CASE NOTES

PRODUCTS LIABILITY—Federal Cigarette Labeling and Advertising Act Does Not Preempt State Tort Claims Against Cigarette Manufacturers for Failure to Warn, Design Defects, or Fraud and Misrepresentation in Advertising—*Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239 (N.J. 1990).

I. INTRODUCTION

Wilfred Dewey, a smoker for 38 years, died of lung cancer in November 1980.[1] In 1982, Wilfred's wife, Claire, brought suit against R.J. Reynolds Tobacco Company; R.J. Reynolds Industries, Incorporated; American Brands, Incorporated; and Brown & Williamson Tobacco Company.[2] Mrs. Dewey's complaint contained four counts.[3] Count one alleged general theories of design defect, including an allegation the defendants "failed to warn the general public and/or the [p]laintiff's decedent of the deleterious, toxic, and hazardous nature of their product."[4] Count two alleged the defendants had committed fraud and misrepresentation in the advertisement and marketing of their products.[5] The third and fourth counts were derivative.[6]

During discovery, Mrs. Dewey admitted her husband did not begin smoking defendant Brown & Williamson's cigarettes until 1977, which was eleven years after Congress enacted the Federal Cigarette Labelixng and Advertising Act ("Cigarette Act").[7] Brown & Williamson thereafter moved for summary judgment, claiming the Cigarette Act preempted all of Mrs. Dewey's claims.[8] The trial court agreed the Cigarette Act preempted

---

1. Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239, 1240-41 (N.J. 1990); Dewey v. R.J. Reynolds Tobacco Co., 523 A.2d 712, 714 (N.J. Super. Ct. Law Div. 1986).

2. Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d at 1240-41; Dewey v. R.J. Reynolds Tobacco Co., 523 A.2d at 714.

3. Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d at 1241; Dewey v. R.J. Reynolds Tobacco Co., 523 A.2d at 714.

4. Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d at 1242.

5. Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d at 1241; Dewey v. R.J. Reynolds Tobacco Co., 523 A.2d 712, 714 (N.J. Super. Ct. Law Div. 1986).

6. Count three alleged a cause of action pursuant to New Jersey's wrongful death statute. Dewey v. R.J. Reynolds Tobacco Co., 523 A.2d at 714. *See generally* N.J. STAT. ANN. § 2A:31 (West 1987) (containing New Jersey's wrongful death provisions). Count four involved a claim for loss of consortium. Dewey v. R.J. Reynolds Tobacco Co., 523 A.2d at 714.

7. Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d at 1241.

8. *Id.* In addition, the defendant claimed Mrs. Dewey's complaint "was deficient as a matter of New Jersey substantive law." *Id.* At the trial level, the defendant relied on

Mrs. Dewey's claims of inadequate warning and fraudulent advertising.[9] The court held, however, that the Cigarette Act did not preempt the claims premised on design defects.[10] The appellate division affirmed.[11]

The New Jersey Supreme Court granted leave to Brown & Williamson to appeal, and allowed R.J. Reynolds Tobacco Company to file a brief and to appear as an intervenor.[12] The court affirmed in part and reversed in part.[13] The Federal Cigarette Labeling and Advertising Act does not preempt state tort claims against cigarette manufacturers for failure to warn, design defects, or fraud and misrepresentation in advertising. *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239 (N.J. 1990).

II. BACKGROUND

A. *Prior Tobacco Litigation*

In recent years, a number of products liability claims have been brought against cigarette manufacturers and retailers.[14] These claims generally have alleged: Failure to warn of the danger of smoking,[15] defective design,[16] or fraud and/or misrepresentation in advertising.[17] Thus far, plaintiffs have achieved very little success. Five separate federal circuit courts and the Minnesota Supreme Court have heard tobacco litigation cases.[18] These courts have unanimously held the Cigarette Act preempts

---

Restatement (Second) of Torts. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1977)). Comment i of section 402A bars imposition of strict liability for a product "'whose danger is contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.'" *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1977)).

After the trial court rendered its decision, the New Jersey legislature essentially codified comment i as a manufacturer's defense to product liability suits. *See* N.J. STAT. ANN. § 2A:58C-3(a)(2) (West 1987). On appeal, the New Jersey Supreme Court considered whether the new law operated retroactively to bar Mrs. Dewey's claims. Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d at 1251-55. The court ultimately held that it did not. *Id.* at 1255.

9. Dewey v. R.J. Reynolds Tobacco Co., 523 A.2d 712, 716 (N.J. Super. Ct. Law. Div. 1987).

10. *Id.* at 717.

11. Dewey v. Brown & Williamson Tobacco Co., 542 A.2d 919, 926 (N.J. Super. Ct. App. Div. 1988).

12. Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d at 1242.

13. *Id.* at 1255.

14. *See* cases cited *infra* note 18.

15. Pennington v. Vistron Corp., 876 F.2d 414, 419 (5th Cir. 1989).

16. Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 232 (6th Cir. 1988).

17. Cipollone v. Liggett Group, Inc., 789 F.2d 181, 183 (3d Cir. 1986), *cert. denied*, 484 U.S. 976 (1987) (Cipollone I). See *infra* note 22 for further discussion of the *Cipollone* line of cases.

18. Pennington v. Vistron Corp., 876 F.2d 414 (5th Cir. 1989); Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230 (6th Cir. 1988); Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987); Stephen v. American Brands, Inc., 825 F.2d 312 (11th Cir. 1987); Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 484 U.S. 976 (1987); Forster v. R.J.

any claims challenging the adequacy of a defendant's warning.[19] Only three of these courts have reached the issue of whether the Cigarette Act preempts claims alleging cigarettes are defective and unreasonably dangerous.[20] All three courts have held the Cigarette Act does not preempt such claims.[21] Only two courts have expressly reached the issue of whether the Cigarette Act preempts fraudulent misrepresentation claims; the Third Circuit Court of Appeals has held it does preempt such claims,[22] while the Minnesota Supreme Court has held it does not.[23]

Reynolds Tobacco Co., 437 N.W.2d 655 (Minn. 1989). See *infra* note 22 for further discussion of the *Cipollone* line of cases.

19. Pennington v. Vistron Corp., 876 F.2d at 420; Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d at 235; Palmer v. Liggett Group, Inc., 825 F.2d at 626; Stephen v. American Brands, Inc., 825 F.2d at 313; Cipollone v. Liggett Group, Inc., 789 F.2d at 187; Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d at 661.

20. Pennington v. Vistron Corp., 876 F.2d at 423; Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d at 235; Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d at 659.

21. Pennington v. Vistron Corp., 876 F.2d at 423; Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d at 235; Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d at 659.

22. The Third Circuit in *Cipollone I* did not expressly hold the Cigarette Act preempts fraudulent misrepresentation claims. Such preemptive effect, however, can be inferred from the court's statement that "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." Cipollone v. Liggett Group, Inc., 789 F.2d 181, 187 (3d Cir. 1986) (Cipollone I).

The Third Circuit subsequently confirmed this inference. *Cipollone I* came to the Third Circuit by way of interlocutory appeal. *Id.* at 181. Following resolution of the appeal, the district court applied the *Cipollone I* preemption rule stated above and held that, to the extent they relied on advertising or promotional activities occurring after the date of enactment of the original Cigarette Act, plaintiffs' failure to warn, express warranty, fraudulent misrepresentation, and conspiracy to defraud claims were preempted by the Cigarette Act. Cipollone v. Liggett Group, Inc., 649 F. Supp. 664, 669, 673-75 (N.J. 1986), *aff'd* , 893 F.2d 541 (3d Cir. 1990), *aff'd in part, rev'd in part*, 60 U.S.L.W. 4703 (U.S. June 23, 1992). The district court also found the Cigarette Act did *not* preempt plaintiffs' design defect claim, but dismissed that claim on other grounds. *Id.* at 669-72. On appeal, the Third Circuit affirmed the district court's disposal of each claim, and remanded the case for a new trial of issues not relevant here. Cipollone v. Liggett Group, Inc., 893 F.2d 541 (3d Cir. 1990), *aff'd in part, rev'd in part*, 60 U.S.L.W. 4703 (U.S. June 23, 1992) (Cipollone II).

At the time of this printing, the United States Supreme Court had just returned its decision on the appeal of *Cipollone II*. *See* Cipollone v. Liggett Group, Inc., 60 U.S.L.W. 4703 (U.S. June 23, 1992). The Supreme Court agreed that the Cigarette Act preempted *some* state claims, but did not ascribe the sweeping preemptive effect the district and Third Circuit courts did. After distinguishing between the original 1965 version of the Cigarette Act, which merely provided that no *warning statements* concerning smoking and health other than those set forth in the Act were *required* in the advertising of cigarettes whose packages contained the required labels; and the 1969 amendment to the Cigarette Act, which provided that no other *requirements* or *prohibitions* concerning smoking and health be *imposed* by state law upon the advertising or promotion of cigarettes whose packages contained the required labels, *id.* at 4706-09, the Court held:

> The 1965 Act did not pre-empt state law damages actions; the 1969 Act pre-empts . . . claims based on a failure to warn and a neutralization of federally mandated warnings to the extent that those claims rely on omissions or inclusions in [cigarette

B. *Preemption Principles*

Congress has the power under the Supremacy Clause to preempt both state common law and state statutory law through federal legislation.[24] The central issue in any preemption analysis is "'whether Congress intended that the federal regulation supersede state law.'"[25] In relation to preemption issues, courts have developed several principles for ascertaining congressional intent.[26]

First, Congress can preempt state law by express statement.[27] However, a strong presumption exists against preemption,[28] and courts are unlikely to find federal legislation has preempted state law absent clear statutory language to the contrary.[29] Thus, most courts have held the Cigarette Act does not expressly preempt state tort claims.[30]

Second, Congress may impliedly preempt state law by enacting a federal scheme that "occupies the field."[31] Again, a presumption exists against preemption, especially when Congress legislates "in a field which the States have traditionally occupied."[32] Tort actions generally concern rights and remedies traditionally defined by state law.[33] Thus, courts have

---

> manufacturers'] advertising or promotions; the 1969 Act does not pre-empt . . . claims based on express warranty, *intentional* fraud and misrepresentation, or conspiracy [to misrepresent or conceal material facts concerning the health hazards of smoking].

Id. at 4710 (emphasis added). Because the district court dismissed the plaintiffs' design defect claim on other grounds, the Court had no occasion to consider whether the Cigarette Act preempts claims based on that theory. *Id.* at 4705 n.6 ("We are not presented with any question concerning [design defect] claims."). The reader should keep this recent decision in mind when assessing assertions and authority appearing throughout this Case Note.

23. Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655, 662 (Minn. 1989).

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

25. Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d at 1243 (quoting Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n, 476 U.S. 355, 369 (1986)).

26. *See* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 479-501 (2d ed. 1988).

27. *See* Pennington v. Vistron Corp., 876 F.2d 414, 417 (5th Cir. 1989).

28. Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d at 1245 (citing Maryland v. Louisiana, 451 U.S. 725, 746 (1981)).

29. *See* TRIBE, *supra* note 26, at 479-81.

30. Pennington v. Vistron Corp., 876 F.2d at 418; Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 234 (6th Cir. 1988); Palmer v. Liggett Group, Inc., 825 F.2d 620, 625 (1st Cir. 1987); Stephen v. American Brands, Inc., 825 F.2d 312, 313 (11th Cir. 1987); Cipollone v. Liggett Group, Inc., 789 F.2d 181, 185 (3d Cir. 1986), *cert. denied*, 484 U.S. 976 (1987); Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655, 658 (Minn. 1989). See *supra* note 22 for further discussion of the *Cipollone* line of cases.

31. TRIBE, *supra* note 26, at 497-501.

32. *Id.* at 499 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

33. Cipollone v. Liggett Group, Inc., 789 F.2d at 186.

been reluctant to find Congress intended the Cigarette Act to occupy the field of cigarettes and health to the extent it excludes state tort claims.[34]

Finally, preemption can be implied when state law is in "actual conflict" with federal law.[35] This "actual conflict" may arise in one of two ways. First, it may be a "physical impossibility to comply with both" state and federal law.[36] Second, a conflict may arise when the state law poses "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[37] Most courts have relied on this principle of "actual conflict" in determining the Cigarette Act preempts certain state tort claims.[38]

III. THE MAJORITY OPINION

A. *An Interesting Interpretation of the Role of Judicial Comity*

As discussed above, five separate federal courts of appeals have found the Cigarette Act preempts certain state tort claims.[39] *Cipollone v. Liggett Group, Inc.* (*Cipollone I*)[40] is a particularly noteworthy case because it represents the prevailing view of the Third Circuit. The New Jersey Supreme Court in *Dewey* recognized the significance of the *Cipollone I* decision, stating: "Defendants contend that our task is merely to adopt the Third Circuit's reasoning in *Cipollone* [*I*], as did the trial court in this case. That contention requires us to examine the logic underlying adherence to federal law on the meaning and effect of a federal statute."[41]

Ironically, the majority recognized principles of "judicial comity"[42] required that "lower federal court decisions in this area should be accorded due respect, *particularly where they are in agreement.*"[43] The majority further recognized that "[b]y helping to ensure uniformity, judicial comity

---

34. *Id.*

35. TRIBE, *supra* note 26, at 481-97.

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

37. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

38. Pennington v. Vistron Corp., 876 F.2d 414, 421 (5th Cir. 1989); Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 234 (6th Cir. 1988); Palmer v. Liggett Group, Inc., 825 F.2d 620, 626 (1st Cir. 1987); Stephen v. American Brands, Inc., 825 F.2d 312, 313 (11th Cir. 1987); Cipollone v. Liggett Group, Inc., 789 F.2d 181, 187 (3d Cir. 1986), *cert. denied*, 484 U.S. 976 (1987); Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655, 660 (Minn. 1989). See *supra* note 22 for further discussion of the *Cipollone* line of cases.

39. *See supra* text accompanying notes 14-38.

40. Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 484 U.S. 976 (1987). See *supra* note 22 for further discussion of the *Cipollone* line of cases.

41. Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d at 1243 (citations omitted).

42. Judicial comity has been defined as the "[p]rinciple in accordance with which courts of one state or jurisdiction give effect to laws and judicial decisions of another state out of deference and respect, not obligation." BLACK'S LAW DICTIONARY 760 (5th ed. 1979).

43. Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d at 1244 (emphasis added).

discourages forum shopping."[44] Nevertheless, the majority felt its independent analysis of the federal scheme under the Cigarette Act was warranted.[45] It reached this conclusion despite the fact five federal courts had decided differently. The court stated:

> [W]hen adjudicating federal questions, the state courts form an integral part of the national structure. . . . In that capacity, they occupy exactly the same capacity as the lower federal courts, which are coordinate, and not superior to them. There is no appeal from the state to the lower federal court. Instead, both are subject to the reviewing power of the Supreme Court, which furnishes the unifying principle. *Decisions of the lower federal courts are no more binding on a state court than they are on a federal court not beneath it in the judicial hierarchy.*[46]

The majority thus concluded it was not per se bound by the interpretations of the lower federal courts.[47] This conclusion may significantly change the role that state courts play in the development of federal law.

B. *Interpreting the Cigarette Act*

In 1964, the Surgeon General's Advisory Committee issued a report to Congress concluding "cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action."[48] The report also linked smoking to lung cancer, chronic bronchitis, emphysema, cardiovascular disease, and cancer of the larynx.[49]

Several states responded almost immediately to the report, enacting mandatory warning labels for cigarette packages.[50] In addition, the Federal Trade Commission proposed a series of rules that would have required a warning be placed on all cigarette packages and advertisements.[51] Congress became "[c]oncerned about the potential maze of conflicting regulations, . . . [and] it intervened in 1965 to set up a uniform system of warning labels for cigarettes."[52]

The Cigarette Act contains three provisions that are particularly relevant to the majority's analysis of the preemption issue. Section 1331 sets forth the purpose and policy of the Cigarette Act:

---

44. *Id.*
45. *Id.*
46. *Id.* (emphasis added) (citations omitted).
47. *Id.*
48. H.R. REP. NO. 449, 89th Cong., 1st Sess. 1, *reprinted in* 1965 U.S.C.C.A.N. 2350, 2351.
49. Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d at 1244.
50. *Id.* (citing Palmer v. Liggett Group, Inc. 825 F.2d 620, 622 (1st Cir. 1987)).
51. *Id.* (citing Banzhaf v. FCC, 405 F.2d 1082, 1089 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969)).
52. *Id.*

> It is the policy of Congress, and the purposes 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 about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.[53]

Section 1333 of the Cigarette Act prescribes the language that must be used on the cigarette labels and advertisements.[54] As currently worded, the section prescribes four separate warnings.[55] A manufacturer is required to rotate the use of these warnings on its labels and advertisements, using a different warning each quarter.[56]

Finally, section 1334 addresses the issue of preemption. It states:

> (A) Additional Statements
> 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) State Regulations
> 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.[57]

C. *Express Preemption*

The majority pointed to the language of section 1334 of the Cigarette Act, and noted it does not expressly prohibit state common law tort claims.[58]

---

53. 15 U.S.C. § 1331 (1988). The quoted text reflects changes made to subsection 1 in 1984. The court actually considered the original language of subsection 1. Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d at 1245. The differences, however, are not relevant to the court's decision. *Id.*

54. 15 U.S.C. § 1333 (1988).

55. *Id.* The warnings prescribed for labels are slightly different than those prescribed for advertisements. The four warnings for labels are: (1) "Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy"; (2) "Quitting Smoking Now Greatly Reduces Serious Risks to Your Health"; (3) "Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight"; and (4) "Cigarette Smoke Contains Carbon Monoxide." *Id.*

56. *Id.*

57. *Id.* § 1334.

58. Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d at 1245.

Rather, the majority interpreted the section as merely prohibiting states from requiring any additional warnings on cigarette packages.[59]

The *Dewey* court noted its interpretation of section 1334 did not conflict with the interpretations by other courts.[60] For example, the Third Circuit reached the same conclusion in *Cipollone I*.[61] The *Cipollone I* court similarly faced the question of whether the Cigarette Act preempted state common law claims.[62] The court ultimately held the Cigarette Act did not *expressly* preempt such claims.[63] In reaching its conclusion, the *Cipollone I* court relied on two factors. First, it noted a strong presumption exists that Congress did not intend to preempt state law absent express language to the contrary.[64] Second, it noted Congress had enacted numerous statutes containing language expressly preempting state common law.[65] The *Cipollone I* court reasoned that, in light of Congress's failure to include such language in the Cigarette Act, the Act did not expressly preempt state common law.[66]

The majority in *Dewey* endorsed this portion of the *Cipollone I* analysis, concluding: "Th[is] lack of express guidance, combined with the strong presumption against preemption where state powers are involved, militate[s] against a finding of express preemption."[67]

D. *Implied Preemption*

1. *"Occupation of the Field"*

After concluding the Cigarette Act did not expressly preempt state tort claims, the majority addressed whether the Cigarette Act impliedly preempted such claims.[68] Again, the majority relied heavily on *Cipollone I*. The *Cipollone I* court pointed to section 1331, which declares the purpose of the Cigarette Act is to "establish a comprehensive Federal program" in order to avoid "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking

---

59. *Id.*

60. *Id.*; *see also supra* text accompanying notes 26-30.

61. Cipollone v. Liggett Group, Inc., 789 F.2d 181, 185 (3d Cir. 1986), *cert. denied*, 484 U.S. 976 (1987). See *supra* note 22 for further discussion of the *Cipollone* line of cases.

62. *Id.* at 183.

63. *Id.* at 185.

64. *Id.* (citing Maryland v. Louisiana, 451 U.S. 725, 746 (1981)) (other citation omitted).

65. *Id.* (listing the following as statutes that contain explicit preemption provisions: 12 U.S.C. § 1715z-18(e) (Supp. II 1984); 17 U.S.C. § 301(a) (1976); 29 U.S.C. §§ 1144(a), (c)(1) (1982)).

66. *Id.*

67. Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d at 1245 (citing Cipollone v. Liggett Group, Inc., 789 F.2d 181, 186 (3d Cir. 1986), *cert. denied*, 484 U.S. 976 (1987)). See *supra* note 22 for further discussion of the *Cipollone* line of cases.

68. *Id.*

and health."[69] In light of this language, the *Cipollone I* court concluded Congress clearly intended to occupy some field.[70]

Under the *Cipollone I* analysis, however, the central issue involves determining the scope of the field that Congress intended to occupy.[71] In making its determination, the court observed that tort claims concern rights that are traditionally defined exclusively by state law.[72] Therefore, the *Cipollone I* court reasoned it was required to adopt a restrained view, and it concluded:

> In light of this constraint, we cannot say that the scheme created by the Act is "so persuasive" or the federal interest involved "so dominant" as to eradicate all of the [plaintiff's] 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.[73]

The majority in *Dewey* expressed its approval of this conclusion, stating: "We agree with those courts that hold that the Cigarette Act neither expressly preempts common-law remedies nor impliedly preempts those remedies by pervasively occupying the field of law."[74]

2. *"Actual Conflict"*

The *Dewey* majority also concluded that allowing state tort remedies did not create an "actual conflict" with the Cigarette Act.[75] In reaching this conclusion, the majority rejected both theories of preemption by actual conflict.[76] First, it found compliance with both state and federal law is not impossible.[77] Second, it concluded state tort remedies do not present an obstacle to the accomplishment of the purposes of the Cigarette Act.[78] This

---

69. 15 U.S.C. § 1331 (1988).

70. Cipollone v. Liggett Group, Inc., 789 F.2d at 186.

71. *Id.*

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

73. *Id.* (citations omitted).

74. Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d at 1247.

75. *Id.*

76. See *supra* text accompanying notes 35-38 for a discussion of the theories of preemption by actual conflict.

77. Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d at 1247 (citing Pennington v. Vistron Corp., 876 F.2d 414, 418-21 (5th Cir. 1989); Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 234 (6th Cir. 1988); Palmer v. Liggett Group, Inc., 825 F.2d 620, 625-26 (1st Cir. 1987); Cipollone v. Liggett Group, Inc., 789 F.2d 181, 185-87 (3d Cir. 1986), *cert. denied*, 484 U.S. 976 (1987); Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655, 659-60 (Minn. 1989)). See *supra* note 22 for further discussion of the *Cipollone* line of cases.

78. Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d at 1248.

conclusion by the majority "parts company" with the decisions of other federal and state courts, including the *Cipollone I* court.[79]

The majority began this portion of its analysis by identifying the purposes of the Cigarette Act.[80] In this regard, the majority relied on section 1331 of the Cigarette Act, and found it has two separate goals: (1) to adequately warn the public of the hazards of smoking, and (2) to protect commerce and the national economy.[81] The majority found the goal of protecting commerce was secondary to the goal of adequately warning the public, stating:

> It is significant that the second goal, the protection of trade and commerce, must be achieved "consistent with" and not "to the detriment of" the first and principal goal—to inform the public adequately that cigarettes may be hazardous to health. Moreover, the secondary goal focuses on the need for uniform labeling and advertising *regulations* as a way of protecting commerce and the national economy, but it does not go so far as to restrict the rights of injured consumers.[82]

Next, the majority analyzed the effects of state tort remedies on this primary purpose of adequately warning the public.[83] It concluded the tort remedies did not create an obstacle to the accomplishment of this primary purpose, stating: "It is clear that the allowance of such remedies will further, not impair, the goal of adequately informing the public of the risks of cigarette smoking."[84]

Finally, the majority considered whether allowing state tort remedies would inhibit accomplishment of the second goal of the Cigarette Act—protecting commerce and the national economy. The defendants argued that "preemption occurs because the incidental regulatory pressure exerted by a jury verdict would necessarily conflict with the goal of uniform regulations."[85] The defendants contended such jury verdicts forced manufacturers to print warning labels other than those federally prescribed, because "[o]nce 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."[86]

The majority rejected these contentions for two reasons. First, it noted the ultimate goal of an "actual conflict" analysis was merely to

---

79. *Id.* at 1247.
80. *Id.* at 1248.
81. *Id.*
82. *Id.* (citation omitted).
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* (quoting Palmer v. Liggett Group, Inc., 825 F.2d 620, 627-28 (1st Cir. 1987)).

determine the intent of Congress.[87] In support of its conclusion that Congress was willing to tolerate the regulatory consequences of the application of state tort law, the majority quoted the United States Supreme Court decision in *Silkwood v. Kerr-McGee Corp.*:[88]

> It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a [defendant] will be threatened with damages liability if it does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to accept.[89]

Second, the majority found the "[d]efendants overstate[d] the regulatory pressure that state-law damage claims would generate."[90] The majority noted manufacturers could deal with the potential liability in at least three ways: (1) manufacturers could add an additional warning to their labels, (2) they could provide a package insert that more adequately warns of the risks of smoking, or (3) they could do nothing and risk exposure to liability.[91] Under the majority's view, these options were voluntary and not regulatory.[92] Hence, allowing state tort remedies could not be seen as conflicting with the federal goal of uniform regulation.[93]

The court summarized its preemption analysis by stating: "We are convinced that had Congress intended to immunize cigarette manufacturers from packaging, labeling, misrepresentation, and warning claims, it knew how to do so with unmistakable specificity."[94]

IV. THE DISSENTING OPINION

Justice Antell's minority opinion vigorously asserted the majority had not correctly applied the principles of comity:

> [The court's] "independent analysis of the federal scheme". . . reject[ed] the well-reasoned, unanimous determinations of five federal Circuit Courts of Appeal and the Supreme Court of Minnesota which all conclude that Congress has preempted the question of adequate warnings concerning the use of cigarettes. *So much for comity.*"[95]

---

87. *Id.* at 1249.
88. Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984).
89. *Id.* (quoting Silkwood v. Kerr-McGee Corp., 464 U.S. at 256 (rejecting argument that imposition of punitive damages would be tantamount to imposing a safety regulation)).
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 1251.
95. *Id.* at 1255 (Antell, J., concurring in part and dissenting in part) (emphasis added).

Justice Antell also disagreed with the majority's conclusion that Congress intended to tolerate the application of state tort claims.[96] Under his interpretation, "[t]he Act leaves no doubt as to what warning should be given and how great an intrusion must be tolerated by commerce. Implicit in this is the conclusion that any attempted modification of that balance 'under state law' would be in actual conflict with federal law."[97]

Finally, Justice Antell disagreed with the majority's assessment of the impact of state law claims on the Cigarette Act's purpose of uniformity.[98] He feared the decision would subject manufacturers to diverse claims that would be "limited only by the resourcefulness of counsel and expert witnesses."[99] In his view, these claims would have a greater regulatory impact on manufacturers than any state governmental authority.[100]

V. CONCLUSION

It is not entirely clear what effect, if any, the *Dewey* decision will have on tobacco litigation. Plaintiff's attorneys have not yet "rushed to enlist in the battle against the tobacco industry."[101] Some tobacco industry spokesmen consider the decision an "aberration."[102] And yet, a Texas Court of Appeals has already followed *Dewey* in holding the Cigarette Act does not preempt all tort claims brought against cigarette manufacturers.[103] In addition, the United States Supreme Court is currently considering other preemption issues related to the Cigarette Act.[104]

The decision's importance is not limited to its impact on the tobacco industry. Preemption issues can arise whenever a claim involves an area addressed by federal regulation. Thus, *Dewey* will undoubtedly have an effect in a variety of litigation contexts, including products liability, employment discrimination, and environmental pollution.

---

96. *Id.* at 1256 (Antell, J., concurring in part and dissenting in part).
97. *Id.* (Antell, J., concurring in part and dissenting in part).
98. *Id.* at 1257 (Antell, J., concurring in part and dissenting in part).
99. *Id.* (Antell, J., concurring in part and dissenting in part).
100. *Id.* (Antell, J., concurring in part and dissenting in part).
101. Paul Marcotte, *Cigarette Decision*, 76 A.B.A. J., Nov. 1990, at 34.
102. *Id.*
103. Carlisle v. Philip Morris, Inc., 805 S.W.2d 498, 509 (Tex. Ct. App. 1991).
104. At the time of this printing, the United States Supreme Court had just returned its decision on these issues. *See* Cipollone v. Liggett Group, Inc., 60 U.S.L.W. 4703 (U.S. June 23, 1992). See *supra* note 22 for a discussion of this decision.

Following *Dewey*, plaintiffs no longer need to give up hope when faced with a preemption claim. The decision provides plaintiffs with a number of plausible arguments that Congress did not intend to preempt all state tort claims. Likewise, the decision provides defense attorneys with some insight toward arguments they may face in the future.

Mark Fiorentino