TORT LAW IN THE REGULATORY AGE

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I. INTRODUCTION

The impact of public law regulations on private law liability is a recurring issue in environmental and toxic tort cases.[1] Increasing numbers of American businesses and industries seek refuge from state tort actions in the doctrine of federal preemption. These defendants urge federal displacement of state tort remedies, hoping to avoid accountability for their actions, especially in the absence of congressional regulation.[2] Such a regulatory gap deprives citizens of the right to legal recourse for injury.[3]

This use of preemption as an offensive weapon is especially significant in environmental and toxic tort cases because of the potential scope of its application. In light of a steadily expanding Commerce

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1. *See* Allan Kanner, *Future Trends In Toxic Tort Litigation*, 20 RUTGERS L.J. 667, 686-687 (1989) [hereinafter *Future Trends*].

2. A meaningful alternative may be procedural as well as substantive. For example, the discovery rights afforded civil litigants are often not available in administrative proceedings, even though they may be outcome determinative. *See* Allan Kanner, *The Evolving Jurisprudence of Toxic Torts: The Prognosis for Corporations*, 12 CARDOZO L. REV. 1265 (1991) [hereinafter *Evolving Jurisprudence*] (discussing the importance of discovery in civil litigation).

3. Although the Supreme Court recognized Congress' preemptive authority as early as 1824 in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), over one-half of the federal statutes which have ever preempted state law were enacted after 1970. *See* W. John Moore, *Stopping the States*, NAT'L J. July 21, 1990, at 1760. The demand by business and industry for federal preemption is often an attempt to avoid state regulation that is more stringent than federal requirements. *Id.*

Clause power, Congress posses significant regulatory authority over the national economy.[4] Congress' increasing authority over the national economy suggests that a growing number of traditional state causes of action will fall within the domain of Congress and thus be subject to preemption defenses.[5] Some of the regulated areas currently subject to preemption challenges are cigarettes,[6] drugs,[7] medical devices,[8] nuclear

4. *E.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

5. A report by the Academy for State and Local Government found that, while the federal role in intergovernmental relations has diminished as a result of deregulation and reduced federal aid, state and local authority continues to be preempted. *See* Martha M. Hamilton, *Industries Try for Federal Regulation; Businesses Find Rules of States are Tougher*, WASHINGTON POST, Nov. 29, 1987, at H1, H6. The result is a regulatory vacuum. *Cf.* Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (confronting the issue of whether federal preemption existed absent express statutory language and a federal regulatory program).

6. Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1341 (1988). The circuit courts that considered whether to permit tort recoveries against a cigarette manufacturer for failure to warn of the hazards of cigarette smoking concluded that allowing such a recovery conflicts with the delicate balance Congress sought to achieve between public health and the national economy. *See, e.g.*, Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 234-35 (6th Cir. 1988) (citing the Third Circuit's statement that "[t]he Act 'represents a carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of the national economy' "); Palmer v. Liggett Group, Inc., 825 F.2d 620, 626 (1st Cir. 1987) (holding that a suit under the Act which "disrupts excessively the balance of purpose set by Congress" is preempted); Cipollone v. Liggett Group, Inc., 789 F.2d 181, (3d Cir. 1986) (holding that claims for failure to warn of the hazards of smoking "tip" the Act's balances of purpose and conflict with the Act), *cert. denied*, 479 U.S. 1043 (1987). In Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655 (Minn. 1989), the Supreme Court of Minnesota held that the Cigarette Labeling and Advertising Act preempts any tort claims based upon the duty to warn, but does not preempt tort actions for fraudulent misrepresentations with respect to advertising. *Id.* at 660-62.

7. Federal Food, Drug and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301-393 (1988 & Supp. II 1990). In Abbott by Abbot v. American Cyanamid Co., 844 F.2d 1108 (4th Cir. 1988), the Fourth Circuit held that the FDCA does not preempt defective design or failure to warn claims arising out of vaccinations. *Accord* Hurley v. Lederle Lab. Div. of Am. Cyanamid Co., 863 F.2d 1173 (5th Cir. 1988).

8. Medical Devices Amendment to the Food, Drug and Cosmetic Act, Pub. L. No. 94-295, 90 Stat. 539 (1976) (codified at 21 U.S.C. §§ 360c-360e (1988)). In Moore v. Kimberly Clark Corp., 867 F.2d 243 (5th Cir. 1989), the Fifth Circuit held that the Medical Devices Amendment to the FDCA preempts failure to warn and labeling claims for toxic shock syndrome; however, the amendment does not preempt negligent design claims. *Id.* at 246-47. LaVetter v. International Playtex, 706 F. Supp. 722 (D. Ariz. 1988) held the FDCA preempts all tort claims which would impose additional or different requirements with respect to the safety or effectiveness of a medical device. *Id.* at 723. *Accord* Slater v. Optical Radiation Corp., 756 F. Supp. 370 (N.D. Ill. 1991).

In contrast, in Callan v. G.D. Searle & Co., 709 F. Supp. 662 (D. Md. 1989), the

power,[9] and pesticides.[10]

The use of preemption as an offensive tactic is unlikely to succeed. Overlapping public and private law is not novel. Until recently, such dual regulation was not deemed problematic.[11] Many of the federal

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district court rejected the notion that the Medical Devices Amendment preempts state tort claims. *Id.* at 667-68.

9. Atomic Energy Act, 42 U.S.C. §§ 2011-2296 (1988). In Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984), the United States Supreme Court held that the Atomic Energy Act does not preempt punitive damage claims under state law. *Id.* at 626. Moreover, the Court declined to preempt state tort law in the absence of a federal remedy. *Id.* at 623. *Silkwood* is an important case dealing with federal preemption of state tort liability. For courts to preempt state tort law, they must overcome the Courts' holding in *Silkwood.*

10. Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1988 & Supp. III 1991). In Ferebee v. Chevron Chemical Corp., 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062 (1984), the District of Columbia Circuit Court held that FIFRA does not preempt state common law tort claims based on inadequate labeling. *Id.* at 1540-43. The court reasoned that even if a state may not require a manufacturer to impose additional warning labels beyond those mandated by federal law, a state may still require a manufacturer to pay damages to compensate those injured. *Id.* at 1541. The district court in Fitzgerald v. Mallinckrodt, Inc., 681 F. Supp. 404 (E.D. Mich. 1987), held that FIFRA preempted state tort claims for negligent labeling. *Id.* at 407-408. The district court rejected the *Ferebee* court's analysis and adopted the reasoning of the "cigarette" cases instead. *Id.* at 407.

The 1991 Supreme Court case Wisconsin Pub. Intervenor v. Mortier, 111 S. Ct. 2476 (1991), established that:

> [e]ven when Congress has not chosen to occupy a particular field, preemption may occur to the extent that state and federal law actually conflict . . . [such as] when "compliance with both . . . is a physical impossibility," or when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Id. at 2482.

The Court found that "mere silence" on the issue of preemption was insufficient to establish that Congress intended to preempt state law. *Id.* at 2483. The Court construed FIFRA to allow state regulation of use and sales of pesticides even where a "narrow preemptive overlap" might occur. *Id.* at 2486. Simultaneous compliance with both the local ordinance and FIFRA was not impossible. FIFRA never sought to establish a permanent affirmative permit scheme, notwithstanding its sweeping regulation of registration, classification, certification, inspection, labelling, and possible banning of pesticides. *Id.*

11. *See Future Trends, supra* note 1, at 687 n.124 (noting cases upholding state tort claims despite federal regulations). In a recent case, Ciba-Geigy v. Alter, No. 91-235, 1992 WL 117164 (Ark. May 26, 1992), the Arkansas Supreme Court held that the intent of Congress in enacting FIFRA, which imposed a duty to label, did not preempt the State of Arkansas' state tort law claims against Ciba-Geigy for failure to adequately label the herbicides it manufactured. *Id.* at 9. This ruling was based on the existence of a savings clause in FIFRA section 136(v), which clearly states that states are allowed to regulate the use of EPA approved pesticides. *Id.* at 8.

regulatory statutes, including the environmental statutes, contain express savings clauses, which attempt to elucidate the balance between state and federal statutory purview.[12]

Federalism makes clear that federal regulations and state tort laws must co-exist. It demands that courts foreclose state remedies only upon clear and unambiguous evidence that Congress so intends.[13] Congress possesses the power to displace or preempt state law through the Supremacy Clause.[14] "The purpose of Congress is the ultimate touchstone" in determining whether Congress has exercised this power.[15]

Nevertheless, it is uncommon for Congress to expressly preempt state common law. Instead, Congress affords deference to state sover-

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> [W]e understand the desirability of uniformity in labeling hazardous products, and we do not doubt that Congress intended to achieve uniform minimum labeling standards by passing the Act. We cannot, however, conceive of a plan by Congress to supplant the laws by which the states recompense, and to a degree protect, their citizens and others from injury resulting from the use of those products. Congress surely did not intend to put in place a system of uniformity in labeling so absolute as to subvert the tort laws of the states.

Id. at 9.

12. *See, e.g.*, National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1397(c) (1988) ("Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(b)(2)(A) (1988) ("Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking, or securities."); Clean Water Act, 33 U.S.C. § 1365(e) (1988) ("Nothing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief.").

13. Preemption of state law may be affected by Congressional legislation. Under such circumstances, "[a court's] sole task is to ascertain the intent of Congress." California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987). The requisite Congressional intent may manifest itself in several forms.

14. The origins of the preemption doctrine are found in the Supremacy Clause of Article VI of the United States Constitution which states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI. Nothing within the text of the Constitution itself mandates the preemption of state tort law. Arguably, the text stands for preservation of state tort law. *E.g.*, U.S. CONST. amend. VII.

15. *Guerra*, 479 U.S. at 284 (quoting Malone v. White Motor Corp., 435 U.S. 497, 504 (1978)).

eignty concerns and principles of federalism.[16] Accordingly, it became necessary for the Supreme Court to enunciate and consistently apply guidelines for giving effect to the purpose of Congress.[17] At the same time, due regard for healthy federalism led the Court to prescribe a presumption against federal preemption of state law. A clear and unambiguous statement of Congress' intent to preempt state law is dispositive.[18] However, absent express preemption, state law is implicitly preempted if it lies within a field Congress intended to occupy solely or to the extent that the state law actually conflicts with the federal law.[19] For example, Congress implicitly preempts state law by enacting legislation which occupies the entire field of regulation such that supplementary state regulation is impossible[20] or where the exercise of state law conflicts with federal law.[21] A state law conflicts with federal law

16. *See, e.g.*, Federal Railroad Safety Act, 45 U.S.C. §§ 421-445 (1988) ("A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule [covering the same subject matter].").

17. The Court has consistently announced and applied these preemption principles: 1) state law is preempted when Congress has explicitly provided; 2) in the absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively; and 3) to the extent it conflicts with Federal Law. *See, e.g.*, English v. General Elec. Co., 496 U.S. 72, 78-79 (1990) (employee's state law tort claim is not preempted by the Energy Reorganization Act); California v. ARC Am. Corp., 490 U.S. 93, 100 (1989) (state indirect purchaser laws were not preempted by federal antitrust laws); California Fed. Sav. & Loan Ass'n. v. Guerra, 479 U.S. 272, 280-81 (1986) (Title VII does not preempt the California Fair Housing & Employment Act); Hillsborough County v. Automated Medical Lab. Inc., 471 U.S. 707, 713 (1984) (county health ordinance is not preempted by Public Health Service Act).

18. *English*, 496 U.S. at 79.

19. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

20. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). *See also* Pacific Gas & Elec. Co. v. State Energy Resources Conservation Comm'n, 461 U.S. 190, 203-204 (1983) ("Absent explicit preemptive language, Congress' intent to supersede state law altogether may be found from a 'scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. . . .' "); Maryland v. Louisiana, 451 U.S. 725, 746 (same).

21. *See, e.g.*, International Paper Co. v. Ouellette, 479 U.S. 481, 493-94 (1987) (holding that the Clean Water Act preempted Vermont law as applied to actions arising from an out-of-state water source because application of Vermont law would enable the parties to circumvent the Clean Water Act); Worm v. American Cyanamid Co., 970 F.2d 1301, 1307 (4th Cir. 1992) (holding that the Federal Insecticide, Fungicide and Rodenticide Act preempted state tort law providing for damages for failure to provide adequate warning to consumers because state tort law was more elaborate than and different from FIFRA); Title Ins. Co. v. Internal Revenue Serv., 963 F.2d 297, 301-02 (10th Cir. 1992) (holding that state law which required the filing of a certificate of

only where compliance with both state and federal law is physically impossible[22] or the state law obstructs the accomplishment of Congress' purposes and objectives.[23]

The presumption against preemption is especially strong when Congress legislates in an area traditionally occupied by the States.[24] The presumption is based primarily upon federalism concerns. The preemption analysis begins from the assumption that Congress does not intend to deprive the states of their traditional police powers absent a clearly expressed purpose.[25] The presumption against preemption is stronger where Congress allegedly supplants traditional state tort remedies without providing an alternative avenue for redress.[26]

Executive Order No. 12612 memorialized and expanded the presumption against preemption.[27] President Reagan issued the Order on October 26, 1987. The President sought to restore the division of power between the national government and the states that Framers of

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redemption no later than 75 days from the date of public foreclosure sale conflicted with federal law permitting such filings at least 120 days from a public foreclosure sale and thus were preempted).

22. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963).

23. International Paper Co. v. Ouelette, 479 U.S. 481, 491 (1987) (quoting Hillsborough County v. Automated Medical Lab., Inc., 471 U.S. 707, 713 (1985)).

24. Legislation or administrative action affecting a subject matter "traditionally regarded as properly within the scope of state superintendence" carries a strong presumption against preemption. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 144 (1963). A clear statement of congressional intent is required; preemption is not to be found absent a clear and unambiguous Congressional mandate. *Id.* at 142. Caution in finding preemption is justified because if a court erroneously permits preemption of a state law, the state is powerless to remedy the situation. Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483, 488 (9th Cir. 1984). Congress has the ability to clearly state its intentions to preempt. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947).

25. *Rice*, 331 U.S. at 230. This presumption against preemption guarantees that the federal-state balance will not be disturbed unnecessarily by the courts. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

26. Absent a federal remedy, the presumption against preemption of state law remedies, such as tort recoveries, is heightened. Abbot by Abbot v. American Cyanamid Co., 844 F.2d 1108, 1112 (4th Cir. 1988), *cert. denied*, 488 U.S. 908 (1988).

The Supreme Court recognized that Congress is highly unlikely to remove all means of judicial recourse for those injured without providing an alternative federal remedy. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984). The Supreme Court has never found a negligence claim preempted by federal law where some form of alternative remedy does not exist. *See, e.g.*, United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954) (noting that a finding of preemption would not only cut off the injured party's right to recovery, but would also have the effect of granting the tortfeasor immunity from liability).

27. 3 C.F.R. 252 (1988), *reprinted in* 5 U.S.C. § 601 (1988).

the Constitution contemplated.[28] Section 4 of Order 12612 directly addresses preemption through Executive or agency action. The Order requires either an express statement that Congress intended to preempt state law or other comparably dispositive evidence.[29]

Whenever a department or agency official determines that an administrative action might impinge upon state sovereignty, Section 6 of Order 12612 requires the department or agency to prepare a Federalism Assessment.[30] The presence or absence of such Federalism Assessment may evidence either an attempt by a department or agency to preempt state law, or it may reflect the department's or agency's interpretation of a federal statute.[31]

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28. *Id.*

29. *Id.* Section 4 of Order 12612 directly addresses preemption through Executive or agency action:

> (a) Executive Departments and agencies shall construe, . . . [a] statute to preempt State law only when the statute contains an express preemption provision, or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of state law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under Federal statute.
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> (b) Where a Federal statute does not preempt State law [as defined above], executive departments and agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption of state law by rulemaking only when the statute expressly authorizes issuance of preemptive regulations, or there is some other firm or palpable evidence compelling the conclusion that the Congress intended to delegate authority to issue regulations affecting state law.
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> (c) Any regulatory preemption of state law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.
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> (d) As soon as an Executive department or agency foresees the possibility of a conflict between State law and federally protected interests within its area of regulatory responsibility, the department or agency shall consult . . . with appropriate officials and organizations representing the states in an effort to avoid such conflict.
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> (e) When an executive department or agency proposes to act through adjudication or rule-making to preempt State law, the department or agency shall provide all affected states notice and an opportunity for appropriate participation in the proceedings.

Id.

30. *Id.*

31. *Id.* The contents of any Assessment must:

> (1) Certify that a proposed policy has been evaluated in light of the principles, criteria and requirements of the Order;
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> (2) Identify any policy provisions inconsistent with the Order;
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> (3) Identify the extent to which a policy would impose financial costs or burdens upon states; and
>
> (4) Identify the extent to which the policy would preempt state law or impinge upon state sovereignty.

Id.

Section 8 expressly states that the Order's sole objective is to improve the internal management of the executive branch.[32] The language of this section precludes only an action to enforce compliance with Executive Order 12612. Because administrative preemption turns on departmental or agency intentions and interpretations, this section does not impair the value of Order 12612 in any preemption analysis.

The effect of Order 12612 upon the judicial approach to preemption is uncertain. However, when considered with current case law, the provisions of Executive Order 12612 have a potentially large impact upon administrative preemption.

For example, under *City of New York v. Federal Communication Commission*,[33] an agency may preempt state laws without express authorization under a federal statute so long as the statute is not construed as forbidding preemption.[34] While the Supreme Court has indicated that the judiciary will not place limits upon an agency's exercise of preemption, Executive Order 12612 acts as a check from within the executive branch.

If a statute is silent or ambiguous with respect to whether it authorizes the preemption of state law, courts defer to an administrative interpretation.[35] Courts afford deference to administrative interpretations, assuming it is based upon a reasonable construction of the statute.[36] Because Order 12612 demands narrow Executive branch construction of federal law, so as to avoid preemption absent a clear congressional intent, the effect will be to preserve state law.

In light of these clear and longstanding rules, it is surprising that the Supreme Court granted certiorari in *Cipollone v. Liggett Group, Inc.*[37]

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32. *Id.*

Section 8 of Order 12612 states: "This Order is intended only to improve the internal management of the Executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by any party against the United States, its agencies, its officers, or any person." *Id.*

33. 486 U.S. 57 (1988).

34. *Id.* at 64.

35. *See, e.g.*, Colorado Pub. Utilities Comm'n v. Harmon, 951 F.2d 1571, 1579 (10th Cir. 1991) (deferring to the Department of Transportation's determination that its regulations overlapped with Colorado law).

36. Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).

37. 112 S. Ct. 2608 (1992). In *Cipollone*, the Court held that the Federal Cigarette Labeling and Advertising Act, as amended by the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 92-222, 84 Stat. 87 (1969), which required warning labeling on all cigarette packaging, did not preempt state law damages actions. Rather, the federal

From a jurisprudential point of view, the merits of the Court's ultimate decision in *Cipollone* adds little to the position advanced by the Court in *Silkwood v. Kerr-McGee Corp.*[38] One explanation is that *Cipollone* and other recent tort cases, such as those challenging the constitutionality of punitive damages in the commercial context,[39] reflect the business community's influence over the Supreme Court's docket.[40] Depriving injured plaintiffs access to jury awarded damages works to the business community's advantage. Therefore, the business community argues for preemption, thus placing the decision making process in the hands of an administrative agency instead of a jury.[41] Most of the Court's opinions addressing the preemption doctrine begin with a liturgical recitation of the presumption against preemption and then disregard it during the analysis.[42] The result is that courts find that the

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Cigarette Labeling and Advertising Act superseded only positive enactments by state and federal rulemaking bodies that attempted to create duplicate regulations:

> Petitioner alleges two theories of fraudulent misrepresentation. First, petitioner alleges that respondents, through their advertising, neutralized the effect of federally mandated warning labels. Such a claim is predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking. Such a prohibition, however, is merely the converse of a state law requirement that warnings be included in advertising and promotional materials. Section 5(b) of the 1969 Act preempts both requirements and prohibitions; it therefore supersedes petitioner's first fraudulent misrepresentation theory.

112 S. Ct. at 2623.

38. 464 U.S. 238 (1984).

39. *E.g.* Pacific Mutual Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991); Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).

40. *Evolving Jurisprudence*, *supra* note 2, at 1273. Primarily, the business community exercises its influence over the federal bureaucracy to impact the Court's docket. *Id.*

41. *See, e.g.*, Carl Colteryahn Dairy, Inc., v. Western Pa. Teamsters and Employers Pension Fund, 785 F. Supp. 536, 543-44 (W.D. Pa. 1992) (holding ERISA preempted state law claims for breach of contract, trustees' fraudulent misrepresentation, trustees' negligent performance of duties, and conspiracy to commit fraud against trustees); Brown v. Keystone Consol. Indus., Inc., 680 F. Supp. 1212, 1218-24 (N.D. Ill. 1988) (holding that the Labor Management Relations Act and the National Labor Relations Act preempted state law claims for fraudulent misrepresentation, fraudulent conveyance, intentional interference with contractual relations, and state law RICO claims); Allor v. Amicon Corp., 631 F. Supp. 326, 331 (E.D. Mich. 1986) (holding the Labor Management Relations Act preempted state law claims for fraudulent misrepresentation).

42. *See, e.g.*, Greater Washington Bd. of Trade v. District of Columbia, 948 F.2d 1317, 1320-25 (D.C. Cir. 1991) (noting that "the exercise of federal supremacy is not lightly to be presumed" but holding ERISA preempted state law requiring employers to provide health benefits to employees if employer was already providing health benefits

imposition of tort liability "conflicts" with federal regulatory schemes and is therefore preempted. Although the *Cipollone* decision slows this trend,[43] the longer view must be toward the ever-shifting Supreme Court majority.

II. STATEMENT OF THE CASE

A. *Proceedings Below*

Rose Cipollone and her husband filed a product liability action seeking damages for injuries resulting from Rose's lifetime use of cigarettes.[44] In her complaint, Rose Cipollone alleged that the defendants, the manufacturers of the cigarettes Rose Cipollone smoked, 1) failed to provide consumers with adequate information of the health risks associated with smoking; 2) intentionally neutralized the effect of the congressionally-mandated health warnings through advertising and public relations campaigns; 3) knowingly misrepresented the health hazards of smoking; and 4) ignored and withheld from the public medical and scientific evidence of the dangers of smoking.[45]

As an affirmative defense, the defendants raised the Labeling Act's preemption provision to all plaintiff's post-1965 (post-Labeling Act) claims.[46] Plaintiff moved to strike the preemption defense.[47] The dis-

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under different plan); Federal Express Corp. v. California Pub. Util. Comm'n, 936 F.2d 1075, 1078-79 (9th Cir. 1991) (noting the presumption against preemption, but holding that the Airline Deregulation Act preempted state law regulating the terms of service offered by air carriers); Professional Lawn Care Ass'n v. Milford, 909 F.2d 929, 932-34 (6th Cir. 1990) (noting the presumption against preemption but holding the Federal Insecticide, Fungicide and Rodenticide Act preempted state law imposing notice requirements on pesticide users); Taylor v. General Motors Corp., 875 F.2d 816, 823 (11th Cir. 1989) (noting the strong presumption against preemption but holding that the National Traffic and Motor Vehicle Safety Act preempted state tort claims for strict liability and negligence against automobile manufacturer).

43. For a discussion of the early impact of *Cipollone* on these defenses, see Andrew Blum, *Cipollone Said To Spur Settlement; But Lawyers Disagree*, NAT. L.J., p. 3, August 24, 1992 (discussing *Cipollone's* impact on airbag and pesticide cases). *See also U.S. Supreme Court Asked to Review Decision by Tenth Circuit Finding Pre-emption by FIFRA*, Toxic L. Rep. (BNA) No. 12, at 344 (August 19, 1992) (discussing effect of *Cipollone* on preemption claims under the Federal Insecticide, Fungicide and Rodenticide Act).

44. 593 F. Supp. 1146 (D.N.J. 1984). After Rose's death in 1984, her husband filed a third amended complaint to include a wrongful death claim. 112 S. Ct. at 2614. Following the trial, Antonio Cipollone died and their son prosecuted the case. *Id.*

45. 593 F. Supp. at 1149.

46. *Id.*

47. *Id.*

trict court ruled that the Act did not expressly or impliedly preempt any of Mrs. Cipollone's claims.[48] The district court certified its finding of preemption for interlocutory appeal, and the Court of Appeals for the Third Circuit agreed to hear the appeal.[49]

The court of appeals upheld the district court's conclusion that the Labeling Act's preemption provision did not expressly preempt Mrs. Cipollone's common law tort claims.[50] The court of appeals found that Congress had not "occupied the field" of smoking related health hazards.[51] The court concluded, however, that Mrs. Cipollone's state law tort claims were preempted because they presented an "actual conflict" with the Act. The court held that Mrs. Cipollone's common law tort claims frustrated the purpose of the Act. On remand, the trial court interpreted the court of appeals' decision as barring Mrs. Cipollone's post-1965 claims for failure to warn, fraudulent misrepresentation, express warranty, and conspiracy to defraud.[52]

Following a four-month trial, the jury returned a verdict of $400,000 on Mrs. Cipollone's pre-1966 express warranty claim against Liggett Group, the manufacturer of the cigarettes she smoked during that period.[53] The jury also concluded that Liggett had a duty to warn of the hazards of smoking prior to 1966; Liggett breached that duty; that breach proximately caused Rose Cipollone's lung cancer and death.[54] Nevertheless, the jury returned a verdict in Liggett's favor on the failure to warn claim because of its findings on comparative fault.[55]

Both parties appealed. The court of appeals reversed in part,[56] af-

48. *Id.* at 1170.

49. Cipollone v. Liggett Group, Inc., 789 F.2d 181, 183 (3d Cir. 1986).

50. *Id.* at 185.

51. *Id.* at 187. The court stated that the Act preempted all claims pertaining to smoking and health that challenge the adequacy of the warning label or the propriety of a party's action with respect to advertising and promotion as well as claims pertaining to a negligent failure to warn. *Id.* By negative implication, the court held that claims outside these areas are not preempted by the Act.

52. Cipollone v. Liggett Group, Inc., 649 F. Supp. 664, 672-75 (D.N.J. 1986).

53. 693 F. Supp. 208, 210 (D.N.J. 1988).

54. *Id.*

55. *Id.* The jury found that Mrs. Cipollone voluntarily encountered a known danger, which proximately caused her cancer. *Id.* The jury attributed 80% of the fault to Mrs. Cipollone thus barring her failure to warn claim. *Id.*

56. The Court reversed the district court's order, which barred the Cipollones' risk utility claim. The appellate court also reversed the lower court's judgment on the failure to warn claim, express warranty claim, and the motion for summary judgment. Cipollone v. Liggett Group, Inc., 893 F.2d 541, 583 (3d Cir. 1990).

firmed in part,[57] and remanded for a new trial.[58] The court recognized the problems created by its interlocutory preemption decision. The court's finding of preemption created an artificial time constraint on the determination of both causation and liability.[59] It concluded that the skewed effect of its ruling warranted a reversal of the jury's comparative fault finding.[60] Despite these observations, the court reaffirmed its prior interlocutory preemption decision, affirming the district court's interpretation that the court of appeals decision barred the Cipollones' claims for failure to warn, fraudulent misrepresentation, express warranty, and conspiracy to defraud.[61]

The court also held that the preemption bar applied to Mrs. Cipollone's intentional tort claims.[62] The court reasoned that such claims challenged the defendants' advertising and promotional activities with respect to cigarettes, in conflict with the earlier preemption opinion.[63] In its earlier decision, however, the court of appeals noted the absence of definitive evidence that Congress intended to preempt state tort law.[64]

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57. The court affirmed the district court's order dismissing the Cipollones' post-1965 failure to warn, express warranty, and intentional tort claims. *Id.*

58. *Id.*

59. *Id.* at 546. The court of appeals noted that its holding caused the district court to forbid the jury from considering the effect of the cigarette manufacturer's post-1965 conduct. The jury could only consider whether the pre-1965 breach of warranty and failure to warn proximately caused Mrs. Cipollone's death. *Id.* The court allowed the jury to consider Mrs. Cipollone's post-1965 smoking, believing it relevant to a determination of comparative fault. *Id.*

60. 893 F.2d at 547. The court noted that "permitting [Liggett Group, Inc.] to take advantage of Mrs. Cipollone's post-1965 conduct to escape liability altogether, particularly in the face of [the Cipollones'] allegations that [Liggett Group, Inc.] engaged in post-1965 conduct designed to reassure smokers, creates an unacceptable imbalance." *Id.*

61. *Id.* at 582.

62. *Id.* On appeal, Mr. Cipollone argued that the district court erred in holding that the court of appeals preemption holding barred all of the Cipollones' intentional tort claims. *Id.* The court of appeals rejected this argument, concluding that the Cipollones' based their claim on the manufacturer's advertising conduct, and therefore, was in the realm of actions barred by preemption. *Id.*

63. *Id.*

64. 789 F.2d 185-86. The Supreme Court affirmed the Court of Appeals conclusion: The Senate Report emphasized that the "pre-emption of regulation or prohibition with respect to cigarette advertising is narrowly phrased to preempt only state action based on smoking and health. It would in no way affect the power of any State . . . with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings or similar police regulations."

Chief Judge Gibbons joined in the preemption portion of the opinion because he felt bound by the prior panel's decision.[65] In a concurring opinion, he concluded that, as a matter of law, the court's original preemption decision was wrong.[66]

B. *Statute Involved*

As enacted by Congress, the Federal Cigarette Labeling and Advertising Act of 1965[67] required cigarette manufacturers to place the following warning on cigarette packages beginning on January 1, 1966: "Caution: Cigarette Smoking May be Hazardous to Your Health."[68] In 1970, Congress amended the warning to read: "Warning, The Surgeon General Has Determined That Cigarette Smoking Is Dangerous

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112 S. Ct. at 2624 n.26 (quoting S. Rep. No. 566, 91st Cong., 1st Sess., at 12 (1969)). The Supreme Court further noted:

> [T]his reading of "based on smoking and health" is wholly consistent with the purposes of the 1969 Act. State law prohibitions on false statements of material fact do not create "diverse, nonuniform and confusing" standards. Unlike state law obligations concerning the warning necessary to render a product "reasonably safe," state law proscriptions on intentional fraud rely only on a single, uniform standard: falsity. Thus, we conclude that the phrase "based on smoking and health" fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements. Accordingly, petitioners' claim based on allegedly fraudulent statements made in respondents' advertising are not preempted by section 5(b) of the 1969 Act.

Id. at 2624.

The court of appeals held that the lower court correctly found that § 1334 of the Act did not expressly preempt state tort law. 789 F.2d at 185. Nor did Congress clearly intend to occupy the field so as to preclude all state tort actions. *Id.* at 186. Every court that has considered this issue has reached the identical conclusion. *See, e.g.*, Pennington v. Vistron Corp., 876 F.2d 414, 418 (5th Cir. 1989) (noting that the preemption provision of the Act makes no reference to any state tort claims, directly or indirectly; therefore, the Act did not expressly preempt plaintiff's products liability claims); Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 234 (6th Cir. 1988) (stating that § 1334 does not expressly preempt state law claims nor is there evidence of Congressional intent to displace state common law claims); Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655, 658-661 (Minn. 1989) (noting that state law claims are not expressly preempted nor impliedly preempted absent actual conflict with the Act); Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239, 1247 (N.J. 1990) (agreeing with other courts which held that the Act neither expressly preempts state common-law claims nor impliedly preempts them by pervasively occupying the field of law).

65. *Cipollone*, 893 F.2d at 583 (Gibbons, J., concurring).

66. *Id.* Chief Judge Gibbons believed the court's prior interlocutory ruling lacked a factual basis. *Id.*

67. Pub. L. No. 89-92, 79 Stat. 282, (codified as amended at 15 U.S.C. §§ 1331-1340 (1988)) [hereinafter *Labeling Act*].

68. § 4, 79 Stat. at 283.

to Your Health."[69]

The Labeling Act's preamble sets forth the Act's policy and purpose.[70] The original Act contained an express preemption clause, which required only that a specific warning phrase appear on every pack of cigarettes sold.[71] That preemption provision was amended in 1970 to clarify the Act's preemptive authority.[72] However, the Act

69. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 4, 84 Stat. 87 (codified as amended at 15 U.S.C. § 1331-1339 (1988)). Congress changed the warning requirement in 1984 by enacting the Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200 (codified at §§ 1331, 1333, 1335-1341 (1988)), but those requirements were not implicated because Rose Cipollone's lung cancer was diagnosed in 1981.

70. § 2, 79 Stat. at 282. These provisions were not changed by the 1970 amendment to this Act. The Labeling Act's preamble sets forth the following statement of policy and purpose:

> DECLARATION OF POLICY
>
> § 2. It is the policy of the Congress, and the purpose of this Act, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

Id.

71. § 5, 79 Stat. at 283. The original Labeling Act included the following preemption section:

> Section 5. (a) No statement relating to smoking and health, other than the statement required by § 4 of this Act, shall be required on any cigarette package.
>
> (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Id.

The preemption section also required the Federal Trade Commission ("FTC") to submit periodic reports to Congress on the effectiveness of cigarette labeling, advertising, and promotion. § 5(d)(2), 79 Stat. at 283. It required the Secretary of Health, Education and Welfare to transmit periodic reports to Congress on the health consequences of smoking and the need for legislation. § 5, 79 Stat. at 283. The section recognized that the Act failed to limit the FTC's authority with respect to unfair practices in cigarette advertising. § 5(c), 79 Stat. at 283. The preemption section did not affirm nor deny the FTC's holding that it was authorized to require an affirmative statement in cigarette advertising. *Id.*

72. The preemption provision was amended as follows: Sec. 5(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

lacks specific provisions addressing state law tort claims, and it provides no compensation scheme for individuals injured by smoking.

The Act prohibits imposition of advertising requirements "under state law," thus precluding the imposition of state statutory or regulatory requirements.[73] If Congress wanted to bar common law tort actions as well, it could have done so explicitly, as it has in other statutes.[74] Moreover, the Labeling Act's legislative history supports the notion that Congress anticipated the continuation of product liability suits against cigarette manufacturers under the Act.

Congress' silence with respect to preemption made it appropriate for the lower court to search for signs of implied intent. In the Cigarette Labeling and Advertising Act, however, Congress was not silent. It included a section specifically entitled Preemption which failed to include state tort actions;[75] therefore, it was unnecessary to infer an implied intent to preempt these claims.[76]

The decision to confer immunity upon an entire industry from liability for damages caused by the product it produces is a policy decision for Congress, not the courts. Cigarette-related illnesses and deaths impose significant costs on society in the form of medical expenses and lost productivity,[77] yet courts shield the cigarette industry from the

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conformity with the provisions of this Act. § 5(b), 84 Stat. at 88 (subsection 5(a) of the 1965 Act remained unchanged).

73. § 5(b), 84 Stat. at 88.

74. *See, e.g.*, Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a) (1988) ("[T]he provisions of this subchapter and subchapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.").

75. *See* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 281-82 (1987) (holding "there is no need to infer congressional intent to preempt state laws"); *see also* California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 591-92 (1987) (stating that clear statements in the "Purpose" section of the Senate Report on the Coastal Zone Management Act clearly indicate congressional intent regarding preemption and, thus, "end [the court's] inquiry"); Forster v. R.J. Reynolds Tobacco Co., 423 N.W.2d 691, 696 (Minn. App. 1988) ("It is one thing for courts to try to divine congressional intent from the overall operation of a statute and its legislative history when Congress has been silent, but it is quite another to do so when Congress has included specific provisions, as it did in 15 U.S.C. § 1334, expressly addressing what it intended to preempt.") *aff'd in part, rev'd in part*, 437 N.W.2d 655 (Minn. 1989).

76. § 5, 79 Stat. at 283.

77. *See generally* Leila B. Boulton, Comment, *Tobacco Under Fire: Developments in Judicial Responses to Cigarette Smoking Injuries*, 36 CATHOLIC U. L. REV. 643, 645 n.11 (1987) (discussing estimates on medical care costs and loss of productivity costs attributable to cigarette smoking).

responsibility for these damages. No other industry, regardless of its financial security, enjoys a comparable immunity. Some commentators suggest that courts are compelled to find preemption in cigarette cases in order to protect the tobacco industry from a flood of claims.[78] However, the tobacco industry is not in need of such indulgence. Since the mid-1950s, the industry has not lost a trial or paid a settlement in response to a smoking-related tort claim.[79] Cigarette manufacturers compiled this unique record without the benefit of federal preemption.[80] Rather, the manufacturers prevail because the plaintiffs fail to satisfy the burden of proof relative to causation.[81] It should be immediately apparent that, even without the protective shield conferred upon cigarette manufacturers by the Third Circuit, few smokers could be confident of prevailing in a product liability action.[82]

C. *Issues Before The Supreme Court*

All the tools needed to properly resolve the preemption issue in *Ci-*

78. *See* Richard C. Ausness, *Cigarette Company Liability: Preemption, Public Policy, and Alternative Compensation Systems*, 39 SYRACUSE L. REV. 897, 903 (1988) ("some courts may have used the preemption doctrine to mask their misgivings about the ability of tort litigation to provide fair compensation to injured consumers without bankrupting the tobacco industry."); Brendan K. Collins, Case Review, 32 VILL. L. REV. 875, 891 (1987) ("unless claims like those of the Cipollones [are] preempted, the industry would be overcome by a tidal wave of lawsuits").

79. Donald W. Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423, 1423 (1980).

80. *Id.* at 1425. "These victories have been the result of both favorable legal rulings and tenacious defense work." *Id.*

81. *Id.* at 1425-28. *See also* William Kepko, Comment, *Products Liability: Can It Kick the Smoking Habit?* 19 AKRON L. REV. 269 (1985) (discussing the history of cigarette liability actions in which cigarette manufacturers consistently prevail).

82. If a significant number of claims for smoking-related injuries succeeded, Congress could protect the industry by establishing a compensation scheme funded by cigarette taxes. An industry compensation fund has been advanced unsuccessfully in the past. *See, e.g.*, Richard C. Ausness, *Compensation For Smoking-Related Injuries: An Alternative to Strict Liability in Tort*, 36 WAYNE L. REV. 1085 (1990); Garner, *supra* note 79, at 1464 (discussing the merits of imposing a "safety tax" based on the comparative levels of danger between various brands of cigarettes). The tobacco industry, which carries considerable clout in congressional corridors, can be counted on to ensure that the industry remains a viable market competitor. It was unnecessary for the Third Circuit to cast a protective shield over the cigarette manufacturers. The Third Circuit should have heeded the Supreme Court's advice: "The courts should not assume the role which our system assigned to Congress." Pacific Gas & Elec. Co. v. Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 223 (1983).

pollone previously appeared in *Silkwood v. Kerr-McGee Corp.*[83] However, the Third Circuit followed a new course. The Third Circuit concluded that permitting state law tort claims obstructed the accomplishment and execution of Congress' objectives, as represented in the Labeling Act.[84] According to Professor Lawrence Tribe, the court abandoned established principles of federalism and jeopardized the rights that states afford their citizens.[85] It became necessary for the Supreme Court to correct the appellate court's error.

Protecting consumers from hazardous products and affording fair compensation to those who are injured by such products represent strong state interests.[86] These interests are acknowledged as reasons

83. 464 U.S. 238 (1984).

84. *Cipollone*, 789 F.2d at 187 (quoting Hines v. Davidowitz, 312 U.S. 52 (1941)). The language from *Hines* arguably permits a court to substitute its own policy judgments for those of Congress. For this reason, commentators urge its abandonment. *See* Robert C. Carlsen, Comment, *Common Law Claims Challenging Adequacy of Cigarette Warnings Preempted Under the Federal Cigarette Labeling and Advertising Act of 1986*: Cipollone v. Liggett Group, Inc., 60 ST. JOHN'S L. REV. 754, 767 (1986).

This interpretation of *Hines* is not mandatory. The context in which Justice Black announced this rule indicates that it was clearly intended to apply in areas of particularly federal concern. At issue was the validity of an Alien Registration Act adopted by the state of Pennsylvania:

> Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. And in that determination, it is of importance that this legislation is in a field that affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax. And it is also of importance that this legislation deals with the rights, liberties and personal freedoms of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans.

312 U.S. at 67-68. This distinction was underscored recently in Hillsborough County v. Automated Medical Lab., Inc., 471 U.S. 707 (1985), which involved the issue of preemption of local regulation of blood plasma. Justice Marshall noted that *Hines* inferred a congressional intent to preempt state law based on a dominant federal interest in foreign affairs. *Id.* at 719. "Needless to say, those factors are absent here. Rather, as we have stated, the regulation of health and safety matters is primarily and historically, a matter of local concern." *Id.*

85. Laurence H. Tribe, *Federalism with Smoke and Mirrors*: *Anti-cigarette Suits*, THE NATION, June 7, 1986, at 788.

86. *See, e.g.*, Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239, 1249-50 (N.J. 1990) (noting that a state has a strong public policy interest in providing compensation to those injured by defective products); Feldman v. Lederle Lab., 479 A.2d 374, 391 (N.J. 1984) (same); O'Brien v. Muskin Corp., 463 A.2d 298, 303 (N.J. 1983) (same); Freund v. Cellofilm Properties, Inc., 432 A.2d 925, 931 (N.J. 1981) (discussing the need

for imposing liability for injuries resulting from products which prove to be dangerous.[87] Nevertheless, the defendants in *Cipollone* claimed that Congress displaced state law and deprived injured victims of their right to seek just compensation with respect to injuries resulting from a single product.[88]

D. *The Supreme Court Strengthens the Presumption Against Preemption*

In *Cipollone v. Liggett Group, Inc.*,[89] the Supreme Court stated that because of the presumption against preemption, the Act must be narrowly construed, and each common law claim must be examined to determine whether it is expressly preempted.[90] The preemption language must be given a "fair but narrow" reading.[91] The Court found that the petitioner's claim, alleging a conspiracy by respondents to misrepresent or conceal facts concerning the health hazards of smoking, was not preempted. The predicate duty not to conspire to commit fraud is not a prohibition "based on smoking and health" addressed by Section 5(b) of the Act, which refers to the wording required as health warnings on cigarette labels.[92] The Court concluded that the federal statute only preempted state and federal rulemaking authorities from mandating particular cautionary statements regarding cigarette smoking and did not preempt state law tort actions.[93]

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for strict liability in defective design cases because of the importance of user protection and the need for uniformity and consistency in products liability cases).

87. *See generally* Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965) (discussing the history and development of strict liability based on the need to compensate victims of defective products); John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973) (same).

88. Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146, 1149 (D.N.J. 1984), *rev'd* 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987).

89. 112 S. Ct. 2608 (1992).

90. *Id.* at 2621.

91. *Id. See supra* notes 71-72 and accompanying text for the preemption language of the Federal Cigarette Labeling and Advertising Act.

92. 112 S. Ct. at 2624. Section 1333(a) of the Act references the specific wording required in the warning labels affixed to cigarette packaging. 15 U.S.C. § 1333(a) (1988).

93. 112 S. Ct. at 2619. Because the statute included a broader preemption provision than the original Act, barring not only "statements" on smoking and health but also "requirements" and "prohibitions" relating to cigarettes, the Court found the scope of the pre-emption clause was changed by the inclusion of this language, even though the

Justice Blackmun, who concurred in part and dissented in part, emphasized the presumption against preemption of state law tort claims. He concluded that Congress never intended to displace state common-law tort actions like the claims presented by Mrs. Cipollone.[94] Preemption undermines the natural ability of the states to regulate the health and safety of its citizenry. The effect of the Court's reinforcement of the presumption against preemption is already affecting the course of state law litigation.[95]

III. PREEMPTION LAW

A. *There Is a Strong Presumption Against Preemption of State Tort Remedies*

Fundamental to the preemption doctrine is the assumption that Congress does not intend to displace all state tort law.[96] This presumption against preemption is more than a statutory construction tool. The presumption is rooted in the basic principles of federalism which are embodied in the Constitution.[97] Healthy federalism requires a presumption that Congress did not intend to preclude all state law in areas traditionally occupied by the states.

When Congress legislates in a field traditionally occupied by the states, the courts assume that the state's police powers are safe from preemption by a Federal Act, provided Congress has not specifically legislated to the contrary.[98] The Supreme Court consistently reaffirms

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legislative history of the revisions suggested the later act was merely a "clarification" of the earlier act. *Id.*

94. *Id.* at 2631 (Blackmun, J., concurring in part, dissenting in part).

95. *See* Andrew Blum, *Cipollone Said to Spur Settlement; But Lawyers Disagree*, NAT'L L.J., August 24, 1992, at 3. The Ford Motor Company, subsequent to the *Cipollone* decision, settled an airbag personal injury suit for $350,000 in Thomas v. Ford Motor Co., No. 8:91-2630-21, 2631-21 (E.D.S.C. 1991). Plaintiffs' attorneys noted settlement talks picked up after the *Cipollone* ruling which was, at the time, before the Fourth Circuit on a writ of mandamus. Blum, *supra*.

96. Maryland v. Louisiana, 451 U.S. 725, 746 (1981); *see also* Milwaukee v. Illinois, 451 U.S. 304, 316 (1981) (" '[W]e start with the assumption that the historic police powers of the states were not to be superseded . . . unless that was the clear and manifest purpose of Congress.' ").

97. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243 (1959). *See also* Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (noting that the presumption against preemption "provides assurance that the 'federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts").

98. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

this presumption in favor of state law.[99]

The Court established an even stronger presumption against federal preemption in the absence of any alternative federal remedy. In *Marbury v. Madison*,[100] Chief Justice Marshall stated that the government must insure that the law affords every injured individual the protection of the law.[101] Based on recognition of this basic notion, the Court refuses to find preemption of state law remedies where federal law provides no alternative redress.[102] In *Silkwood*, the Court concluded that Congressional silence assumes additional significance when Congress fails to provide a remedy for persons injured from the use of a consumer product, because Congress is unlikely to remove all means of judicial recourse for those injured by illegal conduct.[103] Justice Blackmun, dissenting in *Silkwood*, was equally emphatic on this point.[104]

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99. *See, e.g.*, FMC Corp. v. Holliday, 111 S. Ct. 403, 410 (1990) (noting the presumption that "Congress does not intend to pre-empt areas of traditional state regulation"); English v. General Elec. Co., 496 U.S. 72, 73 (1990) (holding that there was "no 'clear and manifest' intent on the part of Congress, in enacting § 210 [of the Energy Reorganization Act] to preempt all state tort laws that traditionally have been available to those persons who, like petitioners, allege outrageous conduct at the hands of an employer"); Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 310 n.13 (1988) (distinguishing the facts before the Court in *Schneidewind* and those in *Rice v. Santa Fe Elevator* where the field of regulation was one which "the states had traditionally occupied"); Florida Lime & Avocado Growers, Inc., v. Paul, 373 U.S. 132, 143-44 (1963) (noting that the regulation of avocados is one traditionally considered within the states' authority, and therefore, an "unlikely candidate for exclusive federal regulation").

100. 5 U.S. (1 Cranch) 137 (1803).

101. Chief Justice Marshall stated that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Id.* at 163.

102. *See* United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656, 663-64 (1954).

103. In *Silkwood* the Court stated: "This silence [of Congress] takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1983).

104. Justice Blackmun stated that "[t]he absence of federal regulation governing the compensation of victims . . . is strong evidence that Congress intended the matter to be left to the States." 464 U.S. at 263-64 n.7. Other courts have followed this theory. *See, e.g.*, Abbot v. American Cyanamid Co., 844 F.2d 1108, 1112 (4th Cir. 1988) ("The presumption . . . is even stronger against preemption of state remedies, like tort recoveries, when no federal remedies exist.").

B. *State Tort Remedies Are Not Consistent With Federal Regulations*

In *Silkwood*, the Court held that federal law preempted state regulation of atomic power, but permitted jury awards for damages due to plutonium contamination.[105] The Court found that the Nuclear Regulatory Commission possessed exclusive regulatory authority over safety issues related to nuclear development, while state law governed the compensation of individuals injured by nuclear hazards.[106]

Moreover, both dissenting opinions in *Silkwood* agreed with the majority that compensatory damages are consistent with federal regulation.[107] Justice Blackmun differentiated between the objectives of punitive and compensatory damages and determined that compensatory damages serve to compensate victims for their injuries.[108] Justice Blackmun concluded that such an award of compensatory damages was consistent with federal regulation of a given area of law because it is not regulatory in nature. Similarly, Justice Powell concluded that an award of compensatory damages is not regulatory, especially where state law explicitly provides such compensation.[109]

Courts conclude that compelling a corporate defendant to pay com-

105. 464 U.S. 238, 258 (1984). *See also* English v. General Elec. Co., 496 U.S. 72, 85 (1990) ("This result is strongly suggested by the decision in *Silkwood*."); Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 186 (1988) (holding that "Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not" based on the Court's holding in *Silkwood*).

106. The Court stated that "Congress did not believe that it was inconsistent to vest the NRC with exclusive regulatory authority over the safety aspects of nuclear development while at the same time allowing plaintiffs like Mr. Silkwood to recover for injuries caused by nuclear hazards." 464 U.S. at 258.

107. *See infra* notes 108-109 and accompanying text.

108. Justice Blackmun stated that "the purpose of punitive damages is to regulate safety, whereas the purpose of compensatory damages is to compensate victims." 464 U.S. at 263.

109. Justice Powell's view was that "[t]here is no element of regulation when compensatory damages are awarded, especially when liability is imposed without fault, as authorized by state law." *Id.* at 276 n.3. The Court reaffirmed this distinction in English v. General Elec. Co., 496 U.S. 72 (1990):

> [F]or a state law to fall within the preempted zone, it must have some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels. We recognize that the claim for intentional infliction of emotional distress at issue here may have some effect on these decisions, because liability for claims like petitioner's will attach additional consequences to retaliatory conduct by employers. As employers find retaliation more costly, they will be forced to deal with complaints by whistleblowers by other means, including altering radiological safety policies. Nevertheless, we believe that

pensatory damages does not impair a federal statutory scheme.[110] While "tension" may exist between tort liability and federal regulations, the threat of paying damages does not frustrate a federal remedial scheme of imposing civil fines on violators of federal standards.[111] State law tort verdicts do not mandate any specific action from a defendant. Rather the defendant is merely required to answer in damages. These state law tort verdicts provide defendants with merely the option to change their behavior.[112]

The Supreme Court recognized that common law tort liability exerts a "regulatory" impact which conflicts with federal schemes.[113] How-

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this effect is neither direct nor substantial enough to place petitioner's claim in the preempted field.

Id. at 85.

110. *See, e.g.*, Ferebee v. Chevron Chem. Corp., 736 F.2d 1529, 1543 (D.C. Cir. 1984) (holding compliance with both the Federal Insecticide, Fungicide and Rodenticide Act was not impossible since Chevron could still use an EPA-approved label and pay damages to successful tort plaintiffs), *cert. denied*, 469 U.S. 1062 (1985); Montana Pole & Treating Plant v. I.F. Laucks & Co., 775 F. Supp. 1339 (D. Mont. 1991) (following the reasoning in *Ferebee* and concluding FIFRA did not preempt state law tort recovery on failure to warn theory); Riden v. ICI Americas, Inc., 763 F. Supp. 1500, 1506-08 (W.D. Mo. 1991) (holding that it is not impossible to comply with FIFRA and pay damages on state tort law claims).

111. *See, e.g.*, Silkwood v. Kerr-McGee, 464 U.S. 238, 257 (1984) ("Paying both federal fines and state imposed punitive damages for the same incident would not appear to be physically impossible.").

112. *See, e.g.*, Ferebee v. Chevron Chem. Corp., 736 F.2d 1529, 1541 (D.C. Cir. 1984) ("The verdict itself does not command Chevron to alter its label."), *cert. denied*, 469 U.S. 1062 (1984). Indeed, compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable person would take additional precautions. *See, e.g.*, Rudelson v. United States, 602 F.2d 1326 (9th Cir. 1979) ("A person is not necessarily free from negligence just because he 'may have complied with safety statutes or rules. The circumstances may require him to do more.' ").

113. *See* Chicago & N. W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318-19 (1981) (shipper brought state court action against railroad for failure to provide adequate rail service); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243 (1959) (employer brought state court action against unions to enjoin picketing and collect damages). In *Garmon*, the Court said, "[s]uch regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Garmon*, 359 U.S. at 247.

Garmon sought to replace state tort remedies with the remedial scheme provided by the National Labor Relations Board "by ensuring that primary responsibility for interpreting and applying this body of labor law remains with the NLRB . . . based on the primary jurisdiction rationale." Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54, 468 U.S. 491, 502 (1984). As one district court concluded, *Garmon* deals with the primary jurisdiction of the NLRB and its remedial scheme. Wood

ever, cases such as *San Diego Building Trades Council v. Garmon*[114] and *Chicago & North Western Transportation Company v. Kalo Brick & Tile Co.*[115] are distinguishable because they involved business torts arising out of actions permissible under federal law and for which relief could be granted by administrative agencies. Neither case involves preempting a common law negligence action for personal injuries. Inflexible application of the *Garmon* doctrine must be avoided,[116] particularly where the states have a substantial interest in regulating the conduct at issue, and this interest does not interfere with the federal regulatory scheme.[117] When Congress displaces state law, preemption is not an automatic defense merely because the federal statute intrudes into the range of subjects traditionally left for state police powers.[118] This is particularly true when Congress' desire for national uniformity in a regulatory scheme takes precedence over the state police power interest.[119]

IV. CONCLUSION

The *Cipollone* decision strengthened the presumption against preemption. The Court signaled that regulatory legislation will not be in-

v. General Motors Corp., 673 F. Supp. 1108, 1117-18 n.14 (D. Mass. 1987), *rev'd*, 865 F.2d 395 (1st Cir. 1988).

114. 359 U.S. 236 (1959).

115. 450 U.S. 311 (1981).

116. Certain areas of law such as labor relations, immigration, and foreign policy are deemed to fall within the federal sphere of superintendence. Therefore, the presumption against preemption is eased, assuming it even exists at all. *See* San Diego Building Trades Council v. Garmon, 359 U.S. 236, 242-43 (1959); Hines v. Davidowitz, 312 U.S. 52, 62-63 (1941). However, even the presence of a uniquely federal subject matter does not preempt all state laws which might affect it. Further exceptions to preemption under *Garmon* arise when the conduct involved is a "mere peripheral concern of a federal labor law or statute or an issue involving deeply rooted state concerns.

117. *See* Breininger v. Sheet Metal Workers Int'l Assoc. Local Union No. 6, 493 U.S. 67 (1989). Some lower courts have rejected the notion that a defendant can comply with federal regulations and still pay tort damages. Such courts disparage the "choice of reaction" analysis as "akin to coming up for air after being underwater" and hold that permitting the award of tort damages in personal injury cases would have a "regulatory effect" which would frustrate congressional efforts to regulate a particular field. *See* Palmer v. Liggett Group, 825 F.2d 620, 627 (1st Cir. 1987). *See also* Wood v. General Motors Corp., 865 F.2d 395, 410-12 (1st Cir. 1988) (discussing how state design standards can frustrate the implementation of federal performance standards under the Federal Motor Vehicle Safety Standards Act).

118. Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982).

119. *See* Kamen v. Kemper Fin. Serv., Inc., 111 S. Ct. 1711, 1717 (1991).

terpreted in an over-reaching fashion to protect the interests of business against common law tort grievances. *Cipollone* relieves courts of the uncertainty resulting from the creative interpretation of federal statutes absent express preemption. The decision restricts the ability of the business community to influence which areas are provided federal protection by opening up possibilities for state common law challenges.

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