A PLAINTIFF'S GUIDE TO REACHING TOBACCO MANUFACTURERS: HOW TO GET THE CIGARETTE INDUSTRY OFF ITS BUTT

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I. INTRODUCTION

The recent decision by the Supreme Court in the vanguard tobacco product liability case, *Cipollone v. Liggett Group, Inc.*,[1] highlights the timeliness of this article. Both the plaintiff, the tobacco victim, and the defendant, the tobacco industry, petitioned the Court for certiorari, demonstrating *Cipollone*'s importance.

The Supreme Court's decision in *Cipollone* was rendered as this article went to press. We therefore encourage the reader to evaluate the arguments contained in this article in light of the Supreme Court's decision.

For years, the tobacco industry has been able to avoid liability to smokers or their survivors for injuries arising from tobacco products. Suits brought against cigarette companies during the 1950's and 1960's, based on theories of fraud, negligence and breach of warranty,[2] invariably were resolved in favor of the

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[1] Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986), *rev'g* 593 F. Supp. 1146 (D.N.J. 1984), *cert. denied*, 479 U.S. 1043 (1987), *on remand*, 649 F. Supp. 664 (D.N.J. 1986), *and* 683 F. Supp. 1487 (D.N.J. 1988), *aff'd in part, rev'd in part*, 893 F.2d 541 (3d Cir. 1990), *cert. granted*, 111 S. Ct. 1386 (1991).

[2] *See, e.g.*, Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964) (breach of implied warranty, negligence, fraud and deceit by false advertising); Lartigue v R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir. 1963) (breach of implied warranty and negligence), *cert. denied*, 375 U.S. 865 (1963); Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962)(negligence and breach of implied warranty), *certified question answered*, 154 So.2d 169 (Fla. 1963), *conformed to*, 325 F.2d 673 (5th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964); 391 F.2d 97 (5th Cir. 1968), *different results reached on reh'g*, 409 F.2d 166 (5th Cir. 1969) (per curiam), *cert. denied*, 397 U.S. 911 (1970); Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d. Cir 1961) (negligence and breach of express warranty), *rev'd and remanded*, 350 F.2d 479 (3d Cir. 1965), *cert. denied*, 382 U.S. 987 (1966), *modified*, 370 F.2d 95 (3d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967); Cooper v. R.J. Reynolds Tobacco Co., 256 F.2d 464 (1st Cir. 1958) (per curiam) (fraudulent advertising), *cert. denied*, 358 U.S. 875 (1958).

manufacturers or were dropped by exhausted plaintiffs who had endured litigation that sometimes lasted for over a decade.[3] Although courts increasingly concerned themselves with consumer protection during this period,[4] the products liability field underwent rapid change with courts differing on the theoretical basis for their rulings. Further, courts and juries reacted with considerable hostility to the allegations of smokers and their families that someone other than smokers should be responsible for their injuries, considering the increasing public awareness of the hazards of smoking.[5]

Adding to the confusion over what theories of law should govern the claims of smokers and their families against the tobacco industry, the American Law Institute, in 1965, published section 402 A of the RESTATEMENT (SECOND) OF TORTS.[6] Section 402 A provides in part: "[o]ne 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."[7] Section 402 A, which divided products into those which could normally be used safely and those which were "unavoidably unsafe," explicitly excluded tobacco from the unavoidably unsafe category.[8] Because of this exclusion, tobacco manufacturers received additional insulation against liability by the use of the consumer expectations test, a test measuring when a product was unreasonably dangerous.[9] Under the consumer expectation test,

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[3] For example, in *Pritchard*, 295 F.2d 292, the suit lasted for twelve years, going through two trials and six appeals. By the time the U.S. Supreme Court denied certiorari in 1967, the plaintiff had long since died of lung cancer. *See* Donald W. Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423 (1980) [hereinafter Garner, *Cigarette Dependency*].

[4] Marcia L. Stein, *Cigarette Products Liability Law in Transition*, 54 TENN. L. REV. 631, 632 (1987)[hereinafter Stein, *Cigarette Products*].

[5] Both the media and the federal government began to focus much attention on the potential hazards of smoking during the 1950's. Surgeon General Leroy E. Burney, who had formed a study group on the connection between cigarettes and cancer, concluded in 1957 that the evidence increasingly pointed toward a link between the two. *See* Paul G. Crist & John M. Majoras, *The "New Wave" in Smoking and Health Litigation - Is Anything Really So New?*, 54 TENN. L. REV. 551, 556 (1987) [hereinafter Crist & Majoras, New Wave.]. Edward R. Murrow's television program, "See It Now," had a two-part series on smoking and lung cancer in the spring of 1955. *See id.*

[6] RESTATEMENT (SECOND) OF TORTS § 402 A (1965).

[7] *Id.*

[8] RESTATEMENT (SECOND) OF TORTS § 402 A, cmt. i (1965), provides: "[g]ood tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful. . . ." *Id.*

[9] A manufacturer is not liable for injuries by his product, if not unavoidably

an otherwise dangerous product might not be unreasonably dangerous if the public were warned of its dangers.[10] Unavoidably unsafe products, on the other hand, were those whose utility outweighed their risks, and so long as a manufacturer provided appropriate warning, he could escape liability for injury.[11]

Further shielding the tobacco industry from liability, Congress passed the Federal Cigarette Labeling and Advertising Act (the Labeling Act)[12] in 1965, mandating health warnings on cigarette packages.[13] At that time, the tobacco interests were well represented in Congress. The representatives from the six southern tobacco producing states held a disproportionate number of committee chairmanships in the House and Senate, and by 1962, tobacco ranked fourth in the value of the country's cash crops, grossing $1.3 billion for American farmers.[14]

The judiciary has also historically protected tobacco companies from liability. Five United States Courts of Appeals[15] and

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unsafe unless the product was defective in a manner that made it "unreasonably dangerous." Comment i states: "[t]he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary knowledge common to the community as to its characteristics." RESTATEMENT (SECOND) OF TORTS § 402 A, cmt. i (1965).

10 *Id.* § 402 cmt. j.

11 *Id.* § 402 cmt. k.

12 Pub. L. No. 89-92, 79 Stat. 282 (1965)(current version codified at 15 U.S.C. §§ 1331-1341 (1988)).

13 The Act originally required the following words to be printed on each package of cigarettes: "Caution: Cigarette smoking may be hazardous to your health." Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 (1965). The warning language required by the Act has been amended twice since its enactment. In 1970, Congress changed the statement to read: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health." Finally, in 1984, Congress decided to provide more detailed information by mandating four different labels on the packages. The warnings state:

> (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.

Comprehensive Smoking Education Act § 4, Pub. L. No. 98-474, 98 Stat. 2200 (1984) (codified as amended at 15 U.S.C. § 1333 (1988).

14 Stein, *Cigarette Products*, *supra* note 4, at 644-45.

15 Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986), *rev'g* 593 F. Supp. 1146 (D.N.J. 1984), *cert. denied*, 479 U.S. 1043 (1987), *on remand*, 649 F. Supp. 664 (D.N.J. 1986), and 683 F. Supp. 1487 (D.N.J. 1988) *aff'd in part, rev'd in part*, 893 F.2d 541 (3d Cir. 1990), *cert. granted*, 111 S. Ct. 1386 (1991); Pennington v. Vistron Corp., 876 F.2d 414 (5th Cir. 1989); Roysdon v. R.J. Reynolds Tobacco

the Minnesota Supreme Court[16] have ruled that the Labeling Act impliedly preempts many state common law claims.[17]

In 1986, however, a federal district court bucked the historic trend protecting tobacco manufacturers. In the landmark case of *Cipollone v. Liggett Group, Inc.*,[18] a plaintiff successfully obtained a damage award against a tobacco company for injuries and death caused by the use of its cigarettes.[19] Other courts continued the counter-trend. Three years after *Cipollone*, the Minnesota Supreme Court in *Forster v. R.J. Reynolds Tobacco Co.*[20] developed a new preemption test,[21] further reducing the blanket immunity that tobacco companies have long enjoyed. In 1990, casting an even broader ray of hope for injured victims and their families, the New Jersey Supreme Court ruled in *Dewey v. R.J. Reynolds Tobacco Co.*,[22] that the Federal Cigarette Labeling and Advertising Act does not preempt state claims for failure to warn, design defect, or fraud and misrepresentation in advertising against cigarette manufacturers. Finally, a Texas Court of Appeals decision held that the Act does not preempt state common law claims.[23] In what has been termed the "new wave" of tobacco litigation,[24] today's plaintiffs may be able to hold cigarette manufacturers civilly liable, at least in some jurisdictions, for injuries cause by their deadly cigarettes.

This article's purpose is to survey the field of products liability law as applied to the tobacco industry. It will demonstrate how cigarette manufacturers have been virtually the only industry that has historically escaped liability to consumers and bystanders injured by their products. Finally, this article will recommend ways by which future plaintiffs may be able to recover for tobacco-related injuries.

Co., 849 F.2d 230 (6th Cir. 1988), *aff'g* 623 F. Supp. 1189 (D.C. Tenn. 1985); Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987); Stephen v. American Brands, Inc., 825 F.2d 312 (11th Cir. 1987).

16 Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655 (Minn. 1989).

17 *See infra* notes 102-56 and accompanying text.

18 789 F. 2d 181 (3d Cir. 1986), *rev'g* 593 F. Supp. 1146 (D.N.J. 1984), *cert. denied* 479 U.S. 1043 (1987), *on remand*, 649 F. Supp. 664 (D.N.J. 1986), *and* 683 F. Supp. 1487 (D.N.J. 1988), *aff'd in part, rev'd in part*, 893 F.2d 541 (3d Cir. 1990), *cert. granted*, 111 S. Ct. 1386 (1991).

19 *See infra* notes 58-67 and accompanying text.

20 437 N.W.2d 655 (Minn. 1989).

21 *See infra* notes 126-32 and accompanying text.

22 121 N.J. 69, 577 A.2d 1239 (1990).

23 Carlisle v. Morris, No. 3-89-175-CV (Tex. Ct. App. Feb. 8, 1991).

24 *See, e.g.*, Crist & Majoras, *New Wave*, *supra* note 5 at 551.

II. EARLY SUITS AGAINST CIGARETTE MANUFACTURERS

Professor Garner has noted that when cigarettes were found to contain such foreign objects as worms, snakes, firecrackers, mice and human toes,[25] cigarette manufacturers have usually—but not always—been held civilly liable.[26] But when plaintiffs have alleged that the harmful components of cigarettes, i.e., tobacco, caused them to develop cancer,[27] the tobacco industry enjoyed a long, unbroken string of court victories until the 1986 *Cipollone* decision.[28]

The earliest suit claiming that injury had been caused by the tobacco in cigarettes occurred in 1956, when the wife of a lung cancer victim sued the manufacturer for misrepresentation and deceit.[29] Her complaint alleged that her husband had been induced to smoke by the manufacturer's false advertising, which included a daily newspaper advertisement in a local newspaper stating that "20,000 doctors say that "Camel" cigarettes are healthful," and a television and radio commercial stating that " 'Camel' cigarettes are harmless to the respiratory system."[30] Although the manufacturer ultimately won the case on summary judgment,[31] the case alerted the entire tobacco industry that similar suits might follow. In two negligence actions, *Mitchell v. American Tobacco Company*[32] and *R.J. Reynolds Tobacco Company v. Hudson*,[33] the plaintiffs were successful in getting the courts to reject the manufacturers' contention that the statute of limitation should begin to run when the harm occurred. Both courts agreed that the tolling began when the plaintiffs discovered, or should have discovered, they had lung cancer.[34]

Plaintiffs, however, generally had trouble proving foreseeability in their negligence claims. In both *Lartigue v. R.J. Reynolds*

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25 *See* Garner, *Cigarette Dependency*, *supra* note 3 at 1425.

26 *Id.* at 142 n.22 (noting that tobacco suppliers have occasionally escaped liability when their products contained bugs, tacks and steel blades).

27 *See infra* notes 29-57 and accompanying text.

28 Garner, *Cigarette Dependency*, *supra* note 3 at 1425.

29 *See* Cooper v. R.J. Reynolds Tobacco Co., 234 F.2d 179 (1st Cir. 1956), *on remand*, 158 F.Supp. 22 (D. Mass. 1957), *appeal dismissed on other grounds*, 256 F.2d 464 (1st Cir.), *cert. denied*, 358 U.S. 875 (1958).

30 *Id.* at 173 n. 1.

31 The plaintiff failed to offer evidence in support of the alleged misrepresentations. Cooper v. R.J. Reynolds Tobacco Co., 158 F. Supp. 22 (D. Mass. 1957), *aff'd*, 256 F.2d 464 (1st Cir. 1958), *cert. denied*, 358 U.S. 875 (1958).

32 183 F. Supp. 406 (M.D. Pa. 1960).

33 314 F.2d 776 (5th Cir. 1963).

34 *Mitchell*, 183 F. Supp. at 411; *Hudson*, 314 F.2d at 783.

Tobacco Co.[35] and *Ross v. Philip Morris & Co.*,[36] juries found for the defendants because the plaintiffs failed to prove that the manufacturers had reasonably foreseen the dangers of lung cancer resulting from the use of their cigarettes.

The foreseeability requirement was addressed again in *Green v. American Tobacco Company*.[37] In *Green*, the plaintiff had alleged several theories, including breach of an implied warranty and negligence. During the litigation, the Court of Appeals for the Fifth Circuit certified to the Supreme Court of Florida the issue whether Florida law required the manufacturer to know, or have an opportunity to know, of its product's danger to be held liable for breach of the warranty of merchantability.[38] The supreme court determined that there was no such foreseeability requirement under Florida law[39] and that the risk of injury for an unwholesome product was to be apportioned to the manufacturer.[40] Despite the favorable ruling, the plaintiff lost on the issue of causation. Even though the jury determined that smoking Lucky Strikes had caused Green's lung cancer, the Fifth Circuit, using a reasonable fitness standard,[41] added the requirement that the plaintiff prove that a significant number of other victims had died from smoking the product.[42] Additionally, the Fifth Circuit refused to admit evidence favorable to the plaintiff during cross examination of the defendant's expert witness.[43] Thus, after twelve years of litigation, which included two jury trials and six appeals, the tobacco manufacturer defeated the persistent plaintiff.

The plaintiff in *Pritchard v. Liggett & Myers Tobacco Co.*,[44] obtained more favorable judicial treatment but could not continue the suit long enough to take advantage of it. In *Pritchard*, the plaintiff sued on breach of express warranty and negligence,

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35 317 F.2d 19, 22-23 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963).

36 328 F.2d 3, 4-5 (8th Cir. 1964).

37 304 F.2d 70 (5th Cir. 1962), *certified question answered*, 154 So. 2d 169 (Fla. 1963), *conformed to*, 325 F.2d 673 (5th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964); 391 F.2d 97 (5th Cir. 1968), *different results reached on reh'g*, 409 F.2d 166 (5th Cir. 1969)(per curiam), *cert. denied*, 397 U.S. 911 (1970).

38 *Green*, 304 F.2d at 73.

39 *Green*, 154 So.2d at 172.

40 *Id.* at 173.

41 *Green*, 391 F.2d at 102.

42 *Id.* at 99-102.

43 *Id.* at 101-02.

44 295 F.2d 292 (3d Cir. 1961), *aff'd on reh'g*, 350 F.2d 479 (3d Cir. 1965), *cert. denied*, 382 U.S. 987 (1966), *modified*, 380 F.2d 95 (3d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967).

claiming that he had relied on the defendants' negligent statement concerning the safety of the cigarettes. The trial court dismissed the negligence count and entered a directed verdict on the warranty claim.[45]

On appeal, the Third Circuit overruled the trial court and remanded for a new trial.[46] The Third Circuit suggested that several theories might be used against the tobacco manufacturer: first, if the plaintiff could prove explicit language, he might succeed on breach of express warranty;[47] second, the manufacturer might be found liable for having failed to conduct testing to determine the health consequence of its cigarettes;[48] third, the defendant might be found liable for negligent failure to warn of health hazards,[49] and finally, the cigarettes might be held unmerchantable if the plaintiff could prove he was injured by them.[50]

On remand, the court tried the breach of express warranty and negligent failure to warn.[51] Although the jury found for the plaintiff on causation, it determined that the plaintiff had assumed the risk of injury.[52] Further, it found that the defendant was not negligent and had not made any express warranties.[53] The court of appeals reversed the assumption of risk finding, stating that the defense applied when a plaintiff knew about the danger and expressing doubt that the plaintiff could have known when the tobacco company had extensively advertised its cigarettes as being safe.[54] The court also clarified the reliance issue in the express warranty claim, holding that the plaintiff need not prove actual reliance on the advertisements because their natural tendency was to induce consumers to purchase the product.[55] Clarifying its order, the Third Circuit remanded for a new trial on the liability and damages issues,[56] but by then the weary plaintiff had voluntarily withdrawn the suit.[57]

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45 *Id.* at 301.
46 *Id.*
47 *Id.* at 296-97.
48 *Id.* at 300.
49 *Id.*
50 *Id.* at 296.
51 *Pritchard*, 350 F.2d at 479-81.
52 *Id.* at 482.
53 *Id.*
54 *Id.* at 485-86.
55 *Id.* at 483.
56 *Pritchard*, 350 F.2d at 96.
57 Garner, *Cigarette Dependency*, *supra* note 3, at 1427.

III. THE *CIPOLLONE* BREAKTHROUGH

On June 13, 1988, in *Cipollone v. Liggett Group, Inc.*,[58] for the first time, a tobacco company was held liable for injuries and death caused to a consumer by the use of its cigarettes. The *Cipollone* jury determined that the cigarette manufacturer knew about the health dangers of smoking before 1966, had failed to warn of the pre-1966 health dangers and had breached express warranties through its pre-1966 advertising. Although the jury found that the plaintiff, Rose Cipollone, was eighty percent contributorily negligent, a finding which precluded recovery on the failure to warn count under New Jersey law, it nonetheless awarded her widower $400,000 under breach of express warranty.

While she was dying of cancer, Rose Cipollone brought her fourteen-count complaint against three cigarette companies on grounds of strict liability, negligence, intentional tort and breach of warranty.[59] She alleged that the companies had produced an unsafe and dangerous product whose risk outweighed its utility, and that they either negligently or intentionally failed to adequately warn the public of the dangers of smoking the product. Moreover, she claimed that the defendants "negligently or intentionally advertised their products so as to neutralize and render ineffective those warnings actually given, warnings which [were] made meaningless in any event by the addictive qualities of cigarettes."[60]

The defendants' response, in essence, was that their compliance with the Cigarette Labeling and Advertising Act[61] immunized them from tort liability,[62] an argument which had, prior to *Cipollone*, never failed to shield tobacco companies from liability.[63] Judge H. Lee Sarokin held that the Act did not impliedly preempt the states from compensating victims for injuries caused by smoking or imposing liability on cigarette companies, even if their cigarette packages contained the congressionally mandated

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58 *Cipollone*, 593 F. Supp. 1146 (D.N.J. 1984), *rev'd*, 789 F. 2d 181 (3d Cir. 1986), *cert. denied* 479 U.S. 1043 (1987), *on remand*, 649 F. Supp. 664 (D.N.J. 1986), *and* 683 F. Supp. 1487 (D.N.J. 1988), *aff'd in part, rev'd in part*, 893 F.2d 541 (3d Cir. 1990), *cert. granted*, 111 S.Ct. 1386 (1991).

59 *Id.* at 1149.

60 *Id.*

61 15 U.S.C. §§ 1331 to 1341 (1988).

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

63 *See supra* notes 27-56 and accompanying text.

warning.[64] Indeed, he stated: "the issues are within a different field, that of products liability, the continued existence of which was assumed by Congress, and left for the states."[65] The district judge continued that "injuries to persons, property and the environment were wrong even before government declared that they were wrong."[66] Finally, Judge Sarokin concluded that:

> [Drug cases] among others, recognize that even the federal government is fallible. The fact that it finds a product safe or a warning adequate does not necessarily make it so. The private citizen should not be deprived of the opportunity to establish such fallibility and vindicate his or her rights to recover for injuries sustained if supported by competent proofs.[67]

IV. THE FEDERAL CIGARETTE LABELING AND ADVERTISING ACT[68] AND PREEMPTION OF COMMON LAW CLAIMS

The *Cipollone* decision toppled one of the major obstacles that confronted plaintiffs seeking to hold cigarette manufacturers liable for the injuries caused by smoking: the preemptive effect of the Federal Cigarette Labeling & Advertising Act.

A. Background

In the 1950's, the federal government first became involved in health issues concerning smoking. Surgeon General Leroy E. Burney, who had formed a study group on the subject in 1956, issued a statement that there was evidence of a link between cigarette smoking and cancer.[69] A few years later, representatives of various health organizations implored Surgeon General Luther L. Terry to investigate health issues related to cancer. At Terry's behest, the Secretary of Health, Education and Welfare proposed the formation of an advisory committee on the subject, and this proposal was approved by President John F. Kennedy in 1962.[70] Two years later, the committee issued a 387 page report, determining that cigarette smoking is related to lung cancer, chronic bronchitis, emphysema, cardiovascular diseases and cancer of the

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64 *Cipollone*, 593 F. Supp. at 1164.

65 *Id.*

66 *Id.* at 1170.

67 *Id.* at 1149.

68 15 U.S.C. §§ 1331 to 1341 (1988).

69 SMOKING AND HEALTH, REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (U.S. DEPT OF HEALTH, EDUC. & WELFARE 1964) at 6-7 [hereinafter 1964 REPORT].

70 Crist & Majoras, *New Wave*, *supra* note 5, at 557.

larynx, and concluding that "[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action."[71] As a vast amount of media attention was focused on the Advisory Committee's report, several states began to pass their own laws to protect the public from smoking,[72] and one year after its publication, Congress enacted the Labeling Act.[73]

The purpose of the legislation was twofold: to mandate the printing of a uniform warning on all packages of cigarettes sold in the country about the hazards of cigarette smoking and to protect the national economy by permitting the manufacture and sale of cigarettes to continue.[74] Many states had proposed their own laws regulating the sale, advertising and labeling of cigarettes after the advisory committee's report had been issued.[75] Congress, desiring to establish uniformity in an area affecting interstate commerce and wishing to avoid harmful economic consequences that could follow a prohibition on the sale and manufacture of cigarettes,[76] mandated that a single warning be placed in conspicuous and legible type on every package of cigarettes sold in the United States to effectuate a balance between the two goals.[77] Originally, the required warning simply stated "Caution: Cigarette Smoking May Be Hazardous to Your Health".

The Act has since been amended twice, providing for clearer, more definitive warnings.[78] The Federal Trade Commission was also given the authority to regulate cigarette advertising.[79] To assure uniformity of regulation, the Act provided for a sweeping provision preempting additional warnings under state law and prohibiting the states from regulating cigarette advertising. The Act states the following:

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71 1964 REPORT, *supra* note 69, reprinted in 1965 U.S. CODE CONG. & ADMIN. NEWS 2350, 2351.

72 *See* Crist & Majoras, *New Wave*, *supra* note 5, at 557 n. 42, noting that following publication of the report, public fear was so great that one state "dug up" a 1907 statute that made it illegal to sell cigarettes; and the city council of Eastland, Texas proposed an ordinance imposing a $1,000 fine or three years in jail for smoking inside the city limits.

73 Pub. L. No. 89-92, 79 Stat. 282 (1965)(currently codified at 15 U.S.C. §§ 1331-1341 (1988)).

74 15 U.S.C. § 1331 (1988).

75 *See, e.g.*, Crist & Majoras, *New Wave*, *supra* note 5, at 557 n.42.

76 § 1331.

77 15 U.S.C. § 1333 (1988).

78 *See supra* note 13.

79 15 U.S.C. § 1338 (1988).

> *Preemption*
> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
> (b) No requirement or prohibition based on smoking and health shall be imposed under state law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.[80]

Subsection (a) is in its original form. Subsection (b), however, was amended in 1969.[81] As originally enacted, subsection (b) provided that "[n]o statement relating to smoking and health shall be required in the advertising of any cigarette, the packages of which are labeled in conformity with this act."[82]

Thus, at least until the *Cipollone* decision, the cigarette industry argued successfully that under the preemption doctrine, compliance with the Act's warning requirement immunized it from liability to anyone who had chosen to smoke cigarettes notwithstanding the warning.

B. Preemption

Federal preemption of state action stems from the mandate of the Supremacy Clause of the United States Constitution.[83] The Supreme Court has declared that "[i]n every case, the act of Congress, or the treaty is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it."[84]

To determine whether a federal statute preempts state law, it is necessary to engage in statutory construction, examining first the explicit words of the federal stature and then the congressional intent behind it.[85] Thus, Congress may expressly preempt state regulation by statutory language or it may impliedly do so if such was the congressional intent and if Congress has indicated

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80 15 U.S.C. § 1334 (1988).

81 Pub. L. No. 91-222, 84 Stat. 87 (1969)(currently codified as amended at 15 U.S.C. § 1334 (1988)).

82 *Id.*

83 U.S. CONST., art. VI, cl. 2: Article 6 states: "[t]his Constitution and the Laws of the United States which shall be made pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." *Id.*

84 Gibbons v. Ogden, 22 U.S. (9 Wheat.), 6 L.Ed 23 (1924).

85 Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 152 (1963).

this intent by occupying the field in a particular area.[86] Federal law preempts state law to the extent that it actually conflicts with the federal law.[87]

Congress manifests its intent to supersede state law from a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it" either because the federal interest in the area is so dominant or because the federal and state law seek to achieve the same purpose.[88] Even if Congress has not entirely displaced state law in a particular area, state law may be preempted to the extent that it conflicts with a federal statute[89] or stands as an obstacle to the full achievement of the congressional objectives[90] There, however, is a presumption that Congress did not intent to displace state law,[91] which may be rebutted only by showing "pervasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."[92]

1. Express Preemption

No court has held that the Labeling Act expressly preempts state common law claims.[93] The appellate court in *Cipollone*[94] summarily concluded that the preemption provision contained in 15 U.S.C. § 1334 did not expressly preempt state common law claims and also noted that although the provision explicitly prohibited the state and federal agencies from requiring additional warnings on cigarette packages, the language did not specifically refer to the viability of state common law claims.[95] This result was reinforced by the strong presumption against preemption where traditional state powers are involved.[96] The court pointed

86 *Id.* at 152-53.

87 *Id.*

88 *Id.* at 153.

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

90 Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984).

91 Maryland v. Louisiana, 451 U.S. 725, 746 (1982).

92 *Florida Lime & Avocado Growers*, 373 U.S. at 142.

93 *See* Pennington v. Vistron Corp., 876 F.2d 414, 418 (5th Cir. 1989) (noting that all circuits agree the Act does not expressly preempt products liability claims).

94 Cipollone v. Liggett Group, Inc., 789 F. 2d 181 (3d Cir. 1986), *rev'g*, 543 F. Supp. 1146 (D.N.J. 1981), *cert. denied*, 479 U.S. 1043 (1987), *on remand*, 649 F. Supp. 664 (D.N.J. 1986), *and* 683 F. Supp. 1487 (D.N.J. 1988), *aff'd in part, rev'd in part*, 893 F.2d 541 (3d Cir. 1990), *cert. granted*, 111 S. Ct. 1386 (1991).

95 *Id.* at 185-86.

96 *Id.* at 185.

to the Copyright Act of 1976,[97] which contained a clause expressly prohibiting state common law claims, and to the Occupational Safety and Health Act of 1970,[98] which contained a savings clause expressly preserving such claims.[99] The Labeling Act, in contrast, was completely silent on the subject, compelling that court as well as others which subsequently addressed the issue to conclude that the Act did not expressly preempt state claims.[100]

2. Implied Preemption

A federal statute may impliedly preempt state common law claims under either an "occupation of the field" or an "actual conflict" test. According to the former inquiry, state law is impliedly preempted by the federal statute if Congress so intended and has manifested its intent by occupying a field in a given area. Whether Congress has occupied a field may be inferred in any one of three ways: (1) where there is a pervasive scheme of federal regulation in the area; (2) where federal interest in the area is dominant; or (3) where the objective of the federal law reveal the same purposes as state regulation.[101]

a. *Federal Courts on Implied Preemption*

The federal courts of appeals have differed on the application of implied preemption doctrine to the Federal Labeling Act. The Third Circuit, in *Cipollone*, deemed it unnecessary to resort to the Act's legislative history because the statute's language was alone a sufficiently clear expression of Congress's intent.[102] Rather, the *Cipollone* court focused first on the issue "whether Congress intended to occupy the field relating to cigarettes and health to the exclusion of state law product liability actions. . . ."[103] The court found that Congress clearly intended to

97 17 U.S.C. § 301(a) (1972).

98 29 U.S.C. § 653(b)(4) (1982).

99 *Cipollone*, 789 F.2d at 185 n.5.

100 *Id.* at 186; *accord* Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230,234 (6th Cir. 1988); Palmer v. Liggett Group, 825 F.2d 620, 625 (1st Cir. 1987); Stephen v. American Brands, Inc., 825 F.2d 312, 313 (11th Cir. 1987); Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655, 658 (Minn. 1989).

101 Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986), *rev'g*, 543 F. Supp. 1146 (D.N.J. 1984), *cert. denied*, 479 U.S. 1043 (1987), *on remand*, 649 F. Supp. 664 (D. N.J. 1986), *and* 683 F. Supp. 1487 (D. N.J. 1988), *aff'd in part, rev'd in part*, 893 F.2d 541 (3d Cir. 1990), *cert. granted*, 111 S. Ct. 1386 (1991).

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

103 *Id.*

occupy the field, as evidenced by the "sweeping language" of the preemption provision and by its statement of purpose to "establish 'a comprehensive Federal program' with respect to labeling and advertising regulation"[104] Because, however, the plaintiff's tort action concerned "rights and remedies traditionally defined solely by state law,"[105] the Third Circuit took a "restrained view" of congressional intent to preempt the field, finding that the scheme of the act was not "so pervasive" or the federal interest "so dominant" as to eradicate all of the [plaintiffs'] claims.[106]

The court next examined the extent to which the plaintiff's state common law claims actually conflicted with the purposes and effects of the federal law. In articulating a "balance of purpose" theory, the court stated that the Labeling Act represents a precisely drafted balance between the goals of warning citizens of the dangers of cigarette smoking and preserving the interest of the domestic economy.[107] Applying this theory, the court concluded that state law claims for failure to comply with advertisement, warning and promotion requirements other than those addressed in the Act have the result of upsetting the Act's equilibrium, and thus actually conflict with the federal law.[108] The Third Circuit then remanded to the district court the issue of which common law claims were not preempted by the Act in light of its decision.[109]

On remand, the district court held that the Act preempted plaintiffs' claims of failure to warn, express warranty, fraudulent misrepresentation and conspiracy to defraud to the extent that they challenged the manufacturer's advertising, public relations and promotional activities before the effective date of the Act; not preempted, however, were the design defect and risk utility claims.[110] But in a later pretrial ruling, the court deemed the risk utility claims barred by the retroactive application of the New Jersey Products Liability Act.[111] On appeal for the second time, the Third Circuit disagreed, but stated that it would follow the New Jersey Supreme Court's decision in the pending case of

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104 *Id.*
105 *Id.*
106 *Id.*
107 *Id.* at 187.
108 *Id.*
109 *Id.*
110 *Cipollone v. Liggett Group, Inc.*, 649 F. Supp. 664, 669-75 (D. N.J. 1986), *aff'd in part, rev'd in part*, 893 F. 2d 541 (3d Cir. 1990), *cert. granted*, 111 S. Ct. 1386 (1991).
111 *Cipollone v. Liggett Group, Inc.*, 893 F.2d at 553 (3d Cir. 1990), *cert. granted*, 111 S. Ct. 1386 (1991). *See also* N.J. STAT. ANN. § 2A:58C-3(a)(2) (West 1987).

Dewey v. Brown & Williamson Tobacco Corp.[112]

The following year in *Palmer v. Liggett Group, Inc.*, the First Circuit likewise found that the Labeling Act impliedly preempted state common law claims for inadequate warning.[113] Like the *Cipollone* court, the First Circuit found Congress's preemptive intent so clear that it did not need to examine the Act's legislative history. The *Palmer* court was not so restrained, however, in applying a balance of purpose analysis. Not only did that court find that Congress had drawn a careful balance of the Act's competing purposes—"health protection [through education] and trade protection,"[114] but that Congress had also measured the relative weight of the policies when it stated that "the federal warning should protect commerce 'to the maximum extent' consistent with its health policy."[115] The court then concluded that Congress could not have intended any one jury in any one state to upset the balance[116] and that the Supremacy Clause, as enforced via the preemption doctrine, prohibited upsetting this equilibrium.[117]

Such strong language has been used by cigarette manufacturers who argue that all common law claims tip the Labeling Act's careful balance.[118] Indeed, one lower court has even construed *Palmer* to mean that all of the plaintiffs post-1965 claims were impliedly preempted by the Act.[119] The Fifth Circuit however, narrowed its preemption holding on appeal, concluding that a strict liability claim was not preempted.[120]

The Eleventh Circuit[121] adopted the reasoning of *Cipollone* in *Stephen v. American Brands, Inc.*[122] The Sixth Circuit[123] relied on both *Cipollone* and *Palmer* in holding that failure to provide ade-

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112 225 N.J. Super. 375, 542 A.2d 919 (App. Div.), *appeal granted*, 113 N.J. 379, 550 A. 2d 482 (1988); *Cipollone*, 893 F.2d at 578.

113 825 F.2d 620 (1st Cir. 1987), *sub nom.*, Public Citizen v. Liggett Group, Inc., 858 F.2d 775 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 838 (1989).

114 *Palmer*, 825 F.2d at 625-26.

115 *Id.* at 626 (citation omitted).

116 825 F.2d at 626.

117 *Id.*

118 Carolyn Brue-Legried, Comment, *Forster v. R.J. Reynolds Tobacco Co.: Minnesota Supreme Court Gives the Green Light to Cigarette Plaintiffs*, 74 MINN. L. REV. 839, 855 n. 97 (1990) [hereinafter *Green Light*].

119 Pennington v. Vistron Corp., 876 F. 2d 414, 418-19 n. 4 (5th Cir. 1989).

120 *Id.* at 427.

121 Stephen v. American Brands, Inc., 825 F.2d 312, (11th Cir. 1987).

122 Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 234-35 (6th Cir. 1988).

123 *Id.*

quate warnings was preempted by the Act.[124] Likewise, state courts have tended to follow either the *Cipollone* or *Palmer* analysis.[125]

b. *State Courts on Implied Preemption*

Like the New Jersey Supreme Court, the Minnesota Supreme Court has held that the Cigarette Labeling Act does not prevent state law from providing redress to injured parties. Thus in Minnesota, claims for misrepresentation, strict liability for unsafe design, breach of express and implied warranties and for negligence are not preempted, provided the claims can be proven without resort to allegations of inadequacy of warnings.[126] In developing its own test for implied preemption in the *Forster* decision,[127] the Minnesota Supreme Court rejected the *Cipollone* court's "propriety" test.[128] The *Forster* test is twofold: preempted are those claims that challenge "the adequacy of cigarette advertising or promotion with respect to smoking and health" and those that challenge the effect of that cigarette advertising or promotion on the federal label.[129] Effectively, only claims that implicate failure to warn or inadequacy of warning are preempted under the *Forster* test.

Although the trial court, on remand, ultimately dismissed the plaintiff's complaint on the merits,[130] one commentator has suggested that the *Forster* test should supersede *Cipollone* and *Palmer* as the universal model for determining state common law claims which endure the Cigarette Labeling Act.[131] The commentator reasoned that:

> *Forster* correctly limits the Labeling Act's preemptive reach to failure to warn claims. Limited preemption properly matches

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124 Brue-Legried, *supra* note 118, at 856.

125 *See* Dewey v. Brown & Williamson Tobacco Corp., 225 N.J. Super. 375, 380, 542 A.2d 919, 921 (App. Div. 1988) for published state court decisions and federal authority following *Cipollone*; see also Phillips v. R.J. Reynolds Indus., Inc., 769 S.W.2d 488, 490 (Tenn. Ct. App. 1988), and Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655 (Minn. 1989), for federal and state court decisions following *Palmer*.

126 *Forster*, 437 N.W.2d at 655.

127 *Id.*

128 *Forster*, 437 N.W.2d at 660 (referring to *Cipollone*'s preemption of state claims that challenge "the propriety of a party's actions with respect to the advertising and promotion of cigarettes).

129 *Forster*, 437 N.W.2d at 660; Comment, *Green Light*, *supra* note 113, at 865.

130 Forster v. R.J. Reynolds Tobacco Co., No. 85-4294, slip op. at 2 (Minn. Dist. Ct. Feb. 13, 1990).

131 Brue-Legied, *supra* note 118, at 865.

> Congress's intent in the Labeling Act. Further, *Forster* corrects several problems with *Cipollone* and *Palmer* cases and their progeny: it preempts fewer claims, rejects the overly broad application of balancing reasoning and properly weighs the presumption against preemption. Finally, the *Forster* decision makes good policy sense by allowing injured plaintiffs an opportunity to prove their claims.[132]

Strikingly expanding the break from federal and state court precedent, both New Jersey and Texas state courts have ruled that the Labeling Act does not preempt any state common law claims. In *Dewey v. R.J. Reynolds Tobacco Co.*,[133] The New Jersey Supreme Court held that failure to warn and misrepresentation in advertising claims arising after the Labeling Act's effective date are *not* preempted, nor are claims based on design defect or fraud. While the supreme court recognized that lower federal court decisions involving statutory interpretation should be accorded due respect, it noted that the decisions were not binding per se,[134] and disagreed with those courts that found implied preemption of state law claims based on inadequate warning under an "actual conflict" analysis.[135] According to the *Dewey* court, preemption by actual conflict is " 'more an exercise of policy choices by a court than strict statutory construction' "[136] Because state common law tort remedies advance rather than impair the goal of providing information to the public of the health risks of smoking, the *Dewey* court stressed that the only federal goal that might be thwarted by permitting state actions could be the protection of commerce if such actions created incidental regulatory pressure conflicting with the goal of uniform regulations. Analogizing to the Atomic Energy Act,[137] the court noted that *Silkwood v. Kerr McGee Corp.*[138] was germane because it suggested Congress's willingness to countenance the indirect regulatory consequences of applying of state tort law despite preemption of direct state regulation.[139] Likewise, the court observed that, despite compliance with warning provisions of other federal legislation, includ-

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132 *Id.*

133 121 N.J. 69, 577 A.2d 1239 (1990). For a thorough discussion of *Dewey* and preemption, see Jean L. Dusinski, Note, *Federal Cigarette Labeling and Advertising Act Does Not Preempt State Tort Law and New Jersey Products Liability Law Does Not Apply Retroactively*, 22 SETON HALL L. REV. 193 (1991).

134 *Dewey*, 121 N.J. at 80, 577 A.2d at 144.

135 *Id.* at 86-87, 577 A.2d at 1247.

136 *Id.* (quoting Abbot v. American Cyanamid Co., 844 F.2d 1108 (4th Cir. 1988)).

137 42 U.S.C. §§ 2011 to 2284 (1988).

138 464 U.S. 238 (1984).

139 *Dewey*, 121 N.J. at 89-90, 577 A.2d at 1249.

ing the Federal Insecticide Fungicide & Rodenticide Act,[140] the Federal Hazardous Substances Act,[141] and the Food and Drug Administration's requirement that oral contraceptives provide precise uniform warnings,[142] manufacturers have not been shielded from state law liability, which has broader compensatory goals than the federal legislation.[143] Moreover, the court reminded that "[s]imilarly, in this case, a New Jersey jury could decide that a cigarette manufacturer, rather than an injured party, ought to bear the cost of injuries that could have been prevented with a more detailed warning label than that required under the Cigarette Act."[144]

A Texas Court of Appeals reached a decision similar to *Dewey* in *Carlisle v. Philip Morris, Inc.*[145] Applying a heightened presumption against preemption and noting that state courts are not bound by decisions of the lower federal courts, the *Carlisle* court identified six factors which led it to conclude that none of the plaintiffs' claims against the manufacturer were preempted by the Act:[146]

> (1) The "frustrating" effect of such claims on congressional goals is speculative; (2) Avoiding divisive labeling regulations is the secondary goal of the Act; the primary goal is informing the public of the hazards of cigarette smoking permitting common-law tort claims; (3) A holding that the plaintiffs claims are preempted would leave them without any remedy for the defendants' allegedly tortious conduct; (4) Congress could easily have expressly preempted common-law tort claims, but did not do so; (5) The legislative history of the Labeling Act gives no indication that Congress intended to preempt common-law tort claims; and (6) The Comprehensive Smokeless Tobacco Health Education Act of 1986 evinces congressional intent that common-law tort claims would not be preempted.[147]

The *Carlisle* court further identified flaws in the Third Circuit's reasoning in *Cipollone* and the First Circuit's treatment of the preemp-

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140 7 U.S.C. §§ 136 to 136(y) (1988).

141 15 U.S.C. §§ 1261 to 1277 (1988).

142 43 Fed. Reg. 4220 (1978); 21 C.F.R. § 310.501 (a)(2)(1) (1984).

143 *Dewey*, 121 N.J. at 92-93, 577 A.2d at 1250-51.

144 *Id.* at 92, 577 A.2d at 1250.

145 No. 3-89-175 CV, 1991 WL 12469 (Tex. Ct. App. Feb. 6, 1991). Plaintiffs in *Carlisle*, two persons alleging injuries and two widows alleging wrongful death, sued in four separate lawsuits under five causes of action: failure to warn, design defects, manufacturing defects, affirmative misrepresentation and civil conspiracy. The four cases were consolidated by the trial court, which granted the defendants' motions for summary judgment on the preemption issue. *Id.* at 1-2.

146 *Id.* at 18.

147 *Id.* at 18-19.

tion issue in *Palmer*.[148]

Agreeing with Professor Tribe's criticism that the *Cipollone* decision "seems hard to square with *Silkwood*" and the presumption against preemption of state law claims,[149] the Texas court also charged that the Third Circuit ignored the legislative history of the Labeling Act and failed to address the argument that preemption leaves the plaintiff without a remedy.[150] Noting that the Fifth, Sixth and Eleventh Circuits had also ignored the consequences of leaving plaintiffs without a remedy, the *Carlisle* court attacked the answers to the remedy claim given by the First Circuit in *Palmer*: First, that the plaintiffs' smoking was voluntary; and second, that the United States Supreme Court has often left plaintiffs without a remedy by preempting state claims.[151]

3. Addiction and the Preemption Issue

The *Carlisle* court posited that the addictive nature of cigarettes excludes consideration of the assumption the risk doctrine from playing a role in preemption analysis. The court noted that the "addictive property [of cigarettes], if shown to exist, could transform what was initially a voluntary activity into an involuntary one, effectively placing a prospective plaintiff in exactly the same position as the plaintiffs in *Silkwood* and *Laburnum*. Indeed, the failure to warn of cigarettes' addictive nature could be the essence of a plaintiff's complaint."[152]

4. The United States Supreme Court: Which Way on Preemption?

It has been suggested that decisions such as *Dewey* and *Carlisle* open the door to potential suits by smokers or their estates numbering in the tens of thousands.[153] Cases in New Jersey and Texas are already governed by conflicting law, and under diversity jurisdiction, no case in which R.J. Reynolds (a New Jersey corporation) is a defendant, can be removed to federal court in New Jersey.[154] Further, in other jurisdictions, plaintiffs wishing

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148 *Id.* at 30-33.

149 *Id.* at 30 (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 480, 490-91 (2d ed. 1988)).

150 *Carlisle*, No. 3-89-175 CV, slip op. at 30.

151 *Id.* at 31-33.

152 *Id.* at 31. *See also infra* notes 220-225 and accompanying text.

153 Pet. for Cert. to the U.S. Sup. Ct., Respondents' Memorandum, *Carlisle v. Philip Morris, Inc.*, No. 90-1038 (Tex. Ct. App. Feb. 6, 1991)(citation omitted).

154 *Id.*

to avoid the federal court death knell on the preemption issue have avoided removal from state courts by naming as a defendant an in-state retailer or distributor.[155] Thus, to avoid the conflict that will inevitably recur between the federal and state courts, the Supreme Court's upcoming determination of the preemption issue in the context of *Cipollone* is necessary. A ruling against preemption, urged by the authors of this article, is crucial, otherwise plaintiffs will be left without any remedy, and tobacco will be "virtually the only industry in which manufacturers will be able to avoid the choice of increasing product safety, increasing warnings, or paying damages to injured consumers."[156]

V. REACHING THE TOBACCO INDUSTRY: THEORIES OF LIABILITY

A. Duty to Warn

Outside of the tobacco industry, manufacturers and distributors have been held strictly liable for personal injuries caused not only by defects in their products, but because of their failure to warn consumers about the inherent conditions that make the product unreasonably dangerous.[157] The duty to warn in a strict liability case arises if the seller has, or should have, knowledge of a dangerous use.[158]

The strict liability duty to warn, as usually formulated, and under the RESTATEMENT,[159] is hard to distinguish in practice from the duty to warn imposed by a negligence standard.[160] Even if a warning is otherwise adequate, it can be rendered inadequate (or more inadequate) due to representations that make the product seem less dangerous, or otherwise mislead the user regarding the nature or extent of the product's dangers.

In a 1983 case,[161] an electrical equipment manufacturer discovered a dangerous design defect in a high-voltage circuit breaker. The manufacturer developed a modification that would prevent the danger. The manufacturer sent a warning letter to every one of its customers, notifying them of the problem, and sent a repair kit to each customer. Despite these precautions, the

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155 *Id.*

156 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 480, 490-91 (2d ed. 1988).

157 Flaminio v. Honda Motor Co., Ltd., 753 F.2d 463 (7th Cir. 1984)(applying Wisconsin law).

158 *Id.*

159 RESTATEMENT (SECOND) OF TORTS, § 402 A, cmt. j (1965).

160 *See* Gracyalny v. Westinghouse Elec. Corp., 723 F.2d 1311 (7th Cir. 1983).

161 *Id.* at 1314.

manufacturer could be held liable if the jury found that the warning was unclear or if it was accompanied by misleading representations of safety, which may have served to render the warning inadequate.[162]

More obvious examples of misleading representations can be found in cases involving poisoning. In one case,[163] a woman was fatally poisoned by fumes from a container of carbon tetrachloride cleaning fluid. Although the container had a "Caution" message in 1/4 to 1/8 inch letters on two narrow sides, the court found that the conspicuous display of the words "SAFETY-KLEEN" in 1/2 to 3/4 inch letters on all four sides could have been a negligent breach of its duty to give adequate warning.[164] The court was concerned that the word "safety" was so prominently featured as to exclude from the victim's mind that "provident fear" which has been characterized as "the mother of safety."[165] In another case,[166] a manufacturer accompanied a warning with misleading representations of safety, which the court held may have served to render the warning inadequate.[167]

The duty of manufacturers to warn users of the dangers of cigarette smoking has, in the opinion of some courts, been modified by the Federal Cigarette Labeling and Advertising Act.[168] In *Cipollone,*[169] the Third Circuit held that the Cigarette Act[170] federally preempts all claims against cigarette manufacturers based on their post-1965 marketing behavior.[171] The Court held that the Act preempts recovery on theory of failure to warn under state law, based on the cigarette companies' advertising of cigarettes or upon the adequacy of their warnings as to the hazards of smoking on or after January 1, 1966.[172] Conversely, the Court

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162 *Id.* at 1321. The court left it to the jury to decide whether the letter constituted an adequate warning. A secondary factor in this case was that the manufacturer did not follow up the initial letter to ensure that the modification kit was actually installed, thereby breaching its non-delegable duty. *Id.*

163 Maize v. Atlantic Refining Co., 41 A.2d 850 (Pa. 1945).

164 *Id.* at 55. The court stated: "[t]he word 'Safety' was so conspicuously displayed on all four sides of this can of dangerous fluid as to make the word 'Caution' and the admonition against inhaling fumes and as to use only in a well ventilated place seem of comparatively minor import." *Id.*

165 *Id.* at 55-56.

166 Bryant v. Technical Research Co., 654 F.2d 1337 (9th Cir. 1981).

167 *Id.* at 1345-46.

168 15 U.S.C. §§ 1331-1341 (1988)(effective January 1, 1966).

169 Cipollone v. Liggett Group, Inc., 893 F.2d 541 (3d Cir. 1990), *cert. granted,* 111 S. Ct. 1386 (1991).

170 *Id.* (citing 15 U.S.C. §§ 1331 to 1341 (1982 & Supp. II 1984)).

171 *Id.* at 559.

172 *Id.* at 545.

held that the defendant, the Liggett Group, owed a duty to warn consumers of the health effects of smoking prior to 1966, and would therefore be liable to smokers harmed by a breach of that duty.[173] The Court took judicial notice of the addictive nature of nicotine,[174] and noted that smokers who became addicted prior to 1966 may be able to hold cigarette manufacturers liable for injuries caused by their post-1965 cigarette smoking.[175]

The "decision and reasoning" of *Cipollone*[176] was cited by the Eleventh Circuit in a 1987 failure-to-warn case.[177] In *Stephen*, the widow of a deceased smoker sued, in part, on a failure-to-warn theory. The defendant answered that some of plaintiff's claims were preempted by the Labeling Act. The district court denied plaintiff's motion to strike that defense, and the Court of Appeals affirmed, relying on *Cipollone*.

It must be remembered that the *Cipollone* decision was made by a Federal Circuit Court of Appeals, and is not per se binding on state courts with respect to Constitutional or statutory interpretation.[178] Lower federal court decisions are no more binding on a state court than they are on a federal court not beneath it in the judicial hierarchy.[179] When *Dewey v. R.J. Reynolds Tobacco Co.*[180] was heard by the Supreme Court of the State of New Jersey, the Court made an independent analysis, with due respect to the *Cipollone* decision. The Court held that the Cigarette Act would not prevent a New Jersey jury from deciding

> that a cigarette manufacturer, rather than an injured party, ought to bear the cost of injuries that could have been prevented with a more detailed warning label than that required under the Cigarette Act. We think that our citizens are entitled at least to the opportunity to present such a claim.[181]

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173 *Id.* at 559.

174 *Id.* at 563 (citing U.S. Dep't Health & Human Serv., THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION—A REPORT OF THE SURGEON GENERAL (1988)).

175 *Cipollone*, 893 F.2d at 563.

176 Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986), *rev'g* 593 F. Supp. 1146 (D.N.J. 1984), *cert. denied*, 479 U.S. 1043 (1987), *on remand*, 649 F. Supp. 664 (D.N.J. 1986), and 683 F. Supp. 1487 (D.N.J. 1988) *aff'd in part, rev'd in part*, 893 F.2d 541 (3d Cir. 1990), *cert. granted*, 111 S. Ct. 1386 (1991).

177 Stephen v. American Brands, Inc., 825 F.2d 312 (11th Cir. 1987).

178 Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 577 A.2d 1239 (1990).

179 *Id.* at 79, 577 A.2d at 1244 (quoting Note, *Authority in State Courts of Lower Federal Court Decisions on National Law*, 48 COLUM. L. REV. 943, 946-47 (1948)).

180 *Id.* at 80, 577 A.2d at 1244.

181 *Id.* at 92, 577 A.2d at 1250 (citation omitted).

The court cited other federal statutes and regulations,[182] which require manufacturers to conform with specific labeling requirements, yet do not immunize the manufacturer of a hazardous product from failure to supply an adequate warning. The United States Food and Drug Administration (FDA) prescribes warnings to be used on oral contraceptives to ensure that patients are "fully informed of the benefits and risks involved in the use of these drugs,"[183] and requires "precise and nationally uniform" labelling in that respect.[184] Compliance with FDA labels on oral contraceptives, however, does not shield manufacturers from liability.[185] Similarly, the Federal Hazardous Substances Act (FHSA)[186] requires that hazardous household substances sold in interstate commerce have a label containing specific warnings and instructions. The D.C. Circuit, however, has held that the Act prescribes only the minimum warning. Compliance with the Act would not preclude a finding of negligence for failure to give additional warnings.[187]

The *Dewey* Court has therefore split with the Third Circuit, and has maintained (in the State of New Jersey) a right of action against cigarette manufacturers based on claims of misrepresentation and failure to warn.[188] This decision will have limited effect in future New Jersey cases, due to the 1987 New Jersey Products Liability Law,[189] which provides, in part, that in a product liability action arising from an alleged design defect, the manufacturer or seller shall not be liable if

> [t]he characteristics of the product are known to the ordinary consumer or user, and the harm was caused by an unsafe aspect of the product that is an inherent characteristic of the product and that would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the class of persons for whom the product is intended. . .[190]

The revised statute would arguably prevent recovery in New

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182 43 Fed. Reg. 4220 (1978); 21 C.F.R. § 310.501(a) (1984)(labeling of oral contraceptives); 15 U.S.C. §§ 1261-77 (1988)(labeling of hazardous household substances).

183 43 Fed. Reg. 4220 (1978); 21 C.F.R. § 310.501(a) (1984).

184 21 C.F.R. § 301.501(a)(2)(1) (1984).

185 *Dewey*, 123 N.J. at 93, 577 A.2d at 1251 (citing MacDonald v. Ortho Pharmaceutical Corp., 475 N.E.2d 65, 70 (Mass. 1985)).

186 15 U.S.C. §§ 1261-77 (1988).

187 *Dewey*, 121 N.J. at 93, 577 A.2d at 1251 (citing Burch v. Amsterdam Corp., 366 A.2d 1079, 1085 (D.C. 1976)).

188 *Id.* at 100, 577 A.2d at 1255.

189 N.J. STAT. ANN. § 2A:58C-3 (West 1987).

190 *Id.* § 2A:58C-3(a)(2).

Jersey cigarette cases filed after July 22, 1987,[191] and especially in those cases where the smoker began smoking on or after January 1, 1966.[192] Despite the fact that the revised Products Liability Law may bar *recovery* in future cases, the *Cipollone* court held that the New Jersey Products Liability Law did not relieve the cigarette manufacturer of any duty to warn.[193]

The holding in *Cipollone*, that common-law tort claims are preempted by the Labeling Act, has been criticized by both commentators and by the Chief Judge of the Third Circuit. The *Cipollone* I decision ignored legislative history, ignored the fact that preemption would leave plaintiffs without any remedy and gave little weight to the presumption against preemption.[194] Professor Tribe noted that, in virtually every other industry, manufacturers have the choice of increasing the safety of their products, increasing the warnings of the dangers in their products or paying damages to injured consumers.[195] He further criticized[196] the inconsistency between *Cipollone* and *Silkwood*,[197]in which the Supreme Court held that state common-law tort claims are not preempted by the Atomic Energy Act. The *Silkwood* Court in arriving at its conclusion noted that Congress neglected to establish any federal remedy for plaintiffs injured by such conduct, and concluded that "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."[198]

Equally telling is Chief Judge Gibbons' concurring opinion in *Cipollone* II. Judge Gibbons concluded that "our interlocutory ruling [in *Cipollone* I] on the preemptive effect of the Labeling Act. . . was wrong as a matter of law, and should be overruled by the court in banc."[199] The judge further explained that the only reason that he joined in the preemption section of the opinion was because the panel was "bound by what I believe to be an erroneous opinion of the Court."[200]

Due to the inconsistencies of the *Cipollone* I opinion, and the

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191 The effective date of the statute.

192 The effective date of the Labelling Act.

193 Cipollone v. Liggett Group, Inc., 683 F. Supp. 1487 (D. N.J. 1988), *aff'd in part, rev'd in part*, 893 F.2d 541 (3d Cir. 1990), *cert. granted*, 111 S. Ct. 1386 (1991).

194 *Cipollone*, 789 F.2d at 131.

195 TRIBE, *supra* note 156, at 490.

196 *Id.* at 490-91.

197 Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984).

198 *Id.* at 251.

199 Cipollone v. Liggett Group, Inc., 893 F.2d 541, 583 (Gibbons, J., concurring), *cert. granted*, 111 S. Ct. 1386 (1991).

200 *Id.*

limiting effect of the revised New Jersey Products Liability Law on future New Jersey cases, the recent Texas decision in *Carlisle v. Philip Morris*[201] may prove to be of greater precedential value. The *Carlisle* Court reiterated that state courts are not bound by lower federal court opinions interpreting the Labeling Act, although such decisions are persuasive.[202] After making its own analysis of the arguments for and against preemption, the court concluded that there is no basis for either express or implied preemption of common-law tort claims under the Act.[203]

The *Carlisle* decision refuted the logic of earlier cases and built a solid foundation for its decision to allow common-law claims against cigarette manufacturers, wholesalers and related entities, including claims of failure to warn, design defect, manufacturing defect, affirmative misrepresentation and civil conspiracy.[204] Citing Supreme Court cases, the court noted that there is a presumption against preemption[205] and that "the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[206] Public health and safety is an area of traditional state control,[207] therefore it stands to reason that the Labeling Act would not preempt state authority unless the Act clearly stated that intention. Even if the defendant alleges that state law poses an obstacle to the accomplishment of the purposes and objectives of Congress, the defendant must overcome the presumption against preemption in an area traditionally regulated by the states.[208] In ruling against preemption, the *Carlisle* court cited six factors supporting its decision.[209]

In analyzing the preemption issue, the *Carlisle* court focused on

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201 No. 3-89-175-CV, 1991 WL 12469 (Tex. App. Ct. Feb. 6, 1991).

202 *Id.* at 12.

203 *Id.* at 34.

204 *Id.* at 2.

205 *Id.* at 15 (citing Maryland v. Louisiana, 451 U.S. 725, 746 (1981)).

206 *Id.* (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

207 *Id.* ("the regulation of health and safety matters is primarily, and historically a matter of local concern")(quoting Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 719 (1985)).

208 *Id.* (quoting California v. ARC America Corp., 490 U.S. 93 (1989)).

209 (1) The "frustrating effect of such claims on congressional goals is speculative; (2) Avoiding diverse labeling regulations is the secondary goal of the Act; the primary goal—informing the public of the hazards of cigarette smoking—would arguably be enhanced by permitting common-law tort claims; (3) A holding that plaintiffs' claims are preempted would leave them without any remedy for the defendants' allegedly tortious conduct; (4) Congress could easily have expressly preempted common-law tort claims, but did not do so; (5) The legislative history of the Labeling Act gibes no indication that Congress intended to preempt common-law tort claims; and (6) The Comprehensive Smokeless Tobacco Health Education Act

the failure-to-warn claims, but noted that the presumption against preemption was even stronger for the other claims.[210] Although it is too early to tell whether the *Carlisle* decision will be followed in other jurisdictions, its well-reasoned argument and its reliance on Supreme Court decisions for authority should appeal to both state and federal courts.

B. Fraud and Deception, and Intent to Deceive

Prior to the 1971 government ban on tobacco advertising, the tobacco industry was a major advertiser on American radio and television. After the 1971 ban,[211] the tobacco industry became one of the largest advertisers in America's newspapers, magazines and billboards.[212] It is reasonable to assume that cigarette manufacturers would not spend large sums of money on advertising over a number of decades unless they felt that the advertisements promoted the consumption of cigarettes.

In a 1956 decision, the First Circuit allowed an action in deceit to be pleaded by the administratrix of the estate of a deceased smoker.[213] The suit alleged that the defendant cigarette manufacturer advertised that its Camel cigarettes are "healthful" and "harmless to the respiratory system", that these representations were untrue and that the defendant knowingly made the untrue representations.[214] The suit further alleged that the defendant intended that the deceased and other members of the public should rely on the representations by purchasing the defendant's cigarettes, that the deceased did rely on the representations and did purchase defendant's cigarettes exclusively, and that the deceased was "thereby deceived, defrauded and persuaded to use 'Camel' cigarettes [which resulted in cancer of the lung, and the pain, suffering and damages for which plaintiff prays for judgment]".[215] Although summary judgment was later granted to the defendant because plaintiff failed to produce the

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of 1986 evinces congressional intent that common-law tort claims not be preempted. *Id.* at 18-19.

210 *Id.* at 19.

211 15 U.S.C. § 1335 (1988).

212 Clara Sue Ross, Comment: *Judicial and Legislative Control of the Tobacco Industry: Toward a Smoke-Free Society?*, 56 U. CIN. L. REV. 317 (quoting *Media Advertising for Tobacco Products*, 255 J.A.M.A. 1033, 1033 (1986)).

213 Cooper v. R.J. Reynolds Tobacco Company, 234 F.2d 170 (1st Cir. 1956), *appeal dismissed on other grounds*, 256 F.2d 464 (1st Cir.)(per curiam), *cert. denied*, 358 U.S. 875 (1958).

214 *Id.* at 173 n.1.

215 *Id.* at 174.

allegedly deceptive advertisements,[216] this decision remains as precedent for holding cigarette manufacturers liable for fraudulent representations.

In a later Minnesota case,[217] a smoker with inoperable lung cancer and his wife sued a tobacco manufacturer on theories of strict liability, breach of warranty and negligence. The Minnesota Supreme Court held that the Labeling Act preempts any state claim that questions the adequacy of cigarette advertising or promotion with respect to smoking and health, or which questions the effect of that advertising or promotion on the federal label.[218] The court held that claims that are not based on a duty to warn, e.g., strict liability based on a risk-utility theory, affirmative misrepresentation, or breach of warranty, however, do not conflict with the objectives of the Labeling Act and are thus not preempted.[219] Cigarette manufacturers, therefore, cannot look to the Labeling Act to protect them from liability for affirmative misrepresentations about their products in the Minnesota state courts.

C. *Industry Conspiracy, Failure to Warn, and Fraudulent Concealment, as Revealed in Tobacco Industry Documents*

Discovery documents obtained by the plaintiff in *Cipollone* revealed that the three defendants, Liggett, Philip Morris, and Lorillard, which still deny that smoking is hazardous, had proven to themselves by the early 1960's that smoking causes lung cancer. As discussed above, the documents also show that the defendants had discovered ways to make less hazardous cigarettes but chose not to market these cigarettes. Perhaps the most egregious discovery, however, is the evidence of the industry's calculated and successful efforts, beginning in the 1930's, to confuse the American public in general, and doctors in particular, about the dangers of cigarette smoking.[220]

The *Cipollone* documents include internal research and development documents which support Judge Sarokin's opinion that the tobacco companies "intentionally and wilfully ignored the

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216 256 F.2d 464, 467 (1st Cir.)(per curiam), *cert. denied* 358 U.S. 875 (1958).

217 Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655 (Minn. 1989), *rev'g in part* 423 N.W.2d 691 (Minn. Ct. App. 1988).

218 *Id.* at 660.

219 *Id.* at 661-62.

220 *Additional Incriminating Documents Released,* TPLR PRESS RELEASE 1 (Tobacco Products Liability Project, Boston, Mass., March 26, 1988 Supp.)[hereinafter TPLR].

known health consequences to consumers from the sale of their products; that their so-called investigation into the risks was not to find the truth and inform their consumers, but merely an effort to determine if they could refute the adverse reports and maintain their sales."[221] In 1988, the research director of Philip Morris referred to a "gentlemen's agreement from the tobacco industry" regarding biological studies.[222] In a 1971 seminar, the same director discussed details of the industry's new "counter-propaganda" strategy.[223] There is, however, an internal Philip Morris memorandum indicating that as early as July 24, 1958, the company knew that heavy cigarette smoking contributes to lung cancer. That memorandum warned the company that it should manufacture a safer cigarette that delivers little or no tar and nicotine, without admitting a direct relation between smoking and health.[224] Other documents support Judge Sarokin's conclusion that "the creation of [the Council for Tobacco Research] and the work performed was nothing but a hoax created for public relations purposes with no intention of seeking the truth or publishing it," and that "the research actually conducted was unrelated or not pertinent to the real health issues."[225]

D. Private Discovery and Public Access to Industry Documents

Although the *Dewey* and *Carlisle* decisions have expanded the tobacco industry's liability beyond that decided by the *Cipollone* court, the *Cipollone* case will nevertheless have a dramatic impact on future cases. This impact will arise because the documents discovered in *Cipollone* will be available to future plaintiffs. The industry can no longer exhaust plaintiffs by forcing them to endure the rigors of extended discovery. In addition, evidence discovered in future cases will now more likely be made available to other plaintiffs.

Faced with a mounting body of adverse evidence and with eroding defenses, the industry may be forced to adopt a new strategy to preserve a market for its product. Perhaps the tobacco manufacturers will press Congress to pass legislation that

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221 *Id.*

222 *Id.* (citing *Cipollone* Plaintiff's ex.s P-0503, P-0508 & P-0509). The change in language between the three drafts of this internal memorandum may be construed as an indication of scienter.

223 *Id.* at 2 (citing *Cipollone* plaintiff's ex. P-0504).

224 *Id.* at 2 (citing *Cipollone* plaintiff's ex. P-0510).

225 *Id.* at 4 (citing *Cipollone* plaintiff's ex. P-0506, P-0511, P-0518, P-0520, P-0526, P-0528 to 0533 & P-0538).

will couple tighter regulation of the industry with laws that will limit or eliminate its liability to smokers and bystanders.

E. Strict Liability

Relatively few Americans roll their own cigarettes; most smokers purchase manufactured cigarettes.[226] Cigarettes are therefore a consumer product, which the user is anticipated to and does receive without significant change in the state in which it is marketed.[227] Any seller of cigarettes should, therefore, be held strictly liable for physical harm resulting from the defective condition or unreasonably dangerous nature of the cigarettes.[228] Under the RESTATEMENT's strict liability provision, it is not necessary to prove negligence on the part of the seller, nor is it necessary to demonstrate privity between the seller and the injured user or consumer.[229]

This seemingly simple rule is complicated by the definition and application of the terms "defective condition" and "unreasonably dangerous." Obvious examples of defective condition are cases in which the product is contaminated by foreign objects[230] or where the product contains a harmful ingredient,[231] for example, a dangerous chemical additive. An unusual quantity of an ingredient that is normally present in the product may also be considered a defective condition.[232]

In a 1987 decision,[233] the Supreme Court of Mississippi held that the ingredients of Pall Mall brand cigarettes were discoverable despite the fact that they were a trade secret of the defend-

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226 Although an informal survey of several metropolitan New York establishments indicated that cigarette rolling papers are generally available, none of these establishments sold cigarette tobacco to be rolled into hand-rolled cigarettes. It is reasonable to assume that most rolling papers in this area are therefore purchased to make non-tobacco cigarettes, which is beyond the scope of this paper.

227 RESTATEMENT (SECOND) OF TORTS § 402 A (1)(b).

228 *Id.*, § 402 A(1). The section states:

> 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.

Id.

229 *Id.* § 402 A (2).

230 *Id.* § 402 A, cmt. i.

231 *Id.*

232 *Id.*

233 American Tobacco Co. v. Evans, 508 So. 2d 1057 (Miss. 1987).

ant.[234] The official reporters do not carry any further history of the case and, therefore, the results of this discovery are unknown. If, however, discovery revealed that the cigarettes contained harmful ingredients (other than normal tobacco), then this would support a case for strict liability against the defendant. Other plaintiffs can make similar discovery against any other company that sells cigarettes in the United States. Future plaintiffs may also use the documents discovered in *Cipollone*,[235] which may include evidence of harmful additives in Liggett's cigarettes.

The RESTATEMENT considers that "[a] product is defective and unreasonably dangerous when a reasonable seller would not sell the product if he knew of the risks involved or if the risks are greater than a reasonable buyer would expect.[236] This aspect of the Restatement's strict liability rule is open to interpretation, which varies between jurisdictions.

The Supreme Court of California crafted a two-pronged definition of a defectively-designed product in its 1978 decision, *Barker v. Lull Engineering Co.*[237] The *Barker* court emphasized that:

> [A] trial judge may properly instruct the jury that a product is defective in design (1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove . . . that on balance the benefits of the challenged design outweighed the risk of danger inherent in such design.[238]

The *Barker* test would allow a plaintiff to make a design defect case on either a "consumer expectation" basis or on a "risk/utility" basis. A danger, hidden to the "ordinary consumer," would allow a plaintiff to win on a "consumer expectation" basis. If the danger was known to the ordinary consumer, the plaintiff could still win if the danger proximately caused his injury, and if there was a practical alternative design. Factors in the "risk/utility" analysis that would be used in deciding the practicality of the alternative design would include the gravity of the danger to be avoided, the likelihood that the danger would occur in the challenged design, the mechanical feasibility of the alternative design, the increased cost of the alternative design and whether the alternative design would be as useful as

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234 *Id.* at 1057.
235 893 F.2d 541 (3d Cir. 1990), *cert. granted*, 111 S. Ct. 1386 (1991).
236 Welch v. Outboard Marine Corp., 481 F.2d 252, 254 (5th Cir. 1973).
237 Barker v. Lull Engineering Co., Inc., 573 P.2d 443, 456 (Cal. 1978).
238 *Id.* at 457-58.

the challenged design.[239]

Risk/utility analysis is not universally accepted. A federal district court in Massachusetts recently considered and flatly rejected the analysis.[240] In explaining its disallowance, the district court expressed concern that unless the purely hedonistic consumer's preference for a product is considered "utility", then a very large percentage of manufactured products would fail a risk/utility analysis.[241] One can only speculate at what the court had in mind, but potentially dangerous products such as alcohol, refined sugars and saturated fats—harmful in large quantities and/or over a long time span—are safe and useful in small quantities. Indeed, many medicines contain alcohol as an essential ingredient, and sugars and fats can play a role in a balanced diet, but the same cannot be said about tobacco.

Although risk/utility analysis is currently a minority rule, it is a legitimate method to decide whether a product is unreasonably dangerous. This kind of analysis can be found in Restatement section 402 comment k, which discusses unavoidably unsafe products, such as the Pasteur treatment for rabies. The Pasteur treatment is very painful, and frequently results in harm to the patient, but the treatment is legally justified because the only alternative is to let the patient die a miserable death. This is obviously a risk/utility analysis, and the comment justifies such a product as an "apparently useful and desirable product, attended with a known but apparently reasonable risk." The key word is reasonable, which in this case means that the risk is unavoidable, the risk cannot be reduced, the risk is justified by the benefits and that the product is properly prepared and accompanied by proper directions and warnings. Thus, the roots for risk/utility analysis lie in Section 402 A, and risk/utility should emerge as a "modern rule." Although one may argue that this is the sort of analysis that is best left to the legislature, the courts are often forced to make such decisions when the legislature is silent. If the legislature is unhappy with the common law, it can override the courts by enacting a statute.

Much has been made of comment i in Section 402 A, because it specifically states that "[g]ood tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably

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239 *Id.* at 455.

240 Kotler v. American Tobacco Co., 731 F. Supp 50, 52, (D. Mass. 1990), *aff'd* Nos. 90-1297, 90-1400, 1990 WL 207437 (1st Cir. Dec. 19, 1990).

241 *Id.* at 53.

dangerous."[242] The Supreme Court of New Jersey in *Dewey* criticized comment i and concluded that a plaintiff may argue that a cigarette manufacturer has a duty to minimize the unavoidable, i.e., inherent, dangers attendant to cigarette smoking.[243] The court further noted that the New Jersey courts never adopted the "good tobacco" example given in comment i.[244]

Section 402 A, comment i, and section 402, comment k, facially appear to conflict. One resolution is to conclude that tobacco is either unavoidably unsafe, which would subject it to the risk/utility analysis of comment k, or is not unavoidably unsafe, which would place a duty upon manufacturers to minimize or eliminate tobacco's dangers. The tobacco-industry documents discovered in *Cipollone* demonstrate that some cigarette manufacturers considered producing safer cigarettes as early as 1958.[245] One such attempt to minimize or eliminate these dangers was R.J. Reynolds' smokeless cigarette, which patent records indicate was available as early as 1964.[246]

Under risk/utility analysis, compliance or noncompliance with governmental regulations does not absolutely determine the issue of liability.[247] If there is a government or industry standard relevant to the product in question, the standard may be relevant and admissible (subject to appropriate limiting instructions), in performing a risk/utility analysis.[248] Compliance with a relevant governmental safety standard is generally considered probative of non-defectiveness or non-negligence.[249] Although the Federal Trade Commission tests cigarettes and publishes 'tar' and nicotine measurements, it does not set any kind of industry standards. One way that the tobacco industry might seek to limit its liability would be to en-

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242 RESTATEMENT (SECOND) OF TORTS § 402 A, cmt. i.

243 Dewey v. Reynolds Tobacco Co., 121 N.J. 69, 577 A.2d 1239, 1241 (1990).

244 *Id.* at 98, 577 A.2d at 1253.

245 Richard A. Daynard, *The Cipollone Documents*, TRIAL, November 1988, at 52, col. 3.

246 *See* U.S. Patent No. 3,258,015, "Smoking Device," claim filed Feb. 4, 1964, patent issued June 28, 1986. *See infra* notes 290-301 and accompanying text.

247 Knitz v. Minster Machine Co., No. L-84-125, 1987 WL 6486 (Ohio App. 1987).

248 *Id.* at 29.

249 *See* Kaufman v. Meditec, Inc., 353 N.W. 2d 297, 301 (N.D. 1984), in which a products liability reform act provision established a rebuttable presumption "that a product is [not defective] where the alleged defect in the plans or designs . . . were in conformity with government standards established for that industry". *But see* Wilson v. Piper Aircraft, 577 P.2d 1422 (Or. 1978), in which FAA approval of an engine design was held not to be conclusive on the question of tort liability. Breach of such a standard may be evidence of defectiveness or negligence per se. *See* Elsworth v. Beech Aircraft Corp., 691 P.2d 630 (Cal. 1984).

courage the creation of government safety standards for cigarettes. Companies that comply with these standards might be shielded from liability.

The key element of the design defect claim made in *Cipollone* was that the defendants failed to market a safer cigarette.[250] There was evidence that all three defendants had developed cigarettes that greatly reduced the risk of cancer. Defendant Liggett patented[251] a cigarette in 1975, that contained a palladium catalyst and a nitrogen salt that is a normal component of tobacco, especially burley tobacco.[252] These ingredients resulted in an almost total elimination of tumors when smoke extract from the improved cigarette was painted on the backs of laboratory mice in a standardized test.[253] A 1977 internal memo[254] discovered in the *Cipollone* case indicated that Liggett planned to introduce the improved cigarette in the Spring of 1978. The *Cipollone* documents revealed that the other defendants, Lorillard and Philip Morris, also discovered that burley tobacco and palladium catalysts could be used to manufacture safer cigarettes. Lorillard considered using a palladium catalyst as early as 1960.[255] In 1973, a Lorillard memorandum predicted that "[a] 'safe' cigarette, defined as one showing little or no carcinogenic activity when measured by mouse skin painting. . . should be realizable [within] a total time span of five years."[256] Philip Morris also discovered that palladium and burley tobacco could be used in manufacturing safer cigarettes. Internal memoranda in 1962[257] and 1963[258] indicate that Philip Morris' scientists realized that catalysts such as palladium could reduce harmful substances, including benzopyrene, from cigarette smoke. Philip Morris' mouse-painting tests in 1965 proved that smoke from cigarettes containing only burley tobacco did not cause tumors. A 1967 internal research memorandum urged that Philip Morris publish the results of this study and introduce an all-burley cigarette.[259] Except for R.J. Reynolds' 1964 patent application and Liggett's 1975 patent application, all of these

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250 683 F. Supp. 1487, 1493-95 (D. N.J. 1988), *aff'd in part, rev'd in part*, 893 F.2d 541 (3d Cir. 1990), *cert. granted*, 111 S. Ct. 1386 (1991).

251 *See* TPLR, *supra* note 220, at 8.1.

252 *Cipollone* ex. P-508 (available from TPLR).

253 TPLR, *supra* note 220, at 8.1.

254 *Cipollone* plaintiff ex. P-507 (available from TPLR).

255 *Cipollone* plaintiff ex. P-701 (available from TPLR).

256 TPLR, *supra* note 220, at 7.

257 *Cipollone* plaintiff ex. P-609 (available from TPLR).

258 *Cipollone* plaintiff ex. P-610 (available from TPLR).

259 *Cipollone* plaintiff ex. P-617 (available from TPLR).

discoveries were kept secret by the defendants until they were discovered by *Cipollone*.

Unfortunately for the *Cipollone* plaintiff, the district court held that the "safer cigarette" design defect claim against the defendants failed to offer proof that, had the defendants marketed the "safer" cigarette in 1971, Cipollone would have switched to it and continued to smoke it until she ultimately stopped smoking.[260]

Even if Cipollone could have offered such proof, the district court reasoned, she did not prove that failure to market the "safer" cigarette was the proximate cause of her lung cancer.[261] In New Jersey, the court asserted, a plaintiff must present evidence that the alternative design more likely than not would have prevented plaintiff's injury.[262] Cipollone argued that, under the "lost chance" doctrine, she need only present evidence that defendants' conduct increased plaintiff's risk of contracting lung cancer and that such increased risk was a "substantial factor" in producing plaintiff's condition.[263] The district court observed that the New Jersey courts have not ruled expressly on the applicability of the "lost chance" doctrine to product liability cases, and predicted that the New Jersey Supreme Court would not apply the doctrine in the *Cipollone* case.[264] Based on this conclusion, the district court granted a directed verdict to the defendants as to the design defect claim.[265] Because this ruling was based on a prediction of state common law, the same facts could be used by a similarly-situated plaintiff in another jurisdiction and the plaintiff may obtain a different result.

Plaintiffs, in general, charging that cigarettes are defective and unreasonably dangerous should try to avoid bringing suit against manufacturers in Mississippi. In recent case, *Horton v. American Tobacco Co.*,[266] a Mississippi jury found the manufacturer and the distributor of Pall Mall cigarettes liable for the lung cancer death of a two-pack-a-day smoker, but refused to award his family any damages even though it found that the smoker had not assumed any risk.[267]

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260 683 F. Supp. 1487, 1493-95 (D. N.J. 1988), *aff'd in part, rev'd in part*, 893 F.2d 541 (3d Cir. 1990), *cert. granted*, 111 S. Ct. 1386 (1991).

261 *Id.*

262 *Id.* (citing Brown v. United States Stove Co., 98 N.J. 155, 174, 484 A.2d 1234, 1244 (1984)).

263 683 F. Supp. 1487, 1493-95 (citing Evers v. Dollinger, 95 N.J. 399, 417, 471 A.2d 405, 415 (1984)).

264 *Id.*

265 *Id.*

266 No. 9050-(E)(Miss. Cir. Ct. Sept. 24, 1990).

267 18 PROD. SAFETY & LIAB. RPTR 1063 (1990).

VI. PLAINTIFF'S FAULT AND POSSIBLE REBUTTALS

Vast media attention focused on the hazards of smoking, supplemented by public service broadcasts, publications and activities such as the "Great American Smokeout," make it difficult for juries to conclude that injured plaintiffs did not assume the risk of smoking-related injuries. How can plaintiffs convey to juries that smoking is not simply a matter of individual responsibility? One possible rebuttal, suggested by Professor Garner in 1980,[268] and increasingly used by plaintiffs, is that assumption of the risk requires an unreasonable, voluntary encounter with a known risk,[269] and because plaintiffs have become addicted to cigarettes, their continued use is not voluntary.[270] Indeed, plaintiffs have argued that a cigarette manufacturer's failure to warn of the addictive properties of nicotine[271] make cigarettes unreasonably dangerous.[272] One commentator has even suggested that a new strict liability action be devised, based on Professor White's 1982 proposal, for "intentional exploitation of man's known weaknesses."[273] This tort would impose liability on manufacturers for injuries caused by the normal use of their product if the product, used as directed, is naturally harmful and addictive.[274]

When confronted with the manufacturers' defense that the plaintiff was contributorily or comparatively negligent, plaintiffs may rebut the charge that they knew or should have known of the hazards of smoking by pointing to the plethora of material that the Tobacco Institute continues to publish, which denies the causal connection between smoking and any disease.[275] Furthermore, plaintiffs may also argue that the marketing practices of tobacco manufacturers, which include advertisements showing smokers enjoying the thrill of taking risks by windsurfing, sailing and mountain climbing, effectively negate the presence of warn-

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268 Garner, *Cigarette Dependency*, *supra* note 3, at 1448-52.

269 RESTATEMENT (SECOND) OF TORTS § 402 A cmt. n (1965).

270 *Contra* CRIST & MAJORAS, *New Wave*, *supra* note 5, at 596-601 (arguing that the fact that over thirty million people have stopped smoking illustrates the fallacy that smoking is addictive).

271 *See, e.g.*, William Pollin, *The Role of the Addictive Process as a Key Step in Causation of All Tobacco-Related Diseases*, 252 J.A.M.A. 2874 (1984).

272 Stein, *supra* note 4, at 653.

273 *Id.* at 669 (citing A.A. White, *The Intentional Exploitation of Man's Known Weaknesses*, 9 HOUS. L. REV. 889 (1972)).

274 *Id.*

275 *See, e.g.*, THE TOBACCO INST., CIGARETTE SMOKING AND HEART DISEASE 33-39, (1983); THE TOBACCO INST., CIGARETTE SMOKING AND CANCER: A SCIENTIFIC PERSPECTIVE (1982).

ings on packages of cigarettes.[276]

VII. SMOKELESS TOBACCO

Although cigarette, cigar and pipe smoking may be the best-known uses of tobacco, tobacco may be inhaled as snuff or taken orally as "chewing tobacco." Collectively, these last two categories will be referred as "smokeless tobacco." Smokeless tobacco delivers nicotine (and other chemicals) to the user through his mucous membranes and, in the case of chewing tobacco, through the gastrointestinal tract. Although smokeless tobacco products have the virtue of delivering nicotine to the user without polluting the air with smoke, they cause mouth cancer, gum disease and tooth loss.[277]

The Labeling Act,[278] which prohibited the advertising of cigarettes[279] on radio and television since January 1, 1971, remained silent regarding smokeless tobacco products. The makers of smokeless tobacco took advantage of this opportunity to promote their products via radio and television advertising. Congress extended the radio/television advertising ban to smokeless tobacco products[280] in 1986, but the industry used this 15-year window to build up their market, particularly for "chewing" tobacco.[281]

To inform the public of the dangers of smokeless products, Congress enacted the Comprehensive Smokeless Tobacco Health Education Act[282] (Smokeless Tobacco Act) in 1986. This

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276 Plaintiff's attorney, Jack Dunbar, in *Horton v. American Tobacco Co.*, stated: "[I]t's one thing to sell a dangerous product. It's another thing to sell it with reckless disregard." 18 PROD. SAFETY & LIAB. REP. 1063, 1064 (1990)(citing No. 9050(c) (Miss. Cir. Ct. Sept. 24, 1990)); *see also supra* notes 160-62 and accompanying text.

277 *See* Pub. L. No. 99-252 § 3, 100 Stat. 30, 30-32 (1986); 15 U.S.C. § 4402(a)(1988); UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING: CANCER: A REPORT OF THE SURGEON GENERAL 201 (1982) [hereinafter 1982 SURGEON GENERAL'S REPORT].

278 15 U.S.C. § 1335 (1988).

279 Pub. L. 93-109 § 3, 87 Stat. 352 (1973)(currently codified as amended at 15 U.S.C. § 1335 (1988))(extending the advertising ban to "little cigars").

280 Pub. L. 99-252 § 3(f), 100 Stat. 30, 32 (1986)(currently codified as amended at 15 U.S.C. § 1335 (1988)).

281 A recent innovation in packaging smokeless tobacco is to enclose it into little single-use pouches that fit into the user's mouth, and can be conveniently spit out in one piece. This can be compared to the packaging of tea into tea bags. Perhaps a better term for these pouches (e.g., Skoal's "Bandits") would be "sucking tobacco".

282 15 U.S.C. §§ 4401 to 4408 (1988).

statute was patterned after the Labeling Act,[283] and mandates rotating warning labels on smokeless tobacco products, warning that they cause mouth cancer, gum disease, tooth loss and that they are not a safe alternative to cigarettes.[284]

A noteworthy difference between the Labeling Act and the Smokeless Tobacco Act is that the latter statute explicitly states in the preemption section that "[n]othing in this chapter shall relieve any person from liability at common law or under State statutory law to any other person."[285] In other words, the manufacturers of smokeless tobacco cannot use the preemption section as a defense against common-law causes of action.

One must reconcile the existence of the savings clause in the Smokeless Tobacco Act with the absence of such a clause in the earlier Labeling Act. The *Carlisle* court,[286] quoting a recent commentary,[287] decided that "[t]he more reasonable interpretation of this legislation, however, is that it expresses the ongoing, unchanging, undiminished intent of Congress not to preclude common-law causes of action for failure to warn against the tobacco industry."[288] Because the two statutes serve practically identical purposes, there is no rational basis to believe that Congress intended to shield the tobacco industry from common-law action for cigarettes merely because there is no explicit savings clause in the Labeling Act. The *Carlisle* court's ruling on this point is based, in part, on the documented record of Congressional intent.[289] This holding, if followed in other jurisdictions, destroys whatever liability protection the tobacco industry thought it received from the Labeling Act.

VIII. SMOKELESS CIGARETTES

As discussed in the Strict Liability section of this article, the

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283 15 U.S.C. § 1335 (1988).

284 15 U.S.C. § 4402(a)(1988).

285 15 U.S.C. § 4406(c) (1988).

286 Carlisle v. Philip Morris, No. 3-89-175-CV, 1991 WL 12469 (Tex. App. Ct. Feb. 6, 1991).

287 Taylor E. Ewell, Comment, *Preemption of Recovery in Cigarette Litigation: Can Manufacturer Be Sued for Failure to Warn Even Though They Have Complied with Federal Warning Requirements?*, 20 LOYOLA L.A. L. REV. 867 (1987).

288 *Carlisle*, No. 3-89-175-CV, 1991 WL 12469, slip. op. at 29; Ewell, Comment, *supra* note 287 at 918-19.

289 The *Carlisle* court reminded: "[The Smokeless Tobacco Act], for the most part, simply extends that provisions of . . . the Comprehensive Smoking Education Act of 1984, to include smokeless tobacco products." *Id.* (quoting 1986 U.S. CODE CONG. & ADMIN. NEWS 7, 11).

documents discovered in *Cipollone* have established that at least three of the major cigarette manufacturers[290] developed cigarettes that greatly reduced the risk of cancer.[291] R.J. Reynolds took its research further, and developed a smokeless cigarette, which it patented in 1964[292] and test-marketed under the brand name Premier in 1988 and 1989.[293]

The Premier "cigarette" was not a cigarette per se. Instead, the Premier contained an aluminum chamber that held nicotine and various flavorings that were warmed and inhaled by the user. Unlike other cigarettes, which produce tobacco smoke, Premier would apparently have eliminated both environmental tobacco smoke and many of the harmful substances that are inhaled by the smoker. Thus, it seems that Premier delivered the nicotine and flavor that smokers wanted, while eliminating many of the undesirable and dangerous by-products. Assuming this were true, a plaintiff could argue that cigarette manufacturers should sell only the "safer" smokeless cigarettes, and that conventional cigarettes are, therefore, defective. The *Cipollone* court reasoned that those jurisdictions that apply the "lost chance" doctrine[294] would support such a claim, but predicted that New Jersey's Supreme Court would not apply this doctrine.[295]

A. FDA Jurisdiction Over Smokeless Cigarettes

It has been argued that the Premier was a drug delivery mechanism for nicotine, and should have been regulated as a drug.[296] Because nicotine is an addictive drug, one could make a good case for FDA jurisdiction over smokeless cigarettes.[297] If the FDA decided to gain jurisdiction over smokeless cigarettes on this basis, a weaker but analogous argument could be made for FDA regulation of all tobacco products.

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290 Lorillard, Philip Morris, and R.J. Reynolds.

291 *See* TPLR, *supra* note 220, § 3.1; *Cipollone* plaintiff's ex. P-508, P-617 (available from TPLR).

292 *See* U.S. Patent No. 3,258,015, "Smoking Device," claim filed Feb. 4, 1964, patent issued June 28, 1986.

293 For further discussion of the Premier cigarette and its effect on the 1989 leveraged buyout of RJR Nabisco, Inc., *see Symposium—Fundamental Corporate Changes: Causes, Effects, and Legal Responses*, 1989 DUKE L.J. 1 (1989)[hereinafter *Symposium*].

294 *See supra* note 264 and accompanying text.

295 683 F. Supp. 1487, 1493-95 (D. N.J. 1988), *aff'd in part, rev'd in part*, 893 F.2d 541 (3d Cir. 1990), *cert. granted*, 111 S. Ct. 1386 (1991).

296 James T. O'Reilly, *A Consistent Ethic of Safety Regulation: The Case for Improving Regulation of Tobacco Products*, 3 ADMIN. L.J. 215 n. 90 (1989).

297 *Id.*

B. Duty to Warn and Design Defect

It could be argued that the Premier was defective because RJR breached its duty to warn users of these cigarettes' addictive nature. Unless a plaintiff could claim that he became addicted to Premier cigarettes, switched to regular cigarettes when Premier was no longer available, and then was injured by the regular cigarettes, such questions, however, are now moot. In February 1989, RJR Nabisco announced that it terminated the market testing of Premier and indicated that it had no immediate plans to introduce any product resembling Premier.[298]

C. Industry Liability

It is reasonable to conclude that the cancellation of Premier was based on RJR's restructuring after its acquisition by Kohlberg, Kravis, and Roberts (KKR).[299] Consumers who tested Premier disliked its taste and the feel of its partially-metallic body,[300] but RJR Nabisco had planned to spend $80 million in capital investment on the cigarette in 1989.[301] Either management planned to continue stubbornly pouring money into a hopeless product, or it planned to refine the product into a commercially viable item. The priorities of RJR's management were obviously refocussed by its new owners, KKR, after the buyout. It would seem reasonable to conclude that KKR ordered management to jettison the product to fatten the company's bottom line. This conclusion should serve to increase RJR's culpability, because a plaintiff may show that the company had the opportunity to perfect the safer Premier cigarettes but chose not to do so, in the interest of saving money. An alternate theory for the cancellation of the Premier cigarette can be found in the *Cipollone* "industry conspiracy" theory, discussed supra.

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298 Peter Waldman & Betsy Morris, *RJR Nabisco Abandons "Smokeless" Cigarette*, WALL ST. J., Mar. 1, 1989, at B1 [hereinafter Waldman & Morris, *Nabisco*].

299 *See* Larry E. Ribstein, *Takeover Defenses and the Corporate Contract*, 78 GEO. L.J. 71 n. 60; Betsy Morris & Peter Waldman, *The Death of Premier*, WALL ST. J., March 10, 1989, at B1 [hereinafter, Morris & Waldman, *Death of Premier*].

300 Morris & Waldman, *Death of Premier*, *supra* note 299 at B1.

301 Waldman and Morris, *Nabisco*, *supra* note 298; *Symposium*, *supra* note 293 at 569 n. 113.

IX. INVOLUNTARY SMOKING AND ENVIRONMENTAL TOBACCO SMOKE: DANGERS OF ENVIRONMENTAL TOBACCO SMOKE, AND NON-SMOKERS' RIGHTS

Passive smokers are the blameless victims to whom cigarette manufacturers may someday be found liable. While manufacturers and sellers of tobacco products may argue that cigarette smokers now receive adequate warning and assume the risk of smoking, this argument rings false when applied to nonsmokers that are exposed to "second hand" smoke.

Cigarettes create indoor air pollution in two ways. From the time that a cigarette is lit until the time that it is extinguished, it burns continuously, emitting smoke and gases from the lit end. This "sidestream" smoke and gas is released into the air without any kind of filtration. The other source of pollution is the "mainstream" smoke, which the smoker exhales into the air. Since the mainstream smoke is filtered by the cigarette's filter (if any) and is further filtered (and partially absorbed) by the smoker's lungs, it is not surprising that the sidestream smoke is more toxic than mainstream smoke.[302] When a nonsmoker occupies a smoke-filled room or other enclosed space,[303] he is forced to inhale environmental tobacco smoke (ETS), and becomes an "involuntary" or "passive" smoker.[304]

In his 1986 report,[305] the Surgeon General confirmed that ETS is harmful to nonsmokers. While the Surgeon General's fact-finding may come as no surprise to most nonsmokers, it is an authoritative piece of evidence that has been used by nonsmokers to prove that ETS is a health hazard.[306]

A. Employees' Rights and Employer Liability

At least in the workplace, nonsmokers have certain rights to be free of cigarette smoke. An employer has a common-law duty

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302 *See* Dukelow, *Answers to Inquiry, Cigarette Smoke-Filled Room: A Hazard to Nonsmokers and Children*, 223 J.A.M.A. 336 (1973). For example, sidestream smoke contains approximately 5 times as much carbon monoxide as sidestream smoke.

303 Examples would include airplanes, trains, buses and automobiles.

304 *See* Public Health Service, Department of Health, Education, and Welfare, THE HEALTH CONSEQUENCES OF SMOKING 101-35 (1972) [hereinafter SURGEON GENERAL'S 1972 REPORT].

305 U.S. Dep't of Health, Educ. & Human Services, THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING, A REPORT OF THE SURGEON GENERAL vii (1986) [hereinafter SURGEON GENERAL'S 1986 REPORT].

306 *See* Shimp v. New Jersey Bell Tel. Co., 145 N.J. Super. 516, 368 A.2d 408 (Ch. Div. 1976).

to provide his workers with a safe working environment.[307] Although there has been federal legislation governing workplace safety, such as the Occupational Safety and Health Act (OSHA),[308] this legislation does not preempt the common law.[309] Indeed, the OSHA legislation explicitly acknowledges concurrent state power to act either legislatively or judicially under to common law with regard to occupational safety.[310]

Nonsmokers have used their common-law right to a safe workplace to obtain injunctions against ETS in the workplace. The most widely-quoted of these cases is *Shimp v. New Jersey Bell Tel. Co.*[311] Shimp was a telephone-company secretary who was allergic to cigarette smoke, and was forced to inhale ETS created by her co-workers.[312] She had severe reactions to the smoke, which severely affected her health and forced her to leave work physically ill on numerous occasions.[313] Shimp produced medical evidence of these symptoms, which would go into remission when she was in a smoke-free environment.[314] Shimp further demonstrated that she had tried every avenue open to her to get relief prior to instituting her action for injunctive relief.[315]

The *Shimp* court granted an injunction restricting the smoking of employees to the company lunchroom.[316] The court noted that OSHA did not pre-empt common-law state rights, and that while the Workmen's Compensation Act barred tort actions for damages, it did not bar injunctive relief against occupational hazards.[317] Courts do not need to wait until a hazard ripens into an injury, and may use their equitable powers to afford an appropriate remedy to protect workers against occupational hazards.[318] Nor do they need an implementing statute in order to enjoin conduct that interferes with the rights of an employee.[319]

One of the *Shimp* decision's useful and compelling arguments is that cigarette smoke is not a natural by-product of the

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307 *Id.* at 521, 368 A.2d at 410.
308 29 U.S.C. §§ 651 to 678 (1988).
309 *Shimp*, 145 N.J. Super. at 521-22, 368 A.2d at 410-11.
310 *Id.* at 522, 368 A.2d at 410 (quoting 29 U.S.C.A. § 653(b)(4)).
311 145 N.J. Super. 516, 368 A.2d 408 (Ch. Div. 1976).
312 *Id.* at 520-21, 368 A.2d at 409-10.
313 *Id.* at 521, 368 A.2d at 410.
314 *Id.*
315 *Id.*
316 *Id.* at 531, 368 A.2d at 416.
317 *Id.* at 524, 368 A.2d at 412.
318 *Id.*
319 *Id.* at 524-25, 368 A.2d at 412 (citations omitted).

employer's business. Case law exists, based on the proposition that an employee assumes a risk, as ordinarily incident to his employment, where (a) the employee is employed in the handling of materials that create dust as a non-toxic natural by-product of an industrial process, and (b) the risk is either obvious or is known to the employee.[320] An employer need not fill the air of its offices with tobacco smoke to carry on its business, therefore, the tobacco smoke cannot be regarded as an occupational hazard that Shimp voluntarily assumed in pursuing a career as a secretary.[321] Moreover, tobacco smoke is a toxic substance, increasing the distinction between *Shimp* and the "assumption of risk" line of cases.[322]

The Missouri Court of Appeals followed the *Shimp* decision in *Smith v. Western Electric Company*.[323] In *Western Electric*, the court ruled that injunctive relief would be an appropriate remedy in view of the tobacco smoke's effect on the employee's health, provided that the employee could prove that the employer breached his duty to provide a safe workplace, that irreparable harm to employee's health was otherwise likely, that employee has exhausted all other avenues of relief, and that there was no other adequate remedy at law.[324] The court noted that the employer had a policy prohibiting smoking near its computer equipment, and that this demonstrated that the employer had reasonable alternatives to avoid the continuing breach of its duty to its employee Smith.[325]

In an anomalous decision by the District of Columbia Court of Appeals, *Gordon v. Raven Systems & Research, Inc.*,[326] an employee's action for unlawful discharge—due to her refusal to work in a smoke-filled area—was dismissed because the employee did not introduce evidence of the hazards of ETS to nonsmokers in general. The court would not impose upon an employer the duty or burden to conform his workplace to the particular needs (i.e. sensitivity to ETS) of a particular employee, but would only enforce a duty that the employer owed to its employees in general. In an odd maneuver, however, the D.C. Cir-

320 *Id.* at 523, 368 A.2d at 411 (citing Canonico v. Celanese Corp of America, 11 N.J. Super. 445, 78 A.2d 411 (App. Div.), *certif. den.* 7 N.J. 77, 80 A.2d 494 (1951).

321 *Id.*

322 *Id.* at 523-24, 368 A.2d at 411.

323 643 S.W.2d 10 (Mo. App. 1982).

324 *Id.* at 12.

325 *Id.*

326 462 A.2d 10, 14-15 (D.C. App. 1983).

cuit mentioned the "plethora" of evidence presented in *Shimp*,[327] but chose not to take judicial notice of it. Therefore, it may be likely that the D.C. courts will adopt the *Shimp* decision at some future time.

An employer may not harass, dismiss or otherwise retaliate against employees that seek relief from ETS or other workplace safety hazards.[328] In 1988, the District Court for the District of Columbia ruled that such an employee could bring an action for intentional infliction of emotional distress against her supervisor.[329]

In view of the Surgeon General's reports regarding ETS, it can be argued that employers are on notice of the dangers of ETS and therefore have a duty to protect their employees against these known dangers. As a result of a Washington state court decision, employers that knowingly breach this duty are not only subject to injunction, as discussed supra, but may be liable for damages caused by their negligence.[330] Because the Washington plaintiff's ETS-related injuries were denied coverage under the state's Industrial Insurance Act (worker's compensation), the court held that the employer could be liable for money damages in a negligence action.[331]

B. Bystander's Rights and Tobacco Manufacturers' Liability

Cigarette manufacturers may be civilly liable to people who inhale ETS under the theory of bystander liability. All states that have adopted the theory of strict tort liability have extended the theory to the bystander when called upon to do so.[332] Cigarette manufacturers would be liable under the bystander liability theory for personal injury or property damage, based on the fact that the bystanders were in the vicinity of a dangerous instrumen-

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327 *Id.* at 15.

328 Carroll v. Tennessee Valley Authority, 697 F. Supp. 508, 511-12 (1988); Lepore v. National Tool and Manufacturing Co., 224 N.J. Super. 463, 540 A.2d 1296 (1988).

329 *Carroll*, 697 F. Supp. at 511-12.

330 McCarthy v. Department of Social and Health Services, 759 P.2d 351 (Wash. 1988).

331 *McCarthy*, 759 P.2d at 357.

332 Caruth v. Mariani, 463 P.2d 83, 85 (Ariz. App. 1970); *see also* Sills v. Massey-Ferguson, Inc., 296 F. Supp. 776 (N.D. Ind. 1969); Klimas v. International Telephone & Telegraph Corp., 297 F. Supp. 937 (D. R.I. 1969); West v. Caterpillar Tractor Co., 336 So.2d 80, 89 (Fla. 1976); Elmore v. American Motors Corp., 451 P.2d 84 (Cal. 1969); Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969); Mitchell v. Miller, 214 A.2d 694 (Conn. 1965); Piercefield v. Remington Arms Co., 113 N.W.2d 129 (Mich. 1965).

tality furnished by a manufacturer which fails to give notice (to the bystander) of the danger.[333] Contributory negligence of the bystander is not available as a defense, unless the bystander "voluntarily and unreasonably proceed[s] to encounter a known danger, [which would commonly pass] under the name of assumption of risk."[334] Even if the tobacco industry would go so far as to admit that its products represent a danger to the nonsmoking public, which would invite a new wave of restrictive legislation, one could hardly expect nonsmokers to avoid all public places in an effort to avoid exposure to ETS. One could compare the situation to a factory that releases toxic emissions into the air; those who live and work in the area are not voluntarily and unreasonably proceeding to encounter the factory's toxic emissions.

X. CONCLUSION

This article has advanced possible theories plaintiffs may pursue against tobacco manufacturers, including negligence, breach of warranty, design defect, misrepresentation, failure to warn, deception, industry conspiracy, fraudulent concealment and strict liability due to "unreasonable danger" and risk/utility analysis. Obviously, success on these theories hinges upon the Supreme Court's upcoming determination of the preemptive effect of the Labeling Act in the context of *Cipollone*.

It must be emphasized that this Article does not suggest that smokers should not stop smoking. Rather, the authors believe that so long as the federal government supports the continued existence of an industry which produces a harmful product, courts should not leave injured plaintiffs without a remedy under the rubric of implied preemption. Congress has designed the Labeling Act to operate in two contradictory ways—promoting the economic prosperity of the tobacco industry while warning potential consumers not to smoke. But the industry must not be able to "sit on its butt," while its advertising negates the federally-mandated health warnings and avoids mention of the addictive qualities and other hazards of tobacco. Products liability law should be applied to the tobacco industry just as it is to any other, with the goal of encouraging cigarette manufacturers to market a safer product, while fully warning of all dangers. If tobacco companies do not take these steps, they should be made to pay damages for injuries caused by their harmful products.

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333 *Cf. West*, 336 So.2d at 89.

334 *Id.* at 90 (citing RESTATEMENT (SECOND) OF TORTS, §§ 402 A and 524).