The Liability of Cigarette Manufacturers for Lung Cancer: An Analysis of the Federal Cigarette Labeling and Advertising Act and Preemption of Strict Liability in Tort Against Cigarette Manufacturers

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INTRODUCTION

In the past, tobacco manufacturers have been held liable for producing products containing such distasteful substances as human toes, mice, small snakes, nails, fishhooks, metal particles, and worms. When plaintiffs brought claims for injuries caused by the native ingredients of tobacco smoke, how-

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3 Garner, supra note 1, at 1425.
5 Garner, supra note 1, at 1425; see Corum v. R.J. Reynolds Tobacco Co., 171 S.E. 78 (N.C. 1933).
7 Garner, supra note 1, at 1425; see Liggett & Myers Tobacco Co. v. Rankin, 54 S.W.2d 612 (Ky. 1932).
8 "Among the more obnoxious components are carbon monoxide, nicotine and tar, acrolein, hydrocyanic acid, nitrogen dioxide, cresols, phenol, acetaldehyde, acetone, acetonitrile, acrylonitrile, ammonia, benzene, 2-3 butadione, carbon dioxide, crotononitrile, ethylamine, formaldehyde, hydrogen sulfide, methacrolein, methyl alcohol, methylanine, butylanine, dimethylamine, DDT, endrin, furfural, hydroquinone, nickel compounds, and pyridine." Garner, supra note 1, at 1425 n.23 (citing U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, SMOKING AND HEALTH, REPORT OF THE SURGEON GENERAL, ch. 1, at 30 (1979)).
ever, the tobacco manufacturers historically have enjoyed immunity from liability.  

Today this immunity is in jeopardy. With the recent revival of strict liability cases involving cancer-plagued plaintiffs, cigarette manufacturers have found themselves subject to new potential liability.

Plaintiffs' strict liability claims against cigarette manufacturers are based primarily on inadequate warnings and design defects. While manufacturers argue these claims are preempted by the Federal Cigarette Labeling and Advertising Act, plaintiffs contend they are not preempted. This Comment will analyze these positions and examine in detail the risk-utility analysis to determine whether strict liability should be extended to cigarette manufacturers. Furthermore, taking into consideration Kentucky's strong tobacco interests, emphasis will be directed toward how Kentucky courts should treat plaintiffs' strict liability claims against cigarette manufacturers.

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9 See id. at 1425.


11 See, e.g., Cipollone, 789 F.2d at 184; Dewey, 523 A.2d at 712.


13 See infra notes 16-122 and accompanying text.

14 See infra notes 124-31 and accompanying text.

15 See infra notes 132-48 and accompanying text.
I. BACKGROUND

In 1913, R.J. Reynolds Tobacco Company introduced the Camel cigarette to this country. After World War I, cigarettes became very popular, and the tobacco industry initiated an immense advertising campaign, convincing the American public that cigarette smoking was socially acceptable. Cigarette manufacturers also addressed the health consequences of smoking, advertising that smoking was a healthy activity. It was not until the 1950s that consumers were informed of the association between cigarette smoking and lung cancer. This reality introduced an outbreak of litigation throughout the 1950s, 1960s, and early 1970s regarding cigarette manufacturers' liability toward plaintiffs who claimed to have acquired lung cancer as a result of smoking.

The tobacco industry has enjoyed a life of civil immunity in a world of products liability. Manufacturers of dangerous

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16 Wegman, Cigarettes and Health: A Legal Analysis 51 CORNELL L.Q. 678, 679 (1966).
17 Id.
18 Id. at 680. Wegman notes: A 1932 Lucky Strike advertisement inquired, “Do You Inhale?” and reassured rhetorically: “What’s there to be afraid of?” Old Gold followed in rapid order with its familiar slogan: “Not a Cough in a Carload.” Camel introduced its well-known “T-Zone” in 1936, promising the smoker that both his taste and his throat would react favorably to Camel’s mildness. In addition, the statement that “More Doctors Smoke Camels” carried implications that Camels were healthier than other brands.
19 Id.
20 Id.
22 Garner, supra note 1, at 1423.
products such as automobiles\textsuperscript{22} and drugs\textsuperscript{23} have been held strictly liable for injuries involving their products while tobacco manufacturers have escaped liability. Many believe this immunity is a direct consequence of the tremendous lobbying pressures put on Congress by the tobacco industry.\textsuperscript{24} Notwithstanding this theory, cigarette manufacturers have enjoyed civil immunity in lung cancer cases.

In the past, courts have used theories of negligence, express and implied warranty, strict liability, fraud, misrepresentation, and assumption of risk in their analysis of cases involving cigarette manufacturers' liability\textsuperscript{25} Presently, strict liability\textsuperscript{26} appears to be the best alternative for plaintiffs when bringing civil action against cigarette manufacturers.\textsuperscript{27} The recent cases of \textit{Cipollone v Liggett Group, Inc.},
\textsuperscript{28} \textit{Dewey v R.J Reynolds}

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\textsuperscript{22} See Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960) (automobile manufacturer held liable for defective automobile); see also Suvada v. White Motor Co., 210 N.E.2d 182 (Ill. 1965) (brake manufacturer held liable for tractor braking system malfunction).

\textsuperscript{23} Crocker v. Winthrop Lab., 514 S.W.2d 429 (Tex. 1974) (drug manufacturer held liable for decedent's death resulting from drug addiction).


\textsuperscript{25} See Hudson, 427 F.2d at 541 (negligence); Green, 409 F.2d at 1166 (implied warranty); Pritchard, 370 F.2d at 95 (negligence and express warranty); Ross, 328 F.2d at 3 (implied warranty, negligence, and misrepresentation); Lartigue, 317 F.2d at 19 (negligence and implied warranty); Cooper, 256 F.2d at 464 (fraud); White, \textit{supra} note 24, at 589. See generally Garner, \textit{supra} note 1, at 1434-37 (Professor Garner provides a good discussion of the theones available to plaintiffs.). Although theories of negligence, express and implied warranty, and assumption of risk are currently used by courts, this Comment will focus on a discussion of strict liability claims.

\textsuperscript{26} "Strict liability" means liability that is imposed on an actor apart from either (1) an intent to interfere with a legally protected interest without a legal justification for doing so, or (2) a breach of a duty to exercise reasonable care, i.e., actionable negligence." \textit{W. Keeton, Prosser and Keeton on the Law of Torts} § 75 (5th ed. 1984).

\textsuperscript{27} Garner, \textit{supra} note 1, at 1436; \textit{Note, supra} note 10, at 810; see James, \textit{The Untoward Effects of Cigarettes and Drugs: Some Reflections on Enterprise Liability}, 54 \textit{Calif. L. Rev.} 1550, 1550 (1966) ("The current trend in products liability cases is toward imposing strict liability on the maker for the injurious effects of his product upon a consumer or user when it is put to a foreseeable use.").

Tobacco Co.,29 Palmer v. Liggett Group, Inc.,30 and Stephen v American Brands, Inc.31 involve strict liability claims by plaintiffs against cigarette manufacturers.32

Section 402A of the Second Restatement of Torts33 (Restatement), which deals directly with strict liability of manufactured products, imposes liability on manufacturers who produce "any product in a defective condition unreasonably dangerous to the user or consumer."34 Therefore, for cigarette manufacturers to be held strictly liable, plaintiffs must establish that cigarettes conform to the wording of the Restatement.35

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30 825 F.2d 620 (1st Cir. 1987).
31 825 F.2d 312 (11th Cir. 1987).
32 For a more exhaustive list of cases involving strict liability claims, see supra note 10.
33 Restatement (Second) of Torts § 402A (1965) provides in full:
§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer
(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.
34 Id.
35 Comment 1 to the Restatement (Second) of Torts § 402A attempts to explain the meaning of the phrase "unreasonably dangerous." Comment 1 states in full:
1. Unreasonably dangerous. The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by "unreasonably dangerous" in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is
Recently, plaintiffs have relied heavily on two theories of strict liability, inadequate warning and design defect, in attempting to establish cigarettes as being "in a defective condition unreasonably dangerous to the user or consumer." These two theories have caused a resurgence of litigation involving cigarette manufacturers' liability for lung cancer.

II. THE LABELING ACT

Despite the growing evidence that cigarette smoking is hazardous to human health, Congress has decided not to prohibit it. Congress did decide, however, to regulate smoking and health by enacting the Federal Cigarette Labeling and Advertising Act (Labeling Act). The Labeling Act was originally not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.


36 Id. at § 402A; see, e.g., cases cited supra note 11.
37 See Note, supra note 10, at 809.
38 "The American Cancer Society estimates that cigarette smoking is responsible for 85% of lung cancer cases among men and 75% among women—about 83% overall." AMERICAN CANCER SOCIETY, CANCER FACTS & FIGURES 20 (1987). Also mentioned is the fact that "[s]moking accounts for about 30% of all cancer deaths, is a major cause of heart disease, and is linked to conditions ranging from colds and gastric ulcers to chronic bronchitis and emphysema." Id., see DANGERS OF SMOKING - BENEFITS OF quITTINo & RElATIVE RISKS oF REDUCED EXPOSURE 8-9, 33 (1980) (This pamphlet alleges that tobacco smoking also causes, or is strongly associated with, cancer of the larynx, mouth, esophagus, urinary bladder, pancreas, and kidneys.).
39 Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146, 1157 (D.N.J. 1984), rev'd in part, 789 F.2d 1146 (3d Cir. 1986), cert. denied, 107 S. Ct. 907 (1987); see Hearings on H.R. 643, 1237, 3055, 6543 Before the House Committee on Interstate and Foreign Commerce, 91st Cong., 1st Sess. 348 (1969) (statement of Dr. Sol R. Baker, Chairman, Committee on Tobacco and Cancer, American Cancer Society) ("[W]e are against prohibition. Some of us lived through one era of prohibition, and we certainly would not like to see another. We feel that it is the individual's right to smoke if he decides to.")
enacted in 1965, following a report of the Surgeon General of the United States finding that cigarette smoking is a health hazard to Americans and asking Congress to remedy this endangerment through some form of legislation.\footnote{Cipollone, 593 F Supp. at 1149.} By enacting the Labeling Act, Congress assumed exclusive control over cigarette warnings, advertising and promotions, thereby prohibiting any state from requiring any other warning on cigarette packages and advertisements.\footnote{See infra note 47.}

The Labeling Act necessitates a uniform national warning to inform consumers adequately of the health consequences of cigarette smoking and ensures that “commerce and the national economy” is “protected” and “not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.”\footnote{Labeling Act § 1331; see, e.g., Palmer v. Liggett Group, Inc., 633 F Supp. 1171, 1174 (D. Mass. 1986), rev’d, 825 F.2d 620 (1st Cir. 1987); Cipollone, 593 F Supp. at 1149.} Thus, the Labeling Act’s purposes are twofold: (1) it provides a national uniform warning system prohibiting inconsistent requirements which would vary from state to state, and (2) it protects the national economy by keeping the tobacco industry financially undamaged.

III. PREEMPTION

A. Generally

Preemption is based on the Supremacy Clause\footnote{The Supremacy Clause states: “The Constitution, and the Laws of the United States} and was
first recognized in the landmark case of *Gibbons v Ogden.*\(^{45}\) The Supremacy Clause "invalidates state laws that 'interfere with, or are contrary to' federal law."\(^{46}\) To ensure that its warning would be the only warning required, Congress included two preemption provisions in the Labeling Act. These provisions forbid states from requiring any statement relating to smoking and health different from that which Congress explicitly provides.\(^{47}\)

There are basically three circumstances in which courts have recognized that congressional acts preempt state law. First, Congress may preempt state law expressly\(^ {48}\) Second, Congress may "occupy a given field," thus preempting state law within that field.\(^ {49}\) If Congress "occupies the field" in a particular

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**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.

**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.

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\(^{45}\) The nullity of any act, inconsistent with the constitution, is produced by the declaration, that the constitution is the supreme law. In every such case, the act of congress, or the treaty, is supreme; and the laws of the state, though enacted in the exercise of powers not controverted, must yield to it. *Id.* at 210-11.


\(^{47}\) Labeling Act § 1334. Section 1334 provides in full:

§ 1334. Preemption

(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.

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\(^{49}\) "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 to supplement it," "because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose." *Cipollone v. Liggett Group, Inc.*, 593 F Supp. 1146, 1150-51 (D.N.J. 1984), *rev'd in part,*
area, implied preemption takes effect and federal law preempts state law.\textsuperscript{50} Third, state law may be implicitly preempted when it actually conflicts with the federal law.\textsuperscript{51} "Such conflict occurs where 'compliance with both federal and state regulations is a physical impossibility'"\textsuperscript{52} "or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"\textsuperscript{53}

B. Adequacy of Warning Claims

There is no debate that the Labeling Act expressly inhibits state legislatures from enacting statutes or regulations which require a different warning from that dictated by Congress.\textsuperscript{54} There is great controversy, however, regarding the Labeling Act’s preemptive effect on state common law damage actions involving adequacy of warnings.\textsuperscript{55}


\textsuperscript{50} There are three ways to determine whether Congress has "occupied the field" in a given area: "first, if there is a pervasive scheme of federal regulation in such area; second, if the federal interest in such area is dominant; and third, if the objective of federal law in such area and the obligation imposed by it reveal the same purpose." \textit{Cipollone}, 593 F Supp. at 1163-64.


\textsuperscript{52} \textit{Cipollone}, 593 F Supp. at 1151 (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)).

\textsuperscript{53} \textit{Id.} (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

\textsuperscript{54} \textit{Cipollone} v. Liggett Group, Inc., 789 F.2d 181, 185 (3d Cir. 1986), \textit{cert. denied}, 107 S. Ct. 907 (1987). The Third Circuit stated that "the district court did not question that the [Labeling] Act prohibits state legislatures from requiring a warning on cigarette packages that alters that provided in section 1333." \textit{Id.}, see Roysdon v. R.J. Reynolds Tobacco Co., 623 F Supp. 1189, 1190 (E.D. Tenn. 1985). The District Court states: "It is obvious that this statute prohibits the Tennessee legislature from requiring R.J. Reynolds to use any statement relating to smoking and health other than the one congressionally mandated." \textit{Id.}

Adequacy of warning is a strict liability claim used by plaintiffs to argue that cigarettes are products "in a defective condition unreasonably dangerous to the user or consumer." Since most courts have ruled that the Labeling Act does not expressly preempt these types of claims, express preemption creates no dispute. Rather, the controversy concerns implied preemption; in particular, it concerns whether state common law adequacy of warning claims "conflict" with the Labeling Act.

Cigarette manufacturers argue that state common law claims conflict with the Labeling Act and thus are implicitly preempted. Manufacturers allege such claims "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." In fact, the Supreme Court has recently reaffirmed the axiom that state common law damage awards are preempted when they conflict with federal laws on the theory that state law damage actions have a regulatory effect which may inhibit congressional objectives.

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56 Restatement (Second) of Torts § 402A (1965); see Cipollone v. Liggett Group, Inc., 644 F Supp. 283, 287 (D.N.J. 1986) (The defect may be in the form of a manufacturing flaw, design defect, or inadequate warning.).
57 See, e.g., Palmer, 633 F Supp. at 1174; Cipollone, 593 F Supp. at 1155.
59 Hines, 312 U.S. at 67; see Cipollone, 789 F.2d at 187 ("state common law damage actions have the effect of requirements that are capable of creating 'an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " (quoting Hines, 312 U.S. at 67)).
61 Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such 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
The test for identifying conflict between state common law adequacy of warning claims and the Labeling Act requires courts to examine the effect such claims have on the purposes of the Labeling Act. As previously mentioned, the Labeling Act serves two functions. First, it provides a national uniform warning system. Second, it protects the national economy by keeping the tobacco industry alive. Cigarette manufacturers contend adequacy of warning claims directly affect these purposes, alleging "claims relating to smoking and health that result in liability for noncompliance with warning, advertisement, and promotion obligations other than those prescribed in the [Labeling Act] have the effect of tipping the Act's balance of purposes and therefore actually conflict with the Act." "Certainly exposing a manufacturer to potential damages on the basis of its warning label is a way of requiring a more stringent label." As such, liability based on inadequate warnings would conflict with Congress' intent to have uniform warnings. Manufacturers maintain that strict liability claims structured on the failure to warn are preempted by the Labeling Act because they directly challenge "the adequacy of the [Congress'] warning on cigarette packages." This contention

is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246-47 (1959) (emphasis added); see, e.g., Chicago & N.W Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317-18 (1981) (preempting common law negligence claims); Sperry v. Florida ex rel. Florida Bar, 373 U.S. 379, 403 (1963) ("[T]he authority of Congress is no less when the state power which it displaces would otherwise have been exercised by the state judiciary rather than by the state legislature.").

\(^a\) Cipollone, 789 F.2d at 187; \(^a\) Finberg v. Sullivan, 634 F.2d 50, 63 (3d Cir. 1980) (The court must "examine first the purposes of the federal law and second the effect of the operation of the state law on these purposes.").

\(^a\) See supra notes 40-43 and accompanying text.


\(^a\) Roysdon, 623 F. Supp. at 1191; \(^a\) San Diego Bldg. Trades Council, 359 U.S. at 247.

\(^a\) Roysdon, 623 F. Supp. at 1191.

\(^a\) Cipollone, 789 F.2d at 187; \(^a\) Memorandum in Support of Defendant R.J. Reynolds Tobacco Company's Motion for Summary Judgment at 11, Forster, No. 85-4294, slip op.
was upheld by the Third Circuit in *Cipollone v Liggett Group, Inc.* The Third Circuit ruled "that the Labeling Act preempts all claims that: (1) challenge the adequacy of Congress' warning, (2) question the propriety of defendants' [manufacturers'] advertising and promotion practices, or (3) necessarily depend on an assertion that the defendants had any duty to warn other than as required by Congress."  

Whereas cigarette manufacturers argue adequacy of warning claims are implicitly preempted by the Labeling Act, plaintiffs contend such claims are not preempted. First, plaintiffs maintain "that although Congress intended to occupy a field, that field did not include private 'rights and remedies traditionally defined solely by state law'". "While the federal interest in uniform cigarette labeling is dominant, remedying personal injuries is distinct from it and traditionally has been an area of state concern. Neither the objectives of nor obligations imposed by the Act reveal an intent to do away with state tort remedies."

Second, plaintiffs allege that state common law actions do not conflict with the Labeling Act since it is not a physical impossibility for both the Labeling Act and state law to exist. "[I]t is not 'impossible' for the defendants to be sued, found liable, pay a damage award, and at the same time obey the federal labeling and advertising requirements."

Third, plaintiffs contend there is "a presumption against the preemption of state common law, in particular, since such law concerns areas 'traditionally regarded as within the

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68 789 F.2d 181 (3d Cir. 1986).
70 *Palmer*, 633 F Supp. at 1176 (quoting *Cipollone*, 789 F.2d at 186). The court further stated: "Neither the pervasiveness of the federal regulatory scheme, the dominance of the Federal interest, nor the objectives of and obligations imposed by the federal law indicate that the field Congress meant to occupy included traditionally state-administered products liability law." *Id.*
71 *Id.*
72 *See Cipollone*, 593 F. Supp. at 1167.
scope of state superintendence." Torts are exactly the type of legal actions that fall within the state's scope.

Plaintiffs' most compelling argument against preemption, however, is simply that Congress' "silence on the issue of common law claim preemption" in the Labeling Act means that damages can be awarded for harm caused by inadequate warnings and advertising. A statement by Congress pronouncing that cigarette manufacturers "cannot be held liable in tort" could have easily been made part of the Labeling Act if that were Congress' intention, but no such pronouncement was contained in the Act. In fact, several statutes unequivocally include common law damage claims within the scope of preemption, but the Labeling Act does not. At least two courts have adopted the position that the Labeling Act does not pre-empt state tort claims which challenge the adequacy of warnings. The significance of these two decisions, however, has been considerably weakened by recent case law involving adequacy of warning claims.

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74 Cipollone, 593 F Supp. at 1152 (quoting Florida Avocado Growers, 373 U.S. at 144); accord Palmer, 633 F Supp. at 1174.
76 Palmer, 633 F. Supp. at 1173. The District Court in Palmer further noted: "The legislative history also does not indicate that Congress sought to take over the traditionally state-run area of tort compensation. Congressional discussions of preemption do not mention the common law, but instead focus on executive or legislative regulation." Id. at 1176.
77 Cipollone, 593 F Supp. at 1148. "Before this court or any other court so cavalierly rejects fundamental principles of the common law, it should demand a much more definitive statement from Congress." Id.
79 Cipollone, 789 F.2d at 185-86 n.5.
81 The District Court decision in Palmer v. Liggett Group, Inc. was recently reversed.
In light of the arguments for and against preemption of state common law claims involving warnings, the arguments of the cigarette manufacturers are more persuasive. The Third Circuit in *Cipollone* became the first federal appellate court to hold that the Labeling Act preempts tort claims challenging the adequacy of warnings. Recently, two federal appellate courts have followed the Third Circuit's ruling in *Cipollone*, as have many federal district courts and state courts. The rulings in

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by the First Circuit Court of Appeals, holding that state tort claims challenging the adequacy of warnings are preempted by the Labeling Act. *Palmer*, 825 F.2d at 629. Since the Montana court stayed proceedings pending the First Circuit's decision in *Palmer*, that court is also likely to hold that state tort claims challenging the adequacy of warnings will be preempted by the Labeling Act.

* Dewey v. R.J. Reynolds Tobacco Co., 523 A.2d 712, 714 (N.J. Super. Ct. Law Div. 1986) (citing *Cipollone*, 789 F.2d at 181). "There is no conflict among the federal circuit courts on the preemption issue since *Cipollone* is the sole federal appellate decision and the highest judicial authority to date to have construed the act with respect to common law tort claims." *Id.* at 715.


* Three federal district courts have ruled that the Labeling Act preempts state law failure to warn claims against cigarette manufacturers:

  a. Citing the "very specific preemption language" of Section 1334, the court found it "obvious" that the Labeling Act precluded any state legislative attempt to require different or additional warnings than Congress has prescribed in *Roysdon v. R.J. Reynolds Tobacco Co.*, 623 F. Supp. 1189, 1190 (E.D. Tenn. 1985), appeal docketed, No. 86-5072 (6th Cir. Jan. 20, 1986)—a case decided before the Third Circuit's decision in *Cipollone*. The court then considered common law damage actions and concluded that such attacks on the congressionally-prescribed warning were likewise preempted. *Id.* at 1191. As the court recognized, allowing attacks on Congress' warning in the context of tort actions "would permit [the] state to achieve indirectly, through exposure to tort liability, what it could not achieve directly through legislation." *Id.* Because such a result would flout the "stated intent of Congress to have uniformity in the warnings," claims based on the adequacy of Congress' warning could not stand. *Id.*

  b. In *Johnson v. R.J. Reynolds Tobacco Co.*, No. H-86-1343, slip op. (S.D. Tex. Dec. 5, 1986), Judge Hughes granted defendant cigarette manufacturers' motion for summary judgment on all claims challenging either the adequacy of the warning required by the labeling Act or defendants' advertising and promotional activities. Noting that federal law preempts state law damage actions that frustrate congressional objectives and that "Congress' purpose in enacting this legislation was to avoid conflicting laws and to create a uniform warning," the court found that holding the defendant manufacturers liable, notwithstanding their compliance with the Labeling Act, would "have the effect of tipping the [Labeling]
Cipollone and its progeny are rational and prudent. If a state Act's balance of purposes and therefore actually conflict with the [Labeling] Act. Id. at 3.

c. In Stephen v. American Brands, Inc., No. 86-4004-RV, slip op. (N.D. Fla. Aug. 7, 1986), interlocutory appeal certified and accepted, No. 86-2100 (11th Cir. Oct. 29, 1986), plaintiff alleged that a cigarette manufacturer had failed to warn adequately of an alleged risk of lung cancer, and the manufacturer's answer maintained that such claims were preempted by the Labeling Act. Faced with plaintiff's motion to strike the preemption defense, the United States District Court for the Northern District of Florida canvassed the cases on this subject—including the district court and the court of appeals' decisions in Cipollone—and reaffirmed the Labeling Act's preemptive effect.

In addition, five state courts have found that the Labeling Act preempts state common law tort claims:

a. On March 27, 1987, the District Court of Harris County, Texas in Loving v. R.J. Reynolds Tobacco Co., No. 86-48386, slip op. (Tex. Dist. Ct. March 27, 1987), granted Reynolds' motion for partial summary judgment as to claims relating to Reynolds' marketing, promotion, and advertising of cigarettes after December 31, 1965, because such claims were preempted by the Labeling Act.

b. On March 17, 1987, the District Court of Galveston County, Texas in Tyson v. Monsanto Co., No. 85-CV-0682, slip op. at 2 (Tex. Dist. Ct. March 17, 1987), adopted the reasoning of the Cipollone and Johnson decisions and held that the Labeling Act preempted plaintiffs' claims based on Reynolds' "labeling, promotion, advertising and/or recommending the use of cigarettes" as well as claims based on "marketing or promotion" of cigarettes.

c. On December 22, 1986, the Superior Court of Bergen County, New Jersey held: (1) that it was "bound by the Third Circuit's construction of the [Labeling] Act" since "Cipollone is the sole federal appellate decision and the highest judicial authority to date to have construed the [Labeling] Act with respect to common law tort claims," and (2) that the Labeling Act preempts all claims "alleging defendant's failure to warn or provide adequate warning" or which "predicate liability on fraud and misrepresentation in the defendant's advertising and promotion of its cigarette products." Dewey v. R.J. Reynolds Tobacco Co., [523 A.2d 712, 716] (N.J. Super. Ct. 1986).

d. The Superior Court of Camden County, New Jersey, ruled on February 13, 1987, that:

[T]o the extent that any claims of the plaintiff for damages against the defendant allege as a basis the adequacy of warning or the propriety of defendant's action with respect to advertising or promotion of cigarettes, such claims are preempted by the federal act and must fall. Any claims of the plaintiff for damages against the defendant alleging as a basis that the defendant bore a duty to provide a warning to consumers in addition to the warning Congress has required, again, such claims are preempted by the federal act and must fall. Reach v. American Tobacco Co., No. L-08714-83 (N.J. Super. Ct. Feb. 13,
could employ tort law to evolve its own requirements for labeling and advertising, it would directly conflict with the Labeling Act and provide "diverse," "nonuniform," and confusing requirements concerning statements relating to smoking and health, directly in conflict with congressional intent. Preemption also seems sensible when considering that state courts could formulate nonuniform requirements just as easily as state legislatures. Each state has its own tort law and a variety of judges who rule on this law; thus, inconsistent holdings would no doubt result among the state courts. Such a result would inevitably lead to nonuniform warnings on cigarette packages, thereby circumventing Congress' objective of providing a national uniform warning system. Therefore, state common law claims challenging the adequacy of warnings should be preempted by the Labeling Act.

C. Design Defect Claims Under Risk-Utility Analysis

Adequacy of warning is only one strict liability theory available to plaintiffs to demonstrate that cigarettes are in a "de-
ective condition unreasonably dangerous to the user or consumer. Another strict liability theory frequently implemented is design defect. One method of determining whether a product has a design defect is through the risk-utility analysis. Risk-utility is a balancing test used in situations in which it is hard to establish if a product is truly defective. The risk-utility analysis consists of seven factors which are used to determine whether a product's risk outweighs its utility. A number of courts have used this analysis to conclude that strict liability should be applied to hold manufacturers liable for producing defective and dangerous products.

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89 "The test is sometimes stated as whether a reasonably prudent manufacturer who had knowledge of the defect would have distributed the product." Davidson, The Uncertain Search for a Design Defect Standard, 30 Am. U.L. Rev. 643, 645 (1981). "Other courts apply another measure of design defect, the consumer-expectation test." Handguns and Products Liability, 97 Harv. L. Rev. 1912, 1913 n.7 (1984); see Restatement (Second) of Torts § 402A comment g (1965) (Strict liability applies when "the product is in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."). This Comment will focus solely upon the risk-utility analysis.

90 Handguns and Products Liability, supra note 90, at 1915-16.

91 The seven factors are as follows:

(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
(2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
(3) The availability of a substitute product which would meet the same need and not be as unsafe.
(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
(5) The user's ability to avoid danger by the exercise of care in the use of the product.
(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or the existence of suitable warnings or instructions.
(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.


92 See, e.g., O'Brien v. Muskin Corp., 463 A.2d 298 (N.J. 1983); Cepeda, 386 A.2d...
As with adequacy of warning, the first issue that must be addressed is whether these design defect claims are preempted by the Labeling Act.

Cigarette manufacturers and plaintiffs disagree on whether such claims under the risk-utility analysis should be preempted by the Labeling Act. The cigarette manufacturers' reasoning that these claims should be preempted is convincing. First, manufacturers maintain that labeling a universally known product "defective" simply because its inherent danger outweighs its social benefits "is totally without merit and totally unsupported by legal precedent. It is a misuse of tort law, a baseless and tortured extension of products liability principles."9

Second, manufacturers contend the only issue pertinent to a determination of the reasonableness of the manufacturers' design of the product is whether consumers have been adequately informed of the risks, thus turning the design defect theory into a question of adequacy of warning.95 The only option available to cigarette manufacturers to avoid liability under the risk-utility analysis (other than to stop selling cigarettes altogether) is to provide more or different warnings through labeling or advertising.96 Thus, risk-utility claims directly conflict with the Labeling Act by challenging the adequacy of the warnings required.97 As such, manufacturers assert that risk-utility claims are preempted by the Labeling Act.

Third, manufacturers claim that "even if the adequacy of defendants' warnings were not in issue, a state law holding

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at 816. The court in O'Brien stated:

[Certain] products, including some for which no alternative exists, are so dangerous and of such little use that under the risk-utility analysis, a manufacturer would bear the cost of liability of harm to others. That cost might dissuade a manufacturer from placing the product on the market, even if the product has been made as safe as possible. O'Brien, 463 A.2d at 306.

94 Patterson v. Rohm Gessellschaft, 608 F. Supp. 1206, 1208 (N.D. Tex. 1985); see Handguns and Products Liability, supra note 83, at 1917-18 (The author explains that none of the rationales for the risk-utility test would justify its extension to products with inherent, but well-known dangers such as handguns and alcohol.).

95 Forster, No. 85-4294, slip op. at 9.


97 Id.
them strictly liable for marketing cigarettes would run afoul of Congress' intent to safeguard cigarette commerce as a part of the national economy. That is, manufacturers allege that adoption of the risk-utility analysis could possibly "price cigarettes out of the market," directly conflicting with the policy of Congress to protect the nation's commerce. This policy is stated plainly in the Labeling Act and is reflected in various other statutes regulating tobacco.

Plaintiffs' arguments against preemption of design defect claims under risk-utility are equally strong. First, plaintiffs contend the risk-utility analysis can easily be applied to the cigarette industry. "[T]he low utility of the industry and the gravity of the risks it poses makes it an appropriate industry for the imposition of such policy."

Second, plaintiffs refute the manufacturers' "adequacy of the warning" argument since "such [an] argument miscasts the role of failure-to-warn in risk/utility analysis. For failure-to-warn is merely an alternate ground, rather than a necessary prerequisite, for recovery under risk/utility theory." There are two tests used to determine if a product is safe: (1) the traditional risk-utility analysis, and (2) if the utility outweighs the risks, whether these risks have been reduced to the greatest extent possible without hurting the product's utility. Warning cases involve the second test. The first test, the risk-utility

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98 Cipollone, 649 F Supp. at 670.
99 Cipollone, 644 F Supp. at 289.
100 Labeling Act §§ 1331-1340; see supra note 40 and accompanying text.
101 There are 259 references to tobacco and 93 references to cigarettes in the United States Code. National tobacco marketing legislation is, for instance, based on a legislative finding that "[t]he marketing of tobacco constitutes one of the great basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare."

102 White, supra note 24, at 599.
103 Cipollone, 649 F. Supp. at 670.
104 Beshada v. Johns-Manville Products Corp., 447 A.2d 539, 545 (N.J. 1982). "According to this language, the first prong of risk/utility analysis has nothing whatever to do with the adequacy of defendants' warning labels. Rather, the simple question that Beshada would pose at that stage is whether the product's risks outweigh its usefulness as it is employed by the consumer." Cipollone, 649 F Supp. at 671.
analysis, has nothing to do with adequacy of warning.\textsuperscript{105} Thus, failure-to-warn is an alternate ground. Only if the product's utility outweighs its risks does adequacy of warnings come into play\textsuperscript{106} Therefore, plaintiffs could bring their claims only under traditional risk-utility analysis; as such, it is not preempted because "there you would start with the proposition that at least the warning was adequate."\textsuperscript{107}

Third, plaintiffs reject manufacturers' argument "that all of plaintiffs' strict liability claims must be dismissed because they conflict with Congress' intent to promote the sale of cigarettes."\textsuperscript{108} Plaintiffs refute this "protection of the economy" argument by contending that Congress has the ability to allow plaintiffs to recover under state law for injuries caused by industries, subject to the working of the federal law regulating such industries.\textsuperscript{109} Thus, if Congress wanted to preempt design defect claims the Labeling Act would contain the appropriate wording. According to the Third Circuit Court of Appeals, the Labeling Act, which regulates the cigarette industry, does not preempt all of the plaintiffs' claims.\textsuperscript{110} Therefore, unless such claims relate specifically to cigarette manufacturers' "promotional and sales activities, or the adequacy of their warnings," plaintiffs' strict liability claims are not preempted merely because they affect manufacturers' profits.\textsuperscript{111} In fact, many believe holding cigarette manufacturers liable for design defect does not jeopardize the industry but merely "spreads the risk."\textsuperscript{112}

\textsuperscript{105} Cipollone, 649 F Supp. at 671.
\textsuperscript{106} Id.
\textsuperscript{107} "It is only when this prong of risk/utility analysis is decided in the defendant's favor, i.e., when it has already been determined that the product's utility does indeed outweigh its risks, that the adequacy of the defendant's warnings even potentially enters into the analysis." Id. But see Forster, No. 85-4294, slip op. at 9; Memorandum in Support of Defendant R.J. Reynolds Tobacco Company's Motion for Summary Judgment at 26, Forster, No. 85-4294, slip op.
\textsuperscript{108} Reach, No. L-08714-83, slip. op. at 34.
\textsuperscript{109} Cipollone, 649 F Supp. at 672.
\textsuperscript{111} See Cipollone, 789 F.2d at 187.
\textsuperscript{112} See Wade, supra note 92, at 826. Dean Wade further states:
The idea is that the loss should not be allowed to remain with the injured
The arguments on both sides have substantial merit and the courts are divided on the issue. The contentions asserted by the plaintiffs appear to be the more meritorious, however. Hence, design defect claims under the risk-utility analysis should not be preempted by the Labeling Act.

Recently, three courts have ruled that such claims are not preempted. In *Dewey v R.J. Reynolds Tobacco Co.*, the Superior Court of New Jersey proclaimed it did not "believe that the [Labeling] Act, as construed by the Third Circuit, intended to preempt this kind of strict liability claim." The court further stated that "[a] design defect claim would not have the effect of frustrating Congress' objective in enacting the federal statute and does not conflict with the [Labeling] Act's two-fold purpose of providing warning to the public and protecting national economic interests." Thus, a design defect claim should not be preempted by the Labeling Act. In *Reach v The American Tobacco Co.*, the Superior Court of New Jersey ruled that the risk-utility analysis is not barred by preemption because "there you would start with the proposition that at least the warning was adequate." The court further stipulated that "[a]dequate warnings do not automatically mean party on whom it fortuitously fell, but should be transferred to the manufacturer, who, by pricing his product, can spread it among all the consumers. The extent to which a manufacturer may be free to "spread the risk" created by his product can be the subject of some debate. A different way of expressing essentially the same idea is to say that the activity of making the particular product should pay its own way, that the enterprise should bear the liability.

*Id.*, see also *Garner, supra* note 1, at 1462-63. Professor Garner states:

Since welfare and private insurance pay most of a patient's medical bills, a large portion of cigarette smoking costs are borne by the public. Disability, life insurance, and family assistance programs spread other cigarette losses over a large number of people as well. The annual burden on taxpayers for tobacco related medical bills alone was estimated by ex-Secretary of Health, Education and Welfare Joseph Califano to be somewhere between five and eight billion dollars. Thus, tobacco companies do not pay their way.

*Id.*

114 *Id.* at 716.
115 *Id.* at 717.
117 *Id.* at 34.
a product is free from a defect. " And in *Cipollone v Liggett Group, Inc.*, the United States District Court of New Jersey on remand ruled that the risk-utility analysis is not "necessarily" preempted by the Labeling Act. The court noted that "[i]t is important to remember that in deciding these issues the court makes no finding or prediction as to whether this plaintiff or others with similar claims will ultimately succeed. What is at stake here is the fundamental right to present those claims to a court of competent jurisdiction for adjudication." 

This is a logical conclusion for two reasons. First, the Third Circuit in *Cipollone* clearly ruled that not all claims should be preempted by the Labeling Act. It can be easily inferred that design defect claims are the type of postulates the Third Circuit was protecting from preemption. Second, to proclaim that holding manufacturers liable for a design defect would put the cigarette industry out of business is an inaccurate evaluation of the situation. The cigarette manufacturers can "spread the risk" of liability by increasing the price of cigarettes to the consumer and thus remain in business by passing along the cost of liability awards to the users of the product. Also, cigarette manufacturers could produce substitute products for consumers to use or they could diversify into other product areas. This action would help keep the cigarette industry alive.

**IV  Risk-Utility and Collateral Benefits**

Assuming, *arguendo*, that design defect claims under the risk-utility analysis are not preempted by the Labeling Act, cigarette manufacturers may yet be shielded from strict liability. Even if design defect claims are not preempted by the Labeling Act, such result does not signify that plaintiffs will always prevail in design defect cases. Courts utilizing the risk-utility analysis must consider all its factors before determining whether

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118 *Id.*
120 *Id.* at 671.
121 *Id.* at 675.
122 *Cipollone,* 789 F.2d at 187.
123 See supra note 112.
a product's risk outweighs its utility. Therefore, if cigarette manufacturers can demonstrate that the utility of cigarettes outweighs their risks, they will not be liable for design defects.

Although numerous factors are weighed in the risk-utility analysis, one factor has spawned much controversy between plaintiffs and cigarette manufacturers. This factor is stated as follows: "The usefulness and desirability of the product—its utility to the user and to the public as a whole."

Plaintiffs contend the advantages to society of manufacturing cigarettes are not germane to the risk-utility analysis. This position was upheld in *Cipollone v Liggett Group, Inc.*, when the District Court of New Jersey ruled that, under New Jersey's strict liability law, cigarette manufacturers could not introduce evidence as to the cigarette industry's collateral benefits to the economy as part of their defense to strict liability claims premised on risk-utility analysis.

Cigarette manufacturers assert that such an interpretation of the risk-utility analysis is improper. They assert that utility should be measured both in terms of utility to society as a whole and in terms of the individual plaintiff's utility gained from smoking. Thus, cigarette manufacturers claim that col-

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124 See supra note 92 and accompanying text.
126 See supra note 92 (emphasis added).
127 *Cipollone*, 644 F Supp. at 287.
129 Id. at 288. "The analysis was never meant to balance the risk to consumers against the general benefit to society. Rather, the sole question presented is whether the risk to the consumers exceeds the utility to those consumers." Id. at 290.
130 See id. at 285. Defendant's answer to Plaintiff's interrogatory concerning risk-utility was as follows in the *Cipollone case*:

> The chief component of the social utility of cigarettes is the enjoyment that they provide the millions of individuals in this country who have chosen to smoke.

The cigarette industry is a major contributor to the nation's economy. The industry provides thousands of jobs in manufacturing and in sales. Cigarettes are an important export and as such have a favorable impact upon the nation's balance of trade. And, of course, the industry contributes substantially to the public fisc by way of its payment of federal, state and local taxes.

In the Congressional deliberations that led to passage of the Federal Cigarette Labelling and Advertising Act (1965), prohibition of the sale of
lateral benefits to the economy should be examined in the risk-utility analysis.

It seems clear that collateral benefits should be given weight in the risk-utility analysis. The first factor of the analysis explicitly denotes that utility is to be considered for "the public as a whole," as well as for the user. As such, both cigarette manufacturers and plaintiffs should be allowed to introduce evidence demonstrating the utility of smoking to society as a whole. That is, cigarette manufacturers should be allowed to introduce evidence demonstrating the industry's collateral benefits to the economy; and plaintiffs should be allowed to introduce evidence involving the effects of smoking on the public. Admitting this evidence will not conclusively prove that the utility of cigarettes outweighs their risks or vice versa. By admitting such evidence, however, the courts will be following the language used in the risk-utility analysis, thus adhering to its principles.

V KENTUCKY'S ALTERNATIVE

In 1966, the Kentucky courts adopted the doctrine of strict liability as set out in section 402A of the Second Restatement of Torts. This doctrine holds a manufacturer liable for physical harm caused by any product sold "in a defective condition unreasonably dangerous to the user or consumer."

In *Nichols v Union Underwear Co.*, the Kentucky Supreme Court defined the phrase "unreasonably dangerous," cigarettes was considered. Congress opted instead to allow their sale—and to prevent the destruction of the tobacco industry—as long as consumers were given the prescribed warning. Liggett contends that the Act evinces a Congressional determination (1) that cigarettes have social utility; (2) that the social utility of cigarettes sold with the prescribed warning on the package outweighs any risk associated with such cigarettes; and (3) that ultimately only the individual can make the risk/utility analysis since the decision whether or not to smoke is a personal one.

Id. (citation omitted).

131 See supra note 20 (emphasis added).
133 RESTATEMENT (SECOND) OF TORTS § 402A (1965); see supra note 33 and accompanying text.
134 602 S.W.2d 429 (Ky. 1980).
135 Id. at 433.
thus adopting the "prudent manufacturer test." This test "focuses on whether a prudent manufacturer, aware of the qualities, characteristics, and actual condition of the product would place the product on the market." In so doing, the court rejected the definition of "unreasonably dangerous" used by the Restatement in comment 1, better known as the "consumer expectation" test. Also, the court in *Nichols* held that "consumer knowledge is only one of the factors that should be before the jury in determining whether a product is unreasonably dangerous."

While the *Nichols* decision gave courts one factor to be utilized in determining whether a product is unreasonably dangerous, it failed to provide a checklist of other factors to be considered. In 1984, however, the Kentucky Supreme Court in *Montgomery Elevator Co. v McCullough* stated several factors which merit consideration. "Considerations such as feasibility of making a safer product, patency of the danger, warnings and instructions, subsequent maintenance and repair, misuse, and the product's inherently unsafe characteristics" all have a bearing on whether a product is to be considered unreasonably dangerous. These factors are analogous to those used in the risk-utility analysis. In fact, Justice Lukowsky, in a concurring opinion in *Nichols*, recited the risk-utility analysis and resolved "that whether a design is unreasonably dan-

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116 Id. This name was given to this test in Adams, *Torts*, 73 Ky. L.J. 481, 499 (1984-85).
117 Adams, supra note 136.
118 RESTATEMENT (SECOND) OF TORTS § 402A comment 1 (1965); see supra note 35 and accompanying text.
119 See *Nichols*, 602 S.W.2d at 432. See generally Black, supra note 92, at 420-28 (This article provides a good discussion of the rise and fall of the consumer expectation test.).
120 *Nichols*, 602 S.W.2d at 433; see Black, supra note 92, at 420.
121 Black, supra note 92, at 428. Black states: "[w]hile the [Nichols] court provided a proper jury instruction of a new trial on the Nichols facts, it failed to provide guidelines for other products liability actions. Thus, as the concurring opinion declared the majority opinion left Kentucky products liability law unnecessarily vague." *Id.* at 428-29.
122 676 S.W.2d 776 (Ky. 1984).
123 Id. at 780-81.
124 Adams, supra note 136, at 499. See supra note 92 for a list of the factors used in the risk-utility analysis.
gerous must be determined by a social utility standard—risk versus benefit."

Logic would seem to dictate that since the risk-utility analysis is markedly similar to the prudent manufacturer test adopted in *Nichols* and modified by *Montgomery*, Kentucky courts should adopt a risk-utility analysis when determining whether a design is unreasonably dangerous. As a result, uniformity would be provided in jury instructions and uncertainty would be minimized. When a court administers jury instructions using the risk-utility analysis, it clearly outlines the jury's mission; on the other hand, instructions using the prudent manufacturer test fail "to convey to the jury the ultimate determination that it is asked to make—that of risk versus benefit. Assuming the jury to know what an 'ordinarily prudent company' is, the instruction only impliedly asks the jury to weigh the risk against benefit."

Because of this deficiency, Kentucky courts should adopt the risk-utility analysis. Kentucky courts have yet to encounter a case involving a strict liability design defect claim against a cigarette manufacturer. With the rash of cigarette litigation confronting this nation's courts, however, Kentucky will inevitably encounter such a situation. When such a case arises, the risk-utility analysis should be used to decide whether the risk of manufacturing cigarettes outweighs the utility.

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145 *Nichols*, 602 S.W.2d at 434 (Lukowsky, J., concurring). Justice Lukowsky wrote: The bottom line is that the trier of fact is required to balance two pairs of factors existing at the time of manufacture: (1) the likelihood that the product would cause the claimants harm or similar harms, and the seriousness of those harms; against (2) the manufacturer's burden of designing a product that would have prevented those harms, and the adverse effect that alternative design would have on the usefulness of the product. That is to say that the manufacturer is not liable unless at the time of manufacture the magnitude of the danger to the claimant outweighed the utility of the product to the public.

Id.

146 See Black, *supra* note 92, at 434-35 (Black also agrees that the risk-utility analysis should be used in Kentucky.); Jenkins & Green, *Torts, Kentucky Law Survey*, 69 Ky. L.J. 663, 665-70 (1980-81) (The authors feel the prudent manufacturer test and the risk-utility analysis are ultimately the same test but differ in orientation.).

147 Jenkins & Green, *supra* note 146, at 670.

148 In 1978 Kentucky adopted the Product Liability Act of Kentucky. KY. REV. STAT. ANN. §§ 411.300-.350 (Bobbs-Merrill Supp. 1986). This Act deals specifically with design
CONCLUSION

The strict liability theories of adequacy of warning and design defect have caused a resurgence of litigation involving cigarette manufacturers' liability for lung cancer. 149

Most courts have held adequacy of warning claims to be preempted by the Labeling Act; that is, these claims actually conflict with the purposes of the Labeling Act. 150 Design defect claims brought under the risk-utility analysis have created a much stronger debate among the courts, however. In light of the decisions in Cipollone v Liggett Group, Inc., 151 Dewey v R.J Reynolds Tobacco Co., 152 and Reach v The American Tobacco Co., 153 a design defect claim under risk-utility may be brought by plaintiffs to hold cigarette manufacturers liable for lung cancer. 154

The Kentucky courts have yet to face a case involving this situation. When confronted with common law adequacy of warning claims in cigarette litigation, the courts should adopt the prevailing view that such claims are preempted by the Labeling Act. Furthermore, when the inevitable confrontation with design defect claims occurs, the courts should use the risk-utility analysis to determine whether a product is unreasonably

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149 See supra note 10 and accompanying text.
150 See supra notes 54-87 and accompanying text.
154 See supra notes 89-122 and accompanying text.
dangerous, and in particular, whether cigarettes are unreasonably dangerous.\textsuperscript{155}

\textit{James C. Thornton}

\textsuperscript{155} See \textit{supra} notes 124-47 and accompanying text.