and are currently) involved in the cigarette industry. *Id.* RJR Nabisco, the parent company of R.J. Reynolds Tobacco Co., is the United States' 19th largest industrial company. *Id.* at 1026 n.34. Philip Morris, Cos., Inc., the nation's largest tobacco company, owns Kraft, Inc., a food company, making Philip Morris the ninth largest publicly-traded company in the United States. *Id.*

74. Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 855 (1992).

75. *Id.*

76. *Id.*

77. *Id.* at 856.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 858.

84. *Id.* at 859.

85. *Id.*

discontinued,[86] three resulted in jury verdicts for the manufacturers,[87] and three were ended by summary judgment granted to the manufacturers.[88]

Plaintiffs in these early cases based their claims on negligence and breach of express and implied warranties.[89] The early cases did result in some favorable decisions for plaintiffs.[90] But in the final analysis, the tobacco companies held a perfect record against all legal challenges, due in part to limited medical knowledge, as well as juries' hostility toward plaintiffs who blamed others for the consequences of their own decisions to smoke. Of course, the tobacco manufacturers' overwhelming financial and legal resources and willingness to stonewall smokers' lawsuits played a major role in their success.[91]

### *B. Current Cigarette Litigation*

By the mid-1960s, Americans had become acutely concerned with health, particularly regarding dangers from toxic substances.[92] An important result of this concern was legislation directed at regulating environmental and consumer product quality and safety.[93] Particularly notable was the volume of studies on the hazards of smoking, which ultimately led the Surgeon General to publish a report in 1964 that stated: " 'Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action.' "[94] The Federal Trade Commission [hereinafter FTC] followed with a new trade regulation rule that established a cigarette advertisement to be in violation of the FTC Act if the ad were " 'to fail to disclose, clearly and prominently, in all advertising and on every pack, box, carton, or container [of cigarettes] that cigarette smoking is dangerous to

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86. Donald W. Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423, 1425-27 (1980) (discussing Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961); Padovani v. Bruchhausen, 293 F.2d 546 (2d Cir. 1961); Fine v. Philip Morris, Inc., 239 F. Supp. 361 (S.D.N.Y. 1964); Mitchell v. American Tobacco Co., 183 F. Supp. 406 (M.D. Pa. 1960)).

87. *See* Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964) (holding that the manufacturer could not be liable and could not have foreseen its products' dangers since the plaintiff began smoking in the 1930s and before smoking's risks were recorded); Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir.) (holding that no claim for negligence or breach of implied warranty could succeed since manufacturers could not have known that their products caused cancer), *cert. denied*, 375 U.S. 805 (1963); Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962) (holding that the manufacturer could not be absolutely liable for the plaintiff's death), *question certified on reh'g*, 154 So. 2d 169 (Fla.), *rev'd*, 325 F.2d 673 (5th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964).

88. Hudson v. R.J. Reynolds Tobacco Co., 427 F.2d 541 (5th Cir. 1970) (per curiam) (holding that the plaintiff did not prove the foreseeability of the dangers of smoking); Cooper v. R.J. Reynolds Tobacco Co., 234 F.2d 170 (1st Cir. 1956) (summary judgment granted for the manufacturer after remand in Cooper v. R.J. Reynolds Tobacco Co., 256 F.2d 464 (1st Cir. 1958)); Albright v. R.J. Reynolds Tobacco Co., 350 F. Supp. 341 (W.D. Pa. 1972) (summary judgment granted for the manufacturer), *aff'd*, 485 F.2d 678 (3d Cir. 1973), *cert. denied*, 416 U.S. 951 (1974).

89. Jacobson, *supra* note 73, at 1031.

90. Jacobson, *supra* note 73, at 1033-34.

91. Jacobson, *supra* note 73, at 1035-36 (citing Paul G. Crist & John M. Majoras, *The "New" Wave in Smoking and Health Litigation – Is Anything Really So New?*, 54 TENN. L. REV. 551, 552 n.108 (1987)).

92. *Id.*

93. Rabin, *supra* note 74, at 864.

94. Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2616 (1992) (quoting U.S. SURGEON GENERAL'S ADVISORY COMM., U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, SMOKING AND HEALTH 33 (1964)). When the advisory committee convened, in 1962, to discuss the issue, there were already over 7000 publications that examined the link between smoking and health. *Id.*

health and may cause death from cancer and other diseases.' "[95] In 1965, Congress passed the Federal Cigarette Labeling and Advertising Act, which required a warning on cigarette packages but did not require a warning requirement in cigarette advertising.[96]

The Act's purposes were to adequately inform the public that cigarette smoking could be hazardous to one's health and to protect the economy from the imposition of nonuniform and confusing cigarette labeling and advertising regulations.[97] According to section 4 of the Federal Cigarette Labeling and Advertising Act, it was now unlawful to sell or distribute any cigarettes in the United States unless the package contained a prominent label that stated: " 'CAUTION: CIGARETTE SMOKING MAY BE HAZARDOUS TO YOUR HEALTH.' "[98] Section 5 contained a preemption provision mandating that no statement relating to smoking and health was required on any cigarette package, except for the section 4 requirement, and no statement relating to smoking and health was required in cigarette advertising if the packages were labeled properly.[99] In 1969, Congress amended the 1965 Act by enacting the Public Health Cigarette Smoking Act, which strengthened the warning label by requiring it to read that smoking " 'is dangerous' "[100] rather than " 'may be hazardous.' "[101] The 1969 Act also banned cigarette advertising in " 'any medium of electronic communication subject to [FCC] jurisdiction.' "[102] Finally, the 1969 Act modified section 5's preemption by stating that, concerning advertising or promotion of properly-labeled cigarette packages, no requirement or prohibition based on smoking and health could be imposed under state law.[103]

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95. *Id.* (alteration in original) (quoting 16 C.F.R. §§ 1.61-.67 (1964)). The FTC postponed the regulation's enforcement for six months, due to a request by Congress. *Id.*

96. *Id.* (citing Cigarette Act, *supra* note 3). The Act thus adopted half of the FTC's proposed regulations. *Id.* (citing Cigarette Act, *supra* note 3).

97. *Cipollone*, 112 S. Ct. at 2616.

98. *Id.* (alteration in original) (quoting Cigarette Act, *supra* note 3, § 1333 (Supp. III 1965-67)).

99. *Id.* (discussing Cigarette Act, *supra* note 3, §§ 1334-1335).

100. *Id.* (quoting Cigarette Act, *supra* note 3, § 1333 (1970)).

101. *Id.* (quoting Cigarette Act, *supra* note 3, § 1333 (Supp. III 1965-67)).

102. *Id.* at 2617 (alteration in original) (quoting Cigarette Act, *supra* note 3, § 1335 (1970)).

103. *Id.* Congress passed this law in 1969 in the midst of three important contemporary proceedings: (1) The FTC announced the reinstatement of its 1964 warning requirements for advertising that Congress did not adopt; (2) the Federal Communications Commission (FCC) was considering banning the broadcast of cigarette advertisements by radio and television; and (3) states were proposing to regulate cigarette advertising. *Id.* at 2616. In 1972, the Federal Trade Commission extended its warning label requirement to printed cigarette advertisements, based on the narrower preemption provision prohibiting only state-imposed restrictions. *Id.* at 2617. In 1984, Congress again amended the warning label requirement so that manufacturers were to rotate four different warning labels on cigarette packages:

(1) SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, and May Complicate Pregnancy.

(2) SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

(3) SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight.

(4) SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655, 657 n.2 (Minn. 1989) (citing Cigarette Act, *supra* note 3, § 1333(a)(1) (Supp. 1984)).

Another important key to societal attitudes toward consumer safety during this period was the change in products liability law, particularly the emergence of strict liability.[104] Strict liability relieved the plaintiff from proving a manufacturer's foreseeability of danger or injury to consumers, negligence, and breach of warranty.[105] In addition to eliminating concerns of privity, strict liability only required proof that the latter sold its product in a defective or dangerous condition.[106] This approach was legitimated upon adoption of section 402A of the *Restatement (Second) of Torts* by the American Law Institute in 1965.[107]

It was in this setting, and against the backdrop of newly-emerging toxic tort litigation,[108] that the current wave of cigarette challenges began.[109] In *Roysdon v. R.J. Reynolds Tobacco Co.*,[110] the plaintiff alleged strict liability because the manufacturer failed to warn of the risk of vascular disease.[111] The plaintiff also claimed that the product was defective and unreasonably dangerous.[112] The district court dismissed the failure to warn claim before trial and granted a directed verdict for the manufacturer, holding that the plaintiff did not establish a prima facie case that the product was unreasonably dangerous.[113] The court applied a consumer expectations test that defined a defective product as one that was dangerous beyond its generally-known characteristics.[114] The court reasoned that because the dangers of cigarettes were common knowledge to most of the public, cigarettes could not be unreasonably dangerous.[115] The court of appeals affirmed, holding that

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104. Jacobson, *supra* note 73, at 1036. This tort concept shifted the burden of proof from the injured consumer to the maker of the defective product. *Id.*

105. *Id.*

106. *Id.* at 1037.

107. *Id.* This section reads:

> Special Liability of Seller of Product for Physical Harm to User or Consumer
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule . . . applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

*Id.* at 1037 n.122 (quoting RESTATEMENT (SECOND) OF TORTS § 402(A) (1965)).

108. Rabin, *supra* note 74, at 864. Americans were growing more sensitive to toxic risk, as evidenced by toxic harm cases involving such products as asbestos, Agent Orange, and Dalkon Shields. Rabin, *supra* note 74, at 864. Plaintiffs were alleging that their diseases were caused by post exposure to toxic substances. Rabin, *supra* note 74, at 864.

109. Rabin, *supra* note 74, at 865.

110. 623 F. Supp. 1189 (E.D. Tenn. 1985), *aff'd*, 849 F.2d 230 (6th Cir. 1988).

111. Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 232 (6th Cir. 1988). Mr. Roysdon's leg was amputated due to severe peripheral atherosclerotic vascular disease, alleged to be caused by smoking. *Id.*

112. *Id.*

113. *Id.* at 235.

114. Roysdon v. R.J. Reynolds Tobacco Co., 623 F. Supp. 1189, 1191-92 (E.D. Tenn. 1985), *aff'd*, 849 F.2d 230 (6th Cir. 1988).

115. *Id.*

reasonable consumers could not say cigarettes were defective, due to the community's common knowledge; therefore, the issue of unreasonable danger should not be submitted to the jury.[116]

In *Horton v. American Tobacco Co.*,[117] the plaintiff alleged liability of the manufacturer for the decedent's lung cancer.[118] The complaint stated that the manufacturer had knowingly contaminated the tobacco with insect control pesticide, and it thus was unreasonably dangerous.[119] The trial court held that strict liability concepts of section 402A did not apply since the cigarettes were not unreasonably dangerous.[120] After a mistrial on the liability issue, the Mississippi Supreme Court was asked to determine whether cigarettes were subject to strict liability claims; it refused to review until after a second trial.[121]

Many jurisdictions eventually adopted a risk-utility analysis to determine a 402A standard of liability.[122] This test balanced risks against benefits to determine if a product was defective or unreasonably dangerous.[123] The risk-utility analysis quickly emerged as a possible approach for plaintiffs to follow in establishing a prima facie case of liability.[124] In *Galbraith v. R.J. Reynolds Tobacco Co.*,[125] the first case to be tried under a risk-utility concept, the plaintiffs claimed that smoking the manufacturer's cigarettes caused the decedent's death.[126] The court, however, held that a risk-utility instruction to the jury was not possible as a matter of law.[127] Similarly, in *Gianitsis v. American Brands, Inc.*,[128] the plaintiff alleged that the manufacturer was liable for his lung cancer and that, under the risk-utility concept, recovery under strict liability should have been possible *without* a claim of a defective product since the risks of health concerns outweighed the usefulness of cigarettes.[129] However, the district court ruled, as a matter of law, that the risk-utility test was not recognized under state law.[130] It also held that the state's version

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116. Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 236 (6th Cir. 1988).

117. Jacobson, *supra* note 73, at 1038 n.131 (citing Horton v. American Tobacco Co., 16 Prod. Safety & Liab. Rep. (BNA) 227 (Miss. Cir. Ct. Mar. 4, 1988)).

118. Jacobson, *supra* note 73, at 1038 n.131.

119. Jacobson, *supra* note 73, at 1038 n.133.

120. Jacobson, *supra* note 73, at 1037. Other states using section 402A have also determined that cigarettes cannot be termed unreasonably dangerous. Jacobson, *supra* note 73, at 1039 (citing Roysdon v. R.J. Reynolds Tobacco Co., 623 F. Supp. 1189, 1192 (E.D. Tenn. 1985), *aff'd*, 849 F.2d 230 (6th Cir. 1988)).

121. Jacobson, *supra* note 73, at 1039 n.137 (citing Horton v. American Tobacco Co., 16 Prod. & Safety Liab. Rep. (BNA) at 964 (Miss. Cir. Ct. Oct. 7, 1988)).

122. Rabin, *supra* note 74, at 866.

123. Jacobson, *supra* note 73, at 1039.

124. Jacobson, *supra* note 73, at 1039. If utility outweighs risk, the trier of fact says whether the risk has been sufficiently reduced by the manufacturer. Jacobson, *supra* note 73, at 1039. The manufacturer is judged on all relevant facts as to whether it reasonably placed the product on the market. Jacobson, *supra* note 73, at 1040.

125. Jacobson, *supra* note 73, at 1040 n.145.

126. Jacobson, *supra* note 73, at 1040 n.145.

127. Jacobson, *supra* note 73, at 1040 n.145. The jury held (9 to 3) in favor of the manufacturer since the evidence presented did not link the cause of death to smoking. Jacobson, *supra* note 73, at 1040 n.148.

128. 685 F. Supp. 853 (D.N.H. 1988).

129. *Id.* at 855.

130. *Id.* at 859.

of section 402A required proof that the product was defective.[131] Finally, in *Miller v. Brown & Williamson Tobacco Corp.*,[132] the district court held that, since risks of smoking had a long history of public knowledge, proof that the cigarettes were defective was not possible.[133] The court stated that a risk-utility analysis could not be used under state law since there existed no issues of fact showing a defect.[134] The court of appeals adopted this reasoning by affirming the rationale and the decision.[135]

1. The Statutory Preemption Issue

The issue of federal statutory preemption of state law ultimately became a constitutional issue with regard to claims of manufacturers' failure to warn consumers about the health risks of smoking.[136] The preemption question was prompted by various interpretations of the 1965 and 1969 Acts.[137] The preemption defense, based upon the Article VI Supremacy Clause of the United States Constitution, argued that federal law preempted state law when a conflict arose.[138]

Contemporaneous with the current wave of cigarette litigation, the United States Supreme Court, in *Jones v. Rath Packing Co.*,[139] held that state law could be preempted by express language of a federal statute.[140] The Court asserted that congressional intent could be " 'explicitly stated in the statute's language or implicitly contained in its structure and purpose.' "[141] Following the *Jones* decision, the Court again was faced with determining whether Congress could preempt state law in *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*.[142] In *De La Cuesta*, the Court held that state law could be preempted, absent express language, if the federal law completely occupied a legislative field so that "Congress left no room for the States to supplement it.' "[143] Finally, in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*,[144] the Court maintained that state law could be preempted if that law conflicted with congressional goals articulated in federal law.[145]

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131. *Id.* at 858-59.

132. Jacobson, *supra* note 73, at 1041 n.154.

133. Jacobson, *supra* note 73, at 1041 n.154.

134. Jacobson, *supra* note 73, at 1041 n.154.

135. Jacobson, *supra* note 73, at 1041 n.154.

136. Jacobson, *supra* note 73, at 1045.

137. Jacobson, *supra* note 73, at 1045.

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

139. 430 U.S. 519 (1977).

140. *Id.* at 525.

141. Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2617 (1992) (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

142. 458 U.S. 141 (1982).

143. *Id.* at 153 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, *rev'd*, Rice v. Board of Trade, 331 U.S. 247 (1947)).

144. 461 U.S. 190 (1983).

145. *Id.* at 212-13.

2. Cigarette Litigation in Which Claims Were Preempted

The strength of the preemption defense was first manifested in cigarette litigation in *Stephen v. American Brands, Inc.*[146] In *Stephen*, the deceased had smoked for fifty-four years.[147] The complaint alleged that the manufacturer failed to adequately warn the decedent of the risks of smoking.[148] The manufacturer alleged full compliance with the Federal Cigarette Labeling and Advertising Act,[149] and relied on the preemption defense.[150] The district court denied plaintiff's motion to strike the preemption defense by holding that "the labeling act 'does preempt tort claims which are premised on the adequacy of warnings on cigarette packaging or the propriety of a party's actions with respect to the advertising and promotion of cigarettes.' "[151] The Eleventh Circuit affirmed and, relying in part on the Supremacy Clause of the United States Constitution, held that Congress could preempt state law expressly or impliedly.[152] The court stated that "[t]he burden of showing that Congress intended to preclude the states from providing traditional state law remedies for its citizens rests upon the defendant."[153] Finally, the court stated that further district court proceedings would determine how the preemption defense would affect the plaintiff's claims.[154]

That same year, the First Circuit faced the preemption issue in *Palmer v. Liggett Group, Inc.*[155] Here, the decedent smoked three to four packs of cigarettes per day until he died from lung cancer at age forty-nine.[156] Again, the plaintiffs in *Palmer* alleged liability due to negligent failure to adequately warn of the dangers of smoking, among other causes of action.[157] The manufacturer asserted a preemption defense and filed a motion to dismiss.[158] The motion was denied by the district court, which concluded that Congress's silence on the preemption issue did not indicate a desire to eliminate recovery by consumers injured by cigarette ads that failed to warn of the hazards of smoking.[159] The First Circuit, in reversing the lower court,

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146. 825 F.2d 312 (11th Cir. 1987).

147. *Id.* at 313.

148. *Id.*

149. Cigarette Act, *supra* note 3, §§ 1331-1341.

150. *Stephen*, 825 F.2d at 313.

151. *Id.* (quoting Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987)) (construing Cigarette Act, *supra* note 3).

152. *Id.* (citing Jones v. Rath Packing Co., 430 U.S. 519, *reh'g denied*, 431 U.S. 925 (1977); Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141 (1982); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, *rev'd*, Rice v. Board of Trade, 331 U.S. 247 (1947)). Additionally, the court held that state law could be preempted if it conflicted with federal law. *Id.*

153. *Id.* (citing Silkwood v. Kerr-McGee Corp., 464 U.S. 238, *reh'g denied*, 465 U.S. 1074 (1984), *and cert. denied*, 476 U.S. 1104 (1986)).

154. *Id.*

155. 825 F.2d 620 (1st Cir. 1987).

156. *Id.* at 622.

157. *Id.* The complaint also alleged common law negligence, breach of warranty, and Massachusetts Consumer Protection Act violations. *Id.*

158. *Id.*

159. *Id.* (citing Palmer v. Liggett Group, Inc., 633 F. Supp. 1171, 1173 (D. Mass. 1986), *rev'd*, 825 F.2d 620 (1st Cir. 1987)).

turned to statutory construction and interpretation of the Federal Act.[160] It held that a suit against cigarette manufacturers for damages based on a common law inadequate warning concept, particularly if the warning satisfied the Act's mandate, disrupted congressional intent to balance health protection and trade regulation under the Federal Cigarette Labeling and Advertising Act.[161] The preemption holding stemmed from the court's determination that the Act's language was clear and unambiguous.[162] There was no reason to determine intent by analyzing legislative history, since Congress included a statement of purpose and a preemption section in the Act itself.[163] The First Circuit extended its analysis beyond the *Stephen* Court's evaluation by stating that it believed Congress was attempting to balance two competing interests: health protection education by informing the public of health hazards of smoking, and trade protection by prohibiting " 'diverse, nonuniform and confusing cigarette labeling.' "[164] Therefore, it felt that the Act " 'represents a carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of the national economy.' "[165]

The preemption defense was again utilized in *Roysdon v. R.J. Reynolds Tobacco Co.*[166] In *Roysdon*, the plaintiff had his left leg amputated below the knee due to peripheral atherosclerotic vascular disease.[167] He sued the cigarette manufacturer for failure to warn of the risk of vascular disease and for placing defective and unreasonably dangerous products on the market.[168] The district court ruled for the manufacturer by dismissing the failure to warn claim before trial and by granting a directed verdict on the unreasonably dangerous claim since the plaintiffs had not established a jury question as to that issue.[169] The Sixth Circuit affirmed by holding that the state claim for failure to adequately warn was preempted by the Federal Cigarette Labeling and Advertising Act.[170] The court stated that cigarettes were not defective or unreasonably dangerous, since " '[k]nowledge that cigarette smoking is harmful to health is widespread and can be considered part of the common knowledge of the community.' "[171] The court again based its decision concerning the inadequate warning claim on preemption analysis.[172] It used interpretation of congressional intent, federal statutory language, and federal law

160. *Id.* at 623.

161. *Id.* at 626 (construing Cigarette Act, *supra* note 3).

162. *Id.* (construing Cigarette Act, *supra* note 3).

163. *Id.* (discussing Cigarette Act, *supra* note 3, §§ 1331, 1334).

164. *Id.* (alteration in original) (quoting Cigarette Act, *supra* note 3, § 1331 (1970)).

165. *Id.* (quoting Cipollone v. Liggett Group, Inc., 789 F.2d 181, 187 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987)).

166. 849 F.2d 230 (6th Cir. 1988).

167. *Id.* at 232.

168. *Id.*

169. *Id.*

170. *Id.* (construing Cigarette Act, *supra* note 3).

171. *Id.* at 235-36 (quoting Roysdon v. R.J. Reynolds Tobacco Co., 623 F. Supp. 1189, 1192 (E.D. Tenn. 1985), *aff'd*, 849 F.2d 230 (6th Cir. 1988)).

172. *Id.* at 233-35.

supremacy to arrive at its conclusion.[173] Accordingly, the court determined that the Act was a carefully drafted balance of interests between a need to protect the public and a need to protect the economy and, as such, was not intended to be superseded by any State.[174]

Finally, in *Pennington v. Vistron Corp.*,[175] the decedent's wife sued approximately twenty-five companies, including cigarette makers, for her husband's death due to cancer of the esophagus.[176] The district court granted summary judgment for the cigarette manufacturers,[177] and the ruling was affirmed on appeal.[178] The Fifth Circuit, like other appellate courts, proceeded on a preemption analysis path.[179] First, the court disagreed with the district court's holding that all post-1965 state tort claims based on smoking injury were preempted.[180] The court held that the federal statute did not preempt the plaintiff's unreasonably dangerous per se claim under Louisiana law.[181] Second, the court agreed with the district court that the plaintiff's pre-1966 failure to adequately warn claim was *not* preempted.[182] The court, however, did affirm the lower court's granting of summary judgment for the manufacturers on both non-preempted claims.[183] The ruling was based on the plaintiff's failure to present sufficient evidence to establish a genuine issue of material fact for trial on the non-preempted claims.[184] Once again, the plaintiff's extended cigarette litigation produced no recovery due to the constitutional doctrine of preemption.

### 3. Cigarette Litigation in Which Claims Were Not Preempted

Some state supreme courts have determined that the federal statutes did *not* preempt state common law claims.[185] In *Forster v. R.J. Reynolds Tobacco Co.*,[186] the

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173. *Id.*

174. *Id.* at 234-35 (citing Cipollone v. Liggett Group, Inc., 789 F.2d 181, 187 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987); Palmer v. Liggett Group, Inc., 825 F.2d 620, 626 (1st Cir. 1987)).

175. 876 F.2d 414 (5th Cir. 1989). R.J. Reynolds Tobacco Company, Inc. and American Tobacco Company were the tobacco company defendants-appellees in the suit. *Id.*

176. *Id.* at 416.

177. *Id.* at 416-17.

178. *Id.* at 427.

179. *Id.* at 420-21. The court relied on Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230 (6th Cir. 1988); Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987); Stephen v. American Brands, Inc., 825 F.2d 312 (11th Cir. 1987); and Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987); in determining that the failure to provide an adequate warning claim under Louisiana law conflicted with Congress's clear intent to require uniform warning labels nationwide, and was therefore preempted. Pennington v. Vistron Corp., 876 F.2d 414, 420-21 (5th Cir. 1989). This included all the plaintiff's post-1965 failure to warn claims. *Id.*

180. *Pennington*, 876 F.2d at 423.

181. *Id.* (construing Cigarette Act, *supra* note 3).

182. *Id.* at 424.

183. *Id.*

184. *Id.* at 425-27. The court granted summary judgment since the plaintiff did not submit evidence in opposition to the manufacturers' motion for summary judgment. *Id.* The court stated that "Mrs. Pennington failed to make a showing sufficient to create a substantial fact issue as to an essential element of her claim – that the decedent's esophageal cancer was caused by a defect in the tobacco companies' cigarettes." *Id.* at 427.

185. Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2613 (1992).

186. 437 N.W.2d 655 (Minn. 1989).

plaintiff alleged the decedent's death was caused by lung cancer from smoking Camel cigarettes for thirty years.[187] The trial court granted summary judgment to the manufacturer and retailer on the basis of preemption by federal statute, but the court of appeals reversed, holding there was no federal preemption.[188] The Minnesota Supreme Court held that state tort claims under a state-imposed duty to warn of hazards are impliedly preempted by federal statute.[189] The court said that preempted claims were those that attack the adequacy of advertising concerning health and smoking; those based on strict liability for failure to warn of adverse health consequences; those *state* breach of warranty claims based on duty to warn; and those based on negligence of duty to warn about possible hazards.[190] The court said that state law claims *not* preempted were those based on "defective condition"; those under strict liability for unsafe design; those of intentional misrepresentation based on false advertising statements; and those based on failure to warn that were also pre-1966 claims.[191]

Likewise, in *Dewey v. R.J. Reynolds Tobacco Co.*,[192] the plaintiff alleged her husband's lung cancer death was due to thirty-eight years of smoking.[193] The complaint alleged theories of design defect, inadequate warning, fraud, and advertising misrepresentation.[194] On Federal Cigarette Act preemption grounds, the trial court granted partial summary judgment for the manufacturer on the failure to warn, fraud, and advertising misrepresentation claims, and allowed the remaining claims to stand.[195] The superior court, appellate division, affirmed subject to modification.[196] Pursuant to appeal, the New Jersey Supreme Court had the task of determining whether the Federal Cigarette Act preempted the plaintiff's common law tort claims,[197] and " 'whether Congress intended that the federal regulation supersede state law.' "[198] Based in part on the *Forster* decision, the court determined that the Federal Cigarette Labeling and Advertising Act did not preempt state common law claims for design defect, failure to warn, fraud, or misrepresentation in advertising, thereby rejecting five federal circuit courts of appeals'

187. *Id.* at 656. The complaint alleged that Reynolds' persuasive advertising led to the belief that it was nonhazardous to health and, eventually, to addiction. *Id.* at 656-57.

188. *Id.* at 657 (citing Forster v. R.J. Reynolds Tobacco Co., 423 N.W.2d 691, 696 (Minn. 1988), *aff'd in part, rev'd in part*, 437 N.W.2d 655 (Minn. 1989)).

189. *Id.* at 660.

190. *Id.* at 660-62.

191. *Id.* at 661-63.

192. 577 A.2d 1239 (N.J. 1990).

193. *Id.* at 1241.

194. *Id.*

195. *Id.*

196. *Id.* The modification concerned the trial court's decision on the design defect claim – the Appellate Division believed Comment i of the *Restatement (Second) of Torts* § 402A, should be applied under New Jersey's Products Liability Law. *Dewey*, 577 A.2d at 1241.

197. *Dewey*, 577 A.2d at 1242.

198. *Id.* at 1243 (alteration in original) (quoting Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 369 (1986)).

decisions on preemption.[199] The court stated that it was "convinced that had Congress intended to immunize cigarette manufacturers from packaging, labeling, misrepresentation, and warning claims, it knew how to do so with unmistakable specificity."[200]

Thus, the diametrically opposed views regarding federal statute preemption of damage claims set the stage for the United States Supreme Court to consider the issue and for the Court to define the boundaries for future litigation arising from cigarette smoking injuries.

## IV. INSTANT CASE

In *Cipollone v. Liggett Group, Inc.*,[201] the Supreme Court became the ultimate arbiter on the issue of the preemptive effect of the federal cigarette labeling and advertising statutes upon damage claims against cigarette manufacturers.[202] Justice Stevens delivered the opinion of the Court concerning Parts I through IV, and was joined in Parts V and VI by Chief Justice Rehnquist and Justices White and O'Connor.[203] Justice Blackmun, along with Justices Kennedy and Souter, concurred in part, concurred in the judgment in part, and dissented in part, while Justices Scalia and Thomas concurred with the judgment in part and dissented in part.[204]

Justice Stevens and the majority[205] began the analysis in Parts I and II, with an introduction of the procedural history of the lengthy *Cipollone* litigation and a brief background of the 1965 and 1969 federal statutes enacted to regulate cigarette labeling and advertising.[206] The Court determined, in Part III, that based on the concept of constitutional supremacy, the court of appeals' approach was slightly misdirected on interpreting Congress's intentions of preemption.[207] The Court believed the express language of section 5 of the 1965 and 1969 Acts determined the preemptive scope, since Congress specifically provided for a section addressed to that issue.[208] There was no need to imply " 'intent to preempt state laws from the substantive provisions' of the legislation,"[209] so there was no reason to look beyond section 5 of each act to know what was expressly preempted.[210]

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199. *Id.* at 1251 (construing Cigarette Act, *supra* note 3). The First, Third, Fifth, Sixth, and Eleventh Circuit Courts of Appeals had specifically supported the preemption defense for failure to warn. *Id.* at 1246.

200. *Id.* at 1251 (citing Cigarette Act, *supra* note 3).

201. 112 S. Ct. 2608 (1992).

202. *Id.* at 2615.

203. *Id.* at 2613.

204. *Id.*

205. *Id.* Justice Stevens was joined by Chief Justice Rehnquist and Justices White, Blackmun, O'Connor, Kennedy, and Souter in Parts I, II, III, and IV. *Id.* Justice Stevens was joined by Chief Justice Rehnquist and Justices White and O'Connor in Parts V and VI. *Id.*

206. *Id.* at 2613-17.

207. *Id.* at 2617-18.

208. *Id.* at 2618 (citing Cigarette Act, *supra* note 3, § 1334).

209. *Id.* (alteration in original) (quoting California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 282 (1987)).

210. *Id.* (construing Cigarette Act, *supra* note 3, § 1334).

In Part IV, the Court focused on the 1965 Act's preemption provisions and determined that the provisions only prohibited state and federal rulemaking agencies from requiring specific warning statements on cigarette labels or in advertisements.[211] According to the Court, this interpretation was appropriate for three reasons: a presumption existed against the preemption of state police power regulations, since section 4 of the 1965 Act expressed verbatim the warning of which Congress approved; the section 4 warning did not preclude additional requirements of state law; and there was no conflict between federal preemption of state warning requirements and state common law suits.[212] The majority stated that section 5 should be interpreted as superseding "only positive enactments by legislatures or administrative agencies that mandate particular warning labels."[213] Ultimately, the Court held that the 1965 Act only preempted state and federal requirements of specific warning *statements*, and did not preempt state law damage claims.[214]

In Part V, the Court determined the 1969 Act to contain much broader language than the 1965 Act for two reasons: the 1969 Act prohibited state law " 'requirement[s] or prohibition[s],' " and not just *statements*; and the 1969 Act covered responsibility in cigarette " 'advertising or promotion,' " and not simply " 'advertising' " statements.[215] The Court rejected both parties' contentions that the 1969 Act did not change the federal law's preemptive scope, and held that the Act did change the law considerably.[216] The majority disagreed with the Cipollones' claim that the preemption section of the 1969 Act was not broad enough to preempt common law actions.[217] The Court expressed its opinion that the phrase " '[n]o requirement or prohibition' " meant no distinction between positive enactments and common law so that, although legislative history indicated Congress's concern with the former, the plain language of the Act covered the latter as well.[218] Additionally, the Court rejected another of the petitioner's attempts to exclude common law rules and thereby limit the 1969 Act's preemption language to

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211. *Id.* (construing Cigarette Act, *supra* note 3, § 1334).

212. *Id.* (construing Cigarette Act, *supra* note 3, § 1334).

213. *Id.* (construing Cigarette Act, *supra* note 3, § 1334) (citing Banzhaf v. FCC, 405 F.2d 1082, 1091-92 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969)). The Court felt that this reading paralleled the 1965 Act's purpose of avoiding confusing "regulations," and that the term "regulations" meant positive legislative enactments, not state common law claims. *Id.* at 2619. The Federal Trade Commission's regulatory efforts were also reflective of Congress's intent to prevent confusing label regulations and to preempt all authorities from requiring *any* statement concerning advertising. *Id.*

214. *Id.* at 2619 (construing Cigarette Act, *supra* note 3).

215. *Id.* (alteration in original) (quoting Cigarette Act, *supra* note 3, § 1334 (1970)).

216. *Id.* at 2619-20. The 1969 Act changed the warning label, banned broadcast media advertising, and allowed print advertising to be limited. *Id.* (construing Cigarette Act, *supra* note 3).

217. *Id.* at 2620 (construing Cigarette Act, *supra* note 3).

218. *Id.* (quoting Cigarette Act, *supra* note 3, § 1334 (1970)). The Court stated the differences between the Acts in an alternate way: The common law does not require the use of a particular statement on packaging or in advertising, and it is the duty of the common law to enforce either affirmative requirements or negative prohibitions. *Id.* As such, the Court did not allow the limitation of the 1969 Act to positive enactments by legislative or agency bodies. *Id.* (construing Cigarette Act, *supra* note 3).

positive enactments: The section 5(b) phrase " 'imposed under State law' " recognizes common law as well as statutes and agency regulations.[219]

However, the 1969 Act's preemptive effect does not cover all common law claims, according to the Court's view, nor does the Act say which are or are not preempted.[220] Accordingly, the Court resolved to look at each of the common law claims to decide which were preempted.[221] To do this, the Court looked to see if the legal duty behind a common law damage suit is a " 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion.' "[222] The Court concluded that each portion of the section 5(b) clause would determine which common law claims were preempted, and which were not.[223]

### *A. Failure to Warn*

The Court held that preemption existed for claims that relied on a state law " 'requirement or prohibition . . . with respect to . . . advertising or promotion.' "[224] Thus, failure to warn claims were preempted if they required a showing that the manufacturers' post-1969 advertising should have included more, or clearer, warnings.[225] On the other hand, the Court interpreted the Act to allow failure to warn claims based on manufacturers' testing, research, or other actions unrelated to advertising or promotion of cigarettes.[226]

### *B. Breach of Express Warranty*

The petitioner alleged breach of an express warranty based on advertising statements of the manufacturer.[227] The district court and the Third Circuit had previously determined that this claim was preempted after 1965.[228] The Court reasoned that this result was misguided due to the lower courts' concentration on the claim's challenge of the "propriety" of advertising, rather than on the narrower question of whether the claim required a state law regulation based on smoking

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219. *Id.* at 2621 (quoting Cigarette Act, *supra* note 3, § 1334 (1970)). The Court believed the 1969 Act to be much broader, and thus, the preemptive reach of § 5(b) was extended accordingly. *Id.* (construing Cigarette Act, *supra* note 3).

220. *Id.* (construing Cigarette Act, *supra* note 3).

221. *Id.*

222. *Id.* (alteration in original) (quoting Cigarette Act, *supra* note 3, § 1334 (1970)). The Court also resolved to narrowly construe the language of § 5(b). *Id.* (construing Cigarette Act, *supra* note 3).

223. *Id.* The Court assumed the claims to be analyzed were valid state law claims. *Id.* (applying Cigarette Act, *supra* note 3).

224. *Id.* (alteration in original) (quoting Cigarette Act, *supra* note 3, § 1334 (1970)).

225. *Id.* at 2621-22. Failure to warn liability could be established by a showing that a warning was needed to make a product safe, suitable, and fit for intended use, that the manufacturer failed to warn, and that the failure resulted proximately in consumer's injury. *Id.* Petitioner alleged two failure to warn theories: (1) manufacturers were negligent in testing, researching, marketing, and advertising their products and (2) manufacturers failed to adequately warn of the health consequences of smoking. *Id.*

226. *Id.* at 2622 (construing Cigarette Act, *supra* note 3).

227. *Id.* (citing Cipollone v. Liggett Group, Inc., 893 F.2d 541, 574-76 (3d Cir. 1990), *aff'd in part, rev'd in part*, 112 S. Ct. 2608 (1992); Cipollone v. Liggett Group, Inc., 683 F. Supp. 1487, 1497 (D.N.J. 1988)).

228. *Id.*

and health concerning advertising.[229] According to the Court, an express warranty claim is based on the warrantor's (manufacturer's) requirements, not state law requirements.[230] Thus, although the duty not to breach warranties arises under state law, the *specific* requirement based on smoking and health concerning cigarette advertising in a breach of express warranty claim is based on a manufacturer's advertising statements.[231] As a result, the Court concluded that even if the warranty terms were contained in the manufacturer's advertisements, the breach of warranty claim, based on advertising, is itself not based on a state-imposed duty.[232] The opinion thus held that the 1969 Act did not preempt the breach of express warranty claim.[233]

### *C. Fraudulent Misrepresentation*

The Court began its analysis of fraud by discussing the merits of the first of two theories of fraudulent misrepresentation propounded by the petitioner.[234] First, the Court examined the claim that the manufacturers' advertising "neutralized the effect of federally mandated warning labels" by downplaying the dangers of smoking.[235] The Court said that such a state law *prohibition* was the converse of a state law requirement that warnings be included in advertising and, since the 1969 Act preempts both, it precluded petitioner's first fraud claim.[236] Considering prior Federal Trade Commission and Food and Drug Administration regulations prohibiting the negation of consumer warnings,[237] the majority determined that the first claim of fraudulent misrepresentation was collateral to the failure to warn claim, which was also preempted by the 1969 Act.[238]

The second claim was one of intentional fraud and misrepresentation by false representation and concealment of material fact.[239] The Court analyzed the 1969 Act's preemption power regarding its relation to the state law duty not to make such false statements or to conceal facts.[240] The Court found that preemption language applied only to "the imposition of state law obligations 'with respect to the

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229. *Id.* (emphasis omitted).

230. *Id.*

231. *Id.* The Court said, in sum, that § 5(b) should not be read such that a manufacturer's express warranty, voluntarily undertaken, had the force of a state law requirement. *Id.* (construing Cigarette Act, *supra* note 3).

232. *Id.* at 2622-23.

233. *Id.* at 2623 (to the extent there was a valid claim for express warranty breach) (construing Cigarette Act, *supra* note 3).

234. *Id.*

235. *Id.*

236. *Id.* (construing Cigarette Act, *supra* note 3).

237. *Id.* The Court recognized that regulators have been aware of the connection between prohibitions on advertisements that associated smoking with " 'glamour, romance, youth, happiness,' " and requirements for warnings in advertisements. *Id.* (quoting 16 C.F.R. §§ 1.61-.67 (1964)). In 1964, the Federal Trade Commission required the cigarette manufacturer, in order to prevent false impressions, to disclose smoking's health risks if it also advertised smoking's pleasures. *Id.* (citing 16 C.F.R. §§ 1.61-.67 (1964)). In 1965, the Food and Drug Administration also ruled that hazardous substances would not meet federal labeling laws if anything tending to negate or disclaim the warning appeared on the label. *Id.* (citing 21 C.F.R. § 191.102 (1965)).

238. *Id.* (construing Cigarette Act, *supra* note 3).

239. *Id.*

240. *Id.* (construing Cigarette Act, *supra* note 3).

advertising or promotion' of cigarettes," so that claims of concealment of material facts were not preempted if based on a state law duty to disclose those facts by means *other than* advertising.[241]

The Court held that claims of fraudulent misrepresentation from advertising, such as those based on false statements of material fact made in advertisements, are not preempted by the 1969 Act.[242] It predicated this result upon the general duty not to deceive, rather than a duty based on smoking and health.[243] Congressional intent did not include protection of manufacturers from claims of fraud, according to the Court.[244] The Court felt Congress intended a narrow reading of the phrase " 'relating to smoking and health,' " so that deceptive advertising regulations would not be circumvented.[245] It believed the 1969 Federal Act's purpose in using the phrase was narrow and specific in the first place, since normally state law prohibitions on intentional fraud were based on the generally broad concept of falsity.[246] Therefore, the Court reasoned that the phrase " 'based on smoking and health' " did not include the broader duty not to make fraudulent statements, so the claim based on these advertising statements was not preempted.[247]

### *D. Conspiracy to Misrepresent or Conceal Material Facts*

The majority concluded that the 1969 Act did not preempt the petitioner's claim of conspiracy to misrepresent or conceal material facts of smoking's health hazards.[248] As the claim was founded on a duty not to conspire to commit fraud, the Court determined that this duty was not a prohibition " 'based on smoking and health' " for the same reasons as its analysis of the intentional fraud claim.[249]

### *E. Summary of the Court's Opinion*

Part VI of the Supreme Court majority's opinion, therefore, upheld the validity of state law damage claims under the 1965 Act.[250] Concerning the 1969 Act, it preempted failure to warn claims and negation of federal warning requirements claims if the claims relied on omissions or additions in advertising, but it allowed

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241. *Id.* (alteration in original) (quoting Cigarette Act, *supra* note 3, § 1334 (1970)). If state law required disclosure of material facts about smoking's health effects to an administrative agency, for example, the 1969 Act, § 5(b), would *not* preempt a claim for failure to disclose under state law. *Id.* (citing Cigarette Act, *supra* note 3).

242. *Id.* (construing Cigarette Act, *supra* note 3).

243. *Id.* at 2623-24. Analysis of congressional intent demonstrated the 1965 and 1969 Acts' power to punish deceptive advertising practices. *Id.*

244. *Id.* at 2624.

245. *Id.* (quoting Cigarette Act, *supra* note 3, § 1334 (1970)). "The Senate Report emphasized that the 'preemption of regulation or prohibition with respect to cigarette advertising is *narrowly phrased to preempt only State action based on smoking and health*.' " *Id.* at 2624 n.26 (emphasis added) (quoting S. REP. No. 566, 91st Cong., 2d Sess. 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2652, 2663). Other state powers concerning taxation, sale, and similar police powers would not be affected. *Id.*

246. *Id.*

247. *Id.* (quoting Cigarette Act, *supra* note 3, § 1334 (1970)).

248. *Id.* at 2624-25 (construing Cigarette Act, *supra* note 3).

249. *Id.* at 2624 (quoting Cigarette Act, *supra* note 3, § 1334 (1970)).

250. *Id.* (construing Cigarette Act, *supra* note 3).

to stand claims of breach of express warranty, intentional fraud and misrepresentation, and conspiracy.[251]

### *F. Concurring and Dissenting Opinions*

In an opinion in which Justices Kennedy and Souter joined, Justice Blackmun concurred with the majority as to Parts I through IV, but disagreed with Parts V and VI.[252] Justice Blackmun agreed with all of the majority's non-preemptive opinion, but would have carried it further to include even the claims the majority held to be preempted by the 1969 Act.[253] In essence, Justice Blackmun would have allowed all claims to stand; thus, none would be preempted by federal statute.[254] He believed neither version of the federal statutes showed congressional intent to preempt *any* state common law damage actions.[255] He expressed his conviction that the language of the 1969 Act did not exhibit any more of a congressional intent to preempt state common law damage claims than did that of the 1965 Act.[256] Justice Blackmun's statutory interpretation differed from the majority's broadly-encompassing view that the phrase " 'no requirement or prohibition' " included preemption of state common law suits.[257]

Justice Blackmun's view concerning the legislative history of the 1969 Act indicates his belief that Congress did not intend to leave consumers injured through cigarette manufacturers' conduct without remedies.[258] He postulated that Congress would not have left consumers, injured as such, without a means of judicial remedy.[259]

Finally, Justice Blackmun could not distinguish, as readily as the majority had, between the common law claims so that some were allowed and some were not.[260] He felt the Court frequently shifted from a general analysis of preemption to one of specificity.[261] Justice Blackmun viewed this inconsistency as confusing, since he believed that Congress never "intended to create such a hodge-podge of allowed and disallowed claims when it amended the pre-emption provision in 1970."[262] He

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251. *Id.* at 2625 (construing Cigarette Act, *supra* note 3).

252. *Id.*

253. *Id.* at 2625-32 (Blackmun, J., concurring in part, dissenting in part).

254. *Id.*

255. *Id.* at 2625 (*see* Cigarette Act, *supra* note 3).

256. *Id.* at 2627 (*see* Cigarette Act, *supra* note 3).

257. *Id.* (alteration in original) (quoting Cigarette Act, *supra* note 3, § 1334 (1970)). Justice Blackmun disagreed with the majority's broad interpretation since he believed that, due to the Court's past distinctions between direct state regulation and indirect regulation through common law damage actions, damage claims were *not* " 'requirements' " or " 'prohibitions' " under state law. *Id.* at 2629 (alteration in original) (quoting Cigarette Act, *supra* note 3, § 1334 (1970)).

258. *Id.* at 2630. Justice Blackmun stated that the Federal Cigarette Labeling and Advertising Act had no alternative remedies, unlike other statutes that did. *Id.* (citing Cigarette Act, *supra* note 3). He cited § 502(a) of ERISA as an example of how Congress had established a broad civil enforcement scheme to protect the consumer. *Id.* (citing Employment Retirement Income Security Act 29 U.S.C. § 1144 (a), (c)(1) (1988 & Supp. III 1991)).

259. *Id.*

260. *Id.* at 2631.

261. *Id.*

262. *Id.* (*see* Cigarette Act, *supra* note 3).

believed the majority's decision would create lower court confusion in implementation and, more importantly, that the States would be less able to protect their citizens' safety and health.[263]

Justice Scalia wrote an opinion, with which Justice Thomas joined, that concurred in part and dissented in part with the plurality.[264] In contrast to Justice Blackmun's view, Justice Scalia believed that *all* of the petitioner's claims should be preempted, not under a narrow or broad interpretation of congressional preemptive intent, but under an interpretation according to a statute's "apparent meaning."[265] He felt there was no basis for the plurality's narrow statutory construction.[266] Justice Scalia favored instead the concept that legislative purpose is accurately conveyed by the ordinary meaning of a statute's language,[267] so that when it suggested an intent for the provision to be read broadly (or narrowly), the Court's interpretation of a preemption provision should also be broad (or narrow).[268]

Justice Scalia disagreed with the plurality's finding of partial preemption on three points.[269] First, he expressed his view that the petitioner's pre-1969 failure to warn claim should be preempted.[270] The Court had stated that since common law duties did not require *particular* statements in their advertisements, but only *some* warning statement concerning health risks, the 1965 Act did not preempt claims based on those duties.[271] Justice Scalia did not agree with the *particularity* expressed by the majority.[272] Second, he believed the post-1969 breach of express warranty claim was preempted by the 1969 Act.[273] He disagreed with the majority's finding that liability for breach of express warranty is not imposed by state law within the 1969 Act's language but is assumed by the manufacturer.[274] Justice Scalia contended that if liability arises with a promise or advertising representation, it does so by law and, as such, the express warranty claim was preempted.[275] Third, he argued the post-1969 fraud and misrepresentation claims should be preempted.[276] Justice Scalia stated he would use a " 'proximate application'

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263. *Id.*

264. *Id.* at 2632 (Scalia, J., concurring in part, dissenting in part).

265. *Id.* Justice Scalia believed the best procedure was to apply to the statutory text "ordinary principles of statutory construction." *Id.*

266. *Id.* at 2633.

267. *Id.*

268. *Id.* at 2634. *See, e.g.*, Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 7-8 (1987).

269. Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2634 (1992).

270. *Id.* at 2635 (citing Cigarette Act, *supra* note 3).

271. *Id.* at 2634 (construing Cigarette Act, *supra* note 3).

272. *Id.* Justice Scalia also would preempt claims based on manufacturers' failure to include in their advertisements statements related to health and smoking and claims based on failure to make statements related to health and smoking through non-advertising media. *Id.* at 2635.

273. *Id.* at 2636 (citing Cigarette Act, *supra* note 3).

274. *Id.* at 2635 (citing Cigarette Act, *supra* note 3).

275. *Id.* at 2635-36.

276. *Id.* at 2637.

methodology" to decide if the claims required duties " 'based on smoking and health.' "[277] He agreed with Justice Blackmun, albeit for completely different reasons, in the latter's opinion that the Court's decision would create more implementation problems and questions than it would resolve.[278]

## V. ANALYSIS

*Cipollone* is the first tort litigation decision based on injury from cigarette smoking that actually resulted in a monetary decision for the plaintiff.[279] However, this David and Goliath story has now been slightly modified by the Supreme Court. The Court's decision to allow certain claims and disallow others, based on its interpretation of congressional intent and of the statutory preemption provisions of the appropriate acts, levels the playing field for each side of the controversy. The Court, in effect, seems to be sending this message: Even though smoking's potential effects on physical health have been known for quite some time, if cigarette manufacturers have conspired to hide health information or have otherwise breached express warranties or intentionally misrepresented their products, then a plaintiff who has been injured by their products should at least be allowed to prove this and recover damages if successful. Indeed, the Court seems to be protecting both parties' interests equitably. On one hand, the Court follows the First Circuit's philosophy in *Palmer v. Liggett Group, Inc.*[280] by interpreting Congress's intent in drafting the federal acts as an attempt to balance public awareness of smoking's hazards and national economic interests.[281] On the other hand, the Court also believes that manufacturers must operate within common law boundaries.[282] If these boundaries are violated, manufacturers must be held liable for their actions and for damages. The Court also adopts the tactic taken by the court in *Dewey v. R.J. Reynolds Tobacco Co.*:[283] that Congress did not necessarily intend to protect cigarette manufacturers from all tort claims, since if it had wanted to, it could have done so by specific statutory language.[284] Therefore, the Court's approach is a strong balance that fairly guards the interests of all involved.

The Court's interpretation of the 1965 Act's preemption language regarding advertising seems reasonable in light of the specificity with which the Act was written. The Court felt that since Congress explicitly included a provision addressing the preemption issue and that the provision's plain language provides a reasonable

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277. *Id.* (quoting Cigarette Act, *supra* note 3, § 1334 (1970)). Justice Scalia would ask if the duty imposes an obligation due to the effect of smoking on one's health. *Id.*

278. *Id.* at 2637-38.

279. *Id.* at 2615. However, the $400,000 damage award was to compensate Mrs. Cipollone's husband for losses due to the manufacturer's breach of express warranty. *Id.* No damages were awarded to Mrs. Cipollone herself, since she was judged 80% contributorily responsible. *Id.*

280. 825 F.2d 620 (1st Cir. 1987).

281. *Id.* at 626 (citing Cipollone v. Liggett Group, Inc., 789 F.2d 181, 187 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987)).

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

283. 577 A.2d 1239 (N.J. 1990).

284. *Id.* at 1251.

indication of congressional intent concerning state authority, there is no reason to infer preemption of state laws.[285] This appears to be a logical determination of congressional intent of preemption since the provision was *purposely* placed in the statute. Therefore, the 1965 Act's language preempts legislatures and administrative agencies from requiring specific warning statements, but does not supersede state law damage actions.[286] The Court seems to have wisely drawn upon the First Circuit's analysis in *Palmer v. Liggett Group, Inc.*[287] in focusing on the Act's clear and unambiguous language.[288] In contrast to the *Palmer* holding, however, the Supreme Court believes the 1965 Act *does* allow state common law claims to stand by using the plain meaning of its preemption language as the key element.[289] Justice Scalia's dissent on this point greatly extends the plain meaning concept. His desire to preempt common law claims under the 1965 Act is based on a much broader interpretation of the section 5(b) language which says that " '[n]o statement relating to smoking and health shall be required in the advertising of [properly labeled] cigarettes.' "[290] His rigid interpretation allows for little flexibility in context and allows no remedy at all for consumers under the 1965 Act.[291]

Similarly, the Court appropriately uses the plain language approach[292] to determine that the 1969 Act is much broader in scope and that, although the 1965 Act's section 5 preemption provision was narrow and exact, the 1969 Act's section 5 extends preemption power to include both "positive enactments" *and* state common law claims.[293] This time, the Court utilizes the *Palmer* concept of plain meaning to hold that some common law claims are preempted by the 1969 Act, but not all.[294] Thus, the Court narrowly construes the statutory preemption language of section 5(b) of the 1969 Act to determine which common law claims can stand.[295] The Court uses three phrases to determine which claims are allowed. The Court must decide whether the duty is a " 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or

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285. Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2618 (1992) (citing Cigarette Act, *supra* note 3). *See also* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987); Malone v. White Motor Corp., 435 U.S. 497 (1978).

286. *Cipollone*, 112 S. Ct. at 2618-19. *See* Cigarette Act, *supra* note 3.

287. 825 F.2d 620 (1st Cir. 1987).

288. *Id. See* Cigarette Act, *supra* note 3.

289. *Cipollone*, 112 S. Ct. at 2618 (construing Cigarette Act, *supra* note 3). The Court also acknowledged the Act's *purpose* of avoiding confusing labeling and advertising regulations, as well as on-going *regulatory* efforts. *Id.* (discussing Cigarette Act, *supra* note 3). It determined that "positive enactments" were superseded, but common law damage actions were not. *Id.* at 2619 (construing Cigarette Act, *supra* note 3). By contrast, the *Palmer* court used plain meaning to determine that such common law claims were not possible. *Palmer*, 825 F.2d at 626.

290. *Cipollone*, 112 S. Ct. at 2618 (alteration in original) (quoting Cigarette Act, *supra* note 3, § 1334 (1970)).

291. *Id.* at 2634 (Scalia, J., concurring in part, dissenting in part) (discussing Cigarette Act, *supra* note 3).

292. *Id.* at 2620-21. The plain meaning is one approach to analyzing the statutory meaning of the words of a statute. It takes the literal interpretation as the meaning. *Id.*

293. *Id.* at 2621. The provision held that the Act preempted " '[s]tate *law* with respect to advertising or promotion.' " *Id.* (quoting Cigarette Act, *supra* note 3, § 1334 (1970)).

294. *Id.* (construing Cigarette Act, *supra* note 3).

295. *Id.* (construing Cigarette Act, *supra* note 3).

promotion.' "[296] Unlike any previous courts' analyses, the Court takes the approach of looking at each category of common law damage claims to determine if there exists a legal duty to protect against such damage.[297]

The majority holds that the failure to warn claims based on omissions or inclusions in advertising or promotions are preempted.[298] This follows a narrow reading of the language that the claims "rely on a state law 'requirement or prohibition . . . with respect to . . . advertising or promotion.' "[299] However, Justice Stevens and the majority also leave open the validity of claims based on the manufacturers' conduct unrelated to advertising or promotion.[300] This approach virtually eliminates a plaintiff's failure to warn claims but allows flexibility for suits if failure to warn dangers based on non-advertising activities can be proven. This may seem like a high hurdle to clear, but a plaintiff is not entirely foreclosed from suit as a result.

In contrast, the Court preserves the plaintiff's right, under the 1969 Act, to bring suit for express warranty breach, fraudulent misrepresentation, and conspiracy. According to the Court, an express warranty claim based on smoking and health related to advertising is a "contractual commitment voluntarily undertaken" by the manufacturer,[301] and the remedy for such a breach does not fall under state law. The Court correctly believes this claim is valid,[302] despite Justice Scalia's disagreement and his opinion that the 1969 Act preempts the claim since an express warranty duty arises under state law.[303]

Likewise, the Court correctly holds that claims of concealment of material facts are not preempted if there exists a state law duty to disclose those facts to a regulatory or administrative body other than by advertising or promotion.[304] Quite simply, under state law, if a manufacturer fails to disclose health risks to a responsible agency, then liability for concealment should exist. Fraud by intentional misstatement in advertising is also logically not preempted by the Court,[305] since conduct of that nature is one of the best examples that exists of misleading the public. The Court's analysis of this particular claim follows very closely the court's analysis in *Dewey v. R.J. Reynolds Tobacco Co.*[306] In *Dewey*, the court was certain in its interpretation of the 1969 Federal Act that Congress was not intending to protect cigarette manufacturers from generally fraudulent actions.[307] In *Cipollone*, the Court believes both the 1965 and 1969 Acts were designed to punish deceptive

296. *Id.* (alteration in original) (quoting Cigarette Act, *supra* note 3, § 1334 (1970)).
297. *Id.*
298. *Id.*
299. *Id.* (alteration in original) (quoting Cigarette Act, *supra* note 3, § 1334 (1970)).
300. *Id.* at 2622.
301. *Id.*
302. *Id.* at 2623.
303. *Id.* at 2635-36 (Scalia, J., concurring in part, dissenting in part).
304. *Id.* at 2623.
305. *Id.* at 2624.
306. 577 A.2d 1239 (N.J. 1990).
307. *Id.* at 1251 (construing Cigarette Act, *supra* note 3).

promotional schemes.[308] Indeed, the Court settles on a narrow reading, similar to *Dewey*, of the 1969 Act's phraseology " 'based on smoking and health' " to determine that Congress did *not* intend a claim based on allegedly fraudulent statements in cigarette advertising to be preempted.[309]

Finally, the Court properly recognizes that conspiracy claims are also not prohibitions " 'based on smoking and health,' " similar to intentional fraud claims.[310] Conspiracy claims against the manufacturers are also allowed to stand.[311]

Justice Blackmun's disagreement with the majority stems from his belief that the 1969 Act "no more . . . exhibits an intent to preempt state common-law damages actions than did the language of its predecessor in the 1965 Act."[312] He believes the revised text of section 5(b) of the 1969 Act does not invite preemption, nor is there any "suggestion in the legislative history that Congress intended to expand the scope of the pre-emption provision when it amended the statute in 1969."[313] Justice Blackmun holds the opinion that the majority shifts its level of generality in examining which claims are valid.[314] By allowing certain claims to be preempted, he believes the Court has damaged the States' power to protect the health and safety of its citizens and that Congress never intended such a result.[315]

Justice Blackmun's contention that the majority shifts its analysis level in determining which claims can stand and which cannot may be valid. But this does not necessarily inhibit states from protecting its citizens' health and safety. States are still able to protect health and safety through traditional means, such as transportation and public health facilities. Arguably, States may have less parental power of direct statutory protection regarding cigarette use, but Congress has assumed that role by its explicit preemption language in the 1969 statute. Justice Blackmun's opinion also fails to recognize one important decisional aspect that all citizens make every day: freedom of choice. Citizens have the choice to smoke and if provided with federally-mandated warnings about smoking's hazards, they must accept the consequences of their actions. Although certainly not bound by them, Justice Blackmun's approach ignores past appeals courts' decisions that were based on some form of balancing approach (between a desire to protect the public's interests and to protect the economy's interests), similar to the *Palmer* and *Roysdon* opinions, as well as the fact that certain activities, such as smoking, are known in the community to be harmful.[316] Justice Blackmun's conclusion carries the consumer protection concept extremely far, and leaves no room for a

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308. Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2624 (1992) (construing Cigarette Act, *supra* note 3). The Court felt Congress intended the language "relating to smoking and health" to be read narrowly. *Id.*

309. *Id.* (quoting Cigarette Act, *supra* note 3, § 1334 (1970)).

310. *Id.* (quoting Cigarette Act, *supra* note 3, § 1334 (1970)).

311. *Id.* at 2624-25.

312. *Id.* at 2627 (Blackmun, J., concurring in part, dissenting in part) (discussing Cigarette Act, *supra* note 3).

313. *Id.* at 2629 (discussing Cigarette Act, *supra* note 3).

314. *Id.* at 2631.

315. *Id.*

316. Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230 (6th Cir. 1988); Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987).

manufacturer to protect itself, except by the mere chance that a later court makes its own decision that a manufacturer has lived within the letter of the federal statute completely and without fail.

In clear contrast to Justice Blackmun, Justice Scalia asserts that all claims under both Acts should be preempted.[317] He expresses his belief in a "proximate application"[318] theory to decide if cigarette smoking damage claims create duties " 'based on smoking and health,' " so that the question that arises is whether a particular duty exists because of the effect of smoking upon health.[319] The result, of course, would be complete preemption. But Justice Scalia's approach also goes too far, not in the *Roysdon* balancing concept nor in the over-protection of economic interests, but in not giving enough, if any, protection to consumers, despite their conscious decisions to smoke. Justice Scalia too easily settles on an ordinary statutory construction philosophy, without much regard for consumers' often limited informational sources regarding health. It would be difficult for a plaintiff who had contracted lung cancer after fifty years of smoking to convince Justice Scalia that he or she should have an opportunity to prove a manufacturer's conspiracy or intentional misrepresentation in advertising. Justice Scalia's hard-line stance would preclude any attempt of proof based on *his* interpretation of the federal statutes' preemption provisions, giving consumers virtually no opportunity to protect themselves from basic, though possibly subtle, fraud or misrepresentation, even if they *have* made conscious decisions to smoke.

The majority, however, is unwilling to allow all claims to stand, nor will it allow them all to be preempted. The Court's opinion operates as a balance between extremes by forming a compromise that protects both parties from instant loss. On the other hand, the Blackmun and Scalia dissents discuss the plurality's decision and its probability of creating more questions than answers.[320] But the Court has specifically addressed the fact that if, for example, one can prove intentional fraud by a manufacturer and if a federal statute exists that provides guidelines for product warnings, claims can stand and recovery is possible.[321] Its balanced decision on these particular claims has been general enough so that the concepts can be carried over into future products liability cases similar to *Cipollone*'s cigarette litigation. Some claims will be completely preempted, based strictly on statutory language, if statutes exist for those types of products. But other claims may invariably be valid.

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317. Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2632 (1992) (Scalia, J., concurring in part, dissenting in part) (discussing Cigarette Act, *supra* note 3). Scalia's desire is to apply "ordinary principles of statutory construction" to the text, so that the legislative purpose is more correctly carried out. *Id.* at 2632-33.

318. *Id.* at 2637 (emphasis omitted).

319. *Id.* (quoting Cigarette Act, *supra* note 3, § 1334 (1970)).

320. *Id.* at 2637-38 (Scalia, J., concurring in part, dissenting in part).

321. *See id.* at 2636-38.

Indeed, the Court's decision has implications that extend beyond just cigarette litigation. One example is physical injury from alcohol consumption.[322] A 1988 federal act, the Alcoholic Beverage Labeling Act, requires health warning labels to be placed on alcoholic beverage containers.[323] This statute may be the basis behind the next attempts toward litigation in which consumers may be embroiled.[324] Since alcohol also has a potentially-negative physical impact on consumers' health, plaintiffs injured by the long-term effects of alcohol consumption may be able to learn what to expect by examining past cigarette litigation.[325] Alcohol manufacturers can also anticipate what the rules of the game might be now, by basing their approach on the Supreme Court's *Cipollone* guidelines. If manufacturers follow federal statutory mandates, plaintiffs must prove possible intent, fraud, or conspiracy to misrepresent in order to have a chance at recovery for health injuries. Like the cigarette tort litigation, plaintiffs may have an uphill battle here as well.

In the same vein, cases have also arisen concerning secondhand passive smoke injuries to third parties.[326] Although most of these lawsuits are directed not at manufacturers, but toward employers, the trend may be an indication that claims against the makers are forthcoming.[327] Such plaintiffs may be successful under various claims of liability, particularly industry-wide, market share, or enterprise theories of liability.[328] However, secondhand smoke plaintiffs will likely have a much more difficult task of proving causation and, if and when that is accomplished, in establishing a relationship between themselves and a manufacturer similar to that between a cigarette smoker and a manufacturer. This direct link is virtually nonexistent. Additionally, statutory language that covers advertising speaks to those who use the product, not to those who do not. Their approach to suits will necessarily have to be different than a cigarette smoker's approach because no statutory protection has been or is now in existence to protect them as a class. At this point, secondhand smoke plaintiffs' claims against manufacturers seem weak at best, especially when compared to actual cigarette smokers' claims. Conversely, in the wake of recent Environmental Protection Agency

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322. George Arthur Davis, *The Requisite Specificity of Alcoholic Beverage Warning Labels: A Decision Best Left for Congressional Determination*, 18 HOFSTRA L. REV. 943, 945-47 (1990).

323. *Id.* at 945 (citing Alcoholic Beverage Labeling Act of 1988, 27 U.S.C. §§ 213-219 (1988)).

324. *Id.* at 948-50. This is due, in part, to the Act's silence on the preemption issue. *Id.* at 952-53.

325. *Id.*

326. Larry Kraft, *Smoking in Public Places: Living With a Dying Custom*, 64 N.D. L. REV. 329, 330 (1988).

327. *Id.* at 333-35. *See also* Beverly Pettigrew Kraft, *Laurel Barber's Suit Blames 2nd-Hand Smoke for Lung Cancer*, THE CLARION-LEDGER (Jackson, Miss.), Oct. 24, 1992, at B1.

328. Bradley M. Soos, *Adding Smoke to the Cloud of Tobacco Litigation—A New Plaintiff: The Involuntary Smoker*, 23 VAL. U. L. REV. 111, 120-28 (1988). Under the industry-wide theory, an entire industry is held jointly and severally liable to a plaintiff who cannot prove which defendant made and marketed the product that caused the injury. *Id.* The plaintiff must also prove that all the defendants were part of an insufficient industry-wide safety standard. *Id.* Under a market share theory, the liability is the same as the industry-wide theory, except that responsibility is apportioned according to each defendant's percentage of the product market. *Id.* Under the enterprise theory of liability, defendant manufacturers should bear the losses to injured smokers since the former have some logical connection with the activity creating the losses, examples of which are most notably cases involving asbestos-related injuries. *Id.*

determinations that secondhand smoke is carcinogenic, these plaintiffs' cases may be somewhat bolstered.[329]

Nevertheless, for the many hundreds of thousands of 1940s and 1950s-era smokers who may file claims for physical damages against cigarette manufacturers in the future, the implications of the *Cipollone* decision are far-reaching. The decision, at a minimum, gives them *some* hope of recovery; each individual's case may be different but the chances of recovery increase dramatically if the burden of proof can be carried to show concealment of information or fraud. On the other hand, if manufacturers have operated according to the law, but particularly if they have been open and not fraudulent in advertising or concealment of material health data, their chances of success will likewise increase in weathering attacks on them or their products.

Today, the first question that most, if not all, health insurance companies ask a potential insured is, "Do you smoke?" In allowing a percentage discount credit off the normal premium for non-smokers, insurance companies willingly accept more of the risk for those whom they believe are healthier individuals. Despite this trend by insurance companies and other large entities toward promoting healthier lifestyles, cigarette manufacturers continue to sell their products successfully and are always assured of a fresh crop of newly-emerging smokers with each new generation. This battle for new converts is a continuing one for both sides. Likewise, the battle within cigarette tort litigation between plaintiffs and manufacturers is one in which there is no apparent victor—yet.

## VI. CONCLUSION

The trend of federal and state government, as well as private entities, in the United States concerning cigarette smoking restrictions in public and private places, has prompted Europe to begin to ban smoking in public areas, particularly government buildings and shopping centers.[330] It seems society worldwide is beginning to strengthen its stand on the insistence of maintaining a healthful environment, including the air it breathes. Despite tobacco's stronghold on the financial and economic assets of most technically advanced nations, society's values about smoking, which began changing after the first assault on American tobacco companies was launched in the 1950s, are becoming even stronger in the 1990s.[331] But like many other first attempts at challenging formidable opponents, products liability recovery for smoking-related illnesses, whether direct or passive, as well as recovery for other products of bodily consumption such as alcohol and drugs, may only amount to a trickle from a constricted faucet.

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329. Warren E. Leary, *U.S. Ties Secondhand Smoke to Cancer*, N.Y. TIMES, Jan. 8, 1993, at A14. The Environmental Protection Agency has recently added secondhand tobacco smoke to the list of human carcinogens, after concluding that it kills an estimated 3000 nonsmokers a year and exposes hundreds of thousands of children to respiratory problems. *Id.*

330. Frances Kerry, *France Gearing Up for Second Revolutions: Anti-Smoking Laws*, CHI. TRIB., Oct. 30, 1992, at 2. The new French law sets aside smoking areas in restaurants, factories, offices, and other public places, and provides for fines for individual offenders of up to $260, and for businesses of up to $1200. *Id.*

331. *See supra* notes 74-91 and accompanying text.

*Cipollone* reassures consumers that today there is a much better chance than ever to succeed in recovering damages from manufacturers due to suffering the ill effects of smoking. *Cipollone* has prepared the groundwork for the next wave of plaintiffs. The United States Supreme Court has now clarified the framework within which plaintiffs can build their cases against manufacturers. The Court has also provided the rule book within which manufacturers must operate. Plaintiffs' attorneys may feel that *Cipollone* has given them an edge in structuring their suits, but litigation costs may still be a limiting factor. On the other hand, manufacturers have tremendous financial resources with which to fight. If they have nothing fraudulent to hide, then their defenses to liability seem even stronger. Nevertheless, societal changes in policy values, on a scale such as this, take a long time in coming. The first cigarette litigation cases began in the early 1950s.[332] Forty years later no one has yet to receive one cent in damages from cigarette litigation. The victor of this war may be simply the one who can last the longest. What remains to be seen is whether either side will ever be able to completely claim victory.

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332. *See supra* notes 81-91 and accompanying text.