Tobacco Under Fire: Developments in Judicial Responses to Cigarette Smoking Injuries

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"It's the damnedest thing I ever heard of."*

For over two decades consumers have sued tobacco manufacturers1 for deaths and injuries allegedly caused by using tobacco products.2 Tobacco

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* Overheard, Newsweek, June 23, 1986, at 25 (tobacco heir John D. Reynolds' response to his brother Patrick's membership in the American Lung Association's antismoking campaign).

1. All of the reported cases have been brought against cigarette companies, although manufacturers of other tobacco products are increasingly being sued for harms allegedly caused by using their products. See, e.g., Mintz, Tobacco Company is Cleared: Jury Decides Snuff Didn't Cause Death, Wash. Post, June 21, 1986, at G1, col. 6. This Comment will concentrate on suits brought against cigarette manufacturers.

companies, thus far, have defeated every attempt to hold them liable. In the late 1950's and early 1960's smokers brought a group of unsuccessful claims against cigarette manufacturers based on several theories, including breach of warranty and negligence. These law suits failed because of both adverse legal rulings and the expense of litigation. In the last few years smokers have filed a second group of claims based on new legal theories. In these recent cases plaintiffs have challenged the adequacy of the health warnings on tobacco product packages and the advertising practices of the tobacco industry. At present, the federal courts are divided over whether plaintiffs may bring claims under these legal theories.

On the legislative side, Congress has demonstrated concern with the

3. The tobacco industry has never lost or settled a product liability case. This success in defending product liability suits is unmatched by other consumer product manufacturers. See Garner, Cigarette Dependency and Civil Liability: A Modest Proposal, 53 S. CAL. L. REV. 1423 (1980). Nevertheless, tobacco manufacturers have been held liable for injuries caused by foreign objects found in their products. See id. at 1425.


5. See Garner, supra note 3, at 1425 (manufacturer's victories resulted from favorable legal rulings and "tenacious defense work"); Jakobi, Cigarette Manufacturers' Liability After Cipollone: Gone Up in Smoke?, THE BARRISTER, Summer 1986, at 10 (the "wave of law suits" filed in the 1950's-1960's "foundered either under the weight of adverse court decisions or the expense of litigation").


7. See, e.g., Cipollone, 789 F.2d at 184; Palmer, 633 F. Supp. at 1172; Roysdon, 623 F. Supp. at 1190.

8. See, e.g., Cipollone, 789 F.2d at 184; Roysdon, 623 F. Supp. at 1190.

9. Compare Cipollone, 789 F.2d at 181 (holding that federal statute preempts state law claims challenging the adequacy of health warnings on cigarette packages and the advertising practices of cigarette manufacturers) and Roysdon, 623 F. Supp. at 1189 (holding that federal statute preempts actions based on alleged inadequacy of health warnings on cigarette packages) with Palmer, 633 F. Supp. at 1171 (holding that federal statute does not preempt com-
Responses to Cigarette Smoking Injuries
and social cost\textsuperscript{11} of smoking since 1965. In that year Congress enacted the Federal Cigarette Labeling and Advertising Act;\textsuperscript{12} thus establishing a comprehensive federal program to regulate cigarette labeling and advertising.\textsuperscript{13} Since then, congressional regulation of cigarette and other tobacco product labeling and advertising has become increasingly vigorous.\textsuperscript{14} The Act prohibits advertising cigarettes on radio and television\textsuperscript{15} and requires the familiar Surgeon General's Warnings to appear on cigarette packages.\textsuperscript{16} In addition, the Act contains a section prohibiting states from requiring any statement relating to smoking and health, other than the Surgeon General's Warnings, to appear on any cigarette package.\textsuperscript{17} This section also bars states from imposing any requirement or prohibition under state

\textsuperscript{10} See supra note 2 (discussing the health effects of smoking).

\textsuperscript{11} Estimates show that, in the United States, medical care and lost productivity costs attributable to cigarette smoking total about $65,000,000,000 annually. Blasi & Monaghan, supra note 2, at 502. Moreover, "in 1985 the United States health care system spent an estimated $22,000,000,000 to treat smoking related diseases, of which the Federal Government paid about $4,200,000,000, while lost productivity costs due to smoking related illness and premature death were $43,000,000,000." H.R. 4972, 99th Cong., 2d Sess. § 2(12) (1986); cf. Tribe, Anti-Cigarette Suits: Federalism With Smoke and Mirrors, THE NATION, June 7, 1986, at 788 (smoking related losses total $80,000,000,000 annually).


\textsuperscript{16} Id. § 1333 (Supp. III 1985).

\textsuperscript{17} Id. § 1334(a) (1982).
law concerning the advertising or promotion of any cigarettes labeled with the required Surgeon General's Warnings. In recent cigarette smoking injury cases manufacturers have argued that by allowing plaintiffs to recover tort damages based on theories of inadequate warnings and misleading advertising practices, the states indirectly would be imposing additional requirements on manufacturers in violation of the Act.

This Comment examines recent judicial action in response to the high social cost of tobacco use by first addressing the legal theories that plaintiffs employed against tobacco manufacturers from the 1950's to the 1960's. It then examines the evolution of federal legislation regulating cigarette labeling and advertising. The Comment next explores the legal theories that consumers have used against tobacco manufacturers in the 1980's and considers a recent split in the federal circuits over the acceptance of these new theories of manufacturer liability. This Comment concludes that plaintiffs should be permitted to present to juries state law claims based on cigarette labeling and advertising.

I. CASE LAW DEVELOPMENT: THEORIES OF LIABILITY IN THE 1950'S-1960'S

From the late 1950's to the early 1960's smokers filed claims against cigarette manufacturers under a variety of legal theories including breach of express and implied warranty and negligence. Tobacco companies de-

18. Id. § 1334(b).
19. See infra notes 85-111 and accompanying text.
20. See supra note 4.
21. An express warranty is any factual statement concerning "the quality or character of goods sold, made by the seller to induce the sale, and relied on by the buyer." BLACK'S LAW DICTIONARY 1423 (5th ed. 1979). The Uniform Commercial Code sets forth the general statutory law governing warranties on the sales of goods. Under the U.C.C., an express warranty is a warranty made by the seller to the buyer as part of a contract for sale, and is created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

U.C.C. § 2-313(1) (1978). To create an express warranty, it is not necessary that the seller use formal words such as "warrant" or "guarantee" or that the seller have a specific intention to create a warranty, but a representation merely of the value of the goods or a statement merely of the seller's opinion or commendation of the goods does not create a warranty. Id. § 2-313(2).

22. An implied warranty is a promise arising by operation of law. BLACK'S LAW DICTIONARY 1423 (5th ed. 1979). Implied warranties include implied warranties of
fended these suits by generally denying the charges against them and by raising the affirmative defenses of assumption of risk and contributory negligence. The breach of warranty claims frequently were based on the manufacturers' advertisements. In one case, for example, the plaintiff alleged that the defendant's advertisements praised the healthful and harmless nature of its brand of cigarettes. Tobacco manufacturers' omission of any warning to consumers of the health risks associated with smoking formed the basis of the negligence claims.

In *Pritchard v. Liggett & Myers Tobacco Co.*, the plaintiff brought suit based upon the defendant's negligent failure to warn of the risk of disease and its breach of express warranty. The United States District Court for the Western District of Pennsylvania dismissed the breach of warranty action and granted the manufacturer's motion for a directed verdict on the negligence claim, stating that the plaintiff had offered insufficient evidence of merchantability, whereby the seller warrants that the goods sold are reasonably fit for the general purposes for which they are sold, U.C.C. § 2-314(1) (1978), and implied warranties of fitness for a particular use, whereby the seller warrants that the goods sold are suitable for the special purpose of the buyer. *Id.* § 2-315.

23. In a negligence action, liability is based on the defendant's failure to use the level of care that a reasonably prudent and careful person would have used under the circumstances. W. Keeton, D. Dobbs, R. Keeton & G. Owen, *Prosser and Keeton on the Law of Torts* § 30 (5th ed. 1984).


25. See e.g., *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 296 (3d Cir. 1961) (alleged warranties appeared in advertisements published in newspapers and magazines stating that defendant's cigarettes were not harmful).


27. See e.g., *Pritchard*, 295 F.2d at 299 (plaintiff attempted to prove manufacturer could have foreseen danger of smoking cigarettes and therefore had a duty to warn consumers of danger and to advise proper precautions).


29. The plaintiff sought compensatory and punitive damages for loss of his right lung from cancer allegedly caused by smoking the defendant's cigarettes. *Pritchard*, 295 F.2d at 294. The plaintiff based the breach of warranty claim on the defendant's alleged violation of the Pennsylvania Uniform Sales Act. *Id.* at 296 n.3. The plaintiff alleged that the defendant represented through advertisements that smoking the defendant's cigarettes would not adversely affect the nose, throat, and accessory organs. *Id.* at 296-97.
the defendant's negligence.\textsuperscript{30} The United States Court of Appeals for the
Third Circuit reversed and remanded for a new trial, holding that sufficient
evidence existed of a causal connection between Pritchard's lung cancer and
his smoking the defendant's cigarettes to require the district court to submit
to the jury the issues of the defendant's negligence\textsuperscript{31} and breach of implied
and express warranties.\textsuperscript{32} Although the court stated that the facts supported
both an express and an implied warranty claim,\textsuperscript{33} the plaintiff dropped the
implied warranty claim at the retrial.\textsuperscript{34}

On retrial, the jury found that Pritchard's cancer resulted from smoking
but that the manufacturer was not negligent in failing to warn Pritchard of
the risk of contracting cancer and had not expressly warranted its product.\textsuperscript{35}
The jury also determined that Pritchard had assumed the risk of injury by
smoking the defendant's cigarettes.\textsuperscript{36} The Third Circuit, however, reversed
the jury's finding of assumption of risk, holding that it was not supported by
the evidence because it did not appear that Pritchard knew or had notice of
the harmful effects of smoking cigarettes.\textsuperscript{37} Having already established cau-
sation, the plaintiff might have proven liability on an implied warranty the-
ory had he not chosen to terminate the case.\textsuperscript{38} Pritchard's outcome was the
most favorable one for consumers during this period\textsuperscript{39} as the plaintiff was
able to establish causation and only had to prove liability on an implied
warranty theory to succeed.

The "longest and most nearly successful"\textsuperscript{40} attempt to hold a tobacco
manufacturer liable for injuries allegedly caused by cigarette consumption

\textsuperscript{30} Id. at 295. The plaintiff produced five medical experts in an attempt to establish the
causal relationship between smoking and lung cancer. \textit{Id.} at 294-95.
\textsuperscript{31} Id. at 300.
\textsuperscript{32} Id. at 296-97.
\textsuperscript{33} Id. at 296.
\textsuperscript{34} Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479, 481 (3d Cir. 1965). \textit{See}
Garner, \textit{supra} note 3, at 1427.
\textsuperscript{35} Pritchard, 350 F.2d at 482.
\textsuperscript{36} Id.
\textsuperscript{37} Id. at 485. The court later amended its opinion to state that the plaintiff need not
relitigate the issue of causation because the jury decided that issue in the second trial. Pritch-
ard v. Liggett & Myers Tobacco Co., 370 F.2d 95, 95-96 (3d Cir. 1966). The court, however,
would have required the plaintiff to relitigate liability and damages. \textit{Id.} at 96.
\textsuperscript{38} \textit{See} Garner, \textit{supra} note 3, at 1427-28. The plaintiff claimed that proving liability was
an "insurmountable" problem. \textit{Id.} The appellate court stated, however, that "the facts sup-
port[ed] both a warranty of merchantability and fitness for use, i.e., that Chesterfield cigarettes
were reasonably fit and generally intended for smoking without causing physical injury." Pritch-
ad v. Liggett & Myers Tobacco Co., 295 F.2d 292, 296 (3d Cir. 1961). Thus, it appears
from the court's statement that the plaintiff could have succeeded in establishing liability based
on a breach of implied warranty theory.
\textsuperscript{39} \textit{See} Garner, \textit{supra} note 3, at 1427.
\textsuperscript{40} \textit{See id.} at 1423.
occurred in *Green v. American Tobacco Co.* 41 In *Green*, the plaintiffs were the family of a smoker who died from lung cancer. 42 After determining that smoking the defendant's cigarettes caused the decedent's cancer, the jury found the defendant not liable because the defendant could not foresee the harmful effects of tobacco. 43 While the United States Court of Appeals for the Fifth Circuit affirmed the district court's judgment for the manufacturer, 44 it certified to the Supreme Court of Florida the question of whether the manufacturer must have known of the danger of its product to be held liable for injuries caused by using the product. 45 The state court answered in the affirmative, 46 and in response, the Fifth Circuit remanded the case, holding that sufficient evidence existed to submit to a jury the issue of whether the cigarettes were reasonably fit and wholesome for human consumption. 47

At the second trial, the jury again rendered judgment for the manufacturer. 48 The Fifth Circuit again reversed, holding that Green was entitled to rely on the manufacturer's implied assurances that cigarettes were reasonably fit for their intended purpose, and thus the manufacturer could be held strictly liable for Green's death. 49 On rehearing en banc, the Fifth Circuit

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41. 304 F.2d 70 (5th Cir. 1962), certified question answered, 154 So. 2d 169 (Fla.), conformed to, 325 F.2d 673 (5th Cir. 1963), cert. denied, 377 U.S. 943 (1964), remand rev'd and remanded, 391 F.2d 97 (5th Cir. 1968), rev'd per curiam on reh'g en banc, 409 F.2d 1166 (5th Cir. 1969), cert. denied, 397 U.S. 911 (1970).

42. 304 F.2d at 71. The plaintiffs originally asserted six theories of liability: breach of implied warranty, breach of express warranty, negligence, misrepresentation, battery, and violation of various federal statutes. *Id.* The United States District Court for the Southern District of Florida upheld the manufacturer's motion for a directed verdict on all but the breach of implied warranty and negligence counts. *Id.*

43. *Id.* at 71-72.

44. *Id.* at 76.

45. *Id.* at 86.

46. *Green v. American Tobacco Co.*, 154 So.2d 169, 170-71 (Fla. 1963). The Supreme Court of Florida stated that under Florida law "a manufacturer's or seller's actual knowledge or opportunity for knowledge of a defect or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty." *Id.* at 170.

47. *Green v. American Tobacco Co.*, 325 F.2d 673, 676-77 (5th Cir. 1963), cert. denied, 377 U.S. 943 (1964). Although the first jury found that smoking the defendant's "Lucky Strike" brand of cigarettes caused Green's lung cancer, *see Green*, 304 F.2d at 71-72, the Fifth Circuit refused to reverse the trial court's instruction at the second trial that Green's family would have to prove that the cigarettes presented a "common danger to the general public as distinguished from Mr. Green." *See Green*, 391 F.2d at 102. In other words, the court required the plaintiffs to prove that Lucky Strike cigarettes "endangered" more smokers than Green alone to prevail on a breach of implied warranty of fitness for use theory. *Id.* *See also* Garner, supra note 3, at 1427.

48. *Green*, 391 F.2d at 99. Under the Fifth Circuit's previous opinion, the only issue at the second trial was whether Lucky Strike cigarettes were reasonably fit and wholesome for human consumption. *Id.* at 101. The parties were barred from relitigating the previously established facts that Green died from lung cancer and that cigarettes caused his cancer. *Id.*

49. *Id.* at 106.
overruled its reversal and reinstated the judgment in favor of the manufacturer, concluding that cigarettes were not defective but were reasonably fit for human use even though a significant portion of the population might develop cancer from smoking. The United States Supreme Court denied plaintiffs' petition for writ of certiorari and thus ended the longest and most complex cigarette product liability trial to date.

Three cigarette product liability cases alleging breach of warranty were lost by plaintiffs because they could not prove the cigarette companies could have foreseen the harmful consequences of smoking. In *Lartigue v. R.J. Reynolds Tobacco Co.*, the United States Court of Appeals for the Fifth Circuit upheld the jury's verdict for the defendants, finding that a smoker's widow had no actionable claim against two cigarette manufacturers for either negligence or breach of implied warranty because the state of medical knowledge was such that the manufacturers could not have known that their products might cause cancer.

In *Ross v. Philip Morris & Co.*, a case similar to *Lartigue*, the United States Court of Appeals for the Eighth Circuit upheld the district court's

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50. See *Green*, 409 F.2d at 1166. The Fifth Circuit affirmed the lower court for the reasons set forth in Judge Simpson's dissent in the second remand. *Id.* In finding cigarettes not defective, Judge Simpson stated:

We are not dealing with an obvious, harmful, foreign body in a product. Neither do we have an exploding or breaking bottle case wherein the defect is so obvious that it warrants no discussion. Instead, we have a product (cigarettes) that is in no way defective. They are exactly like all others of the particular brand and virtually the same as all other brands on the market.


52. See Garner, supra note 3, at 1423. The *Green* litigation lasted twelve years and included six appeals and two jury trials. *Id.*

53. 317 F.2d 19 (5th Cir.), cert. denied, 375 U.S. 865 (1963). The plaintiff sued two cigarette companies for the death of her husband, alleging that he contracted cancer from 55 years of smoking the defendant's cigarettes. *Id.* at 22. The plaintiff testified that her husband was a two-pack-a-day smoker and a "cigarette fiend." *Id.*

54. In approving the trial court's jury instruction that an implied warranty does not apply to substances in manufactured products, the "harmful effects of which no developed human skill or foresight can afford," *id.* at 23, the court stated:

Thus far, public policy has not decreed absolute liability for "the harmful effects of which no developed skill or foresight can avoid." At this point, it cannot be said that cigarette smokers who started smoking before the great cancer-smoking debate relied on the tobacco companies' "warranty" that their cigarettes had no carcinogenic element. Today, the manufacturer is not an insurer against the unknowable. *Id.* at 39-40.

55. 328 F.2d 3 (8th Cir. 1964). The plaintiff, who smoked at least two packs of cigarettes per day, sued a cigarette manufacturer on theories of breach of implied warranty, negligence, and fraud by false advertising alleging that smoking caused his cancer. *Id.* at 5.
entry, after a jury trial, of judgment for the manufacturer. Like the Fifth Circuit in Lartigue, the Eighth Circuit held that a manufacturer's implied warranty that its product is reasonably fit for its intended use applies only to foreseeable harmful effects. Finally, in Hudson v. R.J. Reynolds Tobacco Co., the Fifth Circuit affirmed the district court's summary judgment in favor of the manufacturer because the plaintiffs failed to prove the foreseeability of the hazards of cigarette smoking.

In addition to breach of warranty and negligence actions, one plaintiff brought suit based on fraud. In Cooper v. R.J. Reynolds Tobacco Co., the United States Court of Appeals for the First Circuit reversed the district court's judgment for the defendant. The First Circuit held that the plaintiff's complaint established a cause of action for fraud arising out of the defendant's allegedly having advertised that its cigarettes were "healthful" and "harmless to the respiratory system." On remand, the United States District Court for the District of Massachusetts granted the company's motion for summary judgment, holding that the evidence was insufficient to establish that it made the alleged representations. The First Circuit affirmed the district court's finding because the plaintiff did not produce the advertisements in question.

The last reported case filed between the 1950's and 1960's was Albright v. R.J. Reynolds Tobacco Co. In Albright, the court did not address the merits of the plaintiff's claim against the cigarette company because the plaintiff had already settled a suit against a municipality in which he alleged

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56. Id. at 16.
57. Id. at 8-13.
58. 427 F.2d 541 (5th Cir. 1970) (per curiam). In Hudson, a cigarette smoker's family sued a tobacco company alleging that he developed cancer of the lungs and larynx from smoking the defendant's cigarettes. Id. at 541.
59. Id. at 542. The Fifth Circuit affirmed the district court's findings on the basis of Lartigue.
60. Id.
61. 234 F.2d 170 (1st Cir. 1956), on remand, 158 F. Supp. 22 (D. Mass. 1957), aff'd per curiam, 256 F.2d 464 (1st Cir.), cert. denied, 358 U.S. 875 (1958). In Cooper, a woman sued to recover damages for the pain, suffering, and death of her husband from lung cancer allegedly caused by smoking the defendant's "Camel" brand of cigarettes. Id. at 171, 173 n.1.
62. Id. at 173-74 & n.l. The plaintiff alleged that the defendant advertised in newspapers that "20,000 doctors say that 'Camel' cigarettes are healthful" and that the defendant advertised on television and radio that " 'Camel' cigarettes are harmless to the respiratory system." Id. at 173 n.1 (emphasis omitted).
63. Cooper, 158 F. Supp. at 25.
64. Cooper, 256 F.2d at 466. The company's uncontradicted affidavits denied the existence of any such advertisements. Id.
65. See Garner, supra note 3, at 1423 n.3.
his lung cancer resulted from an automobile accident.  

II. STATUTORY LAW DEVELOPMENT: THE FEDERAL CIGARETTE LABELING AND ADVERTISING ACT

In the product liability lawsuits filed against cigarette companies in the 1980’s, the plaintiffs have alleged that the defendant manufacturers negligently or intentionally failed to adequately warn them of the hazards of smoking and advertised their products in a manner that rendered ineffective those warnings actually given. In answer to these allegations, cigarette manufacturers have raised the defense that the Act precludes state tort claims based on labeling and advertising. Congress passed the Act in 1965 in “response to a growing awareness among members of federal as well as state government that cigarette smoking posed a significant health threat to Americans.” As amended in 1970, section 1331 of the Act contains a declaration of legislative intent that indicates that the congressional purpose was twofold—to inform consumers of the health risks of smoking and to ensure uniformity of cigarette labeling.

To carry out this policy Congress required, under section 1333, that the

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67. Albright, 350 F. Supp. at 344-47. In Albright, the plaintiff sued a tobacco manufacturer alleging that smoking the defendant’s cigarettes caused his lung cancer. Id. at 344. After filing this action, the plaintiff settled a suit against the City of Pittsburgh for injuries he received when his car hit a street excavation. Id. at 343-44. In the suit against the city, the plaintiff claimed he developed lung cancer as a result of the accident. Id. at 344. The court held that settlement of the suit against the city precluded the plaintiff from maintaining the suit against the tobacco manufacturer. Id. at 344-47.


69. Cipollone, 789 F.2d at 184.


71. Id. Section 1331 read:

   It is the policy of the Congress, and the purpose of this chapter, 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.

In 1984 Congress amended paragraph one of § 1331 to include a reference to health warnings in cigarette advertisements as well as on cigarette packages. Paragraph one currently states: “(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) (Supp. III 1985).
following notice appear on cigarette packages: "Caution: Cigarette Smoking May Be Hazardous to Your Health." In 1970, Congress altered the notice to read: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." In 1984, Congress amended the Act to require that one of four more explicit health notices appear in rotation on cigarette packages. The 1984 amendments to the Act also require that various rotational warnings appear on all print advertisements and outdoor billboards. The Act further provides that cigarettes may not be advertised on radio or television. It gives the Federal

72. Id. § 1333 (1970).
73. Id. § 1333 (1976).
74. Section 1333(a)(1) currently provides:
   It shall be unlawful for any person to manufacture, package, or import for sale or distribution within the United States any cigarettes the package of which fails to bear, in accordance with the requirements of this section, one of the following labels:
   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.
76. Id. § 1331(a)(3).

In addition to the current ban on radio and television advertising of cigarettes, a bill introduced in the 99th Congress in the House of Representatives proposes to ban all other forms of consumer-oriented promotional advertising of all tobacco products. See H.R. 4972, 99th Cong., 2d Sess. (1986). The bill, known as the Health Protection Act of 1986, was introduced on June 10, 1986, by Congressman Mike Synar (D-Okla.). 132 CONG. REC. H3481 (daily ed. June 10, 1986). The bill would prohibit advertising tobacco products in print media such as newspapers, magazines, billboards, posters, and point-of-purchase display materials. H.R. 4972, §§ 3(a), 5 (1986). Advertising through sample giveaways and sponsorship of athletic events would also be prohibited. Id. § 5. Hearings on the bill were held on July 18, 1986, 132 CONG. REC. D855 (daily ed. July 21, 1986), and August 1, 1986, 132 CONG. REC. D938 (daily ed. Aug. 1, 1986), and the bill most likely will be reintroduced in the 100th Congress. See Abramson, Battle Lines Drawn in Cigarette Ad Fight, Legal Times, Nov. 10, 1986, at 1.

Trade Commission authority to regulate "unfair or deceptive acts or practices in the advertising of cigarettes,"\textsuperscript{78} and the district courts jurisdiction to enjoin violations of the Act.\textsuperscript{79} It also requires the Secretary of Health and Human Services to submit to Congress an annual report on the health effects of smoking.\textsuperscript{80}

Significantly, the Act also contains a provision on preemption, section 1334, which provides that "[n]o statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package."\textsuperscript{81} Section 1334 also states that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any ciga-

\textsuperscript{78} 15 U.S.C. § 1336 (Supp. III 1985). In 1964 the Federal Trade Commission concluded that cigarette advertising was deceptive and unfair and proposed to adopt a trade regulation rule governing cigarette advertising. See Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8325 (1964). The rule would have required cigarette manufacturers to include a warning of the adverse health effects of smoking on each cigarette package and in all cigarette advertisements. Id. Congress preempted the rule by enacting its own cigarette health warnings in the Act. The Act, however, explicitly states that the Commission's authority to regulate unfair or deceptive practices in cigarette advertising was not affected. See 15 U.S.C. § 1336 (Supp. III 1985).

The Commission recently charged R.J. Reynolds Tobacco Company with misrepresenting, in an "editorial" advertisement, the results of a government study on cigarette smoking and health. See Mintz, Judge Shelves Complaint on Reynolds Tobacco Ad, Wash. Post, Aug. 7, 1986, at E2, col. 1. The advertisement, entitled "Of Cigarettes and Science," claimed that federally funded studies indicated smoking is not as dangerous as the public has been told and challenged the link between smoking and heart disease. Id. An administrative law judge dismissed part of the Commission's complaint, concluding that even if the advertisement was inaccurate and incomplete, it was protected by the first amendment as noncommercial speech. Id.


\textsuperscript{81} Section 1334 reads:

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

(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

rettes the packages of which are labeled in conformity with the provisions of this chapter." Thus section 1334 bars states from regulating cigarette packaging and advertising by forbidding a warning other than the warning set forth in the Act. In recent cigarette injury cases manufacturers have argued that to allow plaintiffs to recover damages based on theories of inadequate warnings and advertising practices that undermine those warnings actually given would be to permit states to indirectly impose additional warning requirements on manufacturers in violation of this provision.

III. CASE LAW DEVELOPMENT: THEORIES OF LIABILITY IN THE 1980's

A. The Split of Authority in the Federal Courts

In the 1980's, plaintiffs filed a second group of product liability lawsuits against cigarette manufacturers. In *Cipollone v. Liggett Group, Inc.*, a cigarette smoker and her husband sued three cigarette companies on theories

82. Id. § 1334(b).
84. See infra notes 85-111 and accompanying text.
86. Manufacturers of tobacco products other than cigarettes are also increasingly being sued for illnesses allegedly caused by using their products. For example, in Marsee v. United States Tobacco Co., No. 84-2777 (D. Okla. July 2, 1986) (order dismissing case), the plaintiff sued, seeking 37 million dollars in damages for the wrongful death of her son from oral cancer allegedly caused by using the defendant's smokeless tobacco. The *Marsee* case was the first product liability case involving smokeless tobacco to be tried by a jury. Mintz, *Jury Weighs Lawsuit Over Use of Snuff: Lawyers for Marsee, Firm Trade Barbs*, Wash. Post, June 20, 1986, at A16, col. 1. The jury found that smokeless tobacco did not cause the oral cancer that killed the plaintiff's son. Mintz, *Tobacco Company is Cleared: Jury Decides Snuff Didn't Cause Death*, Wash. Post, June 21, 1986, at G1, col. 6. The case was considered difficult for the tobacco industry to win because the defendant had advertised on television and its products carried no warning labels. Id. at G2, col. 4. Legislation prohibiting the advertisement of smokeless tobacco products on radio and television had been passed at the time of the trial but had not yet taken effect. See 15 U.S.C.A. § 4402(f) (West Supp. 1986). One of the following warning labels is now required on smokeless tobacco packages and in print advertisements for smokeless tobacco:

WARNING: THIS PRODUCT MAY CAUSE MOUTH CANCER
WARNING: THIS PRODUCT MAY CAUSE GUM DISEASE AND TOOTH LOSS
WARNING: THIS PRODUCT IS NOT A SAFE ALTERNATIVE TO CIGARETTES

Id. § 4402(a). See 1982 *SURGEON GENERAL'S REPORT*, supra note 2, at 201 (using smokeless tobacco increases the risk of cancers of the oral cavity).
of strict liability, intentional tort, negligence, and breach of warranty.\textsuperscript{88} The plaintiffs alleged that the defendants failed to warn adequately consumers of the health risks of smoking and that they advertised their products in a manner that rendered ineffective those warnings actually given.\textsuperscript{89} The defendants argued that compliance with the Act preempted state law claims based on labeling and advertising.\textsuperscript{90}

The United States District Court for the District of New Jersey rejected this preemption defense.\textsuperscript{91} The court found that state case law was not expressly preempted by the Act because state law was not a "requirement" or a "prohibition" that could be superseded by the Act's preemption clause.\textsuperscript{92} The court also determined that the Act did not impliedly preempt state case law.\textsuperscript{93} The court reasoned that the Act's purpose was to establish a uniform warning so that cigarette manufacturers would not be subjected to varying state warning requirements.\textsuperscript{94} The court concluded that allowing plaintiffs to bring state law product liability suits against manufacturers would not undermine this purpose.\textsuperscript{95}

The United States Court of Appeals for the Third Circuit reversed the district court,\textsuperscript{96} holding that state law claims challenging the adequacy of

\begin{footnotes}
\footnote{88. Cipollone, 593 F. Supp. at 1149.}
\footnote{89. Id.}
\footnote{90. Id. at 1148. This argument is based on the supremacy clause of the United States Constitution, U.S. CONST. ART. VI, CL. 2, which authorized Congress to preempt state law. Congress may expressly preempt state law by including preemption language in a statute. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). Absent express preemption, federal law may impliedly preempt state law if Congress indicates its intent to "occupy a given field." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984). Congress' intent to occupy a given field, and thus supersede state law, can be determined from the pervasiveness of the federal regulatory scheme, from the dominance of the federal interest, or from the goals of, and obligations imposed by, the federal statute. Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982). Even where Congress has not completely displaced state regulation, state law may still be preempted if it conflicts with federal law. Silkwood, 464 U.S. at 248. Such conflict occurs where it is impossible to comply simultaneously with state and federal law or where state law interferes with the accomplishment of congressional purposes and objectives. Id. Federal statutes can preempt both state statutes and state case law. Sperry v. Florida, 373 U.S. 329, 403 (1963). There is, however, a presumption against preemption. Maryland v. Louisiana, 451 U.S. 725, 746 (1981). See generally Cipollone, 593 F. Supp. at 1150-53 (discussing preemption principles).}
\footnote{91. Cipollone, 593 F. Supp. at 1148.}
\footnote{92. Id. at 1155-56.}
\footnote{93. Id. at 1157-70.}
\footnote{94. Id. at 1169. See also 15 U.S.C. § 1331 (1982 & Supp. III 1985).}
\footnote{96. See Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986), cert. denied, 55 U.S.L.W. 3470 (U.S. Jan. 13, 1987) (No. 86-563). The tobacco industry predicted that the Third Circuit's opinion would end the rash of law suits filed by smokers and their families.}
the warnings on cigarette packages and the advertising practices of the to-
bacco industry were precluded by the Act because the claims would conflict
with the Act's goals and purposes. The Third Circuit agreed that the Act
did not expressly bar state law claims, although it did hold that the Act
impliedly preempted those claims "relating to smoking and health that chal-
lenge either the adequacy of the warning on cigarette packages or the prop-
erty of a party's actions with respect to the advertising and promotion of
cigarettes."97 The Act also implicitly precluded claims that depend for suc-
cess "on the assertion that a party bore the duty to provide a warning to
consumers in addition to the warning Congress has required on cigarette
packages."98 The court determined that allowing plaintiffs to bring claims
based on these theories would conflict with the Act's purposes of warning
the public of the health risks of smoking and protecting the interest of the
nation's economy.99

Opinions by other courts on the preemption defense conflict. The United
States District Court for the District of Massachusetts rejected this defense
in Palmer v. Liggett Group, Inc.,100 a case brought by the family of a man
who died from lung cancer allegedly caused by smoking cigarettes. The
court in Palmer agreed with the district and appellate courts in Cipollone
that the Act does not expressly bar state law claims.101 The court in Palmer
agreed, however, with the district court in Cipollone that by passing the Act
Congress did not impliedly preempt private "rights and remedies tradition-
ally defined solely by state law."102 The court rejected the defendants' argu-
ments that tort suits frustrate the Act's purpose and that it would be

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97. Cipollone, 789 F.2d at 187 (footnote omitted).
98. Id.
99. Id. The Third Circuit remanded the case to the district court for further development
of the parties' claims and to determine which claims were preempted. Id. at 188. The United
States Supreme Court denied plaintiffs' petition for a writ of certiorari. 55 U.S.L.W. 3470
100. 633 F. Supp. 1171 (D. Mass. 1986), appeal docketed, No. 86-1525 (1st Cir. May 5,
1986).
101. Id. at 1174. The court noted that although Congress could have included a savings
clause explicitly preserving state law actions, the omission of a savings clause was not as proba-
tive as the omission of a clause explicitly barring state law claims because there is a presump-
tion against the preemption of state law. Id. at 1174-75. Congress included such a savings
clause explicitly preserving common law claims in the Comprehensive Smokeless Tobacco
this chapter shall relieve any person from liability at common law or under State statutory law
to any other person.").
102. Id. at 1176 (quoting Cipollone v. Liggett Group, Inc., 789 F.2d 181, 186 (3d Cir.
1986)).
impossible to comply with the Act and simultaneously be subject to tort liability. The court reasoned that, in granting compensation to plaintiffs, states are not imposing labeling regulations on manufacturers. Moreover, the court noted that the Act merely requires the presence of the federal warning and "prohibits states or the federal government from requiring any different warnings." It does not preclude manufacturers from choosing to respond to potential tort liability by placing an additional warning, stronger than that required by the Act, on cigarette packages and in cigarette advertisements.

In contrast to the holding in Palmer, the United States District Court for the Eastern District of Tennessee, in Roysdon v. R.J. Reynolds Tobacco Co., held that the Act does preempt state law claims. In Roysdon, a smoker and his wife claimed that his peripheral vascular disease was caused by years of smoking the defendant's cigarettes. They alleged that the defendant's cigarettes were defective, that they were unreasonably dangerous, and that the warnings on cigarette packages and in cigarette advertisements were inadequate. The court held that the Act barred tort actions alleging inadequacy of labeling because such actions conflicted with the Act's purpose of ensuring labeling uniformity. The court also observed that, under Tennessee law, cigarettes were not unreasonably dangerous in view of the widespread public knowledge of their harmful properties.

103. Id. at 1177.
104. Id.
105. Id.
106. Id.
108. Id. at 1190. Before trial the court dismissed the plaintiffs' claim that the warnings on cigarette packages and in cigarette advertisements were inadequate. Id. The court directed a verdict for the cigarette manufacturer on the claim that the defendant's cigarettes were unreasonably dangerous, finding that the plaintiffs had failed to prove their prima facie case. Id.
109. Id.
110. The court reasoned that imposing tort damages on manufacturers for inadequate cigarette labeling would conflict with the Act's purpose of ensuring labeling uniformity by permitting a state to "achieve indirectly, through exposure to tort liability, what it could not achieve directly through legislation. . . . Exposing a manufacturer to potential damages on the basis of its warning label is a way of requiring a more stringent label." Id. at 1191.
111. Id. at 1192. The court noted that in Pemberton v. American Distilled Spirits, 664 S.W.2d 690 (Tenn. 1984), the Tennessee Supreme Court "took judicial notice of the widespread public understanding of the dangers inherent in alcohol." Id. The court further observed that Tennessee tort law incorporates comment i to section 402A of the Restatement (Second) of Torts, which states that to be unreasonably dangerous, 

[the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dan-


B. The Rationale for Rejecting the Preemption Defense

The district court in *Cipollone* and the court in *Palmer* both found that the Act neither expressly nor impliedly preempted causes of action based on health warnings and advertising practices. In rejecting the preemption defense both courts noted that federal statutes have preempted state law in many areas. There is a presumption, however, against preemption because state law is “often the result of many generations of judicial development.” The presumption against preemption is particularly strong where preemption would leave a plaintiff without an adequate remedy for alleged violations of his or her state-created rights. Because section 1334 of the Act does not expressly prohibit damage suits, holding that the Act precludes plaintiffs’ claims with respect to warnings and advertisements would deprive plaintiffs of the opportunity to bring such claims where Congress has provided no remedy for violations of these rights.

In addressing the express preemption defense the district court in *Cipollone* noted that, under section 1334, Congress preempted state regulation of cigarette labeling and advertising. Nevertheless, the court rejected the defendant’s contention that state tort law has a direct regulatory impact on an industry by redistributing losses caused by certain products from injured individuals to the products’ manufacturers. As the court in *Palmer* noted, however, compensating plaintiffs in the form of damage awards for alleged injuries is not direct state action in the same way that awarding plaintiffs injunctive relief would be.

The court in *Palmer* and the district court in *Cipollone* also concluded...
that the Act does not impliedly preempt state law claims.\footnote{Id. at 1173; Cipollone, 593 F. Supp. at 1170-71.} After an analysis of the Act's legislative history the Cipollone court found that Congress intended only to prohibit states from regulating cigarette labeling and advertising,\footnote{Cipollone, 593 F. Supp. at 1161. At the time the Act was passed bills were pending before several state legislatures that would have required health warnings in cigarette advertisements. Id.} and not to foreclose plaintiffs' state law remedies. The court noted that plaintiffs brought product liability suits against cigarette manufacturers before the Act was passed\footnote{Id. at 1161-62. See supra note 4.} and that the Act's legislative history indicated that Congress was aware of these suits.\footnote{The court stated that "although neither the statute itself nor the final committee reports explicitly address the status of these cases after passage of the Act, congressional debate recognized their continued existence." Cipollone, 593 F. Supp. at 1162.} Thus, at the time of enactment, Congress could have statutorily barred plaintiffs from recovering damages had Congress intended to deny plaintiffs this remedy.\footnote{Id.}

The district court in Cipollone and the court in Palmer also determined that state tort law did not conflict with the Act because compliance with both is possible.\footnote{Palmer, 633 F. Supp. at 1177; Cipollone, 593 F. Supp. at 1166.} These courts reasoned that the Act makes it illegal to omit the prescribed health warning from cigarette packages.\footnote{Palmer, 633 F. Supp. at 1177; Cipollone, 593 F. Supp. at 1167. See 15 U.S.C. § 1333 (Supp. II 1984).} It does not prohibit manufacturers from putting additional warnings on cigarette packages in response to adverse jury verdicts.\footnote{Palmer, 633 F. Supp. at 1177; Cipollone, 593 F. Supp. at 1167-68.} Such an action would be the manufacturer's choice, not an action required by state law, and thus, would not conflict with the Act.\footnote{See Palmer, 633 F. Supp. at 1178 ("Many courts have held that compliance with federal labeling requirements under other similar statutes does not immunize a defendant from suit. A jury is still free to find that a reasonable person would have included additional warnings." (citations omitted). See also RESTATEMENT (SECOND) OF TORTS § 288C (1965) ("Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions.").}

C. The Rationale for Applying the Preemption Defense

Both the Third Circuit in Cipollone and the court in Roysdon determined
that the Act precluded state law actions based on allegedly inadequate health warnings.\textsuperscript{130} In reversing the district court, the Third Circuit held in \textit{Cipollone} that state law claims challenging the sufficiency of the health warnings on cigarette packages and the advertising practices of cigarette companies are implicitly preempted by the Act because they would conflict with its goals and purposes.\textsuperscript{131} The court accepted the defendants' assertion that state law damage actions are regulatory and thus conflict with the Act's purposes by imposing requirements on manufacturers different from those in the Act.\textsuperscript{132}

Like the Third Circuit in \textit{Cipollone}, the \textit{Roysdon} court concluded that the Act preempts state law claims based on the adequacy of cigarette warnings.\textsuperscript{133} Although the court found that the Act "does not explicitly prohibit state common law tort actions based on labeling," it determined that Congress' intent to prohibit common law actions could "be implied from the structure and purpose of the Act."\textsuperscript{134} The court reasoned that the purpose of section 1331 of the Act was twofold—to inform the public of the adverse health effects of smoking and to ensure uniformity of cigarette labeling.\textsuperscript{135} Exposing cigarette manufacturers to tort liability for inadequate labeling would not conflict with the first congressional objective of informing the public, but it would conflict with the second objective of ensuring labeling uniformity.\textsuperscript{136} Exposing cigarette manufacturers to liability on the basis of an inadequate warning label can be viewed as a way for states to indirectly require a more stringent warning label than the one Congress required and therefore thwart congressional intent to secure uniform labeling.\textsuperscript{137}

\section*{IV. The Future of Judicial and Legislative Action}

\textbf{A. The Courts' Role}

The cigarette smoking injury cases litigated in the 1980's are significant because of their potential to influence future cigarette product liability law. Preventing plaintiffs from challenging the adequacy of the health warnings

\begin{thebibliography}{137}
\bibitem{131} \textit{Cipollone}, 789 F.2d at 187.
\bibitem{132} \textit{Id.}
\bibitem{133} \textit{Roysdon}, 623 F. Supp. at 1190-91.
\bibitem{134} \textit{Id.} at 1190 (citation omitted).
\bibitem{136} \textit{Roysdon}, 623 F. Supp. at 1191. \textit{See} \textit{Cipollone}, 789 F.2d at 187 (The Act preempts claims based on warnings and advertisements because they conflict with Congress' "carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of national economy.") (citations omitted).
\bibitem{137} \textit{See supra} note 110 and accompanying text.
\end{thebibliography}
or the advertising practices of the tobacco industry would narrow the realm of plaintiffs’ possible legal theories. It would also provide the tobacco industry with another defense in addition to the plaintiff conduct defenses of contributory negligence and assumption of risk. Thus, application of the preemption defense would aid in continuing the trend of immunity of tobacco manufacturers from tort liability.

Yet, allowing plaintiffs to challenge the adequacy of the health warnings and the advertising practices of tobacco manufacturers would give plaintiffs only the “right to present their claims for adjudication.” Permitting these claims to be raised would not ensure their success because overcoming the assumption of risk defense remains a major problem for plaintiffs. Nevertheless, plaintiffs should be allowed to present these claims to juries because of the strong presumption against the preemption of state law by federal law.

Moreover, whether the courts allow plaintiffs to sue on theories of inadequate warnings and misleading advertisements should not affect suits based on the legal theories that plaintiffs have used previously because the Act applies to warnings and advertisements only, not to common law and statutory causes of action. The effect of foreclosing plaintiffs’ suits concerning advertising practices and warnings, however, may be to make it more difficult for plaintiffs to bring claims based on negligence, breach of warranty, and fraud because of the interrelationship between these causes of action and cigarette advertising and labeling. Thus, suits filed in the 1950’s and 1960’s addressed the problems of advertising and labeling under breach of

138. See supra note 24 and accompanying text.
139. See supra note 3 and accompanying text.
140. See Cipollone, 593 F. Supp. at 1171.
141. See id. at 1148, 1171. The district court in Cipollone stated “that it will be extremely difficult for a plaintiff to prove that the present warning is inadequate to inform of the dangers, whatever they may be. However, the difficulty of proof cannot preclude the opportunity to be heard, and affording that opportunity will not undermine the purposes of the Act.” Id. at 1148.
142. See supra notes 114-16 and accompanying text.
143. See Cipollone, 593 F. Supp. at 1156 n.7. See generally Jakobi, supra note 5, at 10 (The Third Circuit’s decision in Cipollone is “wrongly perceived by many to have ended the right to bring common law tort suits against manufacturers.”).
144. See Cipollone, 593 F. Supp. at 1162 n.10. As the court stated:

It should be noted that [the cases filed in the 1950’s and 1960’s] address the problems of labeling and advertising under the aegis of breach of warranty, negligence, or fraud causes of action. Indeed so intertwined is labeling or advertising with any tort causes of action based upon design defects, that the position of defendants . . . that the Act permitted all tort actions except those based upon labeling and advertising is absurd. Labels and advertisements constitute a manufacturer’s public statements about its product; they are a necessary component of any common law tort analysis.

Id. (citations omitted).
warranty, negligence, and fraud theories.\textsuperscript{145}

Under \textit{Cipollone}, smokers cannot challenge either the adequacy of the health warnings on cigarette packages or the advertising practices of the tobacco industry, while under \textit{Roysdon}, smokers cannot bring claims based on allegedly inadequate warnings. Under \textit{Palmer}, however, plaintiffs can still bring these challenges.\textsuperscript{146} The \textit{Palmer} and \textit{Roysdon} cases are currently on appeal\textsuperscript{147} and the Supreme Court recently denied the plaintiffs' writ of certiorari in \textit{Cipollone}.\textsuperscript{148} Affirmance of \textit{Palmer} by the First Circuit or reversal of \textit{Roysdon} by the Sixth Circuit would lead to a split in the circuit courts on the preemption issue.

Plaintiffs are likely to continue challenging the adequacy of the health warnings on cigarette packages until the split in the federal courts is resolved. Plaintiffs will have little difficulty establishing a prima facie case that cigarettes are harmful in light of numerous Surgeon General's reports showing the connection between smoking and disease.\textsuperscript{149} In fact, the warnings currently required on cigarette packages explicitly list the various diseases smoking causes.\textsuperscript{150} Yet, these more detailed warnings also help manufacturers establish the defense of assumption of risk.\textsuperscript{151} Moreover, public health advertising campaigns by the American Cancer Society and the American Medical Association put smokers on notice of the dangerous nature of cigarettes.\textsuperscript{152}

Plaintiffs also are likely to continue challenging defendants' advertising practices. Recently, the courts,\textsuperscript{153} Congress,\textsuperscript{154} and the media\textsuperscript{155} have fo-
cused a great deal of attention on whether tobacco companies' advertising practices are misleading and whether these practices stimulate more people, especially young people, to use tobacco products. Some evidence supports the tobacco industry's claim that advertising causes brand switching rather than total market growth from new users. Other evidence, however, indicates that advertising stimulates more people to smoke than the number of smokers who die or quit every year. Under a narrow reading of the Third Circuit's ruling in *Cipollone*, plaintiffs cannot challenge any of the cigarette companies' advertising practices, even those advertising practices allegedly directed toward encouraging minors to smoke, because the Act preempts all claims based on warnings and advertisements.

If the federal courts ultimately adopt the cigarette manufacturers' theory that state tort liability is regulatory in effect, this ruling may have broad implications for other product liability cases. It could set a precedent for allowing manufacturers to use preemption as a defense to plaintiffs' claims with respect to warnings and advertisements whenever a federal labeling statute requires that states not impose any other requirements on manufacturers. In other words, such a theory could virtually eliminate state prod-

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155. See supra note 77.

156. See Bliley, supra note 77, at 8 ("[T]obacco advertising is not designed to induce people to begin smoking. Its major action, according to the Surgeon General's 1979 Report, 'seems to be to shift brand preferences . . . ."). *Id.*

157. See *Synar I*, supra note 77, at 8. As the author notes, *(i)f [it] is true [that advertising does not encourage smoking], why is the tobacco industry spending over $2 billion annually on advertising—more than any other product in America? According to the industry lobbyists, they are only trying to encourage smokers to switch brands. But only 10 percent of all smokers change brands each year. That means the tobacco industry is spending $355 for each smoker who switches.*

*Id.* Three hundred fifty thousand smokers die annually in the United States from cigarette related diseases, Blasi & Monaghan, supra note 2, at 502, and 1,500,000 quit yearly. *Id.* at 503. Ninety percent of regular smokers have attempted to quit. Jakobi, supra note 5, at 13. Approximately 33% of all Americans smoke. Brandt, *Foreword* to 1982 *SURGEON GENERAL'S REPORT*, supra note 2, at ix.

158. See *Cipollone v. Ligget Group, Inc.*, 789 F.2d 181, 187 (3d Cir. 1986) (the Act "preempts those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes") (footnote omitted).

159. See generally Tribe, *Anti-Cigarette Suits: Federalism With Smoke and Mirrors*, *The Nation*, June 7, 1986 (criticizing Third Circuit's opinion in *Cipollone* as being harmful to
uct liability suits in areas where federal health and safety standards exist.\textsuperscript{160}

\section*{B. The Congress' Role}

Whatever Congress intended, the Act has provided manufacturers with a defense to tort claims based on warnings and advertisements that has been accepted by some courts and rejected by others. Assuming that Congress wants to resolve this controversy, several options are available to it. Congress could amend the Act by adding a preemption clause to prohibit plaintiffs from recovering damages for tobacco-related illnesses if Congress intends that plaintiffs not recover.\textsuperscript{161} Alternatively, Congress could amend the Act to include a savings clause preserving plaintiffs' state law remedies.\textsuperscript{162} By failing to include either of these clauses, Congress originally may have intended that the courts continue to decide whether plaintiffs should recover damages.\textsuperscript{163} In the absence of an explicit statement of legislative intent in the form of a preemption or a savings clause, it is left to the courts to decide whether plaintiffs can recover for injuries allegedly caused by inadequate cigarette warnings and deceptive advertisements.\textsuperscript{164}

\section*{V. Conclusion}

The impact of the cases holding that the Federal Cigarette Labeling and Advertising Act preempts claims against cigarette manufacturers that challenge either the adequacy of the warnings on cigarette packages or the advertising practices of the tobacco industry is limited because the cases expressly federalism concerns because case limits right of states to adjudicate product liability suits in areas where federal health and safety standards apply).

160. See generally id.


162. See, e.g., Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C.A. § 4406(c) (West Supp. 1986) ("Nothing in this chapter shall relieve any person from liability at common law or under State statutory law to any other person.").

163. See Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146, 1162-66 (D.N.J. 1984) (citing congressional debate on the Act as proof that Congress intended to permit plaintiffs' product liability lawsuits to continue); see also Palmer v. Liggett Group, Inc., 633 F. Supp. 1171, 1179 (D. Mass. 1986). The Palmer court cites congressional debate and statutory language from the Comprehensive Smokeless Tobacco Health Education Act of 1986, which requires health warnings to appear on smokeless tobacco product packages and in smokeless tobacco advertisements, to show that Congress was aware of cases like Cipollone and Roysdon while the Smokeless Tobacco Act was pending and that Congress, by including a savings clause in that Act, intended for state law actions against smokeless tobacco manufacturers to continue. \textit{Id.}

164. See Tribe, supra note 159, at 790 ("[A]s long as state law permits, the verdicts should be left by courts where they were left by Congress: for juries to decide, based on the particular set of circumstances in each case.").
bar only these claims and not those based on other theories. The rulings in these cases, however, do continue the trend of de facto immunity of tobacco products manufacturers from civil liability and narrow the number of theories upon which plaintiffs can sue manufacturers. Moreover, foreclosing suits based on advertisements and warnings may make it more difficult for smokers to bring claims based on negligence, fraud, or breach of warranty because proof of these claims often depends on manufacturers' statements in labels and advertisements. Yet, because of the strong presumption against federal preemption of state law, plaintiffs should be permitted to challenge allegedly inadequate health warnings and misleading advertising practices by tobacco manufacturers. In the absence of any clear statement of congressional intent, the burden rests on the courts, and perhaps ultimately on the United States Supreme Court, to determine whether plaintiffs can sue tobacco manufacturers on these other theories.

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