1988

Cigarette Company Liability: Preemption, Public Policy and Alternative Compensation Systems

Richard C. Ausness
University of Kentucky College of Law, rausness@uky.edu

Click here to let us know how access to this document benefits you.

Follow this and additional works at: https://uknowledge.uky.edu/law_facpub

Part of the Torts Commons

Recommended Citation

This Article is brought to you for free and open access by the Law Faculty Publications at UKnowledge. It has been accepted for inclusion in Law Faculty Scholarly Articles by an authorized administrator of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
# Cigarette Company Liability: Preemption, Public Policy, and Alternative Compensation Systems

Richard C. Ausness*

## INTRODUCTION ...................................... 899

## I. THE CIGARETTE WARNING CONTROVERSY ............ 903
   A. The Health Consequences of Smoking ........... 903
   B. The Duty to Warn ................................ 906
   C. Recent Decisions ................................ 910

## II. GENERAL PRINCIPLES OF PREEMPTION ................ 913
   A. Express Preemption ................................ 915
   B. Federal Occupation of the Field ............... 917
   C. Actual Conflict Between State and Federal Law ........................................... 919
   D. Federalism and the Presumption Against Preemption .................................... 923

## III. LEGAL ANALYSIS OF CIGARETTE COMPANY LIABILITY ..... 924
   A. Express Preemption ................................ 924
   B. Federal Occupation of the Field ............... 928
   C. Actual Conflict ................................ 929
      1. Protection of Consumer Interests .......... 930
         a. Freedom of Choice for Consumers ....... 931
         b. Informing Consumers About the Health Risks of Smoking .......... 931
      2. Protection of Interstate Commerce .......... 932
      3. Uniform Versus Minimum Labeling Requirements ........................................ 934
   D. The Presumption Against Preemption .......... 938

## IV. POLICY ANALYSIS OF CIGARETTE COMPANY LIABILITY .. 939
   A. Arguments for Holding Cigarette Companies Strictly Liable ......................... 939
      1. Loss-Spreading ................................ 940
      2. Promotion of Product Safety ............... 944

* Alumni Professor of Law, University of Kentucky. B.A. 1966, J.D. 1968, University of Florida; LL.M. 1973, Yale University.
3. Market Deterrence .............................. 946
4. Implied Representation of Safety ........... 948

B. Arguments for Limiting the Liability of Cigarette Companies ...................... 950
1. Reliance on Existing Legal Standards ... 950
2. Strict Liability as a Limit on Consumer Choice ........................................... 951
3. Responsibility of Victims for Their Decision to Smoke ................................. 953
4. Economic Effects of Strict Liability on Third Parties .................................. 955

V. ALTERNATIVES TO TORT LITIGATION ........................................ 957
A. Suits Against Cigarette Companies as Mass Tort Litigation .......................... 958
1. Massive Liability ................................................. 960
2. High Transaction Costs .......................... 961
B. Reforming the Tort Litigation Process .... 964
1. Consolidation ................................................. 964
2. Class Actions ................................................. 965
3. Offensive Use of Collateral Estoppel ... 967
C. Alternative Compensation Plans ................. 968

CONCLUSION ........................................ 970
INTRODUCTION

For more than three decades injured consumers have sought recovery against cigarette companies for injuries caused by smoking. At first, consumers based their claims on theories of negligence or breach of warranty. Tobacco companies, however, typically claimed to be unaware of the health risks of smoking, despite medical evidence to the contrary, and the courts refused to find them negligent for failing to warn about unknown risks. Lack of knowledge also precluded liability in breach of warranty actions.

Strict products liability has now largely replaced negligence and breach of warranty as a preferred theory of recovery against products sellers. Under this approach, codified in section 402A of the Restatement (Second) of Torts, the seller of a defective product may be held liable to injured consumers without fault. Strict

---

3. In fact, medical experts detected the link between cigarette smoking and lung cancer as early as the 1930's. See, e.g., Hoffman, Cancer and Smoking Habits, 93 ANNALS OF SURGERY 50, 56 (1931) (increase in lung cancer directly connected to spread of cigarette smoking); DeBakey & Ochsner, Primary Pulmonary Malignancy, 68 SURGERY, GYNECOLOGY & OBSTETRICS 435 (1939) (smoking is probably a factor in the development of lung cancer).
4. See, e.g., Pritchard, 350 F.2d at 482; Lartigue, 317 F.2d at 40.
5. See, e.g., Hudson v. R.J. Reynolds Tobacco Co., 427 F.2d 541, 542 (6th Cir. 1970); Ross, 328 F.2d at 12. But see Green, 154 So. 2d at 171.
7. See id. Section 402(A) provides:
   (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
liability is applicable to three types of product defect: manufacturing defects, design defects, and failure to warn. Each of these theories of product defect is potentially applicable to cigarette injury cases.

A manufacturing defect arises from some mishap in the production process; the product is considered defective because it varies from the manufacturer's intended design. Tobacco companies have always been liable for manufacturing defects when, for example, consumers are injured by foreign objects found in cigarettes and other tobacco products.

A design defect exists when the entire product line shares a common characteristic. A product is considered defective when risks of a particular design outweigh its utility. It is difficult to

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.

Id.


13. See Barker, 20 Cal. 3d at 430, 573 P.2d at 455, 143 Cal. Rptr. at 236; Thibault v. Sears Roebuck & Co., 118 N.H. 802, 807, 395 A.2d 843, 846 (1978); Turner v. General Mo-
apply conventional design defect theory to cigarettes because their carcinogenic properties do not result from a conscious design choice, but are inherent characteristics of the product. Nevertheless, litigants have sometimes argued that the health risks of cigarette smoking outweigh its utility to such an extent that strict liability is justified even though no safer alternative design exists.\textsuperscript{14}

Finally, a manufacturer may be held strictly liable under a "failure to warn" theory when it sells a product without providing adequate warnings or instructions.\textsuperscript{16} Injured consumers have claimed that tobacco companies failed to provide them with sufficient information about the health risks or the danger of addiction from smoking cigarettes.\textsuperscript{16} Under this theory, cigarette manufacturers may be held strictly liable even though their products are not otherwise defective.

At first blush, the failure to warn concept looks quite promising from the plaintiff's point of view. Tobacco companies placed no warnings at all on their products until 1966, when the Federal Cigarette Labeling and Advertising Act\textsuperscript{17} became effective. Even after that time, the warnings provided were clearly inadequate under ordinary principles of products liability.\textsuperscript{18} For this reason, injured consumers have relied heavily on the failure to warn theory in recent years in suits against cigarette manufacturers.\textsuperscript{19} Tobacco com-
panies have fought back, however, by arguing that products liability actions based on failure to warn are preempted by the Act.20

The preemption doctrine determines what areas of law are the exclusive responsibility of the federal government and what areas are left to exclusive or concurrent state regulation.21 If the preemption doctrine is applicable in cigarette warning cases, plaintiffs would be unable to challenge the adequacy of any warning contained in cigarette labeling or promotional material.22 This would not only bar claims based on failure to warn, but would also exclude those based on fraud or breach of express warranty.23

The Act expressly prohibits states from directly regulating cigarette labeling or advertising;24 however, neither the Act’s language nor its legislative history indicates whether product liability actions are likewise preempted. Nevertheless, tobacco companies have successfully argued that lawsuits based on failure to warn are preempted because they frustrate the regulatory purposes of the Act.25 Notwithstanding the weight of authority in favor of preemption, this Article takes a contrary position and contends that preemption is not appropriate in cigarette warning cases.26

Not only is preemption unwarranted on doctrinal grounds, but

public policy appears to strongly support the imposition of strict liability upon cigarette manufacturers. This Article speculates that 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. Consequently, the author suggests that it may be necessary to streamline the litigation process for mass torts or perhaps even to replace it with an alternative compensation system for the purpose of adjudicating smoking-related claims.

With this in mind, Part I briefly examines the health risks of smoking and the nature of the common law duty to warn. It also reviews a number of recent cigarette preemption cases. Part II takes a closer look at the preemption doctrine itself. The analysis focuses on the traditional preemption categories: express preemption, occupation of the field, and actual conflict between state and federal law.

Part III applies these concepts to the cigarette warning controversy. It concludes that cigarette warnings do not fall within any of the traditional preemption categories. Part IV considers the cigarette warning controversy from a policy perspective and concludes that cigarette companies should not be immunized by the preemption doctrine from their duty to compensate injured consumers.

Part V concludes that cigarette warning claims, if allowed, would place a significant burden on both plaintiffs and defendants. Therefore, it considers how the present litigation process can be streamlined to handle mass tort claims. In addition, Part V briefly reviews an alternate compensation plan for smoking-related injuries.

I. THE CIGARETTE WARNING CONTROVERSY

A. The Health Consequences of Smoking

According to the Surgeon General, "cigarette smoking is the single most important preventable environmental factor contribut-
Cigarettes contain a variety of harmful substances. Not only does cigarette smoke contain tar and nicotine, but it also includes more than 2,000 potentially dangerous chemical compounds. In addition, herbicides, pesticides and insecticides used in the cultivation of tobacco remain on cigarette tobacco and eventually enter the smoker’s lungs. Furthermore, cigarette filters may contain asbestos, a substance which is especially dangerous to those who smoke.

According to the World Health Organization, more than a million people die annually from the effects of smoking. In the United States, the death toll from smoking now exceeds 350,000 per year. About 130,000 of these deaths are due to cancer, while 170,000 are caused by coronary heart disease, and another 50,000 deaths are attributable to chronic obstructive lung disease.

Cancer was the first of these health risks to be identified and documented. In 1964, a committee appointed by the Surgeon General, after reviewing thousands of articles and scientific studies, concluded that cigarettes caused cancer. Lung cancer is perhaps the greatest cancer risk. Smoking is now thought to cause as
much as 95% of all lung cancer.\textsuperscript{44} The cancer risks of smoking, however, are not limited to lung cancer alone; smoking also causes cancer of the stomach, cervix, pharynx, esophagus, bladder, pancreas and kidney.\textsuperscript{46} In addition, smokers have higher rates of cancer of the larynx and oral cavity.\textsuperscript{46}

Heart disease is another significant health consequence of smoking.\textsuperscript{47} According to the Surgeon General, smoking contributes to coronary heart disease, arteriosclerotic peripheral vascular disease and aortic atherosclerosis.\textsuperscript{48} Smoking is also the primary cause of chronic obstructive lung diseases such as chronic bronchitis and emphysema.\textsuperscript{49} In addition, cigarette smoking has been linked to hearing loss, tissue hypoxia, retinal degeneration, and early menopause.\textsuperscript{50}

Smoking poses a particular threat to the children of women who smoke.\textsuperscript{61} Cigarette smoking by pregnant women significantly increases the chances of miscarriage, stillborn children, premature birth, and children with low birth weight.\textsuperscript{62} Moreover, children born to smoking mothers are more likely to suffer from impaired reading ability and are more susceptible to bronchitis and pneumonia during early childhood.\textsuperscript{63}

The economic and health costs of cigarette smoking are enormous. One commentator estimates that the cost of illness and death, as measured by medical expenses and lost income, amounts


\textsuperscript{46} See Comment, Products Liability—Can It Kick the Smoking Habit?, 19 Akron L. Rev. 269, 269-70 (1985).


\textsuperscript{50} See Note, supra note 41, at 179-80.

\textsuperscript{51} See Note, supra note 2, at 1141.

\textsuperscript{52} See id.

\textsuperscript{53} See Levin, supra note 34, at 228.
to $38 billion a year. Others claim that smoking costs society as much as $80 billion a year. These costs not only fall upon injured consumers and their families, but are also borne by employers, medical insurers and the government.

B. The Duty to Warn

As mentioned earlier, the doctrine of strict products liability applies to both manufacturing defects and design defects. In addition, a manufacturer may be held strictly liable for failing to provide an adequate warning even though a product is not otherwise defective. The duty to warn is based on the notion that consumers are entitled to reasonable information about the products they buy. Because manufacturers typically know more than consumers about the characteristics of their products, they are required to share this information with potential buyers. Consumers who are

54. See Note, supra note 18, at 1072 (estimates lost productivity costs at $25 billion and medical costs at $13 billion).
55. See Tribe, Anti-Cigarette Suits: Federalism with Smoke and Mirrors, THE NATION, June 7, 1986, at 788 (economic cost of smoking estimated at $80 billion a year); Comment, supra note 46, at 273 (estimates cost of smoking at $27 billion in productivity losses and $12 billion in additional health care costs); Comment, Judicial and Legislative Control of the Tobacco Industry: Toward a Smoke-Free Society?, 56 U. Cin. L. REV. 317, 335-36 (1987) (estimates of annual economic cost of smoking-related disease in United States range from $39 billion to $55 billion) [hereinafter Comment, (Judicial)].
56. See Garner, supra note 1, at 1462.
57. See supra notes 9-14 and accompanying text.
58. See supra notes 15-16 and accompanying text. Courts and legal scholars disagree over whether an inadequate warning is merely a form of design defect or whether it provides an independent basis for strict products liability. Compare Britain, Product Honesty Is the Best Policy: A Comparison of Doctors' and Manufacturers' Duty to Disclose Drug Risks and the Importance of Consumer Expectations in Determining Product Defect, 79 NW. U.L. REV. 342, 405-07 (1984) (warning cases are usually viewed as an aspect of the general design defect problem); Twerski, Weinstein, Donaher & Piehler, The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age, 61 CORNELL L. REV. 495, 501 (1976) (if proper warning would make product unmarketable, true issue is acceptability of basic design) (citing Note, Foreseeability In Product Design and Duty To Warn Cases—Distinctions and Misconceptions, 1968 Wis. L. REV. 228, 234); Wade, On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing, 58 N.Y.U. L. REV. 734, 740 (1983) (failure to warn cases may be viewed as design defect cases) with Gershonowitz, The Strict Liability Duty to Warn, 44 WASH. & LEE L. REV. 71, 84 (1987) (policies underlying duty to design safe product and duty to warn are different); Henderson, Judicial Review of Manufacturer's Conscious Design Choices: The Limits of Adjudication, 73 COLUM. L. REV. 1531, 1562-65, 1572-73 (1973) (test for "reasonable design" distinguished from test for duty to warn); Kress & Wheeler, supra note 8, at 135 (a warning is not a design attribute).
properly informed can more easily avoid or reduce risk; even when a product risk is unavoidable, a warning allows the consumer to make an informed judgment about encountering the risk.\footnote{See Wade, supra note 58, at 745.}

For most purposes, the duty to warn is the same whether strict liability or negligence principles are applied:\footnote{See Flaminio v. Honda Motor Co., 733 F.2d 463, 466-68 (7th Cir. 1984); Brochu v. Ortho Pharmaceutical Corp., 642 F.2d 652, 656-58 (1st Cir. 1981); Lindsay v. Ortho Pharmaceutical Corp., 637 F.2d 87, 92 (2d Cir. 1980); Basko v. Sterling Drug, Inc., 416 F.2d 417, 427 (2d Cir. 1969); Woodhill v. Parke-Davis, 79 Ill. 2d 26, 402 N.E.2d 194 (1980); Wolfruber v. Upjohn Co., 72 A.D.2d 59, 64, 423 N.Y.S.2d 95, 97 (4th Dep't 1979); Rainbow v. Albert Elia Bldg. Co., 49 A.D.2d 250, 253, 373 N.Y.S.2d 928, 931 (4th Dep't 1975); see also Birnbaum, supra note 9, at 649.}


Furthermore, manufacturers are required to test their products in order to discover risks.\footnote{See Banks v. Koehring Co., 538 F.2d 176, 179 (8th Cir. 1976); Dayton v. Jifsee Chem. Corp., 395 F. Supp. 1081, 1080 (N.D. Ohio 1975); Henderson, Coping with the Time Dimension in Products Liability, 69 CALIF. L. REV. 919, 926 (1981); Merrill, Compensation for Prescription Drug Injuries, 59 Va. L. REV. I, 38 (1973).}

The duty to warn, however, is generally limited to dangers that are within the scope of scientific knowledge at the time the product is sold.\footnote{See Wade, supra note 58, at 749. However, a duty to warn arises when information is available from which a reasonable inference might be drawn that there is a likelihood that the product is potentially harmful. See McCue v. Norwich Pharmacal Co., 453 F.2d 1035, 1035 (1st Cir. 1972); Hamilton v. Hardy, 37 Colo. App. 375, 385, 549 P.2d 1099, 1108 (Colo. Ct. App. 1976); Wade, supra note 58, at 749.}

The duty to warn also reflects the fact that consumers may be unsophisticated and poorly educated. Consequently, warnings must be clear and understandable,\footnote{See, e.g., Hubbard-Hall Chem. Co. v. Silverman, 340 F.2d 402, 405 (1st Cir. 1965) (symbols must be used to warn when manufacturer knew that illiterate or uneducated persons might use the product); MacDonald v. Ortho Pharmaceutical Corp., 394 Mass. 131, 475 N.E.2d 65 (1985) (reference to cerebral thrombosis not sufficient to disclose risk of stroke).}

they must inform the customer about the specific nature and magnitude of the risk;\footnote{See, e.g., Ellis v. International Playtex, Inc., 745 F.2d 292, 306-07 (4th Cir. 1984) (tampon manufacturer held liable for failing to warn about danger of toxic shock syndrome);}
must be forcefully written and prominently displayed, and they must be communicated in a way as to actually reach the consumer. Furthermore, an otherwise adequate warning may be viti-
ated by overpromotion.

Measured against these criteria, existing cigarette warnings are not sufficient to discharge the manufacturer’s duty to warn. Tobacco companies provided no warning at all to consumers until the Federal Cigarette Labeling and Advertising Act took effect in 1965. Even then, the warnings actually given were not adequate to satisfy the cigarette manufacturer’s duty to warn under principles


67. See, e.g., MacDonald, 394 Mass. at 131, 475 N.E.2d at 65 (warning to physician not sufficient to meet duty to warn consumer).


of strict products liability. More than twenty years later, cigarette warnings are still inadequate.

First of all, the warnings provided on cigarette labels are not conspicuous, nor are they sufficiently forceful to be effective. Initially, the warning merely declared that cigarette smoking may be dangerous to health. Only later was the warning strengthened to state that the Surgeon General had determined that cigarette smoking was dangerous to health.

In addition, existing warnings are not explicit enough to be effective. Until recently, cigarette warnings made only vague references to “health” and said nothing about lung cancer, heart disease, pulmonary disease, or any of the other specific health problems that are clearly linked to cigarette smoking. Although the federal law now requires that more specific warnings be displayed on cigarette packages, many serious dangers are still not disclosed. For example, cigarette manufacturers do not inform smokers about the addictive qualities of tobacco, nor do they warn that exposure to asbestos greatly increases the risk of cancer for smokers. The health consequences of passive smoking are also ignored.

Furthermore, warnings have failed to inform consumers about the likelihood or magnitude of potential injury. Prior to 1985, warnings on cigarette labels merely cautioned that smoking could

---

71. See Note, supra note 18, at 1064.
72. See Levin, supra note 34, at 214.
73. See Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282, 283 (1965). A similar warning, which declared that a sinus medication may cause kidney damage was held to be inadequate because the drug was known to cause kidney damage. See Michael v. Warner/Chilcott, 91 N.M. 651, 655, 579 P.2d 183, 187 (N.M. Ct. App. 1978).
75. See Note, supra note 41, at 178.
78. See Garner, supra note 1, at 1434-40; Note, (Preemption), supra note 16, at 914. According to a report by the Federal Trade Commission, more than fifty percent of adult Americans do not realize that cigarette smoking causes both physical and psychological dependency. See FEDERAL TRADE COMMISSION, STAFF REPORT ON THE CIGARETTE ADVERTISING INVESTIGATION (1981).
79. See Haskins, supra note 37, at 281-84; Comment, (Judicial), supra note 55, at 319.
be "harmful," and failed to mention that smoking could cause such fatal diseases as cancer and heart disease.\(^1\) Warning labels now identify some specific health risks, but still fail to describe the seriousness of these risks.\(^2\) They also fail to warn smokers that they run a substantial risk of developing serious health problems if they continue to smoke.\(^3\)

Finally, the promotional efforts of cigarette companies have diluted the effect of health warnings. For years cigarette advertising has emphasized the youth and vigor of cigarette users, thus suggesting that such products do not really pose a serious threat to smokers.\(^4\) In addition, cigarette manufacturers continue to dispute the link between smoking and disease, thereby implicitly challenging the need for warnings.\(^5\) Arguably, such tactics would subject cigarette manufacturers to strict liability even if their warnings were otherwise adequate.\(^6\)

C. Recent Decisions

At this time, the weight of authority clearly favors the preemption defense. One federal district court and three federal appellate courts have concluded that the Federal Cigarette Labeling and Advertising Act preempts products liability actions against tobacco companies based on failure to warn.\(^7\) These decisions are briefly discussed below.

*Cipollone v. Liggett Group, Inc.*\(^8\) was the first case to consider the preemptive effect of the Act. In 1983, Rose and Antonio Cipollone filed suit against three cigarette manufacturers claiming that Rose had developed lung cancer as a result of using the defendants' products.\(^9\) The cigarette companies declared that any

---

\(^1\) See Note, supra note 41, at 181.
\(^2\) See Levin, supra note 34, at 211.
\(^3\) See id. According to one source, one out of four smokers will die prematurely. See id. at 214 n.145.
\(^4\) See Note, supra note 38, at 1207.
\(^5\) See Note, supra note 18, at 1066-67.
\(^7\) See infra notes 88-113 and accompanying text.
\(^9\) See *Cipollone*, 593 F.2d at 1146. The Cipollones contended that the defendants produced an unsafe and defective product whose risks outweighed its utility. In addition,
claim based on inadequate warning should be preempted by the Federal Cigarette Labeling and Advertising Act. The plaintiffs responded by moving to strike the preemption defense.90

The trial court granted the plaintiffs' motion after ruling that their claims were not preempted.91 The court concluded that Congress had not occupied the entire field of cigarette regulation, but had limited itself to cigarette labeling and advertising.92 The court regarded compensation of tort claims as distinct from labeling regulation and felt that federal occupation of one field should not result in the occupation of a different one in the absence of congressional intent.93

On appeal, the circuit court reversed.94 The court found that product liability claims based on failure to warn would conflict with the Act. According to the court, the Act represented a carefully drawn balance between the interests of public health and the economic welfare of the tobacco industry. Tort liability would pressure cigarette manufacturers into providing warnings beyond those required by the Act, and thereby upset this statutory balance.95 Therefore, the court held that the Act impliedly preempted suits that challenged the adequacy of cigarette package labeling.96

---

90. See id.
91. See id. at 1171.
92. See id. at 1164.
95. See id. at 187. After ruling favorably on the defendants' interlocutory appeal, the circuit remanded the case back to the district for trial. On June 13, 1988, the jury awarded $400,000 in damages to Antonio Cipollone for personal injuries resulting from the death of his wife, Rose. Liability was based on breach of express warranty rather than failure to warn. The jury awarded no damages to the estate of Rose Cipollone. See 16 Prod. Safety & Liab. Rep. (BNA) 845 (Aug. 24, 1988).
96. See id.
Cigarette companies raised a preemption defense again in Roysdon v. R.J. Reynolds Tobacco Co.97 The plaintiff in Roysdon brought suit against R.J. Reynolds, claiming that the defendant failed to warn about the dangers of smoking.98 The trial court dismissed this claim, holding that it was impliedly preempted by the Act.99 The court found that the Act sought to achieve uniform labeling for cigarette products by prohibiting any form of state regulation.100 Exposing cigarette manufacturers to tort liability would coerce them into providing warnings that are more stringent than those required by the Act. According to the court, this would enable the states to regulate cigarette labeling despite the statutory prohibition.101

The preemption defense also prevailed in Palmer v. Liggett Group, Inc.102 The plaintiff in that case alleged that the defendants' failure to warn proximately caused her husband's death from lung cancer.103 The defendants moved to dismiss all claims based on failure to warn, arguing that such claims were preempted by the Act.

The trial court found that damage awards would not conflict with the purposes of the Act and cited numerous instances where federal regulations coexisted with state tort doctrines.104 Furthermore, the court felt that Congress would have expressly prohibited damage suits based on failure to warn if it felt that they would frustrate the Act's regulatory goals.105 Thus, the court held that the Act did not preempt state damage claims and denied the de-

---

99. See id. at 1191.
Nevertheless, the circuit court on appeal concluded that the Act impliedly preempted the plaintiff’s failure to warn claim. The court declared that the gist of the preemption doctrine was whether Congress meant to displace state law when enacting federal legislation. The court determined that Congress had two concerns in mind when it passed the Act: protection of consumers through education, and protection of the tobacco industry by limiting the scope of state regulation. According to the court, however, there was but one purpose—to strike a fair, effective balance between these two competing interests. The court concluded that products liability suits would upset the balance achieved by Congress in the Act, and therefore ruled that the plaintiffs’ claim was preempted.

*Stephen v. American Brands, Inc.* was the last case to consider the preemption issue. In *Stephen*, the plaintiff brought suit against a tobacco company for the death of her husband. The plaintiff claimed that the cigarette manufacturer had failed to provide an adequate warning. The company asserted a preemption defense which the plaintiff moved to strike from its answer. The trial court concluded, however, that some of the plaintiff’s claims might be preempted and denied the plaintiff’s motion. On appeal, the circuit court, relying heavily on *Cipollone*, agreed that the Act might preempt some of the plaintiff’s claims and upheld the lower court’s decision.

II. GENERAL PRINCIPLES OF PREEMPTION

The preemption doctrine is a reflection of the fact that Congress may pass legislation which nullifies inconsistent state statutes. The constitutional source of this federal preemptive power

---

106. See id. at 1180.
107. See Palmer v. Ligget Group, Inc., 825 F.2d 620 (1st Cir. 1987). The court agreed with the lower court that the Act did not expressly preempt product liability actions. See id. at 625.
108. See id. at 626.
109. See id.
110. See id. at 629.
111. 825 F.2d 312 (11th Cir. 1987).
112. See Stephen, 825 F.2d at 313.
113. See id.
114. See Fidelity Federal Savings & Loan Ass’n v. De La Cuesta, 458 U.S. 141, 152
is the Supremacy Clause\(^\text{115}\) which provides that the laws of the United States shall be the supreme law of the land.\(^\text{116}\) State common law doctrines may be preempted in the same manner as statutes when they conflict with federal law.\(^\text{117}\) Furthermore, a federal agency, acting within the scope of its delegated authority, may also preempt state law.\(^\text{118}\)

Although the potential scope of the preemption doctrine is very broad, courts are reluctant to invalidate state law unless Congress clearly intended to exercise its preemptive power.\(^\text{119}\) Consequently, the courts have applied a presumption against federal preemption of state law.\(^\text{120}\) The presumption against preemption is especially strong when state common law doctrines are involved because they often represent many generations of judicial development and concern areas that have traditionally been subject to exclusive state control.\(^\text{121}\)

Courts and commentators often distinguish between express and implied preemption. The conventional approach is to further divide implied preemption into occupation of the field and actual

\(^{115}\) See U.S. Const. art. VI, § 2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . 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." Id.


conflict categories.\textsuperscript{122} As Mr. Justice Black observed in \textit{Hines v. Davidowitz},\textsuperscript{123} this classification scheme is not always applied consistently: "[n]one of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula."\textsuperscript{124} These concepts, however, provide a useful analytical framework and, therefore, will be used in this discussion of the preemption doctrine.

\subsection*{A. Express Preemption}

Congress may expressly preempt state law.\textsuperscript{125} Express preemption occurs when a federal statute specifically excludes state regulation in a particular area.\textsuperscript{126} For example, in \textit{Rice v. Santa Fe Elevator Corp.},\textsuperscript{127} the United States Supreme Court held that preemptive language in the federal Warehouse Act\textsuperscript{128} completely displaced state jurisdiction over federally licensed warehouse operators.\textsuperscript{129} Consequently, the Court invalidated proceedings against a licensee by a state regulatory commission for violating state laws against rate discrimination and other marketing practices.\textsuperscript{130}

The Court reached a similar result in \textit{Jones v. Rath Packing Co.}\textsuperscript{131} In that case, a packing company brought suit to enjoin enforcement of a state statute which conflicted with the Wholesome

\begin{thebibliography}{99}
\bibitem{123}312 U.S. 52 (1941).
\bibitem{124}See \textit{Davidowitz}, 312 U.S. at 67.
\bibitem{126}See, \textit{e.g.}, \textit{Pacific Gas \& Elec.}, 461 U.S. at 190; \textit{Jones}, 430 U.S. at 525 (package weight standards); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (literacy tests); Railway Employes' Dep't, Am. Fed. of Labor v. Hanson, 351 U.S. 225, 232 (1956) (union security agreements); Exxon Corp. v. City of New York, 548 F.2d 1088, 1091 (2d Cir. 1977) (municipal air quality standards).
\bibitem{127}331 U.S. 218 (1947).
\bibitem{129}See \textit{Rice}, 331 U.S. at 233-34.
\bibitem{130}See id. at 235-36.
\bibitem{131}430 U.S. 519 (1977).
\end{thebibliography}
Meat Act. Another federal statute, the Meat Inspection Act prohibited marketing, labeling, packaging, or ingredient requirements beyond those required by the Wholesome Meat Act. The Court determined that this provision expressly preempted inconsistent state labeling requirements. The Wholesome Meat Act allowed reasonable variations between the actual weight and the weight stated on the package label, but the California statute made no provision for moisture loss during distribution. Because the state statute was not consistent with the standards of the federal statute, the Court held that it was preempted.

Express preemption is not limited to federal statutes; federal agencies, acting within the scope of their congressionally delegated authority, may also expressly preempt state law. Thus, the Court in Fidelity Federal Savings & Loan Association v. De La Cuesta held that regulations adopted by the Federal Loan Bank Board preempted state law. The Board’s regulations authorized federal savings and loan associations to place “due-on-sale” clauses in their home mortgage contracts. In California, this practice conflicted with a common law rule, known as the Wellenkamp doctrine, which limited the use of due-on-sale provisions.

The Court observed that the Home Owners’ Loan Act of 1933 (HOLA) gave the Board broad authority to regulate federal savings and loan associations and found the regulations to be within the scope of the Board’s powers. Because the Board clearly indicated its intent to displace state law with respect to due-on-sale

---

134. See Jones, 430 U.S. at 530-31.
135. See id.
136. See id. at 531-32.
138. See Fidelity, 458 U.S. at 141.
139. 44 Fed. Reg. 39108, 39149 (1979) (later codified at 12 C.F.R. § 545.8-3(f) (1980)).
140. See Wellenkamp v. Bank of America, 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978). The California Supreme Court in Wellenkamp held that due-on-sale clauses constituted an unreasonable restraint upon alienation unless the lender could show that such a clause was necessary to protect against impairment of its security interest or the risk of default. See id. at 953, 582 P.2d at 977, 148 Cal. Rptr. at 385.
142. See Fidelity, 458 U.S. at 159-67.
clauses, the Court reversed a state appellate court decision and held that the Board's regulation preempted the Wellenkamp doctrine.

B. Federal Occupation of the Field

Federal and state regulation coexist in many areas. For example, Congress and the states have both regulated in such fields as banking, advertising, debtor-creditor relations, labor relations, and unfair trade law. Even when the federal government plays a dominant role in an area, the states are still able to exercise residuary control. However, federal involvement in an area may be so pervasive as to preclude state regulation in the same field. This result is most likely to occur in areas which are subject to supervision by federal administrative agencies through licensing, adjudication or comprehensive regulation.

143. See id. at 158.
145. See Fidelity, 458 U.S. at 170.
153. See, e.g., Amalgamated Ass'n of St., Elec. Railway & Motor Coach Employees of Am. v. Lockridge, 403 U.S. 274, 296 (1971) (pervasive federal regulation of labor relations precludes state wrongful discharge suit based on enforcement of union security clause in labor contract); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246 (1959) (claim for damages under state law against union for unfair labor practices interferes with NLRB jurisdiction over labor relations); Guss v. Utah Labor Relations Bd., 353 U.S. 1, 10-11 (1957) (state agency had no authority to hear unfair labor practice claim within exclusive jurisdiction of NLRB); Napier v. Atlantic Coast Line R.R., 272 U.S. 605, 612-13 (1926) (federal...
Castle v. Hayes Freight Lines, Inc.\textsuperscript{154} provides an example of the effect of pervasive federal regulation on state authority. In Castle, state officials sought to ban a federally licensed motor carrier from using its highways because the carrier had repeatedly violated state vehicle weight limitations.\textsuperscript{155} The Court observed Congress had adopted a comprehensive plan for regulating interstate motor carriers when it adopted the Federal Motor Carrier Act.\textsuperscript{156} This federal regulatory scheme gave the Interstate Commerce Commission (ICC) the exclusive right to determine which motor carriers could operate in interstate commerce.\textsuperscript{157} Consequently, the states were left with no power to deny the use of their highways to interstate motor carriers licensed by the ICC.\textsuperscript{158}

The dominant nature of a federal interest may also justify federal occupation of a field.\textsuperscript{159} Thus, the Court in Hines v. Davidowitz\textsuperscript{160} invalidated a state alien registration law because it concluded that state restrictions on aliens were inconsistent with the federal government's constitutional responsibility for the conduct of foreign affairs.\textsuperscript{161}

Finally, the need to establish uniform standards throughout the nation often prompts Congress to occupy a particular field.\textsuperscript{162}

\begin{itemize}
\item railroad safety statute occupied the field and thereby foreclosed parallel regulation by state; Pennsylvania R.R. v. Public Serv. Comm'n, 250 U.S. 566, 569 (1919) (ICC railroad safety regulations occupied field to the exclusion of states); Southern Ry. v. Railroad Comm'n of Ind., 236 U.S. 439, 447 (1915) (federal railroad safety statute occupied field and thereby prevented liability for violation of state safety statute).
\item See Castle, 348 U.S. at 62.
\item See Castle, 348 U.S. at 63.
\item See id. at 63-64.
\item See, e.g., Ray v. Atlantic Richfield Co., 435 U.S. 151, 163 (1978) (federal statute which established uniform design and construction standards for tankers preempted more stringent state design requirements); Pennsylvania R.R. v. Public Serv. Comm'n, 250 U.S. 566, 569 (1919) (ICC imposed uniform safety requirements for railroad cars); New York Cent. R.R. Co. v. Winfield, 244 U.S. 147 (1917) (federal statute created uniform system of remedies for injuries to railroad workers engaged in interstate commerce).
\end{itemize}
For example, in *Campbell v. Hussey*, the Court invalidated a Georgia statute which attempted to identify certain tobacco by geographical origin. The Court declared that Congress mandated the adoption of uniform standards of grading and identification for tobacco to serve as a guide for farmers to market their tobacco. This federal program left no room for supplementary state regulation based on a different classification scheme.

The courts are not as likely to give preemptive effect to less comprehensive federal regulatory schemes, however, where the exclusion of state regulation would produce a regulatory vacuum. *Pacific Gas & Electric Co. v. Energy Resources Commission* provides a good illustration of this "anti-vacuum" principle. In that case, the Court upheld a statute that conditioned the construction of nuclear power plants on a finding by a state agency that adequate storage facilities and disposal methods were available for nuclear waste. The Court acknowledged that the Atomic Energy Act gave the Nuclear Regulatory Commission exclusive jurisdiction over nuclear safety, but found that it did not prohibit the states from dealing with economic and other non-safety issues. In the Court's opinion, the state statute did not infringe upon the occupied field of nuclear safety.

**C. Actual Conflict Between State and Federal Law**

Federal statutes or regulations will also override state law if the two conflict with one another. For example, state law may require a person to do something which federal law forbids. In such cases, state law must yield to federal law. A more difficult situa-

---

164. See *Campbell*, 368 U.S. at 302.
165. See id.
171. See id. at 205.
172. See id. at 216.
174. See Pierce, *Regulation, Deregulation, Federalism, and Administrative Law*:
tion arises when state law indirectly frustrates the achievement of federal regulatory objectives. For example, state law may discourage conduct that federal law specifically intends to encourage.\textsuperscript{175} State law may also interfere with federal law by encouraging actions that hinder federal statutory goals.\textsuperscript{176} Some commentators classify this latter situation as interference rather than conflict.\textsuperscript{177} 

\textit{McDermott v. Wisconsin}\textsuperscript{178} illustrates what happens when it is impossible to comply with both state and federal law. In \textit{McDermott}, the Court ruled that the labeling provisions of the Federal Food and Drug Act\textsuperscript{179} preempted a state labeling statute.\textsuperscript{180} In that case, the defendant, who sold syrup imported from another state, showed that syrup meeting the standards of the federal act would be treated as mislabeled under a Wisconsin statute.\textsuperscript{181} On the other hand, compliance with the state act would have resulted in liability under the federal act.\textsuperscript{182} Because it was impossible to satisfy the requirements of both statutes, the Court invalidated the state statute.\textsuperscript{183} 


176. See, e.g., Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 639 (1973) (local airport curfew declared invalid because it would interfere with FAA's ability to control air traffic flow); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959) (state damage award for union picketing conflicted with federal control over labor relations).

177. See Hirsch, supra note 116, at 526. Professor Hirsch, however, points out that direct conflict and interference are not distinct categories, but rather are more like opposite points along a continuum. See id. at 526.

178. 228 U.S. 115 (1913).

179. Ch. 3915, 34 Stat. 768 (1906).

180. See McDermott, 228 U.S. at 137.

181. See id. at 126-27.

182. See id. at 133.

183. See id. at 137. The question of impossibility also arose in Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963), where Florida avocado growers sought to enjoin enforcement of a California statute which prohibited the sale of avocados containing less than eight percent oil. Oil content was used as a measure of maturity by the state statute. The plaintiffs claimed that this standard would exclude the sale of some avocados which complied with federal marketing regulations. See id. at 134. The Court, however, found that Florida growers could meet the California standards by leaving the fruit on the trees beyond the earliest date permitted by the federal regulations. See id. at 143. Conse-
A direct conflict may also occur when state law diminishes or interferes with the exercise of a right created by federal law. For example, in Wissner v. Wissner, a married serviceman obtained a National Life Insurance policy and named his mother as the principal beneficiary. The serviceman’s widow claimed that under California community property law she was entitled to a share of the proceeds of the insurance policy. The federal statute, however, provided that the insured had the exclusive right to designate a beneficiary. According to the Court, the right to obtain government insurance and to designate a beneficiary enhanced morale within the military. Therefore, the Court held that federal law should control the disposition of the insurance proceeds.

Sometimes, provisions of federal law and state law do not expressly conflict, but their regulatory objectives may be incompatible. As suggested earlier, perhaps it is better to describe this as interference rather than direct conflict. Burbank v. Lockheed Air Terminal, Inc. illustrates how state law may indirectly undermine federal regulatory goals. In Burbank, the plaintiff challenged a municipal ordinance which prohibited jet aircraft from taking off between 11:00 p.m. and 7:00 a.m. The Court found that the Fed-
eral Aviation Act[^193] gave the Federal Aviation Administration (FAA) broad authority to regulate air traffic in order to achieve both aircraft safety and efficient utilization of navigable airspace.[^194] If municipal airport curfews were upheld, the Court reasoned, fractionalized control of the timings of takeoffs and landings would undermine the FAA’s pervasive regulatory powers over commercial aviation.[^195] Accordingly, the Court determined that the local ordinance was preempted.[^196]

The Court, however, reached a different result in *Silkwood v. Kerr-McGee, Corp.*[^197] In *Silkwood*, the plaintiff, as administrator of the decedent’s estate, obtained an award of punitive damages against the owner of a nuclear fuel fabrication plant for exposing his daughter to plutonium. The defendant argued that the Atomic Energy Act[^198] precluded the states from awarding punitive damages against federal licensees.[^199] The Court, however, rejected the argument that payment of punitive damages by licensees conflicted with the Nuclear Regulatory Commission’s enforcement powers which included civil penalties.[^200] Furthermore, the Court did not feel that subjecting licensees to liability for punitive damages would frustrate the congressional policy of promoting the use of nuclear power.[^201] Finally, the Court disagreed with the contention that punitive damages amounted to regulation of radiation hazards by the states.[^202]

[^194]: See *Burbank*, 411 U.S. at 633.
[^195]: See id. at 633.
[^196]: See id. at 640.
[^199]: See *Silkwood*, 464 U.S. at 249.
[^202]: See *Silkwood*, 464 U.S. at 257-58. The dissenting justices argued that punitive damages were regulatory rather than compensatory in nature and, therefore, should be preempted because such awards interfered with the Nuclear Regulatory Commission’s exclusive regulatory control over nuclear safety. See id. at 263 (Blackmun, J., dissenting); see also id. at 274-76 (Powell, J., dissenting).
D. Federalism and the Presumption Against Preemption

In theory, the Supremacy Clause gives Congress plenary power over those areas of responsibility assigned to the federal government by the Constitution. At the same time, however, the states have an important role to play in the federal system. Therefore, it is not surprising that the courts have developed doctrines to minimize conflicts between the federal government and the states. One such principle is the presumption against preemption which provides that the preemption doctrine shall not be applied unless Congress manifests a clear intent to displace state law.

Although the presumption against preemption has occasionally been ignored in the past, Professor Tribe suggests that it is completely consistent with the Court's current approach to federal-state relations as reflected by Garcia v. San Antonio Metropolitan Transit Authority. In Garcia, the Court declared that state sovereignty was "more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." According to Professor Tribe, the presumption against preemption furthers the policy behind Garcia by requiring that decisions to restrict state power be done by Congress explicitly. In this way, the political process itself will ensure an appropriate balance between state and national interests. On the other hand, it would frustrate the very process of lawmaking that Garcia relied on to protect states' interests if courts were to give preemptive effect to laws where congres-

---

203. See U.S. Const. art. IV, cl. 2.
204. See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 209 (1824); L. Tribe, supra note 166, § 6-27, at 500.
206. For a discussion of expansive and restricted interpretations given the presumption of preemption by the courts during the twentieth century, see Note, supra note 174, at 626-39.
207. See L. Tribe, supra note 166, § 6-27, at 500.
208. 469 U.S. 528 (1985). The Court in Garcia overruled its prior decision in National League of Cities v. Usery, 426 U.S. 833 (1976), and held that state and local governments were no longer immune from federal regulation under the commerce clause even when they were exercising a "traditional governmental function." See Garcia, 469 U.S. at 546-47.
209. Id. at 552.
211. See id.
sional intent is ambiguous.  

III. LEGAL ANALYSIS OF CIGARETTE COMPANY LIABILITY

This portion of the Article will examine the preemption doctrine's effect on failure to warn claims against cigarette manufacturers. This analysis will observe the conventional distinction between express preemption, occupation of the field and actual conflict because most of the cigarette warning cases have done so. The author concludes that products liability suits based on failure to warn do not fall within any of the accepted preemption categories. Consequently, the preemption doctrine provides no support for rejecting failure to warn claims.

A. Express Preemption

Section 1334(a) of the Federal Cigarette Labeling and Advertising Act provides that no statement relating to health risks from smoking shall be required on cigarette packages other than the statement required by section 1333 of the Act. Section 1334(b) declares that no additional requirements or prohibitions relating to smoking and health may be imposed under state law with respect to advertising or promotion activities. Cigarette manufacturers contend that these provisions expressly preempt products liability claims based on failure to warn. As will be shown, however, neither the legislative history of the Act nor the language of section 1334 supports such a conclusion.

The Federal Cigarette Labeling and Advertising Act's legislative history reveals that at the time of its passage, a number of states and municipalities were proposing to require cigarette manufacturers to place stringent health warnings on their products.

212. See id.
214. See id. This section states that "[n]o statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package." Id.
215. See 15 U.S.C. § 1334(b) (1982). This section states that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." Id.
217. For example, the New York legislature enacted a cigarette labeling law in June, 1965. See 1965 N.Y. Laws ch. 479.
Congress was concerned that differing and conflicting labeling requirements would constitute a burden on interstate commerce.\(^{218}\) Section 1334 was enacted in response to this potential problem.\(^{219}\) For this reason, section 1334 expressly prohibits state and local governments from passing statutes or ordinances which impose labeling requirements or otherwise regulate the advertising or promotional activities of cigarette companies.\(^{220}\)

There is nothing in the Federal Cigarette Labeling and Advertising Act’s legislative history to suggest that Congress was concerned about the effect of product liability suits on interstate commerce. In fact, there is some evidence that members of Congress believed that the proposed Act would have no effect on such actions.\(^{221}\) For example, when Representative Springer and Representative Fascell discussed the effect of the Act’s required labeling provisions on the defense of assumption of risk, Representative Fascell concluded by stating that:

> [t]he legislative record makes it clear that passage of this law and compliance by the manufacturer in no way affects the right to raise the defense of ‘assumption of risk’ and the legal requirement for such a defense to prevail; nor does it shift the burden of proof, nor could it be considered a legal or factual bar to the plaintiff user.\(^{222}\)

Moreover, when the Federal Cigarette Labeling and Advertising Act was amended in 1969, some members of the House Committee on Interstate and Foreign Commerce again concluded that the Act would have no effect on personal injury claims brought by consumers against cigarette companies under state law.\(^{223}\) Thus, Representative Watson declared that “nowhere in the Act of 1965 does it


\(^{221}\) See infra notes 222-23 and accompanying text.

\(^{222}\) See infra notes 222-23 and accompanying text.

preclude an individual or prevent an individual from pursuing a common-law liability action against any tobacco company. . . . "224

Nor does the text of section 1334 support the argument that products liability actions are expressly preempted. Section 1334(a), for example, merely provides that no statement on cigarette packaging "shall be required" beyond that mandated by section 1333.225 Similarly, section 1334(b) states that "[n]o requirement or prohibition" with respect to the advertising or promotion of cigarettes shall be imposed under state law.226 Both of these terms are consistent with directions, backed by coercive power, which mandate or forbid specific behavior and leave the affected party no room for judgment or discretion. In other words, these terms are consistent with direct governmental regulation.

On the other hand, one does not ordinarily use expressions like requirement or prohibition to describe the effect of tort liability. Of course, tort liability may provide a powerful incentive to alter conduct and, therefore, may be used as a tool to promote particular governmental policies.227 Nevertheless, at least in a formal sense, principles of substantive tort law are not like governmental regulations because they do not compel parties to act in a particular manner.228

Dean Calabresi acknowledges this distinction by dividing accident cost avoidance methods into two categories: general deterrence and specific deterrence.229 Under general deterrence, decisions about accident avoidance measures are left to market processes, while under specific deterrence such decisions are made collectively, that is, by an organ of the state.230

General deterrence is exemplified by a rule which holds manufacturers strictly liable in tort for injuries caused by defective products.231 Such a rule exerts deterrent pressure on manufacturers by forcing them to internalize the cost of compensating con-

---

224. Id.
226. Id. § 1334(b).
230. See id.
231. See id.
sumers for their injuries. 232 Manufacturers will respond by spending money to make their products safer, but only as long as it is cost-effective to do so. 233 Thus, under a general deterrence regime, manufacturers, not government officials, make decisions about product safety. 234 Moreover, these choices are based almost entirely upon economic considerations. 235

In contrast, specific deterrence mandates a particular choice determined by the legislature or an administrative agency. 236 Specific deterrence is exemplified by a penal law forbidding the sale of a product without some specified safety device. 237 For example, the federal government may require all motor vehicles to have seat belts. This decision may either reflect a collective decision that seat belts are cost effective from an accident cost avoidance point of view, or it may reflect noneconomic community values. 238

As the foregoing discussion indicates, general deterrence and specific deterrence represent completely different approaches to the problem of accident cost avoidance. Regulations such as those contemplated by a number of state and local governments prior to the passage of the Federal Cigarette Labeling and Advertising Act were examples of specific deterrence: they would have required tobacco companies to place specific language on cigarette labels. 239 This was the type of state activity the Federal Cigarette Labeling and Advertising Act expressly prohibited. 240 On the other hand, strict products liability is a classic example of general deterrence. 241 It relies on market forces, not governmental coercion, to influence manufacturer behavior. 242 Because of this fundamental difference between specific and general deterrence, it is difficult to see how federal legislation that preempted acts of specific deterrence by the states would necessarily preempt general deterrence measures as well.

232. See id.
233. See id.
234. See id.
235. See id. at 73-75.
236. See id. at 68-129.
237. See id.
238. See id. at 97-102.
239. See 1965 N.Y. LAWS ch. 470.
242. See id.
Ferebee v. Chevron Chemical Co.,243 a recent decision by the District of Columbia Court of Appeals, explicitly recognized this distinction between tort liability and direct government regulation for purposes of preemption analysis.244 In Ferebee, the plaintiff sought to recover damages against the manufacturer of paraquat, a toxic herbicide, based on a theory of inadequate warning. The manufacturer contended that the Federal Insecticide, Fungicide and Rodenticide Act245 preempted suits of this nature when the product manufacturer complied with labeling requirements established by the Environmental Protection Agency pursuant to the statute.246 The court, however, declared that damage awards did not constitute regulation because they did not compel the defendant to change its label.247

B. Federal Occupation of the Field

Congressional intent to occupy a field can be implied from the pervasive nature of the federal regulatory scheme or from the existence of a dominant federal interest in the area subject to regulation.248 Neither of these theories, however, seems applicable to a state products liability action.

Section 1331 of the Federal Cigarette Labeling and Advertising Act declares that Congress intended to implement a “comprehensive federal program” with respect to health warnings in cigarette labeling and advertising.249 The regulatory scheme, however, established by the Federal Cigarette Labeling and Advertising Act with respect to cigarette labeling and advertising is not really comprehensive in scope.250 The Act is not part of an expansive federal plan to regulate the cigarette industry, nor is it part of a program to impose federal labeling standards on a broad category of products. Rather, as its legislative history indicates, the Act was passed

244. See Ferebee, 736 F.2d at 1529.
246. See Ferebee, 736 F.2d at 1540.
247. See id. at 1541. The court declared that a damage award “may in some sense impose a burden on the sale of paraquat in Maryland, but it is not equivalent to a direct regulatory command that Chevron change its label.” Id.
to prevent the states from subjecting cigarette sellers to numerous, and possibly conflicting, labeling requirements.\textsuperscript{251} Thus, the Federal Cigarette Labeling and Advertising Act is a highly focused response to a narrow problem; it is not part of a larger federal regulatory scheme. For this reason, one cannot infer a congressional intent to exclude products liability suits against cigarette manufacturers based on the existence of a pervasive federal regulatory scheme.\textsuperscript{252}

Moreover, allowance of products liability claims against cigarette manufacturers will not affect any dominant federal interest. The only federal interest involved in cigarette labeling is the protection of interstate commerce.\textsuperscript{253} This interest, while important, is not so inherently vital to the federal government that state action in related areas should be completely excluded.\textsuperscript{254} Therefore, there is no reason to conclude that products liability actions under state law should be preempted because of federal occupation of the field.

\textbf{C. Actual Conflict}

Actual conflict may occur when there is a direct conflict between the requirements of federal and state law or when state regulation frustrates or impedes the attainment of federal regulatory objectives.\textsuperscript{255} There is no direct conflict between federal cigarette labeling requirements and the duty to warn under state tort law because a manufacturer is free to provide additional warnings
without violating the Act.\textsuperscript{256} Preemption, therefore, would have to be based on interference with the objectives of the Federal Cigarette Labeling and Advertising Act rather than direct conflict between the Act and the allowance of tort claims based on failure to warn.

In order to decide if products liability actions interfere with federal regulatory objectives, one must first determine the Federal Cigarette Labeling and Advertising Act's purposes and then consider whether lawsuits against cigarette manufacturers frustrate these goals.\textsuperscript{257} Congress had a number of objectives in mind when it passed the cigarette labeling act in 1965.\textsuperscript{258} One goal was to safeguard the consumer's right to make informed choices about smoking.\textsuperscript{259} Another was to protect interstate commerce from the burden of diverse state regulatory standards.\textsuperscript{260}

The author believes that Congress adopted minimum labeling standards as an appropriate means of implementing these objectives. Minimum standards would protect consumer interests while permitting tobacco companies to sell their products in an interstate market free of diverse and inconsistent state labeling regulations. Under this interpretation, common law claims against cigarette companies based on a failure to warn should be allowed because they are not at variance with the objectives of the Federal Cigarette Labeling and Advertising Act.

1. Protection of Consumer Interests

The Act protected consumer interests in two ways. First, the Act recognized the consumer's right to decide whether or not to smoke and second, it provided consumers with information about the dangers of smoking.

\textsuperscript{256} See Palmer, 633 F. Supp. at 1177; Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146, 1167 (D.N.J. 1984). Even if the Act prohibited manufacturers from providing additional warnings, compliance with the Act would still be possible since tort liability would not compel them to change the existing warnings.

\textsuperscript{257} See Perez v. Campbell, 402 U.S. 637, 644 (1971); Finberg v. Sullivan, 634 F.2d 50, 63 (3d Cir. 1980).


\textsuperscript{259} See id.

\textsuperscript{260} See id.
a. Freedom of Choice for Consumers

The Act reflects the commitment of Congress to the principle of freedom of choice. During legislative hearings on the Act, a number of witnesses, including those who thought that smoking was dangerous, expressed their opposition to a federal ban on the manufacture of cigarettes and emphasized that smoking should be a matter of personal choice. In its report to Congress, the House Committee on Interstate and Foreign Commerce also declared that consumers must be given the right to decide for themselves whether or not to smoke. For this reason, the Act did not attempt to regulate the tobacco industry or to restrict the sale of cigarettes.

Allowance of products liability claims against cigarette manufacturers does not conflict with freedom of choice for consumers. If cigarette companies seek to avoid future tort liability by providing better warnings, consumers will have more information about the health risks of smoking and, therefore, will be better equipped to decide whether or not to smoke. If tobacco companies refuse to modify their warnings, the cost of cigarettes may increase as if they are held liable, but consumers will still be able to purchase cigarettes if they wish.

b. Informing Consumers About the Health Risks of Smoking

The Act also declared that one of its purposes was to ensure that "the public may be adequately informed that cigarette smoking may be hazardous to health by an inclusion of a warning to


263. See Cipollone, 593 F. Supp. at 1159; see Note, supra note 2, at 1155.

264. See Note, supra note 18, at 1057.
that effect on each package of cigarettes."

Permitting consumers to recover against tobacco companies for failure to warn does not frustrate the Act's consumer information goal, but instead promotes it. Holding cigarette manufacturers strictly liable for placing inadequate warnings on their products will encourage them to provide better warnings in the future and thereby allow consumers to make more informed decisions about smoking.

2. Protection of Interstate Commerce

The Act manifests a clear congressional intent to protect the national economy. This, of course, includes the tobacco industry. This does not mean, however, that Congress meant to insulate cigarette companies from tort liability when it adopted mandatory labeling legislation. To be sure, politicians from the tobacco states played a major role in formulating the labeling statute. Cigarette companies, however, were more concerned with restricting state regulation than with obtaining immunity from tort liability.

There is nothing in the Act's language that suggests that Congress intended to immunize cigarette manufacturers from tort liability. The Act does not even mention tort liability and there are very few references to it in the Act's legislative history. If Congress had intended to grant broad immunity to cigarette manufacturers, it almost certainly would have done so explicitly.

266. See Note, supra note 18, at 1057.
268. See, e.g., Palmer v. Liggett Group, Inc., 825 F.2d 620, 622 (1st Cir. 1987); Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146, 1147 (D.N.J. 1984). At the time of the Act's adoption, tobacco ranked third in agricultural export products, fifth among all cash crops, and supported 750,000 farm families. See Palmer, 825 F.2d at 622 n.2 (citing 111 CONG. REC. 13,898, 13,950 (1965) (remarks of Senators Ervin and Bass)).
271. See supra notes 220-23 and accompanying text.
272. Congress could, of course, exclude state regulation without enacting any regulations itself. See L. Tribe, supra note 166, § 6-23, at 376. In this case, however, the tobacco industry appears to have been willing to accept some sort of warning requirement from
Instead, the Act merely intended to prevent the states from enacting cigarette labeling regulations of their own. Congress believed that those who sold cigarettes in a national market would have difficulty complying with diverse and potentially inconsistent state regulations. The result would hamper economic activity and burden interstate commerce.

Arguably, interstate commerce would also be affected if manufacturers were subjected to diverse standards under common law with respect to cigarette labeling. This conclusion served as the basis for the court's finding of preemption in Cipollone and Palmer. However, this author believes that product manufacturers can contend with differences among state common law doctrines much more easily than they can contend with conflicting state regulation. For this reason, common law tort claims should not be preempted on the theory that they conflict with federal regulatory goals.

If one assumes that cigarette companies operate in the same market environment as other product sellers, there is no basis for finding that a conflict exists between tort liability and the Act. All product manufacturers must contend with variations among state common law doctrines. Manufacturers can cope with these difficulties, however, because tort doctrines, unlike government regulations, allow for flexibility.

Tobacco companies may argue that they lack sufficient flexibility to respond to differing state standards because they are required by the Act to use specific language on their labels and in their advertising. However, since the Act allows cigarette manufacturers to provide additional warnings, they may easily satisfy both state and federal requirements.

This conclusion is further reinforced by the approach taken by Congress when it decided to impose labeling requirements on the sellers of smokeless tobacco products. The Comprehensive Smokeless Tobacco Health Education Act of 1986 closely resembles the

---

Congress in order to avoid the consequences of more rigorous state regulation. See Note, supra note 18, at 1033, 1060 n.229.


274. See id.


277. See Cipollone, 593 F. Supp. at 1167; see also Palmer, 633 F. Supp. at 1177.

cigarette labeling statute. The only significant difference between the two statutes is that the Smokeless Act's legislative history is more explicit about the right of manufacturers to add additional warnings to their products.279

The Smokeless Act contains a preemption section that is similar to the cigarette labeling statute's preemption provision.280 Congress, however, also added a savings clause which preserved common law claims based on failure to warn.281 This suggests that Congress does not believe that potentially differing standards of liability under state products liability law burden product sellers as much as differing state regulatory statutes.282

3. Uniform Versus Minimum Labeling Requirements

Even though failure to warn claims against cigarette manufacturers do not conflict with any of the Act's purposes, they may be inconsistent with the means chosen by Congress to achieve the objectives of the Act. In particular, if the Act is construed to mandate uniform warnings, the coercive effect of potential tort liability may undermine a goal of uniformity. On the other hand, if the Act merely sets forth a minimum standard with respect to warnings, congressional policy would not be frustrated if cigarette manufacturers provided better warnings in order to avoid tort liability. For this reason, it will be necessary to determine whether the Act requires uniform warnings or merely imposes a minimum standard.

One can argue that the Congress intended to establish a scheme of uniform cigarette labeling, thereby prohibiting anyone from changing or supplementing the precise language mandated by the Act. Certainly, Congress expressed concern about the economic hardship that would result if cigarette manufacturers were forced to comply with diverse labeling requirements imposed upon them by state law.283 Moreover, Congress not only prohibited the states

---

281. See id. at § 7(c). The statute provides that "nothing in this Act shall relieve any person from liability at common law or under State statutory law to any other person." Id.
282. See Note, (Preemption), supra note 16, at 904.
Preemption and Cigarette Warnings

from legislating in this area, but also placed specific language in the Act rather than delegating this responsibility to an administrative agency.\textsuperscript{284}

If the Act requires a uniform warning, product liability suits based on failure to warn would probably be preempted by the Act. Otherwise, manufacturers would be forced to choose between compliance with the Act and payment of tort damages. Arguably, the imposition of such a choice on manufacturers would conflict with the purposes of the Act.\textsuperscript{285}

It appears, however, that Congress did not intend to require uniform labeling because it left cigarette manufacturers free to place additional warnings on their packaging. Section 1334(a) provides that no statement \textit{shall be required} on any cigarette package; additionally, section 1334(b) provides that no \textit{requirement or prohibition} with respect to advertising or promotion \textit{shall be imposed under State law}.\textsuperscript{286} This language indicates that the Act merely prohibited the states from forcing manufacturers to modify existing warnings, but would not prevent manufacturers from \textit{voluntarily} providing additional warnings in their labeling or advertising.\textsuperscript{287}

Furthermore, a uniform warning that could not be voluntarily supplemented by cigarette manufacturers would in effect become a maximum standard. This seems inconsistent with the Act’s avowed purpose of informing the public about the health risks of smoking. Congress could hardly object to cigarette companies supplying more information to consumers as long as additional warnings did not dilute the effectiveness of the statutorily required language.\textsuperscript{288}

Thus, while the Act may provide for a scheme of uniform federal regulation of cigarette labeling, it does not necessarily require uniform warnings.\textsuperscript{289} A more likely conclusion is that Congress merely intended to impose minimum labeling requirements on cig-

\begin{itemize}
\item \textsuperscript{284} See id.
\item \textsuperscript{285} See Palmer, 825 F.2d at 627-28.
\item \textsuperscript{288} See Note, (Preemption), supra note 16, at 910.
\item \textsuperscript{289} See id. at 896.
\end{itemize}
arette manufacturers. This interpretation is consistent with many other examples of federal regulatory legislation which merely establish a floor and leave state courts free to encourage higher standards through the imposition of tort liability.

For example, the courts have treated federal motor vehicle safety standards established under the Traffic and Motor Vehicle Act of 1966 as minimum rather than maximum standards. Consequently, injured consumers have been permitted to bring products liability actions against automobile manufacturers based on defective design even when the designs in question comply with federal motor vehicle safety standards (FMVSS). The courts have allowed such suits to be brought even though the states are prohibited from imposing higher safety standards upon automobile manufacturers by direct regulation.

The courts have taken the same approach when federal warning or labeling requirements have been involved. Thus, a federal court in Raymond v. Riegel Textile Corp. concluded that a manufacturer could be held strictly liable to a young girl whose flannelette nightgown caught fire even though the product complied with federal flammability standards. Furthermore, consumers

---

290. See id. at 896-97; see also Cipollone, 593 F. Supp. at 1168.
293. See id.
294. See, e.g., Shipp v. General Motors Corp., 750 F.2d 418, 421 (5th Cir. 1985) (FMVSS not conclusive); Sours v. General Motors Corp., 717 F.2d 1511, 1517 (6th Cir. 1983) (compliance with FMVSS only a guide and not conclusive); Dorsey v. Honda Motor Co., 655 F.2d 650, 654 (5th Cir. 1981) (compliance with federal safety standards does not exempt manufacturer from common law liability); Fox v. Ford Motor Co., 575 F.2d 774, 784 (10th Cir. 1978) (federal seatbelt standards are minimum requirements only); Larsen v. General Motors Corp., 391 F.2d 495, 506 (8th Cir. 1968) (federal act designed to supplement common law); Buccery v. General Motors Corp., 60 Cal. App. 3d 533, 540, 132 Cal. Rptr. 605, 609 (Cal. Ct. App. 1976) (manufacturer of pickup truck may be held liable for failure to provide headrest even though not required to by NHTSA); Arbet v. Gussarson, 66 Wis. 2d 551, 562, 225 N.W.2d 431, 438 (1975) (federal regulations are supplementary to common law products liability).
296. 484 F.2d 1025 (1st Cir. 1973).
297. See The Flammable Fabrics Act, 15 U.S.C. §§ 1191-1204 (1982), which authorizes the Secretary of Commerce to establish flammability standards and expressly preempts inconsistent state standards. See id. § 1203. The court, however, interpreted the statute’s preemption provision narrowly and concluded that it would not bar product liability actions
have been allowed to sue drug manufacturers for a failure to warn even though their warnings were approved by the Federal Drug Administration. Finally, manufacturers of pesticides have been held liable for inadequate warnings even though their warnings complied with federal labeling requirements.

These cases suggest that federal legislation that establishes minimum design or labeling standards will usually not preempt suits against product manufacturers. Admittedly, there are differences between these statutes and the federal cigarette labeling act. For example, in all of the cases discussed above, either the manufacturer or a federal agency formulated the standard in question. However, in the Act's case, Congress itself composed the warning after lengthy consideration and debate. Moreover, unlike some of the other statutes considered above, the Act did not preserve in cases where the manufacturer could have made a safer product. See Riegel, 484 F.2d at 1027.

298. See Brochu v. Ortho Pharmaceutical Corp., 642 F.2d 652, 658 (1st Cir. 1981) (FDA approved package insert warning for oral contraceptives found to be inadequate); MacDonal d v. Ortho Pharmaceutical Corp., 394 Mass. 31, 36-37, 475 N.E.2d 65, 70-71 (Mass. 1985) (FDA approval of package insert warning for oral contraceptives did not preempt suit based on failure to warn about danger of stroke); Feldman v. Lederle Laboratories, 97 N.J. 429, 461, 479 A.2d 374, 390-91 (N.J. 1984) (manufacturer of antibiotic had a duty to urge FDA to change existing warning as new information became available).


common law liability or expressly provide for state participation in the federal regulatory scheme.\textsuperscript{301} Despite these differences, however, the Act still bears a strong resemblance to other federal minimum standards legislation.

D. The Presumption Against Preemption

As mentioned earlier, the United States Supreme Court has often declared that it will not rule that a state is preempted unless the nature of the matter subject to regulation permits no other conclusion or that Congress has unambiguously expressed its intention to exclude state regulation.\textsuperscript{302} This presumption is even stronger in cases where preemption would deprive an injured party of a remedy under state law without providing an equivalent substitute under federal law.\textsuperscript{303}

This presumption against preemption reinforces the conclusion that the Act does not prohibit products liability actions against cigarette manufacturers. Preemption of such actions would infringe upon the states' traditional interests in protecting the health and safety of their citizens.\textsuperscript{304} In addition, preemption would strip injured consumers of their most promising theory of recovery against cigarette manufacturers and would probably leave them without a remedy. For these reasons, the presumption against preemption is especially strong.\textsuperscript{305}


\textsuperscript{304} See Note, (Preemption), supra note 16, at 915-16.

\textsuperscript{305} See Comment, supra note 20, at 662.
Neither the Act itself, nor its legislative history, indicates that Congress intended to limit the right of injured consumers to seek recovery against cigarette manufacturers. Consequently, as the foregoing discussion suggests, products liability suits against cigarette manufacturers are not likely to obstruct or frustrate any of the Act’s apparent purposes, nor should state law be preempted because of potential or hypothetical conflicts between state and federal law. If Congress wished to preempt products liability actions, it could have easily done so. Because Congress did not manifest such an intent, and because no conflict exists between federal and state objectives, the presumption against preemption should be applied in cigarette warning cases.

IV. POLICY ANALYSIS OF CIGARETTE COMPANY LIABILITY

This portion of the Article evaluates the policies that underlie strict products liability. These include loss-spreading, promotion of product safety, market deterrence and fulfillment of consumer expectations. In general, these policies support the imposition of tort liability on cigarette manufacturers. Part IV also evaluates some of the arguments that might be raised against the imposition of strict liability on cigarette companies. Most of these arguments invoke fairness considerations as a basis for withholding liability. These include such concerns as reliance by manufacturers on existing legal rules, impairment of consumer choice, culpable conduct by victims, and avoiding economic harm to innocent third parties.

A. Arguments for Holding Cigarette Companies Strictly Liable

Courts and commentators have invoked a number of public policies to justify holding sellers strictly liable to consumers for injuries caused by defective products. For example, strict liability facilitates loss-spreading by shifting the cost of injuries from accident victims to product manufacturers. It also encourages manu-

308. See infra notes 311-14 and accompanying text.
309. See infra notes 310-14.
311. See Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69
facturers to invest resources in product safety and thereby reduce accident costs. In addition, strict liability promotes an efficient allocation of resources by ensuring that the prices of products reflect their true social costs. Finally, this theory is justified on the grounds that manufacturers impliedly represent their products as safe and should be made to compensate injured consumers when they are not. Each of these rationales provide strong support for the imposition of strict liability on cigarette manufacturers.

I. Loss-Spreading

Risk distribution or loss-spreading can be justified on both fairness and utilitarian grounds. Fairness dictates that those who benefit from an injury-producing activity be required to compensate those who suffer harm. In addition, secondary costs can often be reduced if economic losses are spread among large groups instead of being allowed to fall randomly upon a few individuals.

Loss-spreading is partly based on fairness considerations. Few persons would quarrel with the proposition that those who enjoy the benefits of an activity should assume responsibility for the burdens or costs that the activity generates. Conversely, it is undesirable without good reason to shift the cost of an activity to those who do not benefit from it.

Loss-spreading may also be justified on utilitarian grounds be-


315. See Note, (Plaintiff's Conduct), supra note 16, at 821.

316. In the context of accidents, primary costs refer to the direct physical or economic costs of accidents; secondary costs refer to the indirect or consequential costs that affect accident victims, their families and others when primary accident costs are borne solely by the victim. See G. Calabresi, supra note 229, at 26-27.


319. Of course, society often chooses to subsidize an activity. In such a case, the activity itself should have extremely high social utility or the decision to subsidize should be supportable on wealth distribution grounds. See G. Calabresi, supra note 229, at 26-27.
cause it reduces secondary accident costs.\textsuperscript{320} Society benefits from loss-spreading because secondary costs of injuries are reduced when primary accident costs are shifted from the victim and spread among a large group of people.\textsuperscript{321} Casualty insurance companies operate on this principle when they spread the cost of an accident among a risk pool of policyholders.

The concept of loss-spreading demands that liability for product injuries be placed on the party who can best absorb and spread the cost of compensation.\textsuperscript{322} Where injuries are caused by defective products, it is proper to shift the loss from injured consumers to those who profit or benefit from the presence of the product in the market.\textsuperscript{323} For this reason, manufacturers are appropriate loss-spreaders because they profit from injury-causing activities.\textsuperscript{324} Furthermore, manufacturers typically have the capacity to spread the costs of product injuries because they can insure against such losses\textsuperscript{325} and treat the expense as a cost of production.\textsuperscript{326} Moreover, because manufacturers typically sell to a mass market, the incre-

\begin{footnotesize}
\begin{enumerate}
\item Loss-spreading should be distinguished from loss-shifting in this respect. Shifting accident or other costs from one individual to another will have little effect on secondary costs unless one of the parties is considerably wealthier than the other. See id.
\item See Calabresi, supra note 317, at 517-18. This is a variant on the diminishing marginal utility of money theory. See id. According to this principle, each dollar that a person acquires provides less utility than the previous dollar. See Note, Sales of Defective Used Products: Should Strict Liability Apply?, 52 S. Cal. L. Rev. 305, 317 (1979).
\end{enumerate}
\end{footnotesize}
mental cost to each consumer from such price increases is small.\textsuperscript{327}

As mentioned earlier, the principle of loss-spreading does not support shifting accident costs to those who derive no benefit from the injury-producing activity. At the present time, however, neither cigarette companies nor smokers actually pay most of the health costs of smoking.\textsuperscript{328} Instead, these costs are shifted to other groups which include large numbers of nonsmokers. For example, smoking-related health costs are borne by private health insurance plans which charge the same rates to smokers and nonsmokers.\textsuperscript{329} In addition, the federal government absorbs smoking-related costs through disability and survivors benefit programs under Social Security,\textsuperscript{330} Medicare and Medicaid.\textsuperscript{331} Similarly, health care and other benefits by the Veterans' Administration\textsuperscript{332} include smoking-related health costs. Finally, payments to welfare recipients for health care also cover smoking-related costs.\textsuperscript{333} All of these programs are supported by taxes which are levied upon smokers and nonsmokers alike.

There is no apparent reason to exempt cigarette manufacturers from their loss-spreading responsibilities. The market for tobacco products is extremely large. At least 50 million Americans smoke,\textsuperscript{334} and tobacco companies sell more than 600 billion cigarettes a year in the United States\textsuperscript{335} and receive almost $30 billion in revenue.\textsuperscript{336} The tobacco industry is highly lucrative and industry profits amount to $3.1 billion each year.\textsuperscript{337} Thus, cigarette companies not only profit from the sale of an injury-causing product, but receive sufficient revenue from cigarette sales to enable them to

\textsuperscript{327} See Sales, The Service-Sales Transaction: A Citadel Under Assault, 10 St. Mary's L.J. 13, 16 (1978); see also Note, Liability of a Manufacturer for Products Defectively Designed by the Government, 23 B.C.L. Rev. 1025, 1080 (1982).

\textsuperscript{328} See Comment, supra note 20, at 645. One recent study suggested that nonsmokers bore as much as sixty-two percent of these costs. See Office of Technology Assessment, Smoking-Related Deaths and Financial Costs 56 (1985).

\textsuperscript{329} See Garner, supra note 1, at 1462; see also Note, supra note 18, at 1072.

\textsuperscript{330} See Garner, Cigarettes and Welfare Reform, 26 Emory L.J. 269, 272, 293 (1977).

\textsuperscript{331} See Note, (Plaintiffs' Conduct), supra note 16, at 823 n.76 (costs estimated at $2.1 to $7.1 billion per year).

\textsuperscript{332} See Garner, supra note 330.

\textsuperscript{333} See Note, (Plaintiffs' Conduct), supra note 16, at 823 n.76.

\textsuperscript{334} See id. at 809 n.5.

\textsuperscript{335} See Note, supra note 41, at 167 n.12

\textsuperscript{336} See Note, supra note 2, at 1137.

\textsuperscript{337} See Comment, supra note 46, at 270.
pay substantial amounts of money for purposes of compensation.

The tobacco industry may propose challenges to the loss-spread rationale. First, cigarette companies may claim that liability for the health costs of smoking would be so great that they would be unable to spread losses effectively through the pricing mechanism. Second, they may contend that litigation is a poor method for spreading losses because its administrative costs are so high. Although these arguments have some merit, they are not sufficiently compelling to justify a rule that immunizes cigarette companies from tort liability.

The total health costs of smoking are obviously substantial. According to one estimate, the United States spends $22 billion per year to treat smoking related diseases; lost productivity costs due to smoking related illness and death amount to another $43 billion.\textsuperscript{338} It is doubtful that cigarette companies could spread liability of this magnitude solely through the pricing mechanism. For example, if smokers were required to bear the entire social cost of smoking—$65 billion—the cost would add $2.16 to the price of a pack of cigarettes.\textsuperscript{339} Even if loss-spread were limited to the direct health care costs of smoking, estimated at $22 billion, the cost of a pack of cigarettes would rise by about seventy-three cents.\textsuperscript{340} In all probability, price increases of this magnitude would have a serious impact on the market for tobacco products.

Of course, cigarette manufacturers will probably not pay all of these costs even if they are held strictly liable. In the first place, many victims will not sue at all or will accept minimal settlements in order to avoid the financial and psychic costs of litigation.\textsuperscript{341} Those who do sue will have to overcome causation and other proof problems.\textsuperscript{342} Furthermore, in many cases tobacco companies will be able to invoke statutes of limitations or repose and raise affirma-


\textsuperscript{339} See Tribe, supra note 55, at 788-89 (shifting health costs to cigarette companies would triple the cost of a carton of cigarettes); see also Note, supra note 2, at 1156 (price of cigarettes would increase to $2.50 a pack).

\textsuperscript{340} See Note, supra note 41, at 167 n.12. This assumes that 30 billion packs of cigarettes, containing twenty cigarettes each, are sold each year. See id.

\textsuperscript{341} See Robinson & Kane, Punitive Damages in Product Liability Cases, 6 Pepperdine L. Rev. 139, 142 (1978) (some victims will be unable to undergo the financial and emotional stress of a lawsuit).

\textsuperscript{342} For a discussion of the causation issue see Note, supra note 18, at 1047-49.
tive defenses such as comparative fault and assumption of risk.\footnote{343} Nevertheless, tobacco companies will be exposed to substantial, and possibly overwhelming, liability if they are required to compensate injured consumers.

Cigarette manufacturers may also claim that the transaction costs\footnote{344} of litigation are so high that the imposition of strict liability on them would not promote efficient loss-spreading. Instead, existing compensation schemes, such as private health insurance plans, workers' compensation programs and public health care programs, which spread costs more cheaply, are superior to litigation and should be retained as the primary mechanisms for spreading the health costs of smoking.

While there is some merit to this argument, the problem of transaction costs is one that applies to products liability generally, as well as to other types of tort litigation.\footnote{345} Therefore, cigarette companies would have to show that transaction costs would be substantially greater in tobacco litigation than they would be in other products liability cases. Furthermore, the prospect of excessive transaction costs does not necessarily support the case for total immunity. Tobacco companies and smokers should still be required to pay at least some portion of the health costs of smoking. If products liability litigation is too costly, cigarette companies should be required to contribute to some other type of compensation program in order to avoid tort liability.

2. Promotion of Product Safety

The imposition of strict liability on manufacturers also provides an incentive for them to make safer products.\footnote{346} Manufacturers are usually in a better position than consumers to reduce the number of injuries from defective products.\footnote{347} Because manufac-

---

\footnote{343} For a discussion of affirmative defenses see Garner, supra note 1, at 1448-52; see also Note, supra note 41, at 185-89.
\footnote{344} Dean Calabresi refers to these as "tertiary" costs. See G. CALABRESE, supra note 229, at 225-26.
\footnote{345} Litigation costs consume substantial resources and often limit the amount of money available for compensation. According to one estimate, in products liability cases, victims actually receive only 37.5 cents out of every compensation dollar paid by manufacturers. See O'Connell, An Alternative to Abandoning Tort Liability: Elective No-Fault Insurance for Many Kinds of Injuries, 60 MINN. L. REV. 501, 510-12 (1976).
\footnote{346} See Prosser, supra note 311, at 1119; see also Note, supra note 321, at 815.
\footnote{347} See Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944);
turers are intimately familiar with their products and because assembly line production is well adapted to the use of product safety tests, manufacturers can easily discover and correct defects.\textsuperscript{348} Because they often make conscious decisions to increase product risks in order to save money,\textsuperscript{349} strict liability counteracts this tendency by forcing manufacturers to internalize the cost of product injuries. This encourages an efficient level of investment in product safety.\textsuperscript{350}

At the present time, cigarette companies bear none of the health costs of smoking.\textsuperscript{351} Instead, as mentioned earlier, these costs are borne primarily by private health insurance groups or by the government.\textsuperscript{352} Because cigarette companies have largely externalized the health costs of smoking, they have no incentive to devote resources to measures that will reduce these costs. Therefore, it would appear that the imposition of strict liability upon cigarette manufacturers will encourage them to reduce the health costs of smoking.

The accident cost avoidance rationale is applicable to cigarette companies, however, only if they have the actual or potential ability to affect health costs associated with smoking. The tobacco industry would no doubt contend that the health risks of smoking are inherent and cannot be eliminated without changing the essential character of the product. It is incorrect to assume, however, that cigarette manufacturers are completely unable to reduce the toxic characteristics of their products. For example, there is evidence that low tar and nicotine cigarettes are less dangerous than standard varieties.\textsuperscript{353} Filter tips may also reduce health risks some-

\begin{footnotesize}


\textsuperscript{351} See Note, supra note 2, at 1155.

\textsuperscript{352} See supra notes 328-33 and accompanying text.

\textsuperscript{353} See \textit{American Cancer Society, Dangers of Smoking: Benefits of Quitting & Relative Risks of Reduced Exposure} 8 (rev. ed. 1980).
\end{footnotesize}
what. Cigarette companies could create greater consumer demand for these “safer” types of cigarettes by advertising or pricing strategies. In addition, cigarette companies could reduce health risks by removing additives, pesticides and other dangerous substances from tobacco products. Furthermore, even if existing technology does not permit accident cost reduction, imposition of strict liability on cigarette manufacturers will encourage them to invest in research directed toward that purpose.

Even if smoking cannot be made safer, strict liability will motivate cigarette manufacturers to provide more effective warnings. Cigarette companies are more knowledgeable than consumers about the health risks of smoking. Consumers cannot act properly unless they possess sufficient information to make informed decisions. Therefore, it is appropriate to require cigarette manufacturers to share their information with consumers. Warnings serve this purpose.

Such warnings will reduce the health costs of smoking because they reinforce other educational measures and induce consumers to change their smoking habits. Furthermore, the monetary cost of such warnings is usually small in relation to the health benefits achieved. Because existing warnings are inadequate, product safety will be enhanced if cigarette manufacturers are induced to provide better ones.

3. Market Deterrence

Market deterrence also supports the imposition of strict liability on product manufacturers. According to this theory, the prices of goods should reflect their true social costs, including accident and health costs. Unlike manufacturers, consumers generally underassess the accident costs associated with use of defective prod-

355. See Levin, supra note 34, at 216-17.
356. See Note, (Plaintiffs' Conduct), supra note 16, at 826.
357. See Note, supra note 18, at 1061.
358. See Garner, supra note 1, at 1462.
359. Warnings cost only about 0.0004 cents per pack of cigarettes. See Milio, Health Policy and the Emerging Tobacco Reality, 21 Soc. Sci. Med. 603, 607 (1985); see also Comment, (Judicial), supra note 55, at 326 n.51.
360. See Note, supra note 18, at 1064-44.
361. See generally CALABRESI, supra note 229.
ucts, leading to overconsumption of relatively risky products.\footnote{See id. at 70.} By causing the prices of products to more fully reflect their true social costs, strict liability helps to reduce this overconsumption.\footnote{See generally McKean, supra note 313.} Lower consumption of these products will reduce the number of injuries associated with them.\footnote{See Henderson, supra note 324, at 1040.} Higher prices may also increase the demand for safer (and less costly) substitutes.\footnote{See Note, supra note 321, at 813. Normally, liability for product injuries should be placed on the manufacturer because it is the party who can best ensure that these costs will be reflected in the price of the product.\footnote{See Calabresi, supra note 317, at 505.} Holding cigarette manufacturers liable for the health effects of smoking appears to be consistent with the principle of market deterrence. At the present time, the health costs of smoking are not reflected in the price of cigarettes. Moreover, a substantial part of these costs are not borne by smokers, but are shifted to non-smokers.\footnote{See Garner, supra note 1, at 1462.} In addition, smokers are poorly informed about the health risks of smoking and, therefore, are likely to underestimate the danger of continuing to smoke.\footnote{See Note, supra note 18, at 1061.} For these reasons smokers “overconsume” tobacco products causing society to expend more of its resources than it should on smoking-related health costs.\footnote{See Warner, Smoking and Health Implications of a Change in the Federal Cigarette Excise Tax, 255 J. A.M.A. 1028, 1029-31 (1986). Older smokers, however, are less responsive to price levels; the addictive nature of cigarettes may account for this phenomenon. See id.}

Because smoking should pay for the injuries it causes, one solution is to shift the cost of these injuries back to cigarette manufacturers. Tobacco companies, in turn, will incorporate these costs into the price of cigarettes and ultimately pass them on to smokers. Presumably, some smokers will react to higher prices by reducing their use of tobacco products.\footnote{See id. One study indicated that teenagers and young adults were most responsive to cigarette price increases. See Warner, Smoking and Health Implications of a Change in the Federal Cigarette Excise Tax, 255 J. A.M.A. 1028, 1029-31 (1986). Older smokers, however, are less responsive to price levels; the addictive nature of cigarettes may account for this phenomenon. See id.} This, in turn, will eventually cause the health costs of smoking to decline to a more acceptable level.

Cigarette manufacturers may claim, however, that the price of cigarettes already reflects the health costs of smoking because to-
bacco products are more heavily taxed than other consumer goods. The federal government currently levies an excise tax of sixteen cents a pack on cigarettes.371 In addition, state excise taxes on cigarettes range from two cents to twenty-six cents a pack.372 These taxes amount to almost $10 billion a year.373 Nevertheless, while these taxes are substantial, they are not sufficient to cover more than a small proportion of the health costs of smoking.374 As mentioned earlier, the direct medical costs of smoking are estimated at $22 billion per year.375 Excise taxes do not even amount to half of that figure. Obviously, none of the estimated $43 billion in lost productivity costs are recouped by excise taxes. Therefore, market deterrence still provides a powerful argument for holding cigarette companies strictly liable for the health costs of smoking.

4. Implied Representation of Safety

Some commentators have espoused a representational theory of liability.376 Under this concept, strict liability is justified because manufacturers impliedly represent their products to be safe.377 Advertising reinforces this representation of safety, and thus, engenders a misplaced sense of security in the minds of consumers.378 Because product manufacturers create such expectations in order to increase sales, they should compensate injured consumers when reasonable expectations of safety are not met. In addition, representations of safety in advertisements often cause consumers to

372. See Comment, supra note 55, at 332 n.63.
373. See R. TOLLISON, SMOKING AND SOCIETY 253 (1986); see also Note, supra note 41, at 167 n.12.
374. See Garner, supra note 1, at 1463 n.260.
375. See Blasi & Monaghan, supra note 338.
378. See Owen, supra note 314.
underestimate product risk. Not only does this underassessment of risk vitiate the effect of market deterrence, but in some cases it may even nullify a consumer’s consent to assume risks associated with the product’s use.

According to this representational theory, cigarette companies should be held strictly liable because they have consistently represented their products to the public as being safe. Until the mid-1950’s, cigarette advertisements explicitly claimed that smoking was safe. Even today, cigarette advertisements suggest in subtle ways that smoking is safe. For example, many advertisements feature young, attractive smokers engaging in sports or other physical activities. In addition, the tobacco industry continues to deny that cigarettes pose any serious threat to public health, thereby undercutting the effect of mandatory warnings. All of this, no doubt, contributes to the fact that many smokers still do not fully appreciate the health risks of smoking.

Effective warnings might counteract this false impression of safety. Cigarette companies, however, have never provided consumers with adequate information about the health risks of smoking. Cigarettes carried no warnings at all until 1966 when the Federal Cigarette Labeling and Advertising Act compelled tobacco companies to place a warning on their products. The warning required by the Act was neither forceful nor specific. Nevertheless, cigarette manufacturers did not supplement it with any additional information. Although the statutory warning was strengthened recently, it still fails to warn about many of the health risks of smoking.

381. See Levin, supra note 34, at 237.
383. See generally P. TAYLOR, supra note 38; Note, supra note 18, at 1056.
384. See Levin, supra note 34, at 220; see also FTC STAFF REPORT ON THE CIGARETTE ADVERTISING INVESTIGATION 5-21 (May 1981).
386. See Note, supra note 41, at 177-83.
The tobacco industry has spent substantial amounts of money on advertising to create the impression that smoking is safe.\textsuperscript{387} At the same time, it has warned consumers about the health risks of smoking only when required to do so by law. For this reason, injured consumers may justifiably contend that cigarette companies should bear some responsibility for their health problems.

B. Arguments for Limiting the Liability of Cigarette Companies

The imposition of liability on cigarette manufacturers appears to be consistent with many of the policy goals of products liability. Other considerations, however, mostly based on fairness, may override these objectives. This section will evaluate some of the arguments that might be advanced by the tobacco industry to justify special protection against strict liability. For purposes of this analysis, the tobacco industry is defined to include anyone who directly participates or economically benefits from the production, distribution or sale of tobacco or tobacco products.

1. Reliance on Existing Legal Standards

Cigarette companies may raise a number of equitable arguments based on reliance upon existing legal standards to justify their immunity from tort liability for failure to warn. First, they may assert that liability rules should not be suddenly changed to create a retroactive duty to warn where none existed before. Second, cigarette manufacturers may claim that they reasonably assumed that the Act’s statutory language was sufficient to discharge their duty to warn.

Cigarette manufacturers may contend that courts should not suddenly, and without warning, change existing legal rules and thereby increase their liability for failure to warn. In the words of one commentator:

\begin{quote}
[i]t is the conventional wisdom that courts exist primarily to adjudicate disputes. A dispute generally concerns the legality of someone’s conduct and it is expected that the legality of the conduct will be judged as of the time it took place. It is also expected
\end{quote}

\textsuperscript{387} See Levin, \textit{supra} note 34, at 237. The tobacco industry spends about $2 billion a year on cigarette advertising. See id.
that the judging will be in accordance with reasonably knowable, preexisting rules. 388

If courts allow consumers to bring tort actions based on failure to warn, cigarette companies will be faced with claims from hundreds of thousands of smokers even if they immediately improved their package labeling. Arguably, the imposition of such massive liability on cigarette companies without prior warning is unjust.

If this argument has merit, it is applicable to all product manufacturers, not just tobacco companies. The law of products liability is a rapidly developing field and product manufacturers have often been forced to contend with unexpected increases in liability. 389 Cigarette companies are no different in this respect than other producers. Furthermore, injured consumers are not really asking courts to subject cigarette companies to novel or enhanced liability. Rather, they are merely arguing that cigarette companies should be held strictly liable for failure to warn in the same manner as other product sellers.

In addition, cigarette manufacturers may claim that they reasonably assumed that the language of the Federal Cigarette Labeling and Advertising Act was sufficient to discharge their duty to warn consumers about the health risks of smoking. This is not a persuasive argument either. The Act contained no language to suggest that it preempted product liability actions or otherwise relieved cigarette companies of their common law duty to warn. Therefore, tobacco companies cannot claim detrimental reliance on the statute as an excuse for not warning consumers about the health risks of smoking.

2. Strict Liability as a Limit on Consumer Choice

Subjecting cigarette companies to strict liability may affect the cost and availability of tobacco products and thereby restrict con-
sumer choices. Arguably, this would conflict with a congressional policy, expressed in the Federal Cigarette Labeling and Advertising Act,390 of allowing consumers to choose whether or not to smoke. Personal autonomy is an important value in a democratic society. It includes the right to make decisions about life-style, political affiliation, religion, sexual behavior, and medical treatment.391 In a free market economy, freedom of choice also extends to economic matters.392 Accordingly, consumers must be allowed to select goods and services based on their own notions of personal utility. This includes the right to purchase cigarettes.

In reality, consumers are rarely able to exercise complete discretion in a market environment. Instead, various factors often restrict free choice. For example, the government may prohibit the sale or distribution of a particular product and thereby deny consumers the right to obtain it. Even if a product is physically available, cost constraints may prevent some persons from being able to purchase it. Finally, consumers may be unable to make meaningful market decisions because they are misled or denied essential information by product sellers.

The imposition of strict liability on cigarette companies will not significantly constrain consumer decisionmaking. Obviously, strict liability is unlikely to affect the physical availability of cigarettes. Unlike specific deterrence measures, strict liability allows market forces to determine the price and availability of products.393 Therefore, even if tobacco companies are subjected to strict liability, they will still be free to sell cigarettes and consumers who wish to smoke will still be able to do so.394


393. See, e.g., Michelman, supra note 241, at 652.

394. The imposition of liability on cigarette manufacturers may affect the supply of tobacco products on the market. Some firms may leave the market entirely; others may reduce output in response to lower demand. If the market functions properly, however, the physical supply will generally be sufficient to meet existing consumer demand. See generally
Even though cigarettes may be physically available, imposition of strict liability on tobacco companies may cause the price to increase so substantially that many persons will no longer be able to afford them. Arguably, their right to smoke will thereby be impaired. Cigarettes are a relatively inexpensive product. Therefore, even if the price of cigarettes triples as a result of tort claims against tobacco companies, consumers can still choose to smoke. To be sure, some consumers will be forced to forego other activities if they desire to continue smoking. It is difficult to see, however, that the consumers’ right to smoke is impaired if they are forced to make such choices.  

Furthermore, while imposing strict liability on cigarette manufacturers may marginally restrict freedom of choice for poorer consumers, it will make such choices much more meaningful for consumers generally by encouraging tobacco companies to provide more information about their products. Warnings, of course, reinforce personal autonomy by allowing consumers to make intelligent choices about smoking. If strict liability claims based on failure to warn are allowed, cigarette companies are likely to provide consumers with more information about the health risks of smoking. Consequently, the principle of free choice will be promoted, not undermined, if cigarette companies are subjected to strict liability for failure to warn.

3. Responsibility of Victims for Their Decision to Smoke  

There is considerable support for the proposition that people should not be compensated for self-inflicted injuries. Therefore, cigarette manufacturers may argue that smokers should not recover for their injuries either because they were themselves equally culpable or because they were aware of the dangers of smoking and voluntarily consented to assume these risks when they decided to smoke.  

The first argument is based on the notion that smokers are

---

395. Tort liability may be undesirable if it causes the cost of essential products such as prescription drugs to rise to a level where the poor cannot afford them. See Note, (The Liability), supra note 61, at 758, n.190. No one, however, would suggest that cigarettes are essential products. See id.
396. See Note, supra note 18, at 1057.
397. See Levin, supra note 34, at 244.
guilty of culpable conduct and thus do not deserve to be compensated. Fault, however, is not a collective attribute and it would be unjust to deny recovery to smokers as a class merely because some of them are at fault. Instead, decisions about consumer fault should be made on an individual basis. The proper place to consider consumer conduct is during the litigation process where tobacco companies, in appropriate circumstances, may raise such issues as assumption of risk or consumer fault.

Furthermore, even if one assumes that smokers as a class are blameworthy, the conduct of the tobacco industry is infinitely worse. For example, cigarette companies knew about the health risks of smoking long before consumers, but did nothing to warn them about these dangers. Instead, prior to 1965, they represented to the public that smoking was safe. Even now, cigarette manufacturers deny that smoking is harmful and refuse to provide any warning beyond the statutory minimum. In addition, cigarette companies sell a product that is not only harmful, but is addictive as well. Instead of warning about the danger of nicotine addiction, tobacco companies rely on it to sustain their market. Thus, claims of consumer misconduct by cigarette manufacturers are not likely to carry much weight.

The second argument is based on the principle “volenti non fit injuria.” It presupposes that consumers who freely consent to encounter a risk cannot justifiably complain when that very risk causes injury. Of course, assumptions about collective risk-taking are almost as dubious as assumptions about collective misconduct. Because it is proper, however, to imply consent based on conduct in individual cases, perhaps one can extend the principle of implied consent to collective behavior as well. Even so, tobacco companies cannot make a convincing argument that smokers knowingly and voluntarily agreed to expose themselves to any of the specific health risks of smoking.

To be legally effective, consent must be both informed and

voluntary. Arguably, both of these elements are missing where smokers are concerned. The general public did not become aware of the health risks of smoking until the Surgeon General's Report was published in 1964. Even now, the vast majority of consumers do not know about many of the specific health risks of smoking. Warnings do little to inform consumers about such risks because cigarette advertising dilutes their effectiveness.

There is also some doubt about whether smoking can be regarded as entirely voluntary. To be sure, smoking is a matter of personal choice. While the decision to begin smoking may be voluntary, however, the addictive nature of tobacco causes many smokers to continue smoking when they would rather stop. Nicotine is extremely addictive; according to one commentator, it is more addictive than heroin. Moreover, most smokers become dependent on tobacco within a short time after beginning to smoke. Because the health effects of smoking result from long-term exposure to tobacco products, one may argue that smokers, once they are "hooked" on cigarettes, are no longer acting voluntarily when they continue to smoke.

The argument that injured consumers can make no moral claim for compensation is not persuasive. Smokers as a class have neither waived their right to recovery, nor have they forfeited it by misconduct.

4. Economic Effects of Strict Liability on Third Parties

Another concern is the effect of economic dislocation on third parties. As the experience of the asbestos industry demonstrated, large numbers of products liability claims can bankrupt even large companies. When this occurs, innocent people also suffer: stock-
holders lose their capital, workers may lose their jobs, and state and local governments may lose tax revenues.\textsuperscript{409} Even injured consumers are affected because a company that goes bankrupt can no longer pay tort claims.\textsuperscript{410}

The tobacco industry may claim that it would be economically crippled if cigarette companies were held liable for the health effects of smoking. Not only would cigarette manufacturers be affected, but other businesses would feel the spillover effects of a decline in the tobacco industry. Thus, a large number of people who depend, directly or indirectly, upon the tobacco industry for their livelihood, would be harmed if cigarette companies reduced their operations.

Agriculture is one sector of the economy that obviously benefits from the existence of a tobacco industry. Tobacco is an important crop in many states and produces $3.4 billion per year for tobacco farmers.\textsuperscript{411} The stable market for tobacco and its high per acre return compared with other crops makes it financially attractive for farmers to cultivate.\textsuperscript{412} Although tobacco farmers could grow other crops, many of them would suffer a drop in income if the market for tobacco were to suddenly collapse. Moreover, this economic hardship would not be limited to farmers. Tobacco farming is a labor-intensive enterprise which employs almost a million persons either full-time or part-time.\textsuperscript{413} Many of these employees would not be able to find comparable jobs elsewhere.\textsuperscript{414}

The tobacco manufacturing industry is among the five largest industries in the United States\textsuperscript{415} and employs approximately 1.3


\textsuperscript{410} See, e.g., Comment, Beshada v. Johns-Manville Products Corp.: Adding Uncertainty to Injury, 35 Rutgers L. Rev. 982, 1012 (1983); Note, (New Jersey), supra note 61, at 685.

\textsuperscript{411} See, e.g., Comment, supra note 55, at 330. Tobacco is the number one cash crop in three states. See Note, supra note 41, at 167 n.12.

\textsuperscript{412} See, e.g., W. FINGER, THE TOBACCO INDUSTRY IN TRANSITION (1981). The federal tobacco price support system contributes to this market stability. See id.


\textsuperscript{414} See id.

\textsuperscript{415} See Comment, (Judicial), supra note 55, at 332. The tobacco industry is responsible for about one percent of the nation's gross national product. See R. TOLLISON, SMOKING AND SOCIETY (1986).
It also contributes to the economic health of such industries as banking, transportation, chemicals, paper, and advertising. Although tobacco companies have diversified to escape their dependence on the American tobacco market, most of their profits still come from the sale of cigarettes and other tobacco products.

The tobacco industry also pays substantial amounts in taxes to federal, state and local governments. In 1983, for example, tobacco companies paid $8.02 billion in taxes to the federal government and another $5.44 billion to state and local governments. In addition, all levels of government benefit from income and other taxes paid by tobacco company employees.

It is appropriate to consider the effect that holding cigarette companies liable will have on third parties. Certainly many persons will suffer economic loss if the tobacco industry is crippled by massive liability to injured consumers. However, even if this fear is fully justified, it would still be unfair to completely deny compensation to injured consumers. Unfortunately, preemption has this very effect. Therefore, the courts should not invoke the preemption doctrine merely to protect the tobacco industry from a possible wipeout.

V. ALTERNATIVES TO TORT LITIGATION

This Article has concluded that there is no legal basis for applying the preemption doctrine to cigarette warning cases. Not only is the preemption doctrine inappropriate from a doctrinal point of view, but public policy strongly supports imposing liability on the tobacco industry for the health effects of smoking. Why then have so many courts allowed these claims to be preempted?

One possibility is that courts are fearful the tobacco industry would suffer the same fate as the asbestos industry if it is subjected to strict liability. The underlying concerns are twofold: first, if tobacco companies are bankrupted by massive tort liability they would be unable to compensate injured parties; second, if the costs of tort litigation are too high they would consume the lion’s share

417. See Comment, (Judicial), supra note 55, at 332.
418. See id.
419. See R. TOLLISON, supra note 415. Taxes on cigarette products amount to twenty-five to fifty-five percent of their retail price. See id. at 285.
of the economic resources available for compensation.

If courts share these concerns about the effect of tort liability on cigarette companies, then the preemption doctrine may be nothing more than a convenient tool for shielding the tobacco industry from excessive liability. Even if these concerns are valid, however, the preemption doctrine should not be applied in cigarette warning cases because it denies compensation to most injured consumers and because it relieves cigarette companies of their duty to warn.

One solution is to revise the current cigarette labeling act. The present congressionally dictated warning should be replaced by one that is composed by a Federal administrative agency such as the Federal Trade Commission. The agency should be authorized to update this warning periodically so that it presents consumers with current information about smoking-related risks. The statute may then expressly preempt failure to warn claims based on these warnings. Claims based on the inadequacy of past warnings, however, should be allowed.

With respect to these claims, an effort should be made to streamline the litigation process in order to reduce costs or, if necessary, to develop an alternative compensation mechanism that would be cheaper and more equitable than tort liability. This, of course, could not be done by the courts alone, but would require legislative involvement as well.

This portion of the Article will consider whether cigarette litigation would be excessively costly and whether the litigation process can be reformed in order to reduce costs. Finally, some alternative compensation schemes will be briefly evaluated.

A. Suits Against Cigarette Companies as Mass Tort Litigation

In the past decade, the makers of asbestos, Agent Orange, Asbestos, a silicate fiber product used as insulation material, causes asbestosis, mesothelioma and bronchogenic carcinoma. See Comment, Asbestos Litigation: The Dust Has Yet to Settle, 7 Fordham Urb. L.J. 55, 58, 74 (1978). Asbestosis is a pulmonary fibrosis or increase in the fibrous tissue in the lungs; it is often fatal. See Note, Issues in Asbestos Litigation, 34 Hastings L.J. 871, 873-74 (1983). Malignant mesothelioma is a tumor arising from the body's mesothelial cells; it is invariably fatal. See Mansfield, Asbestos: The Cases and the Insurance Problem, 15
DES, the Dalkon Shield IUD, and other goods have been sued by numerous parties who have been injured because of generic defects in their products. Suits against cigarette companies have been filed by numerous parties who have been injured because of generic defects in their products. See Rubin, Mass Torts and Litigation Disasters, 20 GA. L. REV. 429, 430 (1986). As many as 2.1 million persons will eventually die from asbestos exposure. See Comment, supra. As of 1982, more than 20,000 cases were pending against Johns-Manville Corp. and 500 additional suits were being filed each month. See Phillips, supra note 408, at 343. Estimates of total liability for asbestos-related injuries range from $40 billion to $100 billion. See Comment, An Examination of Recurring Issues in Asbestos Litigation, 46 ALB. L. REV. 1307, 1349 n.197 (1982) [hereinafter Comment, (Recurring Issues)].

Between 500,000 and two million women used DES from the early 1950’s through 1971 in order to prevent miscarriages. DES caused many of their female offspring to develop vaginal cancer, cervical cancer and adenosis. See Note, Proof of Causation in Multiparty Drug Litigation, 56 Tex. L. Rev. 125, 125 (1977). As of 1982, about 1000 “DES daughters” had filed suit against the drug's manufacturers. See Robinson, Multiple Causation in Tort Law: Reflections on the DES Cases, 68 VA. L. REV. 713, 718-19 (1982).

are likely to resemble the above examples of mass tort litigation. This raises legitimate concerns about whether cigarette companies have the ability to fully compensate injured consumers and whether tort litigation is a cost-effective means of compensating victims.

1. Massive Liability

Mass tort litigation has led to mass tort liability for some manufacturers. In some cases, product manufacturers have been forced to declare bankruptcy in order to obtain a respite from existing judgments and future tort liability. Furthermore, the prospects for massive liability are enhanced by the increasing willingness of juries to award punitive damages in mass tort cases.

The effect of massive liability on the tobacco industry's ability to loss spread was discussed in Part IV. At that time, the Author concluded that fear of such liability did not justify preempting tort suits against cigarette companies because this would deprive injured consumers of all compensation. Nevertheless, if tobacco companies are indeed subjected to massive liability in the future, it may be necessary to develop alternative compensation systems to ensure that all injured parties are treated fairly.

425. A mass tort involves multiple occurrences of various related harms over time. See Epstein, The Legal and Insurance Dynamics of Mass Tort Litigation, 13 J. LEGAL STUD. 475, 477 (1984); see also Note, Mass Accident Class Actions, 60 CALIF. L. REV. 1615, 1617-20 (1972).


428. See supra notes 315-45 and accompanying text.

429. Concern about massive liability is particularly justified if claimants recover punitive, as well as compensatory damages against cigarette companies. This is a real possibility if juries find that tobacco companies acted in bad faith by denying the existence of a link between smoking and cancer or suppressing information about the health risks of smoking. See Levin, supra note 34, at 223 (denial that smoking is unhealthy invites punitive damages).
2. High Transaction Costs

In addition, mass tort cases inevitably generate high transaction (litigation) costs. This is due in part from the large number of claimants and the complex issues of causation that are involved in such litigation. The existence of a large number of claimants discourages settlements and forces manufacturers to stubbornly litigate each case. The defendant’s conduct toward one plaintiff in a mass tort case inevitably affects the behavior of other claimants toward the defendant. For example, a manufacturer who loses a case to one claimant will find that other claimants have hardened their positions in the expectation that they will win too. Even settlement with one party is likely to set a floor for negotiations with other claimants if the settlement terms become known.

Transaction costs are also higher when more than one defendant is involved. The presence of multiple defendants complicates settlement negotiations and increases the cost of litigation if a trial becomes necessary. In addition, tort claims of this nature often generate secondary litigation between defendants and their insurance companies and among the carriers themselves.

Causation issues also make the litigation process more costly. There are two aspects to this problem. The first is establishing the identity of the person or entity responsible for the plaintiff’s injury. The generic character of some products, the inconspicuousness of the exposure event, and the long latency period involved in many injuries often make it difficult to identify the responsible

430. According to a 1977 United States Insurance Service Office Survey, insurance companies spent an average of forty-two cents in defense costs for each dollar paid to claimants. See Senate Comm. on Commerce, Science, and Transportation, Product Liability Act Report, S. Rep. No. 476, 98th Cong., 2d Sess. 7 (1984). In addition, plaintiffs typically paid litigation expenses plus thirty-three percent of the recovery as a contingent fee. Thus, the private costs of litigation are more than twice the net recovery for a successful claimant. See Rubin, supra note 420, at 434. Transaction costs are particularly high in asbestos cases: eighty to ninety cents of every dollar spent in such cases went to pay litigation expenses, while only ten to twenty cents went to compensate victims. See Note, supra note 420, at 903, n.192.

431. In many mass tort cases, injuries are often caused by exposure to more than one source. Therefore, injured parties must sue several defendants. Even if the plaintiff brings suit against a single producer, the defendant would probably implead other parties. Thus, claimants who smoked several brands of cigarettes would have to sue more than one cigarette manufacturer. See id. at 889-90.

party.\textsuperscript{433} The second aspect of this problem is determining the origin of the victim's injury or disease. Many diseases do not have a single cause, but result from the complex interaction of various factors.\textsuperscript{434}

Often causal connections between particular activities and disease are based solely on epidemiological statistics. These statistics, however, can only attribute a portion of the disease incidence in the general population to a potential source; given the current state of knowledge about the etiology of many diseases and the generality of most statistical data, it is usually impossible to determine the cause of such a disease in a specific individual.\textsuperscript{435} For this reason, claimants can rarely establish proof of causation based on general statistical data alone.\textsuperscript{436}

Litigation against cigarette companies is likely to have the high transaction costs associated with other types of mass tort litigation. For one thing, cigarette companies have a history of tenaciously defending themselves against prospective tort liability.\textsuperscript{437} In addition, the number of potential claimants is extremely large. An estimated 350,000 Americans die each year because of smoking.\textsuperscript{438} If only a small percentage of them sought recovery, the tobacco industry would face thousands of lawsuits each year. Of course, the number of claimants would diminish rapidly if the cigarette companies won most of the early cases; on the other hand, as the


\textsuperscript{435} See Rosenberg, supra note 433, at 856-57.

\textsuperscript{436} Under the traditional standards of proof, the plaintiff must establish by a preponderance of the evidence that the defendant's conduct caused his injury. Acceptance of statistical data for this purpose varies, however. Under the "strong preponderance" approach, the plaintiff cannot prove causation by statistical evidence alone; some additional evidentiary linkage is required. See Seltzer, Personal Injury Hazardous Waste Litigation: A Proposal for Tort Reform, 10 B.C. ENVTL. AFF. L. REV. 797, 821-22 (1983); Trauberman, Statutory Reform of "Toxic Torts": Relieving Legal, Scientific and Economic Burdens on the Chemical Victim, 7 HARV. ENVTL. L. REV. 177, 198 (1983). Under the "weak preponderance" rule, the plaintiff may recover upon a statistical showing that causation exists even if there is no direct evidence linking the plaintiff or his injuries to the defendant or its product. See Sherman, Agent Orange and the Problem of the Indeterminate Plaintiff, 52 BROOKLYN L. REV. 369, 384 (1986).

\textsuperscript{437} See Comment, Strict Products Liability on the Move: Cigarette Manufacturers May Soon Feel the Heat, 23 SAN DIEGO L. REV. 1137, 1143 (1986) (tobacco companies have never lost or settled a case involving smoking-related illness).

\textsuperscript{438} See Levin, supra note 94, at 198.
Experience of the asbestos industry has indicated, the number of claimants will quickly snowball if most of the initial claimants succeed in recovering against product manufacturers.

Although brand loyalty is strong among smokers, many of them may have smoked a number of brands over their lifetimes. Thus, a good number of cases will involve more than one defendant. Even if defendant cigarette companies cooperate in their defense of a suit, the cost of litigation will undoubtedly be increased by the presence of multiple defendants.

Causation issues will also complicate litigation against cigarette companies. Although cigarette companies dispute the fact that smoking causes lung cancer, the medical evidence is so overwhelming that plaintiffs should be able to prove causation in such cases. Causation issues, however, are likely to be more sophisticated in cases where victims seek recovery for heart disease, lung disease, or cancer of other organs besides lungs. Smoking also contributes to heart disease, chronic obstructive lung disease and other types of cancer. It is not the sole cause of these diseases. For this reason, plaintiffs and defendants alike will be required to seek expert advice to deal with these complex causation questions. This, in turn, will increase the cost of litigation for both parties.

---


440. Cigarette smoking is estimated to cause about ninety-five percent of all lung cancer. See Levin, supra note 34, at 199.

441. See, e.g., U.S. Dep't of Health and Human Services, The Health Consequences of Smoking: Cardiovascular Disease—A Report of the Surgeon General iii-iv (1988). According to the Surgeon General, smoking is responsible for about thirty percent of the fatal heart attacks. This presumably means that most fatal heart attacks are not caused by smoking. On the other hand, smoking is a major contributor to chronic obstructive lung disease. See U.S. Dep't of Health and Human Services, The Health Consequences of Smoking: Chronic Obstructive Lung Disease—A Report of the Surgeon General vii (1984). Smoking contributes to between seventy and eighty percent of all emphysema and chronic bronchitis deaths each year. See Holbrook, Tobacco Smoking, in HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 940 (K. Isselbacher 9th ed. 1980). The link between smoking and other forms of cancer is more attenuated. In addition to smoking, diet and other factors contribute to cancer. See Levin, supra note 34, at 199 n.32. Therefore, smokers who contract cancer, other than lung cancer, may have difficulty holding cigarette companies responsible for their injuries.
B. Reforming the Tort Litigation Process

Commentators have suggested various ways to streamline the litigation process and thereby reduce transaction costs in mass tort cases. These proposals include consolidation, use of class actions and offensive use of collateral estoppel. Unfortunately, so far none of these reforms have been implemented effectively in mass tort cases.

1. Consolidation

Rule 42 of the Federal Rules of Civil Procedure permits a court to consolidate several cases if they present a common question of law or fact. The court may order consolidation of claims for pretrial proceedings, for joint trial of common issues, or for joint trial of all issues. Actions pending in different judicial districts in the federal court system, however, cannot be immediately consolidated under Rule 42. Consolidation is possible only if the related cases are all filed in or transferred to a single federal district court. The district court in which the action is originally filed may transfer the case in its entirety to another district for the convenience of the parties and witnesses or in the interest of justice. This approach has proven of little value in achieving the consolidation of mass tort cases in a single venue, however, because it requires the unanimous cooperation of all the transferor judges to effect complete consolidation.

In addition, separate federal cases may be consolidated for pretrial proceedings by the Judicial Panel on Multi-District Litigation. The MDL Panel may order a transfer when (1) civil actions

442. In addition to these devices, commentators have also advocated such techniques as summary jury trials as well as use of magistrates and special masters. See generally Note, Affirmative Judicial Case Management: A Viable Solution to the Toxic Product Litigation Crisis, 38 Me. L. Rev. 339, 370-76 (1986).
448. See Trangsrud, supra note 446, at 802-03.
involving one or more common questions of fact are pending in different districts, (2) the transfer will promote the just and efficient conduct of individual suits, and (3) the transfer will be for the convenience of parties and witnesses. The MDL Panel has approved consolidation in a number of product liability cases. Consolidation is permitted, however, only for pretrial preparation and the cases must then be returned to the courts from which they were transferred. Therefore, this form of consolidation does not address the problems presented by mass tort litigation.

2. Class Actions

Many commentators have advocated the use of class actions in mass tort cases. In a class action, one or more members of a class may sue or be sued as representative parties on behalf of all members of the group. In order to qualify for certification as a class action in federal court, a dispute must meet the requirements of Federal Rule of Civil Procedure 23(a). These include numerosity of

---

450. See Transtrud, supra note 446, at 803.
455. See Note, (Products Liability), supra note 454, at 263.
class members, commonality of legal and factual questions, typicality of claims or defenses of the class representative, and adequacy of representation. These requirements can usually be satisfied in mass tort cases.

If these conditions are satisfied, the controversy must also fall within one of the categories of class action specified in Rule 23(b).

Rule 23(b)(1)(B) protects litigants when recovery by some plaintiffs impairs others' chances, as when the defendant possesses limited resources for the satisfaction of claims. This form of class action is mandatory in the sense that all members of the class are bound by the outcome of the suit. The courts, however, have been reluctant to certify many products liability cases as limited fund class actions.

One reason is that applicants have been required to establish a "reasonable likelihood" that the plaintiffs' claims will exceed the defendant's available assets. This standard limits the availability of limited fund class actions in such cases.

Rule 23(b)(3) allows class certification in cases where common questions of law or fact predominate over individual issues as long


457. Commonality requires the presence of questions of law or fact common to the class. See Note, The Punitive Damage Class Action: A Solution to the Problem of Multiple Punishment, 1984 U. ILL. L. REV. 153, 166.

458. Typicality requires that the class claims be similar, though not necessarily identical, to the claims of the representative party. See Note, supra note 453, at 524.

459. Adequacy of representation requires that the class be represented by a party with a significant interest in the outcome. The class must be represented by competent counsel, and there must not be any conflicting or antagonistic interests between class members. See Note, supra note 457, at 167.

460. See Trangsrud, supra note 446, at 787-88.


462. See id. at 66-67.


464. See Seltzer, supra note 461, at 66.


466. See Bendectin Prods., 749 F.2d at 306.

467. See Trangsrud, supra note 446, at 801.
as a class action is the superior method of handling the litigation. 468 Common question class actions are not mandatory and potential class members may opt out if they wish. 469 Common question class actions have not been used frequently in mass tort litigation, primarily because courts often conclude that common questions do not predominate. 470

3. Offensive Use of Collateral Estoppel

It has been suggested that offensive use of collateral estoppel will help to simplify mass tort litigation. 471 Collateral estoppel precludes a party from relitigating previously decided facts or issues. 472 Normally, collateral estoppel is invoked by defendants, but increasingly plaintiffs have attempted to use it in order to avoid the expense of proving certain issues time and time again. In such cases, the doctrine is called offensive collateral estoppel. 473

In order to invoke offensive collateral estoppel based on a finding or decision in a previous action, the plaintiff must show that: (1) the defendant was a party or was in privity with a party to the previous action, (2) the defendant or its privy had a full opportunity to litigate the matter at issue, and (3) the questions involved are identical. 474 In mass tort cases, the courts have often

---


473. See id.

474. Comment, (Recurring Issues), supra note 420, at 1331.
refused to allow plaintiffs to use offensive collateral estoppel because the issues adjudicated in previous actions were not identical to the those involved in the case at hand. 475 In addition, attempts to invoke offensive collateral estoppel in mass tort cases have often failed because of the existence of inconsistent verdicts. 476

Thus, it appears that use of offensive collateral estoppel is not likely to facilitate the management of mass tort litigation. 477 This is especially true in the case of cigarette litigation where the adequacy of a warning is at issue. This is because the question of whether a warning was inadequate or not will often depend on such unique circumstances as the particular plaintiff's actual knowledge of the danger. 478

C. Alternative Compensation Plans

Although streamlining the litigation process may reduce transaction costs somewhat, the techniques discussed above have not yet been successfully adapted to mass tort litigation. Moreover, even if transaction costs can be substantially lowered, the economic cost of fully compensating injured consumers may still be more than the tobacco industry can afford. For this reason, it may be necessary to consider alternatives to conventional tort litigation.

Over the years legal scholars have put forth a number of proposals to "reform" the tort system. 479 Regardless of how such a

475. See Trangsrud, supra note 446, at 813. This is a particular problem when the issue involved is whether or not the product was defective. Since the definition of defect varies, it is unfair to preclude the defendant from relitigating this issue based on a finding of defect in another state. See Ehrlenbach, Offensive Collateral Estoppel and Products Liability: Reasoning with the Unreasonable, 14 St. Mary's L.J. 19, 28 (1982).


479. See generally J. O'Connell, Ending Insult to Injury—No-Fault Insurance for Products and Services (1975); Franklin, Replacing the Negligence Lottery: Compensation and Selective Reimbursement, 53 Va. L. Rev. 774 (1967); O'Connell, Alternatives to the Tort System for Personal Injury, 23 San Diego L. Rev. 17 (1986); O'Connell, A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees, 1981 U. Ill. L. Rev. 333 [hereinafter O'Connell, (A Proposal)]; Pierce, En-
plan is packaged, however, it must address at least four problems: (1) scope of compensation, (2) level of compensation, (3) standard required for proof of injury, and (4) source of compensation.

The first element is concerned with defining the boundaries of the compensation system. A plan to compensate persons injured by smoking, for example, may confine itself to diseases, like lung cancer, that are undeniably linked to smoking or it may cover other illnesses as well. The narrower the plan's coverage, the lower its costs will be.480

Most tort reform proposals achieve cost savings over litigation by limiting the scope of recovery.481 Thus, compensation may be limited to direct economic losses such as out-of-pocket medical costs, lost earnings, and perhaps attorney's fees. Often these plans require claimants to forgo compensation for pain and suffering.482 A plan which limited compensation for smoking-related injuries to economic losses would cost far less than one that allowed compensation for pain and suffering.483 Such costs would also be much easier to predict by statistical methods than intangible costs would be.

The compensation scheme's requirements for proof of injury will have a direct impact on the level of transaction costs. If the requirements for establishing causation were kept at a fairly low threshold, transaction costs could be minimized. Further savings could be realized over litigation if an informal and nonadversarial hearing process was utilized.484

The final question is where does the money come from? As mentioned earlier, those who benefit from an activity should bear most of its costs. Therefore, smoking-related injuries should be borne directly or indirectly by smokers rather than the general public. This could be accomplished in several ways. One approach would be for cigarette companies to establish a compensation fund.
which would pay claims to injured consumers.\textsuperscript{485} Each year the compensation fund could levy assessments on cigarette companies on a market share basis sufficient to reimburse it for the previous year's claims. Tobacco companies would pass this cost on to consumers by raising the price of cigarettes.

Another approach might resemble the "Superfund" model.\textsuperscript{486} Under this approach, the compensation fund, administered by a government agency, could be financed by excise taxes levied on the manufacture of tobacco products and earmarked for this purpose. It would be best if this proposal were implemented at the federal level, but it could also be used by individual states.

The compensation plan outlined above is necessarily sketchy. Nevertheless, with suitable refinements, such a scheme might be superior to litigation as a means of determining liability for smoking-related injuries. It would provide some compensation for injured parties; it would place at least part of the health costs of smoking on cigarette companies and smokers; it would protect the tobacco industry against economically crippling tort liability; and it would avoid some of the transaction costs associated with determining liability in an adversarial process.

**CONCLUSION**

Although a number of federal courts have upheld the preemption of failure to warn claims against cigarette manufacturers, the United States Supreme Court will probably make the final decision on this issue. Congress, nevertheless, is free to modify the preemptive language of § 1334 of the Act and expressly preserve common law tort actions. While public attention is now focused on preemption, the real question is the capacity of products liability litigation, as it currently functions, to provide fair compensation to injured parties without destroying the economic well-being of product manufacturers. The tort system seems to have failed to

\textsuperscript{485} The fund could operate as an independent entity or it could be administered by insurance companies.

\textsuperscript{486} The Hazardous Substance Response Trust Fund (Superfund) was established by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. See 42 U.S.C. §§ 9601-9657 (1982 & Supp. 1987). The fund compensates those who are injured by abandoned hazardous waste sites. See id. It is financed by government appropriations, fees from private industry and fines collected under the liability and penalty provisions of the Act. See id. § 9631.
resolve asbestos claims efficiently and it may fail again if cigarette companies are subjected to comparable liability. If this should occur, some sort of legislative solution will be necessary.