CIPOLLONE V. LIGGETT GROUP, INC.: A PREEMPTIVE LUCKY STRIKE?

INTRODUCTION

The Constitution grants Congress the broad power to preempt valid state concerns in the furtherance of vital national interests. Indeed, the American legislative process was designed to balance the needs of the many against the desires of the few. Yet, where Congress fails to clearly articulate its preemptive wishes, either in a statute's text or in the legislative history surrounding the statute, reviewing courts must often attempt to interpret the intended preemptive scope of federal legislation vis-à-vis traditional state powers. Cipollone v. Liggett Group, Inc. is representative of the often painful struggle judges and justices experience in defining the boundaries of congressional intent.

Fundamentally, Cipollone is a products liability action. It represents the attempt of one woman to hold the tobacco industry responsible for the lethal injuries she allegedly suffered as the result of smoking their cigarettes. Rose Cipollone's story is one of misplaced trust, mistaken judgment and personal tragedy. Cipollone is, therefore, a very human story.

However, Cipollone also placed before the Court the troublesome question of tobacco industry liability. In the United States alone, smoking is directly or indirectly responsible for an estimated 350,000 deaths annually. Additionally, smoking imposes an estimated $52 Billion 'drag' on the nation's economy in the form of health care costs and lost worker productivity. Still, many Wall Street analysts fear that industry-wide liability would cripple the industry, throwing thousands from their jobs and eliminating millions of dollars in tax revenue.

Without question, the Cipollone decision has potentially broad social and economic implications with respect to the future of tobacco industry liability. Yet, Cipollone may ultimately be remembered more for its discussion of federal

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1 U.S. CONST. art. VI, cl. 2. "[T]he Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."
3 Id.
6 Id. at 412. Wall Street analysts speculate that cigarette prices could jump by $3.00 a pack if tobacco companies are held liable.
preemption law than for instituting a "third wave" of cigarette litigation.\textsuperscript{7} In fact, the Cipollones themselves provided surprisingly early confirmation of the decision's short coattails when they abandoned their decade-old lawsuit on November 5, 1992.\textsuperscript{8}

As such, the gravamen of this casenote will focus on the Court's preemption analysis. Included in this examination will be the legislative and economic forces underlying the Court's conclusion that the 1965 Federal Cigarette Labeling and Advertising Act does not preempt all state common law tort actions against cigarette manufacturers.\textsuperscript{9}

**BACKGROUND**

*The Federal Cigarette Labeling and Advertising Act*

In 1965, amidst mounting political and scientific pressure, Congress passed the "comprehensive" Federal Cigarette Labeling and Advertising Act.\textsuperscript{10} (Labeling Act). The Labeling Act was designed to both adequately inform the public of the health risks associated with smoking AND to protect the national economy through eliminating divergent labeling and advertising regulations among the several states.\textsuperscript{11}

\textsuperscript{7} The 1950's and 60's saw the "first wave" of cigarette cases, none of which was successful. The "second wave" would not follow until 1984 and would run roughly through 1988. *Cipollone* was among the first of these "second wave" cases and the first to reach the Supreme Court. See Paul G. Crist & John M. Majonas, *The "New" Wave in Smoking and Health Litigation--Is Anything Really So New?,* 54 TENN. L. REV. 551 (1987); and Marcia L. Stein, *Cigarette Products Liability Law in Transition,* 54 TENN. L. REV. 631 (1987).

\textsuperscript{8} Marc Edell, the Cipollones' attorney, cited the more than $5 million his law firm expended during the ten years of litigation as the principal reason for the decision to "pull the plug". See Blair S. Walker, *Landmark Smoking Suit Dismissed,* USA TODAY, Nov. 6, 1992 (Friday through Sunday Final Edition), at 1A.


\textsuperscript{10} Federal Cigarette Labeling and Advertising Act 15 U.S.C. §§ 1331-1340 (1965). (Congress was spurred into action as a result of several contemporaneous events. The first was a 1964 report issued from the Surgeon General's Advisory Committee on Smoking and Health. Picking up on the report's recommendations, the FTC attempted to promulgate its own advertising requirements for the tobacco industry, which were to take effect July 1, 1966. See Unfair or Deceptive Advertising and Labeling 29 Fed. Reg. 8325 (1964) codified as 16 C.P.R. §§ 1.b1-1.b7 Congress ultimately suspended the FTC's efforts in favor of the Labeling Act. Additionally, several states were also contemplating the regulation of cigarette advertisements within their boarders. See, e.g., N.Y. Health Law § 470 (1965).

\textsuperscript{11} 15 U.S.C. § 1331 (1988). In full, section 1331 states the Congressional declaration of policy and purpose as follows:

> It is the policy of the Congress, and the purpose of this act, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby--

(1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.
Unlike the preemptive provisions in other acts, Congress did not expressly address the fate of state common law actions within the preemption clauses of either the original 1965 Labeling Act or its 1969 amendment. Sections 5(a) and (b) of the Labeling Act's original preemption provision prevented any state or local legislative body from imposing any additional "statement" relating to smoking and health. Congress amended and augmented the scope of section 5(b) in 1969. Substantively, the proscription on the several states from requiring any further "statement" relating to smoking and health was replaced with a ban on any subsequent "requirement or prohibition".

The congressional alteration of the Labeling Act's preemptive provision is troublesome, however, in that Congress again failed to address the status of state common law tort actions under the federal preemptive scheme. The congressional omission produced a heated debate over the extent of congressional intent. Proponents of imposing tobacco industry liability argued that the congressional silence, coupled with the absence of any federal remedy within the Labeling Act, expressed a determination that state tort claims were permissible. Moreover, given the historical presumption against state law preemption, proponents argued that preemption of state law damage claims left those injured without a legal remedy.

The tobacco industry, on the other hand, was forced to develop its argument around the fact that no court had ever held the text of the Labeling Act to expressly

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   (a) No statement relating to smoking and health, other than the statement required by section 4 (15 U.S.C. § 1333) of this title, shall be required on any cigarette package.
   (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of the Act.

15 Public Health Cigarette Smoking Act of 1969 Pub. L. 91-222, § 2, 84 Stat. 88 (codified as 15 U.S.C. § 1334(b)(1969)). In full, section 5(b) was amended to read:
   (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 act.

16 See Cigarette Labeling and Advertising: Hearings before the Committee on Interstate and Foreign Commerce, H.R. 643, 1237, 3055 and 6543, 91st Cong., 1st Sess., 176 (1969); Cigarette Labeling and Advertising: Hearings before the Committee on Commerce, S. R. 559 and 547, 89th Cong., 1st Sess. 246 (1965) and Cigarette Labeling and Advertising: Hearings before the Committee on Interstate and Foreign Commerce, H.R. 2248, 3014, 4007, 7051 and 4244, 89th Cong., 1st Sess. 176 (1965). The legislative history surrounding the 1969 Amendment, as well as the original preemption clause, is sprinkled with references to the fate of common law actions, but no court has been willing to infer express Congressional intent from the off-the-cuff comments of a few Congressmen.

preempt state common law actions. The industry’s position, therefore, relied heavily on *Hines v. Davidowitz* as authority for the proposition that state common law tort actions and damages are capable of creating an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." As such, the industry argues that state common law tort actions violate the "requirement" prohibition under the Labeling Act’s preemptive scheme.

*Express and Implied Preemption:*

Prior to the Court’s decision in *Cipollone*, there was little disagreement over federal preemption law. Rudimentary to any preemptive review is recognizing that the analysis originates under the assumption against superseding traditional state police powers. Such state power will prevail unless the "clear and manifest purpose of Congress" to do otherwise is ascertained. As such, congressional intent is said to be the "ultimate touchstone" of preemption analysis.

It is well established that Congress may expressly preempt state law under the sixth amendment’s supremacy clause. Congress need only express its preemptive wishes in the body of a statute to eliminate concurrent jurisdiction. In addition to expressed preemption, however, there exist two equally well-established forms of implied preemption: occupation of the field and actual conflict. Determination of implied preemption turns solely on congressional intent and purpose, which in turn is discovered from the language, structure and purpose of a given statute.

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19 312 U.S. 52, 67 (1941).

20 In light of the depth of the division between the members of the Court, that all nine justices were able to agree upon preemptive standards of review is perhaps the best illustration of the agreement in this area of law. See *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992).


22 Id.


26 Id.

27 *Pacific Gas & Elec. v. Energy Resources Comm’n*, 461 U.S. 190, 204 (1983). The latter two forms of implied preemption, Occupation of the Field and Actual Conflict, are judicially determined supplements to an expressed statutory preemptive clause.


To ascertain whether a federal law is so comprehensive that it "occupies the field" in which a coexistent state law operates, a court must engage in a three question analysis. First, how pervasive is the federal regulatory scheme? Second, are the federal interests dominant to those of the state? Third, a court must examine the objective(s) and obligation(s) imposed under the federal act and ask whether they convey the same purpose(s) as those expressed in the chafing state law. If the federal act leaves no room for parallel state regulation, then Congress exclusively "occupies the field" and preempts all state law in that area. Thus, a state regulation operating in a field Congress exclusively occupies will be preempted even if it is consistent with the federal scheme.

If Congress has not entirely occupied a given field, federal law will still displace state law if there is an "actual conflict" between the state and federal laws. Similar to the analysis performed above, actual conflict inquiry is predicated on the purpose of the federal act and the disruptive force of the state statutory scheme. Interference from the state law must be such that it becomes virtually impossible to conform to both the state and federal regulation. However, actual conflict preemption is not dogmatically applied in all instances. Congress can choose to "tolerate" concurrent regulation if the state law's hinderance does not amount to an "obstacle to the accomplishment of the full purposes and objectives of Congress."

STATEMENT OF THE CASE

Facts

Rose Cipollone began smoking Liggett's Chesterfield brand cigarettes at the age of sixteen. She smoked continuously from 1942 through the early 1980's and would typically consume one to two packs of cigarettes a day. In her deposition, Mrs. Cipollone testified that she started smoking to imitate the

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31 Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985). (A Massachusetts law was said to be preempted even though it was consistent with the substantive requirements of the Employee Retirement Income Security Act of 1974 (ERISA)).
32 Finberg v. Sullivan, 634 F.2d 50, 63 (3d Cir. 1980).
"No doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a state may nevertheless award damages based on its own law of liability. But... Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less."
35 Cipollone v. Liggett Group, Inc., 893 F.2d 541, 548 (3rd Cir. 1990); See also, Brief for Petitioner at 8, Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992) (No. 90-1038).
36 Cipollone v. Liggett Group, Inc., 893 F.2d 541, 551 (3d Cir. 1990). (At the urging of Mr. Cipollone, Mrs. Cipollone did briefly reduce her consumption while pregnant; however, she did not completely stop smoking while she was pregnant.)
glamorous women in Chesterfield's magazine advertisements.\textsuperscript{37} She also claimed Chesterfield's radio commercials influenced her decision to begin smoking.\textsuperscript{38}

In 1955, Mrs. Cipollone switched from Chesterfield to another Liggett brand, L & M Filters.\textsuperscript{39} L & M's ads claimed a new "miracle tip" would provide smokers with a 'Light and Mild smoke'.\textsuperscript{40} Once again, Mrs. Cipollone testified that the advertising used to promote the L & M Filter was a significant factor in her decision to change brand allegiances.\textsuperscript{41} Mrs. Cipollone would go on to switch brands again in 1968, 1970 and 1974 citing health and advertising reasons for each.\textsuperscript{42}

\textsuperscript{37} See Brief for Petitioner at 8, Cipollone v. Liggett Group, Inc., 112 S. Ct 2608 (1992) (No. 90-1038). (Mrs. Cipollone died of lung cancer in 1984, thus the only available testimony from her was the deposition she sat for at Respondent's request).

\textsuperscript{38} Cipollone v. Liggett Group, Inc., 893 F.2d 541, 548 (3d Cir. 1990), cert. granted, 111 S. Ct. 1386 (1991), and rev'd in part, 112 S. Ct. 2608 (1992). Respondents stipulated that Mrs. Cipollone had viewed or read numerous forms of Chesterfield's print, radio and television promotions during the thirteen years (1942-55) she smoked Chesterfield brand cigarettes. During that period, Chesterfield advertisements contained messages such as:

"PLAY SAFE Smoke Chesterfield.
NOSE, THROAT, and Accessory Organs not Adversely Affected by Smoking Chesterfields.
First such report ever published about any cigarette. A responsible consulting organization has reported the results of a continuing study by a competent medical specialist and his staff on the effects of smoking Chesterfield cigarettes. A group of people from various walks of life was organized to smoke only Chesterfields. For six months this group of men and women smoked their normal amount of Chesterfields--10 to 40 a day. 45% of the group have smoked Chesterfields continually from one to thirty years for an average of 10 years each. At the beginning and at the end of the six-months period each smoker was given a thorough examination, including X-ray pictures, by the medical specialist and his assistants. The examination covered the sinuses as well as the nose, ears and throat. The medical specialist, after a thorough examination of every member of the group, stated: 'It is my opinion that the ears, nose, throat and accessory organs of all participating subjects examined by me were not adversely affected in the six-month period by smoking the cigarettes provided." Id.

Chesterfield television ads were also introduced, featuring Arthur Godfrey (Chesterfield sponsored Godfrey's program). Id. at 549.

"... If you believe in me, and over the 23 years I've been in the radio, you know that I have never yet misled you with advertising. Nobody has been able to buy me enough to do that. If you believe in me, then you take my word that I know this--that the Liggett and Myers people don't make statements that they can't substantiate. And when they say that after this test that they made with the doctor, that after he made it, he comes up and says, quote--'It is my opinion that the ears, nose, throat and accessory organs of all participating subjects examined by me were not adversely affected in the six-month period by smoking the cigarettes provided.' And they mean what they say--that specialist said it. Liggett and Myers have substantiated it. Remember that when you're wondering about cigarettes. Smoke Chesterfields--they're good." Id. at 550 n.5.

\textsuperscript{39} Id. at 550.

\textsuperscript{40} Id. at 551.

\textsuperscript{41} Id. at 550. Mrs. Cipollone stated in her deposition, '[W]ell, they were talking about the filter tip, that it was milder and a miracle it would keep the stuff inside a trap, whatever . . . it was the new thing and I figured, well, go along . . . [T]hrough advertising, I was led to assume that they were safe and they wouldn't harm me . . . . There was lots of advertising. There was advertising in magazines, on billboards, in newspapers.'

\textsuperscript{42} Cipollone v. Liggett Group, Inc., 893 F.2d 541, 551 (3d Cir. 1990). In 1968, Mrs. Cipollone began smoking Philip Morris' Virginia Slims brand "because it was very glamorous and very attractive ads". She switch in 1970 to Parliament brand, which was also manufactured by Philip Morris, because it was advertised as having a "recessed" filter. Finally, in 1974, Mrs. Cipollone chose True brand over...
As Mrs. Cipollone grew older, her health steadily declined. First, Mrs. Cipollone developed a severe cough. Then, in 1981, Mrs. Cipollone was diagnosed with lung cancer, which necessitated the removal of her lung in 1982. Despite the loss of a lung and continued ill health, Mrs. Cipollone continued smoking until her physical deterioration finally precluded her from continuing. Rose Cipollone died on October 21, 1984.

Procedural History

Cipollone's procedural history is fodder for mischievous Civil Procedure Professors everywhere. Fourteen months before her death, on August 1, 1983, Mrs. Cipollone and her husband, Antonio, brought this products liability action against cigarette manufacturers Liggett Group, Inc., Philip Morris Incorporated, and Loew's Theatres, Inc. in the United States District Court for the District of New Jersey. Following Mrs. Cipollone's death, Mr. Cipollone, suing in his capacity as Mrs. Cipollone's executor and on his own behalf, filed a third amended complaint upon which the case proceeded to trial.

Founded on diversity jurisdiction, the Cipollones' fourteen count complaint sought damages under theories of strict liability, negligence, intentional tort and breach of warranty. In their answer, the tobacco companies raised the preemption clause of the Federal Cigarette Labeling and Advertising Act as an affirmative defense to all of the Cipollones' causes of action. The Cipollones

Parliament because of its "low tar" ads and the advice of her doctor. True brand was manufactured by Lorillard, Inc.

43 Id.
44 Id.
45 Id.
46 Id.
47 Id.
48 Id. The third amended complaint contained fourteen counts, which differed from the original fourteen. The in turn, were divided into six different categories, as the circuit court explained:

1. FAILURE TO WARN CLAIM: Strict liability in tort (and negligence) on the theory that the defendants failed to warn adequately (or negligently failed to warn adequately) of the health effects of smoking.
2. DESIGN DEFECT CLAIM: Strict liability in tort based on a theory that the Respondents marketed defectively designed cigarettes rather than alternatively designed, safer cigarettes that were available.
3. GENERIC RISK-UTILITY CLAIM: Strict liability in tort on the theory that the risks of smoking cigarettes to the public's health exceed their social utility.
4. EXPRESS WARRANTY CLAIM: Breach of express warranty regarding the health effects of cigarette smoking.
5. FRAUDULENT MISREPRESENTATION CLAIM: Fraud and misrepresentation in the Respondents' advertising and promotion of cigarettes from 1940 to 1983.
6. CONSPIRACY TO DEFRAUD CLAIM: Respondents conspired to defraud the public regarding the health effects of smoking.

moved to strike the defense, while Loew's motioned for a judgment on the pleadings.  

The district court found no express or implied preemption of the Cipollones' state common law tort actions in the Labeling Act. Thus, the court granted the Cipollones' motion to strike the Labeling Act defense and denied Loew's motion for a judgment on the pleadings. From the district court's ruling, the tobacco companies were granted an interlocutory appeal from the Third Circuit Court of Appeals.

The third circuit agreed with the district court in finding that the Labeling Act did not expressly preempt the Cipollones' state common law claims. However, the third circuit went on to discuss the effect of the common law actions vis-a-vis implied preemption. The third circuit found the regulatory effect of common law tort actions might well frustrate the congressional purpose of the Labeling Act. Without expressly reaching which claims their ruling might affect, the third circuit held that the Labeling Act preempted all state law damage claims challenging the adequacy, propriety or duty to provide additional warnings related to smoking and health beyond those Congress had mandated for cigarette packages. The Cipollones' previously successful motion to strike the tobacco companies' preemption defense was therefore reversed, and the case was remanded for proceedings consistent with the opinion.

Returning to district court, the parties moved for clarification of the third circuit's opinion. The district court held the Cipollones' post-1965 claims for

51 Cipollone, 593 F. Supp at 1149.  
52 Id. at 1171. In short, the district court said, "It would be inappropriate to conclude that what is not prohibited is permitted or that a minimum standard fixes the maximum . . . In almost every instance, government standards are meant to fix a level of performance below which one should not fall. However, legal minimums were never intended to supplant moral maximums." Id. at 1170.  
53 Id.  
54 Cipollone v. Liggett Group, Inc., 789 F.2d 181, 183 (3d Cir.1986). cert. denied, 479 U.S. 1043 (1987). The Third Circuit granted Respondents' request and took jurisdiction pursuant to 28 U.S.C. § 1292(b) (1982). Id. (Later, however, Chief Judge Gibbons would lament, "With the benefit of hindsight it seems clear to me that permission to appeal was improvidently granted. The case was legally and factually complicated, and our interlocutory ruling was made in the absence of a factual record which would have sharpened the issues and permitted a more informed application of the Labeling Act ... More fundamentally, I believe that our interlocutory ruling on the preemptive effect of the Labeling Act, to the extent that we reached a definitive ruling, was wrong as a matter of law, and should be overruled by the court en banc." See Cipollone v. Liggett Group, Inc., 893 F.2d 541, 583 (3d Cir. 1990). (Gibbons, C.J., concurring), cert. granted, 111 S. Ct. 1386 (1991) and rev'd in part 112 S. Ct. 2608 (1992).  
55 Cipollone, 789 F.2d at 487. The third circuit said, "[W]e accept the appellants' assertion that the duties imposed through state common law damage actions have the effect of requirements that are capable of creating 'an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" quoting from Hines v. Davidowitz, 312 U.S. 52 (1941).  
56 Id.  
57 Id. at 188.  
failure to warn, fraudulent misrepresentation, express warranty and conspiracy to defraud were barred to the extent that they challenged the tobacco companies' advertising, promotional and public relations activities after January 1, 1966. The district court then granted Philip Morris and Lorillard judgment on the pleadings on their failure to warn and express warranty claims due to the fact that Mrs. Cipollone had used their products subsequent to the Labeling Act’s January 1, 1966 enactment. However, the district court held the design defect and risk-utility claims had not been preempted.

After five years of discovery, a four-month trial followed on the Cipollones’ remaining claims, including: failure to warn, design defect, express warranty, fraudulent misrepresentation and conspiracy. At the close of the Cipollones’ case, the district court struck the design defect claim after finding the Cipollones had failed to sufficiently establish proximate cause against any of the defendant tobacco companies.

The jury deliberated four and one-half days before returning its verdict in the form of special interrogatories. The jury rejected the Cipollones’ misrepresentation and conspiracy to defraud claims against Liggett Group, Inc, Philip Morris and Loew’s. And, while the Cipollones prevailed on their pre-1966 failure to warn claim, the jury refused to award damages to Mrs. Cipollone’s estate due to New Jersey’s comparative negligence statute; the jury found Mrs. Cipollone 80 percent responsible for her injuries. Mr. Cipollone, on the other hand, was awarded $400,000 in compensatory damages for Liggett’s breach of warranty. Both sides filed post-trial motions, which were denied, and both sides filed a timely appeal.

59 Id. at 675. District Judge Sarokin was none too pleased with the task of discerning which of the Cipollones’ causes of action were barred. “The Third Circuit’s opinion has thus left this court with the unenviable task of discerning what that court meant by its mandate and what, if anything, remains of plaintiff’s claims as a result . . . Despite this court’s vehement disagreement with that conclusion, it is duty bound to follow the dictates of the superior court.” Id. at 667.
60 Id. at 669-72.
63 Cipollone v. Ligget Group, Inc., 683 F. Supp. 1487, 1493-95 (D.N.J. 1988). This ruling was not challenged in the subsequent appeal to either the Third Circuit or the Supreme Court.
64 FED. R.Civ. PRO. 49(a).
66 Id. at 555.
67 Id. at 555. Mr. Cipollone’s $400,000 compensatory damage award represented the first such monetary award ever granted to a plaintiff in a smoking related lawsuit. However, the tobacco industries’ "first loss" was short lived, as as the third circuit over turned this award on appeal. To date, the tobacco industry has yet to pay a single penny in any smoking related claim.
68 Id.
The third circuit, upon considering the merits of the cross appeal, affirmed in part, reversed in part and remanded the case for a new trial. From this opinion, Mr. Cipollone sought a writ of certiorari from the Supreme Court, which was granted to settle the preemption question. Shortly thereafter, Mr. Cipollone died and the couple's son maintained the action as the executor of his mother's and father's estates.

ANALYSIS

High Court Lifts Bar to Tobacco Liability Suits

A deeply fragmented Supreme Court held 7-2 that the Labeling Act, as originally drafted and amended, did not preempt all state common law damage actions. In particular, the Court found post-1969 claims of fraudulent misrepresentation, conspiracy, express warranty and failure to warn claims (not based on advertisements) were valid, as were all claims brought as a result of injuries suffered between 1966-1969. However, the Court found straight post-1969 failure to warn claims were preempted.

Harvard Law School Professor Laurence H. Tribe, who argued on the Cipollones' behalf, said of the opinion, "This is a major victory for all those who want to hold cigarette companies accountable." Concurrently, a Philip Morris spokesperson asserted that "Philip Morris considers today's Supreme Court decision as a significant victory." Ironically, both are correct.
Plaintiffs will now enter litigation without the consuming fear of summary judgment based on the Labeling Act. Indeed, plaintiffs have succeeded in winning the right to have a jury decide whether their claims are meritorious. Yet, a significant and troubling questions remain as to the future success of cigarette litigation. Plaintiffs still face the daunting task of convincing a jury that they did not assume the risks associated with smoking. Plaintiffs also face the overwhelming financial and legal resources at the tobacco companies' disposal—resources that ultimately claimed victory over the Cipollones.75

The Pluralities Scope of Preemptive Review

While the Court was mindful of the potential litigation that might arise as a result of their decision, the Court also understood that its principle task in Cipollone was to define the preemptive scope of the Labeling Act. Justice Stevens clearly enumerated that the Court's preemptive review should be limited entirely to the expressed preemptive language of the respective Labeling Acts.76 "Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted."77

The implication of this line of reasoning is vast, as it would virtually eliminate implied preemption analysis where Congress has spoken on the issue of preemption.78 Justice Stevens viewed the Court's role as merely to "identify the domain expressly preempted", without recourse to occupation of the field or actual conflict analysis.79 The restriction of federal preemption in this manner is necessarily rooted in questions of federalism and a balancing of state and federal power. "In the system of American public law, the basic assumption is that states have authority to regulate their own citizens and territory. This assumption justifies an interpretive principle requiring a clear statement (from Congress) before judges will find federal preemption of state law."80 This position is more popularly known as the Plain Meaning Doctrine.

Justice Blackmun, in his opinion concurring in part and dissenting in part, clearly agreed with Justice Stevens' restrained interpretation. "We resort to principles of implied preemption — that is, inquiring whether Congress has occupied a particular field with the intent to supplant state law or whether state law actually conflicts with federal law . . . only when Congress has been silent with respect to pre-emption."81 Justice Scalia, on the other hand, felt this interpretation

75 See supra note 8.
76 Cipollone, 112 S. Ct. at 2618.
77 Id.
78 Id. at 2633.
79 Id. at 2618.
81 Cipollone, 112 S. Ct. at 2625 (Blackmun, J., concurring in part & dissenting in part).
far too narrow. "In my view, there is no merit to this newly crafted doctrine of narrow construction. Under the Supremacy Clause, . . . our job is to interpret Congress' decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning."82

Justice Scalia is correct in his assertion that a "narrow construction" or plain meaning interpretation is not one that has been followed in the past.83 In fact, the Supreme Court recently rejected such a proposition in *Norfolk & Western R. v. American Train Dispatchers Assn.*84 Yet, should the proper method of preemption construction of statutory provisions be their "ordinary meaning" as Justice Scalia suggests?

Under an ordinary meaning approach, the Court would be free to interpret congressional intent as broadly or as narrowly as the statute's text dictated.85 Justice Scalia's position is interesting in that it would allow the Court considerable flexibility in their interpretation of congressional intent. Under the ordinary meaning analysis, the preemption provision of the "comprehensive" Labeling Act would be afforded a broad interpretation, capable of preempting all state law claims. Justification for such an expansive reading, Justice Scalia argues, is found in the expansive language used in the Labeling Acts text.86

Clearly, the "ordinary meaning" approach would vest great power in the Court to dictate the balance of power between state and federal governments through continued use of both implied preemption doctrines. Yet, Justice Scalia fails to suggest how is this balance would be defined. Would it be based on the Court's understanding of the "delicate balance" of compromise Congress fashioned between competing social and economic factions? Or, is it to be based on some larger understanding of American federalism? Or, perhaps the Court will simply protect the spoils of the interest group best able to sway Congress.87

Conversely, the "plain meaning" standard would effectuate a more stringent standard than would the "ordinary meaning" rule. Justice Scalia's principle fear regarding the plain meaning doctrine is based on his supposition that such a rule

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82 *Id.* at 2632 (Scalia, J., concurring in part & dissenting in part).
would demand that a "statute that says anything about preemption must say everything; and it must do so with great exactitude, as any ambiguity concerning its scope will read in favor of preserving state power." Query why Justice Scalia fears the preservation of state power in light of the fact that Congress can speak with great clarity when it so desires.

As far back as Marbury v. Madison, Chief Justice Marshall enumerated that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." Indeed, a well-established "basic assumption that Congress did not intend to displace state tort law" has grown out of Marshall's landmark statement. Yet, under Justice Scalia's interpretation of the Labeling Act, injured parties would have no remedy available in either the state or federal court.

Justice Blackmun's Deference to Federalism and State Rights

As noted above, Justice Blackmun had no quarrel with Justice Stevens' enunciation of a "plain meaning" doctrine. Justice Blackmun's disagreement with Justice Stevens lay in the doctrine's application. Mindful of the presumption against preemption, Justice Blackmun claimed "any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States." Justice Blackmun's position would demand absolute clarity with regard to congressional intent prior to preempting state authority. In reference to the Labeling Act, as amended, Justice Blackmun stated, "... I find the Court's conclusion that the 1969 Act preempts at least some common-law damages claims little short of baffling. [T]he modified language of section 5(b) ... no more 'clearly' or 'manifestly' exhibits an intent to preempt state common law damages actions than did the language of its predecessor ... ."

Justice Blackmun is not alone in his view that the Court often seeks out the purpose of an act rather than the intention of Congress to displace state regulation.

[T]he courts usually analyze preemption cases in terms of the effect of the state law on the operation of the federal scheme rather than the intent of Congress to displace state authority. Courts state that they analyze

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89 5 U.S. 137, 163 (1803).
92 Id. at 2627.
congressional intent, but often they consider the general purpose of the relevant federal statute instead of the specific intent to displace the states. Congressional 'intent' is analyzed as if the states did not exist, and the state law is then placed in opposition to that intent.98

While Justice Blackmun's argument is perhaps the most focused of the three, it may well be the most utopian as well. Political reality suggests there will be times, such as in the case of tobacco interests, where preemptive clarity is politically difficult, if not impossible. Tobacco interests represent millions of dollars in tax revenues, domestic jobs and foreign exports, thereby bringing the survival of the tobacco industry well within the national interest. Yet, smoking kills more Americans annually than all other drugs combined.99

Where Congress is asked to weigh industry demands for liability insulation against constituent demands for protection, political reality suggests that Congress will resort to the nebulous preemptive language contained within the Labeling Act, allowing the ultimate determination of its intent to be "discovered" in the courts. The plain meaning doctrine would help to ensure political accountability of both the legislative and executive branches, as well as maintain the delicate balance of power between the states and the federal government. Conversely, if the Court is willing to go where congressional angels fear to tread and actively determine the extent of congressional preemptive intent, then "Interest groups and politicians have incentives to engage in activities that make it more difficult for the public to discover the special interest group nature of legislation."95

Subsequent Treatment Below

Among the gravest of concerns for both Justices Blackmun and Scalia was the ability of the lower courts to implement the Court's decision in Cipollone.96 To date, at least two lower courts have used Cipollone as dispositive of a preemptive matter.97

In Burke v. Dow Chemical Co., the mother of two children born with brain damage sought damages following exposure to one of Dow's household insecticides while pregnant. Suing under state tort law, Dow moved for summary

98 Wolfson, supra note 87, at 98.
judgment on the grounds that the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) preempted such a claim.\textsuperscript{98} Quoting extensively from \textit{Cipollone}, the District Court for the Eastern District of New York stated, "As the Supreme Court's most recent tort preemption case indicates, where Congress has provided an express preemption clause, the presumption against preemption requires courts to read the clause narrowly."\textsuperscript{99} However, the district court went on to examine court of appeals cases dealing with implied preemption under FIFRA.\textsuperscript{100} In the end, the district court concluded that, "[T]he federalism issues are too important to warrant foreclosing recovery to an injured party on a questionable theory of implied preemption."\textsuperscript{101}

A similar result was reached in \textit{Greenwood Trust Co. v. Massachusetts}. The issue in \textit{Greenwood} was whether a federally insured Delaware bank was permitted to charge its Massachusetts credit card customers a late fee, notwithstanding a Massachusetts statute expressly prohibiting such a practice. The Commonwealth attempted to clothe the issue in implied preemptive terms, while the Delaware banking interests propounded an express preemption analysis.\textsuperscript{102} Again, the plurality position prevailed. The first circuit said, "In recent days, the High Court has made it pellucidly clear that, whenever Congress includes an express preemption clause in a statute, judges ought to limit themselves to the preemptive reach of that provision without essaying any further analysis under the various theories of implied preemption."\textsuperscript{103}

Thus, perhaps Justice Scalia and Justice Blackmun were premature in their paternalistic worries surrounding the ability of the lower courts to implement the pluralities' position. Of course, only time will tell whether the lower courts will truly refrain from resorting to implied preemptive analysis given its long entrenched history. However, \textit{Burke} and \textit{Greenwood} would seem to suggest that the lower courts have embraced the narrow construction analysis.

CONCLUSION

Although obvious, it is worth remembering that decisions such as \textit{Cipollone} do not operate in a vacuum. Congressional reticence at the present time does not assure continued congressional silence. If "discovery" of congressional intent is the ultimate objective of preemptive inquiry, Congress may well "clarify" its position through amendment whenever it wishes; and in fact, such an amendment

\textsuperscript{99} Burke, 797 F. Supp. at 1137.
\textsuperscript{100} Id. at 1137-38.
\textsuperscript{101} Id. at 1141.
\textsuperscript{102} Greenwood Trust, 971 F.2d at 823.
\textsuperscript{103} Id.
was proposed in 1991. Therefore, while Cipollone is unquestionably critical to the interpretation of the Labeling Act and a step towards tobacco industry liability, Cipollone's ultimate precedential value may well rest in its narrowing of preemptive principles.

CHRISTOPHER J. GAGIN

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104 See Federal Cigarette Labeling and Advertising Act, S. 1088, 102d Cong., 1st Sess. s 2757(b) (1991). “Nothing in this title, the Federal Cigarette Labeling and Advertising Act or the Comprehensive Smoking Education Act of 1984 shall be interpreted to relieve any person from liability at common law or under state statutory to any other person.”