Forster v. R.J. Reynolds Tobacco Co.: Minnesota Supreme Court Gives the Green Light to Cigarette Plaintiffs

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John Forster began smoking Camel cigarettes in 1954, at age fifteen. After smoking for some twenty-five years, he attempted to quit several times, without success. In November, 1984, Forster was diagnosed as having inoperable lung cancer. Three months later, Forster and his wife, Ann, sued R.J. Reynolds Tobacco Company (Reynolds), the maker of Camel cigarettes, for negligent failure to warn of the dangers of smoking, strict liability for failure to warn and design defect, misrepresentation, and breach of express and implied warranty. Four months after filing suit, John Forster died at age 46.

Two years later, Reynolds moved for summary judgment, alleging that the Federal Cigarette Labeling and Advertising

1. Brief for Respondent at 11, Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655 (Minn. 1989) (No. C1-87-2170). In a testimonial deposition, Forster testified that he began smoking Camel cigarettes because he thought cigarettes, as portrayed in R.J. Reynolds Tobacco Company’s (Reynolds') advertisements, were “manly” and “glamorous.” Id.
2. Id. at 12-13. Although he was aware of “very vague” claims of health risks from smoking, Forster testified he was “not convinced that there were any health hazards associated with cigarette smoking.” Id. In 1979, after his doctor recommended that he quit smoking, Forster tried several programs, but was unable to stop. He testified that Reynolds’ advertising, which depicted smoking as “macho,” hampered his attempts to stop smoking. Id.
4. The Forsters commenced suit in March, 1985. Id.
5. The Forsters also sued Erickson Petroleum Corporation, doing business as Holiday Station Stores, Inc., the retailer from whom Forster purchased his cigarettes. Id. at 691. This Comment discusses only the suit against Reynolds, the cigarette manufacturer.
6. The suit also included derivative claims for loss of consortium and punitive damages. Forster, 437 N.W.2d at 657, 661-63.
7. Brief for Respondent at 13, Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655 (Minn. 1989) (No. C1-87-2170). Before Forster’s death, the parties agreed that the action could be amended to a wrongful death suit. The amendment had not been completed at the time of the lower court’s summary judgment ruling. Forster, 423 N.W.2d at 692.
Act\(^8\) (Labeling Act) preempted all of Forster's state common law claims.\(^9\) The district court granted summary judgment,\(^10\) but the Minnesota Court of Appeals reversed, finding no federal preemption of Forster's claims.\(^11\) The Minnesota Supreme Court affirmed in part and reversed in part, holding that the Labeling Act preempted some but not all state common law claims.\(^12\)

_Forster v. R.J. Reynolds Tobacco Co._ signals a green light for plaintiffs who wish to sue cigarette manufacturers.\(^13\) The _Forster_ court, in reexamining the Labeling Act's preemption and purpose clauses, proposed a more expansive test for determining which state common law claims survive the Labeling Act than other courts that have addressed the issue.\(^14\)

This Comment contends that the _Forster_ decision took a positive step in expanding the number of claims that survive Labeling Act preemption. Part I discusses the history of lawsuits against cigarette manufacturers, emphasizing the effect of preemption after the Labeling Act. Part II addresses the _Forster_ court's reasoning and holding. Part III argues that although _Forster_ does not provide the perfect solution to determining Labeling Act preemption, its holding is more consistent with the Labeling Act's language and legislative history than the prevailing test in other states. The Comment observes that the _Forster_ preemption test could be construed to preempt even those claims allowed in _Forster_, but asserts that _Forster_'s result

\(^8\) See infra Part I. B.


\(^10\) _Forster_, No. 85-4294, slip op. at 1. The judge granted summary judgment on the preemption issue only, and did not rule on the strict liability issue. _Id._ at 11-12.

\(^11\) _Forster_, 423 N.W.2d at 701 (stating that "at the very heart of our ruling is the firm conviction that if there is a need to immunize the tobacco industry from tort liability, that decision must be made by Congress in an unambiguous mandate and not by the courts").

\(^12\) _Forster_, 437 N.W.2d at 660-62. For a fuller discussion of the Minnesota Supreme Court's analysis and holding, see infra Part II. On remand from the Minnesota Supreme Court, the district court dismissed plaintiff's complaint on the merits. _Forster v. R.J. Reynolds Tobacco Co.,_ No. 85-4294, slip op. at 2 (Hennepin County Dist. Ct., Minn., Feb. 13, 1990).


\(^14\) See infra Part II.
should serve as a national model for future cigarette preemption cases.

I. HISTORY OF LAWSUITS AGAINST CIGARETTE MANUFACTURERS

Cigarette smoking poses serious health risks — the Surgeon General has termed smoking "the single most important preventable cause of death in our society." Cigarette smoking is responsible for more than one of every six deaths in the United States. In 1985 alone, approximately 390,000 Americans died of smoking-related illnesses; cigarette smoking accounted for 87% of lung cancer deaths, 82% of chronic obstructive pulmonary disease deaths, 21% of coronary heart disease deaths, and 18% of stroke deaths.

A. THE EARLY CASES

Despite the magnitude of these health risks, cigarette manufacturers have successfully escaped liability for injuries caused by cigarette smoking. In the late 1950s and early 1960s, smokers began suing cigarette manufacturers on theories of fraud, negligence, and breach of warranty. Plaintiffs failed in all of

15. See U.S. DEP'T OF HEALTH & HUMAN SERVS., REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL at 11 (1989). Even if all smokers were to quit smoking cigarettes today, smoking would continue as "the leading cause of preventable, premature death for many years to come." See Koop, Preface to id., at iv.
16. Id. at 11.
17. Id. at 12.
18. Id. at 161.
19. See Garner, Cigarette Dependency and Civil Liability: A Modest Proposal, 53 S. CAL. L. REV. 1423, 1423-24 (1980) (contending that "only the tobacco industry can boast of defeating every attempt to hold it accountable for injuries caused by its product"). An attorney for a major cigarette manufacturer recently bragged that the "industry's record remains unblemished in the almost 40 years these cases have been pending. No judgment rendered against the [cigarette] companies has stood up." Cohen, Broader Suits Over Cigarettes May Be Possible, Wall St. J., Jan. 8, 1990, at A3, col. 4.
20. See, e.g., Hudson v. R.J. Reynolds Tobacco Co., 427 F.2d 541, 542 (5th Cir. 1970) (per curiam) (breach of implied warranty); Ross v. Philip Morris & Co., 328 F.2d 3, 5 (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, 23 (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, 71 (5th Cir. 1962) (proceeding to the jury on theories of negligence and breach of implied warranty), rev'd and remanded on reh'g, 325 F.2d 673, 679 (5th Cir. 1963), cert. denied, 377 U.S. 943 (1964), rev'd and remanded, 391 F.2d 97, 106 (5th Cir. 1968), aff'd per curiam on reh`g en banc, 409 F.2d 1166, 1166 (5th Cir.
these lawsuits.\footnote{21} One reason was difficult evidentiary burdens. For example, courts initially required plaintiffs who alleged breach of implied warranty to prove that the cigarette manufacturers knew or reasonably should have foreseen the dangers of lung cancer from cigarette use, a burden plaintiffs could not meet.\footnote{22} In Green v. American Tobacco Co.,\footnote{23} the Florida Supreme Court eliminated the foreseeability requirement, holding that defendant's knowledge of the harm resulting from cigarette use was not a prerequisite to liability for breach of implied warranty.\footnote{24} Nevertheless, the cigarette manufacturer prevailed because the plaintiff failed to prove that cigarettes were

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21. See Garner, supra note 19, at 423-26 (arguing that early cases failed because of tenacious defense tactics and unfavorable legal rulings).

22. See, e.g., Hudson, 427 F.2d at 542 (finding for the cigarette manufacturer because plaintiff could not prove the foreseeability of harm in cigarette smoking); Ross, 328 F.2d at 10 (holding that plaintiff must prove defendant reasonably could have suspected that smoking caused cancer); Lartigue, 317 F.2d at 39 (finding for cigarette manufacturer because plaintiff could not establish that at the time his cancer started, medical knowledge was such that defendants could have anticipated by reasonable care that cigarettes could cause cancer).

23. 304 F.2d 70 (5th Cir. 1962), certified question answered, 154 So. 2d 169 (Fla. 1963), rev'd and remanded on reh'g, 325 F.2d 673 (5th Cir. 1963), cert. denied, 377 U.S. 943 (1964), rev'd and remanded, 391 F.2d 97, 106 (5th Cir. 1968), aff'd per curiam on reh'g en banc, 409 F.2d 1166 (5th Cir. 1969), cert. denied, 397 U.S. 911 (1970).

24. Green, 154 So. 2d at 171. The procedural history is quite complex. The case originated in federal district court, and went to the jury on theories of breach of implied warranty and negligence. Green, 304 F.2d at 71. The jury, however, found that the defendant could not reasonably have foreseen the danger of smoking Lucky Strike cigarettes. Id. at 72. On appeal, the Fifth Circuit affirmed. Id. at 72-73. Because of the importance of the question, the Florida Supreme Court certified and decided the question. 154 So. 2d at 170, 173.
not reasonably fit for human consumption.\textsuperscript{25} In \textit{Pritchard v. Liggett & Myers Tobacco Co.},\textsuperscript{26} the plaintiff lost after failing to pursue a claim for breach of implied warranty.\textsuperscript{27} Thus, even before the Labeling Act and preemption defenses, plaintiffs were unsuccessful in lawsuits against cigarette manufacturers.

\section{B. The Federal Cigarette Labeling and Advertising Act}

\subsection{1. The 1965 Labeling Act}

In 1964, the Surgeon General's advisory committee released its initial report on smoking and health, declaring cigarette

\footnotesize{25. The complicated procedural history of \textit{Green} continued after the Florida Supreme Court decision, when the case returned to the Fifth Circuit. There, the circuit court held that implied warranty doctrine required a product to be reasonably fit for human use or consumption. \textit{Green}, 325 F.2d at 675. The court reasoned that no breach of implied warranty existed unless plaintiffs could prove that cigarettes were not reasonably fit and wholesome, and remanded for a new trial on the issue. \textit{Id.} at 675, 678. On remand, the jury found that cigarettes were reasonably fit for human consumption, and the plaintiff again appealed. \textit{Id.} at 101.

The Fifth Circuit reversed the jury verdict, reasoning that Florida law entitled Mr. Green to rely on the implied assurances that Lucky Strike cigarettes were wholesome and fit, and that Mr. Green's widow could hold the tobacco company absolutely liable. \textit{Id.} at 106. A strong dissent argued that Florida law did not impose strict liability without fault unless the product was defective. \textit{Id.} at 111 (Simpson, J., dissenting). Here, Lucky Strike cigarettes were not flawed or defective, but rather were exactly like all other cigarettes. \textit{Id.} at 110 (Simpson, J., dissenting).

The plaintiff's win was short-lived: the Fifth Circuit overruled its earlier reversal, adopted the dissent's reasoning, and affirmed the earlier jury verdict. \textit{Green}, 409 F.2d at 1166.


27. In \textit{Pritchard}, plaintiff sued on theories of negligent failure to warn and breach of express warranty, but the jury found that no express warranties existed, that defendant was not negligent, and that plaintiff had assumed the risk. \textit{Pritchard}, 350 F.2d at 481-82. The Third Circuit reversed the assumption of risk finding and remanded for a new trial. \textit{Id.} at 485. Plaintiff, however, never pursued the new trial, stating that the burden of proof was "insurmountable." See Garner, supra note 19, at 1427 & n.42 (citing Letter from Elmer Fried to Professor Garner (Oct. 2, 1974)).

Interestingly, the Third Circuit earlier had held that cigarettes were unmerchantable if a smoker suffered injuries from smoking. Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292, 296 (3d Cir. 1961). Plaintiff, however, failed to bring a breach of implied warranty claim. \textit{Pritchard}, 350 F.2d at 481-82 (suing only for negligent failure to warn and breach of express warranty). Professor Garner contends that the plaintiff could have prevailed had he pursued the implied warranty claim. See Garner, supra note 19, at 1427-28.}
Several states, as well as the Federal Trade Commission (FTC), responded by adopting laws that required a warning label on cigarette packages and advertisements. In 1965, Congress also reacted to the Surgeon General's report, enacting the Labeling Act. The Act required all cigarette packages to carry the warning label: "Caution: Cigarette Smoking May be Hazardous to Your Health." The Labeling Act's primary purpose was to inform the public of the health risks of smoking.


29. For example, in June, 1965, the New York state legislature adopted a law requiring the following label: "WARNING: Excessive Use Is Dangerous To Health." Palmer v. Liggett Group, Inc., 825 F.2d 620, 622 n.1 (1st Cir. 1987) (citation omitted).

The FTC also proposed a regulation requiring a warning on cigarette packages and advertisements. See 29 Fed. Reg. 530-32 (1964) (proposed Jan. 17, 1964); 29 Fed. Reg. 8324-75 (1964) (proposed July 2, 1964). The regulation required either of the following statements on cigarette advertisements and packages:

CAUTION — CIGARETTE SMOKING IS A HEALTH HAZARD:
The Surgeon General's Advisory Committee on Smoking and Health has found that 'cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate'; or

CAUTION: Cigarette smoking is dangerous to health. It may cause death from cancer and other diseases.


For ease of identification, this Comment will refer to the original Labeling Act as the "1965 Act," the Public Health Cigarette Smoking Act as the "1969 Act," and the Comprehensive Smoking Education Act as the "1984 Act."


32. The House version of the Labeling Act stated that "[t]he principal purpose of this Bill is to provide adequate warning to the public of the potential hazards of cigarette smoking." H.R. REP. NO. 449, 89th Cong., 1st Sess. 1, reprinted in 1965 U.S. CODE CONG. & ADMIN. NEWS 2350, 2350. Similarly, Robert Giles, general counsel of the Department of Commerce, stated:

One basic objective of each of these bills is the same — to protect the health of consumers and prospective consumers of cigarettes. H.R. 3014 and H.R. 4007 have the additional stated objective of protecting commerce and the national economy. While we would ordinarily strongly support both objectives, we feel that . . . the proposed means of attaining the latter objective may be incompatible with the health
protecting the national economy and ensuring a uniform system of cigarette warning labels.\textsuperscript{33}

Significantly, the Labeling Act included a preemption clause.\textsuperscript{34} Subsection 1334(a) preempted states from requiring statements pertaining to smoking and health on cigarette packages labeled in compliance with the Labeling Act.\textsuperscript{35} This subsection applied only to cigarette packages.\textsuperscript{36} Subsection 1334(b) applied only to advertising, and preempted requiring any warnings on cigarette advertisements, as long as the packages of the advertised cigarettes were labeled in compliance with the Labeling Act.\textsuperscript{37} Subsection 1334(c) prohibited the FTC from requiring warnings in cigarette advertising, but stated that the Labeling Act did not affect the FTC's authority to regulate unfair or deceptive practices in cigarette advertisements.\textsuperscript{38} This

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33. The Labeling Act included the following statement of purpose:
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 that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package 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.


34. Id. § 1334.

35. Id. § 1334(a). Subsection 1334(a) read: "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."

36. Id.

37. Id. § 1334(b). Subsection 1334(b) read: "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 this chapter."

38. Id. § 1334(c). In light of the Labeling Act, the FTC vacated its proposed requirements, see supra note 29, but expressly stated that it did not modify the findings and conclusions that led it to require warning labels on cigarette packages and advertisements. See 30 Fed. Reg. 9484-85 (1965) (proposed July 28, 1965). The FTC also stated that during the period that the Labeling Act prevented it from requiring a health statement on cigarette advertisements, it would continue to monitor cigarette advertising and promotional practices and take whatever action it could, consistent with the Labeling Act, to prohibit unfair and deceptive cigarette advertisements. Id. at 9485.
restriction on the FTC's authority to impose advertising requirements expired on July 1, 1969.39

2. The 1969 and 1984 Amendments

Shortly before the Labeling Act's July 1, 1969 expiration date, the FTC again proposed a warning requirement for cigarette advertising.40 Congress responded with the Public Health Cigarette Smoking Act of 1969,41 making four notable amendments to the original 1965 Act. First, Congress altered the warning label on cigarette packages to read: "Warning: The Surgeon General Has Determined that Cigarette Smoking is Dangerous to Your Health."42 Again, Congress required no warning on advertisements. Second, Congress banned all cigarette advertising on television and radio after January 1, 1971.43 Third, the 1969 Act extended the restriction prohibiting the FTC from requiring a warning label in print cigarette advertisements until July 1, 1971.44 After that date, however, Congress gave the FTC the authority to promulgate a regulation requiring a warning label on cigarette advertisements.45 Finally, Congress amended subsection 1334(b) of the preemption


Unless Congress should extend the provisions of the Federal Cigarette Labeling and Advertising Act expiring on July 1, 1969, so as to bar such action, the Commission, relying upon its 1964 Findings and having reason to believe that cigarette smoking creates hazards to health which should clearly be disclosed to the public in all cigarette advertisements, proposes to readopt its 1964 Trade Regulation Rule, modified to read as follows:

In connection with the sale, offering for sale, or distribution in commerce . . . of cigarettes, it is an unfair or deceptive act or practice . . . to fail to disclose, clearly and prominently, in all advertising that cigarette smoking is dangerous to health and may cause death from cancer, coronary heart disease, chronic bronchitis, pulmonary emphysema, and other diseases.

Id. at 7917.
43. Id. § 1335.
44. Id. § 1336.
45. Id. Section 1336 required the FTC to notify Congress six months before any such rule went into effect, "in order that the Congress may act if it so desires."

In 1972, the FTC required major cigarette manufacturers — Philip Morris, American Brands, Brown & Williamson Tobacco Co., R.J. Reynolds Tobacco Co. and Liggett & Myers Tobacco Co. — to place the 1969 warning label on all cigarette advertisements. See In re Lorillard, 80 F.T.C. 455, 460-65 (1972).
clause, forbidding any "requirement or prohibition based on smoking and health . . . under State law."[46]

In 1984, Congress again amended the Labeling Act,[47] requiring cigarette manufacturers to rotate four warning labels.[48] In addition, Congress for the first time required the same warnings on all print advertisements[49] and billboards[50] as well as on cigarette packages. Congress amended the Act's purpose clause to reflect this change.[51]

46. 1969 Act, 15 U.S.C. § 1334(b) (1982). Congress amended subsection 1334(b) to read: "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." For the original language in the 1965 Act's subsection 1334(b), see supra note 37. The language of section 1334(a) remained the same. See supra note 35.

For legislative history concerning the amendment to subsection 1334(b), see S. REP. No. 556, 91st Cong., 1st Sess. 12, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 2652, 2663 (discussing Senate's proposed amendment to pre-emption clause); H.R. CONF. REP. NO. 897, 91st Cong., 2d Sess. 5, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 2676, 2677 (discussing conference committee's suggested compromise to the Senate's proposed preemption clause); see also infra notes 171, 174-176, 181-182 and accompanying text (discussing the Senate and Conference Reports).


48. The 1984 Act requires cigarette manufacturers to rotate the following four warning labels on cigarette packages and advertisements:

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

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

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

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


49. Id. § 1331(a)(2).

50. Id. § 1333(a)(3).

51. Congress amended the purpose clause to include health warnings in cigarette advertisements: "(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 . . . ." Id. § 1331(1). For the earlier language of the purpose clause, see supra note 33.
C. THE PREEMPTION DOCTRINE

The most disputed issue concerning the Labeling Act is preemption.\(^5\) Congress derives its power to preempt state law from the supremacy clause of the Constitution.\(^6\) Although the preemption doctrine defies a general formula,\(^7\) courts have recognized that Congress may preempt state laws expressly or by implication.\(^8\) Express preemption occurs when Congress explicitly bars parallel state law.\(^9\) Historically, express preemption requires a very clear statement from Congress that parallel state laws are prohibited.\(^10\)

Congress also may impliedly preempt state regulation. In analyzing an implied preemption issue, courts first determine whether Congress intended to regulate an area exclusively, or to "occupy the field."\(^11\) Congress's intent to occupy a particular area is shown either by the scope of federal involvement,\(^12\) or

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5. See infra note 77.

6. U.S. Const. art. VI, cl. 2 states:
   This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority 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.

7. See Hines v. Davidowitz, 312 U.S. 52, 67 (1940) (stating that there is no "infallible constitutional test" or any "one crystal clear distinctly marked formula" for determining the validity of state laws when federal laws exist in the same area).

8. See Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 152-53 (1982) (stating that "[p]reemption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose'" (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977))).


10. See, e.g., Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 (1983) (holding that ERISA expressly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan"); De la Cuesta, 458 U.S. at 147 (holding preempted state law restricting use of due-on-sale clauses in mortgages when federal regulation expressly authorized federal savings and loan associations to enforce such clauses, and required that such clauses must be governed "exclusively by Federal law").


12. See, e.g., Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (explaining that "[t]he scheme of federal regulation may be so pervasive as to
the importance of the federal interest. When Congress has not fully occupied a particular field, implied preemption still may apply to the extent state law "actually conflicts" with federal law. An actual conflict occurs when compliance with both state and federal law is impossible. An actual conflict may be more subtle, however, such as when state law frustrates congressional objectives. This type of implied preemption normally requires fairly narrow and concrete congressional objectives.

Courts employ a presumption against preemption. Their reluctance is based on federalism concerns: namely, courts hesitate to usurp a state's exercise of valid police powers, par-

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60. Id. (stating that a congressional act "may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject").
61. See, e.g., Hillsborough County, 471 U.S. at 713 (noting that "[e]ven where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law"); see also Note, supra note 58 at 875-78 (discussing implied preemption by "actual conflict").
62. See, e.g., McDermott v. Wisconsin, 228 U.S. 115, 133-34 (1913) (holding state law preempted when labeling in compliance with federal law would cause the product to be mislabeled under state law).
63. See Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (holding preempted any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"). For example, state laws that discourage conduct that federal law promotes are invalidated. See, e.g., Nash v. Florida Indus. Comm'n, 389 U.S. 235, 239 (1967) (holding preempted a state unemployment compensation law that denied benefits to otherwise eligible applicants who had filed an unfair labor practice charge with the National Labor Relations Board, when the National Labor Relations Act sought to encourage the filing of such charges).
64. L. Tribe, American Constitutional Law 482-89 (2d ed. 1988). Professor Tribe argues:

[While state action is preempted if it specifically frustrates fairly narrow and concrete objectives that underlie federal enactments, no such conclusion follows where the most that can be said is that the direction in which state law pushes someone's actions is in general tension with broad or abstract goals that may be attributed to various federal laws or programs.

Id. at 487 (footnote omitted).

65. See, e.g., Maryland v. Louisiana, 451 U.S. 725, 746 (1981) (noting a presumption that "Congress did not intend to displace state law"); see also L. Tribe, supra note 64, at 479 & n.7 (noting a reluctance to infer preemption).
66. See L. Tribe, supra note 64, at 479-80 (stating that courts' reluctance to infer preemption is "particularly appropriate in light of the Supreme Court's repeated emphasis on the central role of Congress in protecting the sovereignty of the states") (footnote omitted).
particularly in matters relating to health and safety. The current United States Supreme Court increasingly has refused to find preemption absent clear congressional language. In *CTS Corp. v. Dynamics Corp.*, for example, the Court upheld a state law that limited hostile corporate takeovers, despite the existence of a federal law that regulated takeovers.

The presumption against preemption is strengthened when preemption would leave a plaintiff without an adequate remedy. When the presumption is rebutted, however, Congress may preempt state common law as well as state statutes. Courts acknowledge that damage awards from state common law claims may regulate a defendant's conduct as effectively as a state statute.

that when Congress "is said to have pre-empted [matters] ... traditionally occupied by the States ... 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress'" (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

68. See, e.g., Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 719 (1985) (noting that "the regulation of health and safety matters is primarily, and historically, a matter of local concern").


A careful analysis of the current cases offers strong evidence that the trend of the law is increasingly moving away from preemption. In recent years, the Supreme Court has already gone far towards keeping the preemption blade in its sheath. Or, to shift metaphors, before a plaintiff is able to convince a federal court to rule in favor of preemption, that plaintiff must overcome new, higher barriers, jump over more hurdles.

Id. at 312.

70. *Id.* at 312.

71. *Id.* at 72-75, 85-87. Professor Rotunda asserts that *CTS Corp.* demonstrates that "[a]ny obstacles that the state sets up must be fairly high before the Court will infer preemption." Rotunda, *supra* note 69, at 318. For a more thorough discussion of *CTS Corp.*, see *infra* notes 204-06 and accompanying text.

72. *See* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984) (stating that "it is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct").

73. *See* Sperry v. Florida, 373 U.S. 379, 403 (1963) (noting that Congress's power "is no less when the state power which it displaces would otherwise have been exercised by the state judiciary rather than by the state legislature").

74. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959) (noting that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief").
D. PREEMPTION IN CIGARETTE CASES

The scope of the Labeling Act’s preemption provisions has been vigorously debated.\(^\text{75}\) The Labeling Act clearly prohibits state legislatures or agencies from requiring a different warning on cigarette packages and advertising than the warning required by Congress.\(^\text{76}\) The more controversial issue is whether the Labeling Act also preempts state common law claims.\(^\text{77}\)

\[^{75}\text{See infra note 77 and accompanying text.}\]

\[^{76}\text{The plain language of § 1334 precludes state legislatures from requiring a different warning. See supra notes 35-37 and 46. Courts have not doubted that state statutes are preempted. See, e.g., Cipollone v. Liggett Group, Inc., 789 F.2d 181, 185 (3d Cir. 1986) (stating that the district court “did not question that the [Labeling] Act prohibits state legislatures from requiring a warning on cigarette packages that alters that provided in section 1333”).}\]

\[^{77}\text{A number of commentators have written on the preemption issue. See Crist & Majoras, The “New” Wave in Smoking and Health Litigation — Is Anything Really So New?, 54 TENN. L. REV. 551, 566-82 (1987) (arguing that the Labeling Act preempts all common law claims); Edell, Cigarette Litigation: The Second Wave, 22 TORT & INS. L.J. 90, 90, 103 (1986) (arguing that although defendants have enjoyed immunity from liability thus far, plaintiffs will win in due time); Stein, supra note 20, at 646-70 (discussing strict liability); Note, Federal Pre-emption and the Cigarette Act — The Smoke Gets in Your Eyes, 20 ARIZ. ST. L.J. 897, 912-23 (1988) (arguing that the Palmer court ignored legislative history to reach the wrong result); Note, Preemption of State Common Law Actions Against Cigarette Manufacturers by the Federal Cigarette Labeling and Advertising Act: Have Smokers Taken Their Last Puff to Hold Tobacco Companies Liable Under a State Tort Claim?, 10 CAMPBELL L. REV. 467, 476-86 (1988) (arguing that the Palmer decision effectively eliminates cigarette manufacturer liability suits); Comment, Tobacco Under Fire, supra note 20, at 655-66 (contending that failure to warn claims should not be pre-empted); Comment, The Liability of Cigarette Manufacturers for Lung Cancer: An Analysis of the Federal Cigarette Labeling and Advertising Act and Preemption of Strict Liability in Tort Against Cigarette Manufacturers, 76 KY. L.J. 569, 584-96 (1987-88) [hereinafter Comment, Liability of Cigarette Manufacturers] (arguing that the Labeling Act preempts failure to warn claims, and that courts should use the risk-utility analysis for design defect claims); Note, supra note 58, at 896-919 (arguing that Congress did not intend to preempt common law causes for failure to warn against the cigarette industry); Note, Federal Preemption of Cigarette Products Liability Claims Creates a Need for Congressional Action, 6 REV. OF LITIG. 339, 354-73 (1987) (arguing that Cipollone and Palmer are well-reasoned, but questioning Congress’s policy of immunizing cigarette manufacturers from tort liability); Note, Liability of Cigarette Manufacturers for Smoking Induced Illnesses and Deaths, 18 RUTGERS L.J. 165, 175-89 (1986) (discussing potential winning legal theories for plaintiffs, and the assumption of risk defense); Comment, Common Law Claims Challenging Adequacy of Cigarette Warnings Preempted Under the Federal Cigarette Labeling and Advertising Act of 1965: Cipollone v. Liggett Group, Inc., 60 ST. JOHN’S L. REV. 754, 762-69 (1986) [hereinafter Comment, Common Law Claims] (arguing that the Cipollone court erred in holding common law tort claims preempted); Comment, Strict Products Liability on the Move: Cigarette Manufacturers May Soon Feel the Heat, 23 SAN DIEGO L. REV. 1137, 1148-56 (1986) (arguing that the best path to recovery is by liberal appli-}\]
Although no court has held that the Labeling Act expressly preempts state common law claims, all courts deciding this issue have found implied preemption of at least some state common law claims.

The first judicial determination of the scope of Labeling...
Act preemption was the landmark case of *Cipollone v. Liggett Group, Inc.* After summarily rejecting the express preemption of state common law claims, the *Cipollone* court turned to implied preemption. The court found that Congress did not intend to “occupy the field” relating to cigarettes and health, but that some state common law claims against cigarette manufacturers would “actually conflict” with the Labeling Act. In finding this actual conflict, the *Cipollone* court employed a “balance of purposes” theory. The *Cipollone* court reasoned that the Labeling Act represented a careful balance between the purposes of warning the public about the hazards of smoking and protecting the national economy, and that warning requirements that upset this balance should be preempted. The

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81. The *Cipollone* court held that the language of § 1334 did not clearly encompass state common law claims, particularly in light of the presumption against preemption. *Cipollone*, 789 F.2d at 185. Further, the Labeling Act contained neither a clause explicitly preempting state common law claims (as in the Copyright Act of 1976, 17 U.S.C. § 301(a) (1972)), nor a savings clause expressly preserving those claims (as in the Occupational Safety and Health Act of 1970, 29 U.S.C. § 653(b)(4) (1982)). *Cipollone*, 789 F.2d at 185 n.5.

82. In analyzing implied preemption, the *Cipollone* court refused to consider legislative history. *Cipollone*, 789 F.2d at 186 (“[W]e find the language of the statute itself a sufficiently clear expression of congressional intent without resort to the Act's legislative history” (citations omitted)). At least one commentator has argued that this omission caused the wrong result. See Comment, *Common Law Claims*, supra note 77, at 761 (arguing that the *Cipollone* court erred in failing to consider the legislative history of the Labeling Act).

83. *Cipollone*, 789 F.2d at 186. The court noted some evidence of intent to occupy the field in the sweeping language of the preemption clause, and in Congress's purpose of establishing a “comprehensive Federal program” to avoid “diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.” *Id.*

Given the presumption against preemption, however, the court declined to find occupation of the field, explaining:

In light of this constraint, we cannot say that the scheme created by the Act is 'so pervasive' or the federal interest involved 'so dominant' as to eradicate all of the Cipollones' claims. Nor are we persuaded that the object of the Act and the character of obligations imposed by it reveal a purpose to exert exclusive control over every aspect of the relationship between cigarettes and health.

*Id.* (citations omitted).

84. *Id.* at 186-87.

85. *Id.* at 187. See infra notes 86-89 and accompanying text.

86. *Cipollone*, 789 F.2d at 187.

87. The court noted:

Moreover, the preemption provision of section 1334, read together
court concluded that damages resulting from successful state common law claims could lead to non-uniform warnings, thus upsetting the Act’s balance of purposes, and therefore should be preempted.

The *Cipollone* court then created a preemption test, holding preempted state common law claims that challenge the adequacy of warnings on cigarette packages or that necessarily presume a duty to provide a warning beyond Labeling Act requirements. In the “propriety” part of its test, the court also held preempted state common law claims that challenge “the propriety of a party’s actions with respect to the advertising and promotion of cigarettes.” The *Cipollone* court remanded the case to the trial court with directions to apply the test to plaintiff’s claims.

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with section 1331, makes clear Congress’s determination that this balance would be upset by either a requirement of a warning other than that prescribed in section 1333 or a requirement or prohibition based on smoking and health ‘with respect to the advertising or promotion’ of cigarettes.

*Id.* (emphasis in original).

88. *Id.* at 187 (accepting “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’” (citations omitted)).

89. The court concluded that “claims relating to smoking and health that result in liability for noncompliance with warning, advertisement, and promotion obligations other than those prescribed in the Act have the effect of tipping the Act’s balance of purposes and therefore actually conflict with the Act.” *Id.*

90. *Id.* These two clauses of the preemption test appear to relate to § 1334(a), although the *Cipollone* court did not expressly state this.

91. *Id.* For ease of identification, this part of the *Cipollone* test will be referred to as the “propriety” part. The *Cipollone* court appears to derive the “propriety” part of its test from the language of § 1334(b). See supra notes 37, 46.

92. *Cipollone*, 789 F.2d at 188. Applying the Third Circuit’s preemption test, Judge Sarokin on remand held preempted plaintiff’s claims of failure to warn, express warranty, fraudulent misrepresentation, and conspiracy to defraud, to the extent that they sought to challenge the defendant’s advertising, promotional, and public relations activities after January 1, 1966, the effective date of the Labeling Act. *Cipollone* v. Liggett Group, Inc., 649 F. Supp. 664, 669, 673-75 (D.N.J. 1986). Judge Sarokin held that the Act did not preempt the plaintiff’s design defect and risk-utility claims. *Id.* at 669-72.

The following year, the First Circuit decided Palmer v. Liggett Group, Inc. The Palmer court, as in Cipollone, found implied preemption, but even further emphasized the “balance of purposes” reasoning. The court noted that Congress had “run a hard-fought, bitterly partisan battle” to strike an effective balance between the dual policies of health and trade regulation, and could not have intended a “single jury in a single state” to supersede this compromise. This broad purposes language seemed to suggest that most, if not all, state common law claims would be preempted as upsetting the Labeling Act’s balance of purposes.

Subsequent federal and state courts have uniformly

and that it would follow the New Jersey Supreme Court’s decision. Cipollone v. Liggett Group, Inc., 893 F.2d 541, 578 (3d Cir. 1990).

After five years of discovery, the matter went to trial on a claim for design defect, and pre-1966 claims for failure to warn, express warranty, fraudulent misrepresentation, and conspiracy claims. Id. at 553. At the close of plaintiff’s case, the trial judge granted the defendant’s motion for a directed verdict on the design defect claim. Cipollone, 683 F. Supp. at 1493-95. After a four month trial, the jury awarded $400,000 for breach of express warranty, but rejected plaintiff’s pre-1966 fraudulent misrepresentation and conspiracy to defraud claims. Cipollone, 893 F.2d at 553-55.

On appeal, the Third Circuit threw out the verdict and ordered a new trial. Id. at 583. Thus, after six years of litigation, $5 million in fees incurred by the plaintiff’s counsel, and more than $50 million in fees incurred by the cigarette manufacturers’ counsel, the case returned to the trial court for another trial. See Cohen, Broader Suits Over Cigarettes May Be Possible, Wall. St. J., Jan. 3, 1990, p. A3, col. 4.


94. Id. at 625. Plaintiff originally pleaded negligence, breach of warranty, and violations of the Massachusetts Consumer Protection Act. Id. at 622. The district court found no preemption. Palmer, 633 F. Supp. at 1173. On appeal, the First Circuit noted that “[a]t bottom,” Palmer’s claim was for inadequate warning, and held inadequate warning claims preempted. Palmer, 825 F.2d at 522, 629.

95. 825 F.2d at 626. Interestingly, the Palmer court cited no legislative history to support this assertion and specifically declined to “resort to legislative history to determine congressional intent.” Id.

96. Id. The court further stated that allowing “interposition of state common law actions into a well-defined area of federal regulation would abrogate utterly the established scheme of health protection as tempered by trade protection,” and would seriously disrupt Congress’s “calibrated balance of national interests.” Id. at 626, 629.

97. Using this balancing analysis, cigarette manufacturers argue that all common law claims “tip” the careful balance. For example, Reynolds has argued that all common law claims must be preempted because each “disturbs Congress’ regulatory balance too much by seeking to impose warning requirements in addition to Congress’ warnings or to prohibit the sale of cigarettes.”
adopted the *Cipollone* and *Palmer* reasoning and holding.\textsuperscript{98} Based on this reasoning, however, some later courts added a third part to *Cipollone*’s preemption test — holding preempted claims that seek to have a jury reweigh Congress’s regulatory balance of interests as expressed in the Act.\textsuperscript{99} Not surprisingly,

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For unpublished state and federal decisions following *Cipollone* and *Palmer*, see Brief of Appellant R.J. Reynolds Tobacco Co. at 19-20 & n.12, Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655 (Minn. 1989) (No. C1-87-2170) (listing three more federal cases and 13 more state cases).

courts have disagreed about which claims survive the Labeling Act. Courts consistently hold that the Labeling Act preempts negligent failure to warn claims, express warranty claims, and fraud and misrepresentation claims, but are divided on negligent sale and design defect because “they are based solely on the alleged health risks of cigarettes and seek to have a jury reweigh the regulatory balance of interests arrived at by Congress in the Act”); Sahli v. Manville Corp., No. 230512, slip op. at 2 (Contra Costa County Super. Ct., Cal., May 14, 1987) (holding preempted design defect claims under the risk utility theory because “[p]laintiff seeks to have a jury reweigh the regulatory balance of interests arrived at by Congress in the Act”); see also Pennington v. Vistron Corp., No. 83-1332-A, slip op. at 7-8 (M.D. La. Dec. 24, 1987) (holding preempted the risk utility test of strict liability because “Congress has already conducted its own ‘risk-utility’ test and has determined that cigarettes, properly labeled, may lawfully be sold”).

Defendants argued on appeal in Pennington that the Labeling Act preempts all state tort claims because Congress had already weighed the risks and utility of cigarette smoking, and had decided to allow the sale of properly labeled cigarettes, and to protect the tobacco industry from the economic burden of non-uniform warnings. Pennington, 876 F.2d at 422. The Fifth Circuit rejected this argument. Id. at 422-23.


Courts have used § 1334(b) and Cipollone’s “propriety” part, supra note 91 and accompanying text, to hold preempted claims for express warranty. See Cipollone, 649 F. Supp. at 675 (holding that plaintiff’s express warranty claim inevitably questions defendants’ advertising and promotional activities), aff’d, 893 F.2d 541, 582 (3d Cir. 1990); accord Coulter v. Philip Morris, Inc., No. 86-1153-C, slip op. at 2 (Nueces County 94th Jud. Dist. Ct., Tex., Jan. 29, 1988) (holding preempted express warranty claims under the original Cipollone test); Forster, No. 85-4294, slip op. at 10 (Hennepin County Dist. Ct., Minn., July 2, 1987) (holding that the breach of express warranty claim “challenges both the adequacy of the warning provided by Congress on cigarette packages and the propriety of defendant Reynolds’ advertising and promotional practices”).

Courts have held preempted fraud, or intentional misrepresentation, claims based on § 1334(b) and Cipollone’s “propriety” part, supra note 91 and accompanying text. See Cipollone, 649 F. Supp. at 673-74 (holding preempted intentional tort, fraud, and misrepresentation claims because they all relate to the promotional activities). Judge Sarokin wrote: “To excuse any manufacturer from liability for actively misleading the public or concealing essential information is done by this court only by compulsion of the Court of Appeals’ mandate.” Id. On appeal, the Third Circuit affirmed. Cipollone, 893 F.2d at 582; see also Kotler v. American Tobacco Co., 685 F. Supp. 15, 20 (D. Mass. 1988).
whether the Labeling Act also preempts claims for strict liability\(^{103}\) and breach of implied warranty.\(^{104}\)

\(^{103}\) See Restatement (Second) of Torts § 402A (1965). Cigarette plaintiffs' strict liability claims against cigarette manufacturers typically are based on two theories: inadequate warning and design defect. See Comment, Liability of Cigarette Manufacturers, supra note 77, at 570.

All courts have held preempted strict liability claims for failure to warn for the same reasons that negligence claims for failure to warn claims are preempted. See supra note 100. Plaintiffs usually concede that strict liability for failure to warn is preempted. See, e.g., Cipollone, 649 F. Supp. at 669 (observing that “plaintiff's brief... concedes that his failure to warn theory in Count 3 is preempted under the Court of Appeals decision”).

Minnesota applies a risk-utility test to determine if the manufacturer is strictly liable for a design defect. Bilotta v. Kelley Co., 346 N.W.2d 616, 622 (Minn. 1984). Under this test, courts use the following factors to measure whether a manufacturer has exercised reasonable care in its choice of product design:

\(\text{a)}\) the usefulness and desirability of the product,
\(\text{b)}\) the availability of other and safer products to meet the same need,
\(\text{c)}\) the likelihood of injury and its probable seriousness,
\(\text{d)}\) the obviousness of the danger,
\(\text{e)}\) common knowledge and normal public expectation of the danger,
\(\text{f)}\) the avoidability of injury by care in use of the product (including the effect of instructions or warnings), and
\(\text{g)}\) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.

Holm v. Sponco Mfg., Inc., 324 N.W.2d 207, 212 (Minn. 1982) (citing Wade, Strict Liability of Manufacturers, 19 Sw. L.J. 5, 17 (1965)).

Courts applying a risk-utility test have divided on preemption. For cases holding that design defect claims using the risk-utility test are not preempted, see Cipollone, 649 F. Supp. at 669-72 (stating that “the seven-factor Wade test was intended only to be a set of guiding criteria for courts”). In dicta, the Third Circuit affirmed. Cipollone, 893 F.2d at 582 n.52 (refusing to interpret the Labeling Act to bar a risk-utility claim); see also Pennington v. Vistron Corp., 876 F.2d 414, 422-23 (5th Cir. 1989) (allowing risk-utility claims).

For cases holding that risk-utility is preempted, see supra note 99.


\(^{104}\) Because implied warranty is essentially like strict liability, courts typically do not address implied warranty claims separately. Instead, if a court holds preempted strict liability claims, it also holds preempted implied warranty claims. See, e.g., Forster v. R.J. Reynolds Tobacco Co., No. 85-4294, slip
This division among courts made the Forster case a fitting occasion to reexamine the scope of the Labeling Act's preemption.\textsuperscript{105} The trend toward increased preemption of common law claims also demonstrated the need to reevaluate the Labeling Act's preemptive scope. Because preemption under the Labeling Act effectively denies smokers or their survivors an opportunity to sue cigarette manufacturers,\textsuperscript{106} it is imperative that courts make sure they do not improperly bar these claims. This argument is particularly true because even if smokers prevail on preemption grounds, they are not entitled automatically to recover damages; rather, smokers face extremely difficult proof problems under state law.\textsuperscript{107}

op. at 10 (Hennepin County Dist. Ct., Minn., July 2, 1987) (stating that "[i]mplied warranties of fitness are essentially identical to strict liability in tort . . . Plaintiff's implied warranty claim is therefore preempted on the same grounds as the strict liability claim" (citation omitted)). Thus, to the extent that courts are divided on whether to hold preempted strict liability claims, supra note 103, courts similarly are divided on whether to preempt breach of implied warranty claims.

105. This was particularly true of strict liability, a theory plaintiffs were using more frequently in cigarette litigation. See Comment, Liability of Cigarette Manufacturers, supra note 77, at 570 n.10.


Since 1988, courts have dismissed or plaintiffs have dropped 52 tobacco cases; the total number of suits pending against tobacco companies has declined from 155 cases in 1988 to 59 pending lawsuits in early 1990. See Cohen, Broader Suits Over Cigarettes May Be Possible, Wall St. J., Jan. 8, 1990, at A3, col. 4.

107. For example, even if plaintiffs could bring claims for negligent failure to warn, they still would face serious burdens in overcoming the assumption of risk defense. Because courts uniformly have held failure to warn claims preempted, see supra note 100, plaintiffs more commonly bring claims for strict liability, particularly for design defect. See Note, Tobacco Suits Today, supra note 20, at 263-64. These claims also are difficult to prove as a matter of state law. The comment to the Restatement states that good tobacco is not reasonably dangerous simply because the effects of smoking are harmful. Restatement (Second) of Torts §402A comment i (1965). For a more thorough discussion of strict liability problems under state law, see Crist & Majoras, supra note 77, at 584-90 (arguing that claims for strict liability must fail because cigarettes are not defective and/or unreasonably dangerous); Garner, supra note 19, at 1440-48 (discussing potential defenses, including obviousness and knowledge of the risk); Note, Tobacco Suits Today, supra note 20, at 263-68 (discussing obstacles to plaintiff's claims).
II. FORSTER v. R.J. REYNOLDS TOBACCO CO.

A. A NEW PREEMPTION TEST

In Forster v. R.J. Reynolds Tobacco Co.,\textsuperscript{108} the Minnesota Supreme Court became the first court since Cipollone to adopt a new test for determining which state common law claims survive the Labeling Act.\textsuperscript{109} Unlike Cipollone, the Forster court also applied its test to plaintiff's claims, specifically identifying which claims its test would preempt.\textsuperscript{110} Forster thus represents a significant new chapter in cigarette litigation.

Consistent with other courts, the Forster court determined that the Labeling Act did not expressly preempt state common law claims.\textsuperscript{111} The court then analyzed whether the Labeling Act impliedly preempted common law claims, and summarily dismissed implied preemption by occupation of the field\textsuperscript{112} or by impossibility.\textsuperscript{113} It concluded, however, that the Labeling Act did impliedly preempt some common law claims that would frustrate Congress's objectives.\textsuperscript{114}

In finding implied preemption by frustration of purpose, the Forster court reasoned that the Labeling Act's purpose clause reflected a compromise between the interest in protect-

\textsuperscript{108} 437 N.W.2d 655 (Minn. 1989).
\textsuperscript{109} Id. at 660. Other courts either had adopted the Cipollone test, or expanded the test to reflect the Cipollone and Palmer courts' reasoning. See supra notes 98-99 and accompanying text.
\textsuperscript{110} Forster, 437 N.W.2d at 661-63. For a discussion of the Forster court's application of its test to Forster's claims, see infra Part II. B. Cipollone, on the other hand, adopted a preemption test, but remanded to the trial court to determine which of plaintiff's claims remained after applying the test. Cipollone v. Liggett Group, Inc., 789 F.2d 181, 188 (3d Cir. 1986); see supra note 92 and accompanying text.
\textsuperscript{111} The Forster court analyzed the preemption clause, and concluded that "[t]he phrase 'requirement or prohibition * * * imposed under State law' is too obscure for us to say that it is an express declaration that state common law tort actions are preempted. Express preemption requires Congress to speak plainer." Forster, 437 N.W.2d at 658. This holding comports with all other courts deciding cigarette preemption issues. See supra note 78.
\textsuperscript{112} The court dismissed "occupation of the field" in a single line of the opinion: "If federal preemption is to be implied, congressional intent to do so must be clearly inferred, either from the extent of federal involvement or from the scope of the federal interest; and even then the state will be preempted only to the extent that state regulation 'actually conflicts' with federal law. Forster, 437 N.W.2d at 658 (quoting Silkwood v. Kerr-McGee Corp, 464 U.S. 238, 248 (1984))."
\textsuperscript{113} The court simply stated that preemption by physical impossibility was "not the case here." Id.
\textsuperscript{114} Id. at 658-61.
ing health and the interest in protecting the country’s tobacco economy. Congress struck that balance, however, by allowing cigarettes to be sold if properly labeled. In striking that balance, Congress declared its warning adequate to inform the public of health risks. More importantly, Congress expressed a desire for uniform cigarette labeling and advertising regulations. A common law claim for failure to warn would cause a jury to reevaluate the adequacy of the federal warning, and assess damages against manufacturers whose warnings were found wanting. Such unpredictable state regulation of warning requirements, the court found, would directly conflict with the Labeling Act’s purpose of avoiding “diverse, nonuniform and confusing” regulations.

Having concluded that the Labeling Act impliedly preempted some state common law claims, the Forster court created a new preemption test. Like Cipollone, the court first held preempted any claims based on a state-imposed duty to warn. The Forster court, however, rejected the “propriety” part of the Cipollone test, stating “[w]e are unclear what this means.” Instead, the court held preempted claims that ques-

115. Id. at 658.
116. Id. (stating that “Congress has struck this balance by warning people they should not smoke if they value their health, but leaving the decision whether to smoke up to them”).
117. The court noted: “Congress has reserved to itself what this warning will say and where it must be placed. In other words, Congress has declared its warning is an adequate warning and only its warning need be given.” Id. at 658-59.
118. Id. at 659. See also supra notes 33, 51 and accompanying text (discussing the purpose clause).
119. Forster, 437 N.W.2d at 659.
120. Id. The court recognized that damage awards could have a regulatory effect.
121. Id. Although plaintiff argued that Congress would find this conflict acceptable, the court disagreed absent an affirmative indication in the legislative history or express statutory language that Congress intended to maintain conflicting state tort claims. Id. at 660.
122. Id.
123. Id. Both Cipollone’s and Forster’s tests preempt claims alleging inadequacy of warning or a duty to warn beyond the federal warning label. For the precise Cipollone language, see supra text accompanying note 90.
124. The Cipollone court held preempted state common law claims that challenge “the propriety of a party’s actions with respect to the advertising and promotion of cigarettes.” Cipollone v. Liggett Group, Inc., 789 F.2d 181, 187 (3d Cir. 1986); see supra note 91 and accompanying text.
125. Forster, 437 N.W.2d at 660. The Forster court further remarked on Cipollone’s “propriety” language: “Presumably the Third Circuit had in mind the interplay of section 1334(b); namely, that with respect to advertising and
tion "the adequacy of cigarette advertising or promotion with respect to smoking and health," or that question "the effect of that cigarette advertising or promotion on the federal label."126

B. STATE COMMON LAW CLAIMS ALLOWED UNDER THE FORSTER TEST

Having creating its preemption test, the Forster court applied the test to Forster's claims. The court summarily dealt with the negligent failure to warn,127 derivative,128 and pre-1966129 claims, but more fully analyzed the claims for strict liability, misrepresentation, and breach of warranty.

Reynolds argued as a threshold matter that the Labeling Act preempted any common law claims, such as strict liability,130 which based liability on the supposed defective condition of cigarettes.131 Reynolds argued that these claims would destroy Congress's balance in permitting cigarettes with the requisite federal label to be lawfully sold.132 The court rejected Reynolds' contention, reasoning that this argument assumed promotion, insofar as it relates to smoking and health, '[n]o requirement or prohibition shall be imposed under State law.'" Id.

126. Id. Both Cipollone and Forster adopted their preemption test language from § 1334(b). For a discussion of § 1334(b), see supra notes 37 and 46 and accompanying text.

127. The court summarily dismissed negligent failure to warn claims. Forster, 437 N.W.2d at 662. Plaintiff also alleged negligence in the "manufacture, sale, and advertising" of Camel cigarettes. Although these claims were vague, the court held they were not preempted to the extent they did not implicate a duty to warn. Id. at 662.

128. Plaintiff brought two derivative claims, one for loss of consortium and the other for punitive damages. The court believed that neither claim warranted independent discussion, but it did note that failure to warn could not be a factor bearing on punitive damages. Id. at 662-63.

129. Because the Labeling Act went into effect on January 1, 1966, failure to warn and other claims before that date typically have not been held preempted. See supra note 100. Forster made no separate pre-Labeling Act claims. The court noted, however, that plaintiff had begun smoking in 1953, and in dicta stated that pre-1966 claims were not preempted. Forster, 437 N.W.2d at 663.

130. Strict liability imposes liability for a product in a defective condition unreasonably dangerous to the user. See RESTATEMENT (SECOND) OF TORTS § 402A (1965). Cigarette plaintiffs typically plead strict liability claims on two theories: inadequate warning and design defect. See supra note 103.

131. Forster, 437 N.W.2d at 660-61.

132. Id. Reynolds relied on the Cipollone and Palmer balancing reasoning. See supra notes 85-89 and 95-97 and accompanying text. Some courts have used this balancing argument to hold preempted strict liability under the risk-utility test. See supra note 99. For a more detailed explanation of the cigarette manufacturer's position, see Crist & Majoras, supra note 77, at 580-81.
the thrust of Forster's lawsuit was effectively to outlaw cigarettes by means of common law actions.133 This assumption, it found, claimed "too much for state common law tort actions"; although plaintiffs might hope cigarette manufacturers would go out of business, the common law suits were not based on any claim that selling cigarettes was illegal.134 The court thus held that the Labeling Act does not automatically preempt common law claims that assert cigarettes are in a defective condition.135

The Forster court then considered plaintiff's strict liability claims for failure to warn and design defect.136 Although it summarily held preempted strict liability for failure to warn,137 the court allowed strict liability claims for design defect that use the risk-utility test.138 Reynolds argued that risk-utility must be preempted because Congress already had analyzed the risk-utility factors, and nevertheless permitted the sale of cigarettes.139 The Forster court rejected this argument, contending

133. Forster, 437 N.W.2d at 660-61.
134. Id.
135. With respect to strict liability for defective condition, the court found no conflict with the Labeling Act as long as Forster did not implicate inadequacy of warning. Id. at 661. The court noted that strict liability claims for defective condition remained exposed to Reynolds' state law defenses. Id. at 661 n.8.
136. Id. at 661. The complaint did not clearly state these claims. For example, plaintiff's complaint alleged: that the defendants, in selling and advertising cigarettes, failed to warn adequately of the adverse health consequences; that the manner of the defendant's advertising neutralized and made ineffective any warnings; that the product presented a risk of harm greater than its social utility; and that the product was represented as safe for use, but was in a defective condition unreasonably dangerous for its use, hence making defendants strictly liable in tort. Id. The court concluded this language constituted an allegation of strict liability. Id.
137. The court held preempted strict liability for failure to warn "for reasons already given." Id. (citation omitted).
138. Id. at 661. Minnesota law uses a risk-utility balancing test to determine if a products liability claim will lie for a design defect. For a more complete discussion of risk-utility, see supra note 103.
139. Forster, 437 N.W.2d at 661. For the risk utility factors, see supra note 103.

At the Forster district court level, Judge Lebedoff held preempted strict liability claims under the risk-utility test:

As to plaintiffs' claim that defendants' cigarettes were "defective" in that risk of harm associated with them greatly outweighed any social utility, such a claim directly challenges the adequacy of Congress' warning and is thus preempted . . . . A claim that cigarettes are so inherently dangerous that they cannot be sold without tort liability clearly attacks the propriety of defendants' action in promoting and marketing its product.

Forster, No. 85-4294, slip op. at 9-10 (Hennepin County Dist. Ct., Minn., July 2, 1987).
that strict liability assumes the product is usable, and instead questions whether the product is safely designed. Applying a risk-utility balancing test, the court concluded, did not conflict with Congress's purposes.

Plaintiff also pleaded intentional misrepresentation. Reynolds responded that intentional misrepresentation necessarily involves a duty to warn. The court rejected this argument, reasoning that intentional misrepresentation was based not on a duty to warn, but on a duty to tell the truth. To hold otherwise, the court asserted, would assume that "Congress intended the Act to be a license to lie." The Forster court found proof of congressional intent to prevent intentional misrepresentation in the Labeling Act's FTC provisions. The court thus held that a claim for intentional misrepresentation was not preempted.

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140. Forster, 437 N.W.2d at 661 (stating that "[t]his congressional policy decision is not . . . what products liability has in mind").
141. Id. The Forster court did not discuss the seven risk-utility factors, one of which is the effect of warnings. See supra note 103.
142. The plaintiff did not precisely make this claim. Plaintiff's complaint asserted that cigarettes were represented as safe for use and were advertised as safe and nonhazardous. Forster, 437 N.W.2d at 661-62. Although characterizing this as "sparingly pleaded," the court concluded it constituted a claim for intentional misrepresentation. Id.
143. Id. at 662.
144. The court asserted that the duty to warn assumes truthfulness and asks only how much of what was truthful must be disclosed. Id.
145. Id. (noting that "the cause of action, in a preemption sense, does not lie in challenging the adequacy of the federal warning nor in claiming a dilution of that warning, but only in asserting the falsity of what the cigarette manufacturer has chosen to say").
146. Id. The court noted that this assumption was "uncharitable to Congress and violative of this state's deep concern for honesty as well as health." Id.
147. Id. The Labeling Act provides for FTC action if a cigarette manufacturer engages in deceitful advertising. See supra note 38 and accompanying text.

To further support its holding, the Forster court noted that the Cipollone jury considered a claim for post-1966 intentional misrepresentation. Forster, 437 N.W.2d at 662 (citing Cipollone v. Liggett Group, Inc., 683 F. Supp. 1487, 1499-1500 (D.N.J. 1988)). This statement is inaccurate. The jury considered only pre-1966 fraudulent concealment by defendant cigarette manufacturers. Cipollone v. Liggett Group, Inc., 893 F.2d 541, 553 (3d Cir. 1990).
148. Forster, 437 N.W.2d at 662. Once past preemption, the plaintiff would have to prove each element of intentional misrepresentation. Id. at 662. The court noted that allowing intentional misrepresentation claims might conflict
Plaintiff also alleged breaches of express and implied warranty.\textsuperscript{149} The \textit{Forster} court held these claims preempted only to the extent they implicated a duty to warn.\textsuperscript{150} Because warranty claims are similar to strict liability, the court applied strict liability analysis.\textsuperscript{151} The court also applied its earlier analysis of intentional misrepresentation to breach of express warranty claims.\textsuperscript{152}

\section*{III. \textit{FORSTER}: A NEW NATIONAL MODEL}

Although not binding precedent outside of Minnesota, \textit{Forster} v. R.J. Reynolds Tobacco Co. should replace \textit{Cipollone} and \textit{Palmer} as the national model for determining which common law claims survive the Labeling Act. \textit{Forster} correctly limits the Labeling Act's preemptive reach to failure to warn claims. Limited preemption properly matches Congress's intent in the Labeling Act. Further, \textit{Forster} corrects several problems with the \textit{Cipollone} and \textit{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 \textit{Forster} decision makes good policy sense by allowing injured plaintiffs an opportunity to prove their claims.

\subsection*{A. PROPER SCOPE OF PREEMPTION}

\subsubsection*{1. The Labeling Act's Preemptive Scope under \textit{Forster}}

In applying its preemption test, the \textit{Forster} court held preempted only claims that implicated failure to warn or inadequacy of warning. For example, the court held preempted failure to warn and fraudulent concealment of information claims as implicating a duty to warn beyond that imposed by indirectly with the Labeling Act, but asserted that any conflict was "self-imposed" by the manufacturer. \textit{Id.}\textsuperscript{149} \textit{Id.} The district court held preempted both express and implied warranty claims. \textit{Forster}, No. 85-4294, slip op. at 10 (Hennepin County Dist. Ct., Minn., July 2, 1987).\textsuperscript{150} The court noted that these claims still were subject to state law defenses. \textit{Forster}, 437 N.W.2d at 662.\textsuperscript{151} \textit{Id.; see also supra} notes 136-41 and accompanying text (discussing the \textit{Forster} court's reasoning with respect to strict liability).\textsuperscript{152} The court noted that advertisements stating that "A good cigarette can cause no ills," or "Nose, throat, and accessory organs not adversely affected by smoking Chesterfields," would be actionable for either intentional misrepresentation or express warranty. \textit{Forster}, 437 N.W.2d at 662. For an analysis of the \textit{Forster} court's reasoning on intentional misrepresentation, see \textit{supra} notes 142-48 and accompanying text.
the federal warning label. The court allowed claims for strict liability (under risk-utility theory), intentional misrepresentation, and breach of implied and express warranty, as long as those claims did not implicate a breach of the duty to warn or inadequacy of warning. Preempting only those claims that implicate failure to warn or inadequacy of warning comports with Congress's intent in the Labeling Act.

2. Congress's Intended Preemption in the Labeling Act

Whether Congress specifically intended to preempt state common law claims in the Labeling Act is not clear. Although the Labeling Act contains a preemption clause, that clause does not explicitly preempt state common law claims. Analysis of the Labeling Act's original language, later amended-

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153. Forster, 437 N.W.2d at 661-62; see supra notes 127 and 142 and accompanying text.

154. Forster, 437 N.W.2d at 661-62. For a discussion of the Forster analysis on these claims, see supra Part II. B. For each claim, the Forster court made apparent that it preempted claims that involved a failure to warn or inadequacy of warning: strict liability (“aside from the duty to warn, there is no federal preemption for claims based on a ‘defective’ condition of the product”); risk-utility (“if plaintiff can prove a defective condition or a defective design — apart from any claim of inadequacy of warning — we see no conflict with the federal Act”); intentional misrepresentation (stating that this cause of action, “in a preemption sense, does not lie in challenging the adequacy of the federal warning nor in claiming a dilution of that warning, but only in asserting the falsity of what the cigarette manufacturer has chosen to say”); warranty (“[t]o the extent a breach of warranty is based on a duty to warn it is preempted”); negligence (“[t]o the extent negligence is claimed to be a breach of a duty to warn about the hazards of smoking, it is preempted”). Forster, 437 N.W.2d at 661-62.

155. See infra Part III. A. 2.

156. Commentators have argued on both sides of this issue. For a comprehensive list of articles, see supra note 77.

For the argument that Congress did not intend to preempt any common law claims, see Note, supra note 58, at 880-86, 910-11; Comment, Common Law Claims, supra note 77, at 758-64. These authors point to congressional debate before passage of the 1965 Act that recognized the continued existence of common-law products liability cases, and the negative effect these warnings might have on a plaintiff’s case. See, e.g., 111 Cong. Rec. 16,543-44 (1965) (statement of Rep. Fascell) (stating that “[t]he legislative record makes it clear that passage of this law and compliance by the manufacturer in no way affects the right to raise the defense of ‘assumption of risk.’”); see also infra notes 174-76 and accompanying text (discussing the 1969 Senate Report).

For the contrary argument that Congress intended to preempt all state common law claims, see Crist & Majoras, supra note 77, at 566-82; see also infra notes 169-72 and accompanying text (discussing evidence of congressional intent to preempt state common law claims).

157. See supra notes 34-37 and 46 and accompanying text. No court has found express preemption of state common law claims. See supra note 78.
ments, and legislative history, however, indicates that Congress had one principal objective: to inform the public of the dangers of smoking through uniform warnings. To accomplish this objective, Congress preempted any other warning requirement on cigarette packages and advertisements. Common law claims for failure to warn would conflict with this objective and therefore are preempted.

a. Congress’s Principal Objective

The 1965 Labeling Act’s purpose and preemption clauses reflect Congress’s intent to preempt any non-uniform warning requirement on cigarette packages. In the Act’s purpose clause, Congress communicated three policies: 1) to inform the public of health risks by including a warning on each package of cigarettes; 2) to protect the national economy “to the maximum extent consistent” with its first policy; and 3) to insure uniform labeling and advertising regulations. These policies, however, were not of equal importance. Of primary importance was the purpose of informing the public of health risks associated with smoking.

To accomplish this purpose, Congress required a specific warning label on all cigarette packages. In requiring such a warning, however, Congress intended to prevent non-uniform state warning label requirements. It initially expressed this concern in the purpose clause. In addition, Congress included a preemption clause, forbidding conflicting warnings on cigarette packages, and prohibiting any warnings on cigarette advertisements if the advertised cigarette packages carried the label required by the Labeling Act. Congress thus demon-

158. See infra notes 161-68, 177-82 and accompanying text.
159. See infra notes 164-65, 177-82 and accompanying text.
160. See infra notes 183-88 and accompanying text.
162. The purpose clause stated that Congress sought to protect the national economy only “to the maximum extent consistent with” its purpose of informing the public of health risks. 1965 Act, 15 U.S.C. § 1331 (1982); see supra note 33. Legislative history discussed above also demonstrates that Congress’s primary purpose was to warn the public. See supra note 32 and accompanying text.
strated its principal objective of not only warning the public, but doing so in a consistent and uniform manner.

b. The 1969 Amendments to Subsection 1334(b): Congress Demonstrates its Continued Objective of Uniform Warnings on Cigarette Packages and Advertisements

In 1969, Congress amended the Labeling Act, making two significant changes. Congress allowed the FTC to order warnings on print advertisements after July 1, 1971. Congress also amended subsection 1334(b) of the preemption clause to preempt any “requirement or prohibition on smoking and health . . . under State law with respect to the advertising or promotion” of any cigarette packages that complied with the Labeling Act.

Congress’s intent in amending subsection 1334(b), particularly the addition of the words “under State law,” is the crux of the preemption debate. Cigarette manufacturers argue that this amendment reflects Congress’s intent to preempt state common law claims. They emphasize the addition of the words “under State law,” and the Conference Committee’s rejection of a 1969 Senate amendment that would have limited preemption to requirements imposed by “state statute or regulation.” Cigarette manufacturers also point out that Congres...

167. The FTC was required to give Congress six months notice. See supra note 45 and accompanying text.
Subsection 1334(a), which preempted any other warning labels on cigarette packages, was not amended. See supra note 35 and accompanying text.
169. See, e.g., Crist & Majoras, supra note 77, at 560-66. At the time their article was published, both authors were attorneys for the law firm that represented R.J. Reynolds in its smoking and health cases. Id. at 551.
170. 1965 Act, 15 U.S.C. § 1334(b) (1982), did not include the term “state law” and simply provided: “No statement relating to smoking and health shall be required in the advertising of cigarettes the packages of which are labeled in conformity with the provisions of this Act.” See supra notes 37, 46 and accompanying text.
171. The proposed amendment read: “No other requirement prohibition [sic] based on smoking and health shall be imposed by any state statute or regulation with respect to advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.” See S.
gress in 1984 rejected a proposal to amend section 1334 to include a clause that saved common law claims from preemption.\footnote{172}

Plaintiffs' attorneys, however, argue that Congress did not intend the 1969 amendments to pre-empt common law claims.\footnote{173} For example, the 1969 Senate Report summarized the change to subsection 1334(b) as prohibiting regulation or prohibition of cigarette advertising by “State or local authority.”\footnote{174} Further, debate surrounding the 1969 amendment to the preemption clause targeted state regulation, not common law.\footnote{175} Finally, the 1969 Act defined “State” as any “political subdivision of any state.”\footnote{176}

Examining subsection 1334(b)'s original language and the 1969 amendments, however, reveals that Congress in the 1969 amendments intended only to reinforce its principal objective of warning the public through uniform labels, while allowing the FTC to require warning labels on cigarette advertisements. As enacted, subsection 1334(b) preempts any warning require-
ment, from a state or a federal agency, on cigarette advertisements as long as the cigarettes advertised were properly labeled.\textsuperscript{177} In 1969, at the same time that Congress changed the language of subsection 1334(b) to include the phrase “under state law,” Congress also gave the FTC, a federal agency, the right to require warnings on advertisements.\textsuperscript{178} Thus, although under the 1965 version of subsection 1334(b) the FTC could not have required any “statement relating to smoking and health” on cigarette advertisements,\textsuperscript{179} the 1969 amendment freed the FTC to do so.\textsuperscript{180} Accordingly, Congress amended subsection 1334(b) to clarify that states, but not the FTC, were prohibited from requiring warning labels on advertisements.

The legislative history of the 1969 amendments also demonstrates that Congress intended to maintain its objective of uniform warning requirements, while permitting the FTC to require warnings on advertisements. For example, the Senate Report stated that the amendment preempted state warning requirements “to avoid the chaos created by a multiplicity of conflicting regulations.”\textsuperscript{181} In addition, the Conference Report stated that the House bill contained a blanket preemption applicable to federal agencies as well as to state and local governments; this blanket preemption was changed to apply only to states.\textsuperscript{182}

\textsuperscript{177} Subsection 1334(a) applied to cigarette packages, and was not amended. \textit{See supra} notes 35-37 and accompanying text.

\textsuperscript{178} \textit{See supra} notes 45-46 and accompanying text.

\textsuperscript{179} \textit{See supra} note 45 and accompanying text.

\textsuperscript{180} The FTC did require the same warning on advertising as Congress required on cigarette packages. \textit{See supra} note 45. In 1984, Congress amended the Labeling Act to require the same warning labels on advertisements and billboards as on cigarette packages. \textit{See supra} notes 49-50 and accompanying text.


\textsuperscript{182} H.R. CONF. REP. No. 897, 91st Cong., 2d Sess. 5, \textit{reprinted in} 1970 U.S. CODE CONG. & ADMIN. NEWS 2676, 2677. The Conference Committee explained the amendment as follows:

The House bill contained a blanket preemption (applicable to all Federal departments and agencies as well as State and local governments) with respect to requiring statements relating to smoking and health in advertisements of cigarettes the packages of which were labeled in conformity with the legislation.

The Senate preemption applied only to States and their political divisions. They were prevented from imposing any requirement or prohibition based on smoking and health on advertising and promotions of cigarettes in packages labeled in accordance with the Act. With minor technical amendments the conference version is the same as the Senate amendment.
c. Failure to Warn Claims Would Conflict with Congress's Clear Purpose and Therefore are Preempted

Congress demonstrated a continued clear objective of informing the public through uniform and consistent warnings, and a desire to preempt any state requirements for inconsistent warnings on cigarette packages and advertisements. Given this clear objective, state common law claims that in effect require different warning labels conflict with Congress's intent, and should be preempted. State common law claims that implicate failure to warn or inadequacy of warning would require cigarette manufacturers to change warning labels, and thus these claims conflict with the Labeling Act.

A failure to warn claim requires a jury to evaluate the cigarette's warning label, and imposes liability on a manufacturer whose warning is found inadequate, even if the manufacturer complied with the Labeling Act. A damage award for failure to warn encourages a manufacturer to strengthen its warning label to avoid future liability. Moreover, because each state has its own tort law, state courts inevitably would reach contradictory holdings. These inconsistent holdings would cause manufacturers to place different warnings on cigarette packages and advertisements depending on the decisions in that location, a result directly in conflict with Congress's principal objective of a uniform warning system.

Common law claims conflict with the Labeling Act when the common law would require a different warning than the Labeling Act. Only common law claims that allege a failure to warn or that question the adequacy of the warning label would cause a cigarette manufacturer to change the warning label.

Id.

183. See supra notes 161-82 and accompanying text.
184. See supra notes 118-21 and accompanying text.
185. See, e.g., Palmer v. Liggett Group, Inc., 825 F.2d 620, 627-28 (1st Cir. 1987). The Palmer court noted:
   Once a jury has found a label inadequate under state law, and the manufacturer liable for damages for negligently employing it, it is unthinkable that any manufacturer would not immediately take steps to minimize its exposure to continued liability. The most obvious change it can take, of course, is to change its label.

Id.

186. See Comment, Liability of Cigarette Manufacturers, supra note 77, at 582-84 (arguing that awarding damages for inadequacy of warning claims would cause contradictory state tort law and conflict with the Labeling Act).
187. Congress has demonstrated its concern for uniform warning requirements. See supra notes 161-65, 177-82 and accompanying text.
bel, and thereby lead to non-uniform warnings. Thus, only failure to warn and inadequacy of warning claims conflict with Congress's purpose and should be preempted.

B. CORRECTING PROBLEMS RESULTING FROM CIPOLLONE AND PALMER

In addition to properly following congressional intent, the Forster court remedied three problems with the Cipollone/Palmer test. The Forster test preempts fewer claims than Cipollone, rejects the balancing analysis other post-Cipollone courts have used to hold preempted additional common law claims, and properly weighs the presumption against preemption to permit common law claims that do not clearly conflict with the Labeling Act.

1. The Flawed Cipollone Test

The Cipollone court developed the first preemption test for determining which common law claims survive the Labeling Act. The "propriety" part of that test, however, allows courts to hold preempted more claims than Congress intended, including claims that challenge the "propriety" of a manufacturer's advertising, even if those claims do not implicate the duty to warn. For example, post-Cipollone courts interpreted the "propriety" part of the Cipollone preemption test as preempting claims for express warranty and fraud.

Forster properly preempts only common law claims that

188. See supra notes 118-21 and accompanying text. For example, assume that plaintiff wins a lawsuit claiming that the cigarette company could have manufactured a "safer" cigarette. A damage award from such a lawsuit would not cause the cigarette company to change its warning label, but instead would cause the company to develop a "safer" cigarette.

189. Cipollone held preempted state common law claims that challenge the adequacy of warnings on cigarette packages, or that necessarily presume a duty to provide a warning beyond that required by the Labeling Act. Cipollone v. Liggett Group, Inc., 789 F.2d 181, 187 (3d Cir. 1986). Cipollone also held preempted claims that challenge "the propriety of a party's actions with respect to the advertising and promotion of cigarettes." Id.; see supra notes 90-91 and accompanying text.

190. For the language of the "propriety" part of the Cipollone test, see supra text accompanying note 91.

191. See supra Part III. A.

192. See supra notes 101-02 and accompanying text (discussing the preemption of express warranty and fraud claims); see also Crist & Majoras, supra note 77, at 575-77 (arguing that misrepresentation and express warranty claims are an explicit challenge to "the propriety of a party's actions with respect to the advertising and promotion of cigarettes").
implicate inadequacy or failure to warn. For example, the Forster court held express warranty claims preempted only if they implicated the duty to warn.\textsuperscript{193} The Forster court refused, however, to hold preempted claims for intentional misrepresentation, stating that those claims do not challenge the adequacy of the federal warning, but rather challenge the truth of a manufacturer’s advertisement.\textsuperscript{194} Thus, Forster narrows the preemption scope to failure to warn, and corrects the overbroad preemption caused by the “propriety” part of the Cipollone test.

2. Inappropriate Use of the Balancing Analysis

\textit{Cipollone} and \textit{Palmer} emphasized Congress’s careful balancing of its dual interests in informing the public and protecting the national economy.\textsuperscript{195} Because common law claims could upset Congress’s careful balance, both courts concluded that the preemptive scope of the Labeling Act included common law claims.\textsuperscript{196}

This balancing logic, however, is flawed. Both courts misconstrue the purpose clause as creating an equal balance between the two interests of informing the public and protecting the national economy.\textsuperscript{197} The purpose clause and the legislative history, however, suggest that Congress primarily intended to

\begin{footnotesize}
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\item \textsuperscript{193} Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655, 662 (Minn. 1989); \textit{see supra} notes 149-52, 154.
\item \textsuperscript{194} Forster, 437 N.W.2d at 662; \textit{see supra} notes 142-48, 154 and accompanying text.
\item \textsuperscript{195} \textit{See supra} notes 85-89 and 95-97 and accompanying text (discussing the \textit{Cipollone} and \textit{Palmer} “balancing” reasoning).
\item \textsuperscript{196} Cipollone v. Liggett Group, Inc., 789 F.2d 181, 187 (3d Cir. 1986); Palmer v. Liggett Group, Inc., 825 F.2d 620, 626 (1st Cir. 1987); \textit{see also supra} notes 85-89 and 95-97 and accompanying text (discussing \textit{Cipollone} and \textit{Palmer}). An award of damages from state common law suits would have a regulatory effect on cigarette manufacturers, the courts decided, and would tip the Act’s balance of purposes.
\item \textsuperscript{197} \textit{See, e.g., Cipollone, 789 F.2d at 187 (stating that the purposes clause in 15 U.S.C. § 1331 reflects a “carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of national economy”)}. The \textit{Palmer} court stated:

It is these policies, and more importantly, the balance fixed between them that is our focus . . . Congress ran a hard-fought, bitterly partisan battle in striking the compromise that became the Act. It is inconceivable that Congress intended to have that carefully wrought balance of national interests superseded by the views of a single state, indeed, perhaps of a single jury in a single state.

\textit{Palmer, 825 F.2d at 626.}
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inform the public. Thus, Cipollone and Palmer’s interest in maintaining a careful balance is misplaced.

Based on this flawed balancing analysis, however, some later courts expanded the Cipollone test to preempt common law claims that upset Congress’s balance. By expanding the Cipollone test, these courts held preempted additional state common law claims, in particular strict liability claims. Further, cigarette manufacturers have seized on the balancing reasoning as a device to extinguish all cigarette claims, arguing that all common law claims upset Congress’s careful balance.

Using this balancing analysis to preempt common law claims is contrary to both Congress’s intent and to recent Supreme Court preemption principles. Such balancing analysis creates a broad test, capable of holding preempted nearly all common law claims. Had Congress intended such a far-reaching preemptive scope, it would have occupied the field relating to regulation of cigarettes; no court, however, has held that Congress intended such a broad scope of regulation.

In addition, the Supreme Court has been increasingly reluctant to preempt state law based on a balancing theory. In CTS Corp. v. Dynamics Corp., the Court assumed that the Williams Act, a federal law regulating takeovers, represented a careful balance between the interests of offerors and target companies, and that state statutes upsetting this balance were preempted. Despite these assumptions, the Court held that the Williams Act still did not preempt an Indiana law that se-

198. See supra notes 32, 161-62 and accompanying text; see also Comment, Federal Cigarette Labeling, supra note 77, at 885-86 (arguing that the language of the Labeling Act suggests a “hierarchy of purpose”).

199. See supra note 99 and accompanying text.

200. Courts using this added clause have held preempted claims for strict liability, claims which survived the original Cipollone test. See supra notes 99 and 105 and accompanying text.

201. See supra notes 97 and 99 and accompanying text.

202. See supra notes 97, 99 and text accompanying note 201.

203. The Cipollone court did not find occupation of the field. Cipollone v. Liggett Group, Inc., 789 F.2d 181, 186 (3d Cir. 1986); see supra note 83 and accompanying text. The Palmer court did not address occupation of the field, but found instead that common law claims conflicted with Congress’s purpose. Palmer v. Liggett Group, Inc., 825 F.2d 620, 626 (1st Cir. 1987); see supra notes 93-97 and accompanying text. Later courts adopted the Cipollone test, and similarly did not find occupation of the field. See, e.g., Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 234 (6th Cir. 1988); see supra note 98 and accompanying text.


205. Id. at 80 (citing Edgar v. MITE Corp., 457 U.S. 624, 632-34 (1982)).
verely curtailed hostile corporate takeovers.206

Forster, like Cipollone and Palmer, found an equal balance in the interests of informing the public and protecting the economy.207 The court, however, correctly refused to hold preempted common law claims that upset Congress’s balance. For example, it expressly rejected Reynolds’ argument that claims alleging a defective condition of cigarettes should be preempted because those claims would destroy the Labeling Act’s balance of purposes.208 Instead, Forster asserted that Congress already had struck the balance between warning the public and protecting the economy by allowing the sale of cigarettes that carried the warning label.209

3. Weighing the Presumption against Preemption

In analyzing preemption cases, courts begin with the strong presumption that Congress did not intend to preempt state law, absent a clear indication to the contrary.210 After considering this presumption, the Cipollone court refused to find “occupation of the field” relating to cigarettes and health.211 The evolution of cigarette preemption law since Cipollone reflects a noticeable shifting of that presumption. Post-Cipollone courts have expanded the preemption scope, causing additional claims to fall within the Labeling Act’s grasp.212 With this increased scope of preemption, subsequent courts in effect have held the

206. Id. at 86-87. The Indiana law in effect required prior approval by a majority of disinterested shareholders before a takeover for corporations incorporated in the state of Indiana. Id. at 72-75. Both the district court and the Seventh Circuit had held that the Williams Act preempted the state law. Dynamics Corp. v. CTS Corp., 794 F.2d 250, 262-63 (7th Cir. 1986). The Supreme Court held that the purpose of the Indiana law did not frustrate the federal purposes, even though “[v]ery few tender offers could run the gauntlet that Indiana has set up.” Id. at 263.

For a discussion of the Supreme Court’s recent views on preemption, see Rotunda, supra note 69, at 311-13.

207. See supra note 115 and accompanying text.

208. See supra notes 130-35 and accompanying text.

209. See supra notes 116-17 and accompanying text.

210. See supra notes 65-68 and accompanying text.

211. Cipollone v. Liggett Group, Inc., 789 F.2d 181, 186 (3d Cir. 1986); see supra note 83 and accompanying text. One commentator has argued that the Cipollone court shifted this presumption by holding preempted any state common law claims. See Note, Has Federalism Gone Up In Smoke?, supra note 77, at 805-08 (arguing that the Cipollone court departed from traditional notions of federalism and tipped the balance against providing a remedy for injured state citizens).

212. See supra notes 99 and 103 and accompanying text.
field of smoking and health "occupied," 213 a result Cipollone expressly rejected as shifting the presumption against preemption, 214

Forster runs counter to this trend by giving proper weight to the presumption against preemption. Noting the state's strong interest in protecting its citizens' health and safety, the court limited the scope of preemption to only those common law claims that directly conflict with Congress's clear objective in the preemption clause — preventing non-uniform warning labels. 215 Forster thus properly balanced the federal Labeling Act with a state's right to allow an injured citizen to obtain a remedy. This presumption is particularly appropriate in cigarette cases, in which the plaintiff, once past the preemption issue, still faces difficult proof problems under state law. 216

C. POLICY JUSTIFICATIONS SUPPORT THE FORSTER RESULT

Forster is an appropriate judicial interpretation of federal legislation. The decision adequately allays federalism concerns, 217 preempting only those common law claims that directly conflict with the Labeling Act's objective, 218 and thus preserves a state's right to exercise its police power interest in the health and safety of its citizens. Forster also allows injured plaintiffs an opportunity to prove their claims, and to obtain a remedy. 219 Expansive preemption tests, developed by some courts before Forster, 220 effectively eliminate all recourse for injured plaintiffs.

As a broader policy matter, Forster appropriately reduces the blanket immunity from tort liability that cigarette manufacturers have enjoyed. Other industries are held liable for injuries caused by their dangerous products, 221 yet the tobacco

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213. Some courts have held preempted all claims in a tobacco lawsuit. See Forster, No. 85-4294, slip op. at 1-3, 12 (Hennepin County Dist. Ct., Minn., July 2, 1987) (granting summary judgment for defendant by holding preempted negligence, strict liability, breach of warranty, and misrepresentation). In Pennington v. Vistrion Corp., the district court held that the Act preempted all of plaintiff's post-1965 claims, including failure to warn and strict liability. See Pennington v. Vistrion Corp., 876 F.2d 414, 418-19 n.4 (5th Cir. 1989).
214. Cipollone, 789 F.2d at 186; see supra note 83 and accompanying text.
215. See supra Part III. A.
216. See supra notes 106-07 and accompanying text.
217. See supra notes 65-68 and accompanying text.
218. See supra Part III. A.
219. See supra note 72 and accompanying text.
220. See supra note 99 and accompanying text.
221. See Garner, supra note 19, at 1423-24 (noting that the automobile,
industry, most recently because of preemption, has defeated all attempts to hold it accountable for injuries its product causes.\textsuperscript{222} This immunity is strikingly ironic when one considers that cigarette smoking is responsible for more than one of every six deaths in the United States.\textsuperscript{223}

IV. \textit{FORSTER: RIGHT RESULT, WEAK TEST}

Unlike other courts following \textit{Cipollone} and \textit{Palmer}, the \textit{Forster} court developed a new preemption test, preempting common law claims based on a state-imposed duty to warn, or common law claims that question "the adequacy of cigarette advertising or promotion with respect to smoking and health," or "the effect of cigarette advertising or promotion of the federal label."\textsuperscript{224} When analyzing \textit{Forster}'s claims, however, the court did not follow this stated test. Instead, it held preempted only claims that involved a duty to warn or inadequacy of warning.\textsuperscript{225}

The claims of intentional misrepresentation and breach of warranty illustrate the problem with \textit{Forster}'s stated preemption test. Cigarette manufacturers may argue that these claims are preempted because the claims in fact do question "the adequacy of cigarette advertising or promotion with respect to smoking and health." The \textit{Forster} court nevertheless did not hold intentional misrepresentation or breach of warranty claims preempted, as long as they did not implicate a duty to warn.\textsuperscript{226} Thus, the \textit{Forster} test can be interpreted more broadly than it was applied, in a way that the \textit{Forster} court obviously did not intend, and in a manner contrary to congressional intent.\textsuperscript{227}

Because of this inconsistency between the \textit{Forster} test and the common law claims that \textit{Forster} held preempted, subsequent courts may use the test's language to hold preempted additional claims contrary to \textit{Forster}'s result. \textit{Forster} would have provided clearer guidance had its test simply stated that the Labeling Act preempted common law claims that implicated a

\textsuperscript{222} See \textit{supra} note 19 and accompanying text.
\textsuperscript{223} See \textit{supra} note 16 and accompanying text.
\textsuperscript{224} See \textit{supra} notes 122-26 and accompanying text.
\textsuperscript{225} See \textit{supra} Part II. B. and note 154.
\textsuperscript{226} See \textit{supra} notes 142-52, 154 and accompanying text.
\textsuperscript{227} See \textit{supra} Part III. A.
duty to warn, or claimed inadequacy of warning on cigarette packages and in cigarette advertisements.

CONCLUSION

Since the landmark case of *Cipollone v. Liggett Group, Inc.*, courts applying the preemption doctrine have allowed fewer common law claims for injured smokers. In *Forster v. R.J. Reynolds Tobacco Co.*, the Minnesota Supreme Court reexamined the Federal Cigarette Labeling and Advertising Act, and held preempted only those claims that implicated a failure to warn or inadequacy of warning. Although the court could have stated a clearer test for determining what claims were preempted, it nevertheless reached the right result. *Forster*’s limited preemption is more consistent with the Labeling Act’s language and legislative history than the currently prevailing test, and also is desirable for policy reasons, including federalism concerns and reducing the immunity from liability cigarette manufacturers presently enjoy. As courts recognize the positive attributes of this approach to cigarette litigation preemption, *Forster* should become the prevailing standard throughout this nation.

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