Lindsey v. Tacoma-Pierce County Health Department: Cipollone Revisited, Billboards, State Law Tort Damages Actions, Federal Preemption and the Federal Cigarette Labeling and Advertising Act

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INTRODUCTION

Despite the fact that there are approximately half as many cigarette smokers today as there were 35 years ago before the Federal Cigarette Labeling and Advertising Act (FCLAA) was enacted, tobacco use is still the greatest health hazard in the United States. Consequently, state and local government entities still feel compelled to find effective ways to curb tobacco use. This has led to the enactment of state and local restrictions aimed at limiting the impact of tobacco advertising. In response, cigarette manufacturers, retailers, and advertisers argue that these provisions violate the FCLAA. This is not surprising, because cigarette manufacturers have effectively used the FCLAA to their benefit in another context—state law tort damages claims. However, manufacturers' attempts to utilize the FCLAA as a "shield" against local regulations that restrict cigarette advertising must be questioned. Similarly, the continued use of the FCLAA to basically "immunize" cigarette manufacturers from state law tort damages claims should be reexamined.

These issues center on the FCLAA's preemption provision. It is clear that this provision prevents state and local governments from imposing different warning requirements on either cigarette packages or cigarette advertising. The courts, however, have construed the pro-

3. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, TARGETING TOBACCO USE: THE NATION'S LEADING CAUSE OF DEATH AT A GLANCE (1999). According to the Centers for Disease Control and Prevention (CDC), some 430,000 people die every year from tobacco use—that is one in every five deaths. Id. at 2. Tobacco users die from heart disease, different cancers, and other diseases linked to smoking and chewing tobacco. Id. Further, treating these diseases results in an annual cost of more than $50 billion in direct medical expenses. Id. Although it has been acknowledged that cigarette smoking is dangerous to one's health, tobacco use is still the leading cause of death in the United States. Millions of smokers have quit and many young people have decided never to start smoking. Unfortunately, the decline in smoking has leveled off. Id. See also NATIONAL CENTER FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION, STATE SPECIFIC PREVALENCE OF CURRENT CIGARETTE AND CIGAR SMOKING FACT SHEET (1998).
vision to prevent certain state law tort damages claims. The courts have also found the provision applicable to state and local regulations dealing with tobacco advertising that are unrelated to any warning requirement.

The number of legal disputes regarding local regulation of tobacco advertising will probably diminish as a result of the tobacco settlement. Despite the settlement between major cigarette manufacturers and the states, wherein manufacturers have agreed to take down billboards throughout the country, there will undoubtedly still be some disputes. In addition to billboards, many of the local restrictions embrace other types of publicly visible advertising of tobacco products. Further, these restrictions are not just aimed at cigarette manufacturers, but cigarette retailers as well.

During the same period as the tobacco industry settlement, four federal appellate cases also dealt with both local regulations restricting tobacco advertising and the FCLAA. The most noteworthy of these cases was Lindsey v. Tacoma-Pierce County Health Department. In Lindsey, the Ninth Circuit found that a local regulation restricting tobacco advertising was completely preempted by the FCLAA. In addition to Lindsey, the Seventh Circuit in Federation of Advertising Industry Representatives (FAIR) v. City of Chicago, the Second Circuit in Greater New York Metropolitan Food Council, Inc. v. Giuliani, and the First Circuit in Consolidated Cigar Corporation v. Reilly all dealt with similar regulations. Although these three courts upheld the main provisions of the regulations at issue in those cases, in each case one aspect of the regulation involved was found to be preempted by the FCLAA.

The Ninth Circuit in Lindsey, as well as the three other courts, purportedly all followed the United States Supreme Court's decision in Cipollone v. Liggett Group, Inc., which is the only case in which the Supreme Court has addressed the preemptive reach of the FCLAA. Cipollone, however, addressed the preemption issue in a different context: it involved state law tort damages claims brought against cigarette manufacturers by a plaintiff allegedly injured from

7. There are also questions as to the binding effect of this settlement on these tobacco companies who were not parties to it.
8. 195 F.3d 1065 (9th Cir. 1999).
9. 189 F.3d 633 (7th Cir. 1999).
10. 195 F.3d 100 (2d Cir. 1999).
11. 218 F.3d 30 (1st Cir. 2000).
smoking cigarettes. In *Cipollone*, the cigarette manufacturers raised the FCLAA’s preemption provision as a defense to those claims. A plurality of the Supreme Court ruled that the FCLAA prevents certain state law tort damages claims from being asserted against cigarette manufacturers. Following *Cipollone*, plaintiffs bringing state law tort damages claims against cigarette manufacturers were consistently unsuccessful. History now suggests that *Cipollone* was not the best decision and that a reexamination of the issue of federal preemption of state law tort damages claims based on the FCLAA is needed.

*Cipollone* is probably the main reason why the states found it necessary to unite in the massive lawsuit against the cigarette industry. Their efforts resulted in an unprecedented $246 billion settlement agreement. *Cipollone* is also most likely the primary reason that the

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13. Id. at 508-09.
14. Id. at 510.
15. Id. at 507, 519-20, 524-30.
federal government currently believes it is necessary to pursue racketeering charges against the industry. Moreover, the Cipollone case is feasibly the chief explanation for the public's frustration, as was demonstrated in the national record-setting $145 billion punitive damages judgment rendered against the cigarette makers in 1999.

Although Lindsey and Cipollone present different questions regarding the applicability of the FCLAA, this Article attempts to address both.

This Article evaluates Lindsey and other recent cases dealing with local regulations restricting tobacco advertising; it also examines their respective preemption analyses, suggesting that the use of the FCLAA's preemption provision against such regulations is unwarranted. Initially, it must be noted that in Lindsey, the Ninth Circuit misconstrued the Supreme Court's discussion of the preemptive scope of the FCLAA by failing to read it in the proper context. Moreover, it is clear that the FCLAA's preemption provision was not intended to prevent the particular types of regulations involved in Lindsey and these other cases. The preemption provision was only meant to preempt health-risk or health-related requirements or prohibitions with respect to the advertising or promotion of cigarettes, which these regulations do not involve.

This Article also revisits Cipollone, examines the different positions taken with respect to the issue of whether the FCLAA preempts state law tort claims, and concludes that the decision that the

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18. Engle v. R.J. Reynolds Tobacco Co., No. 94-08273(A)(20) (Fla. Dade Cty filed May 5, 1994) was a class action brought on behalf of smokers suffering from "diseases like lung cancer and emphysema" seeking damages against the seven leading tobacco companies, the Council for Tobacco Research U.S.A. Inc., and the Tobacco Institute, a tobacco-financed public relations association. The lawsuit alleged that by denying that smoking is addictive and by suppressing research on the hazards of smoking, the tobacco industry improperly deceived the public about the dangers of using tobacco products. On July 14, 2000, a jury handed down the largest punitive damage award in U.S. history, ordering the tobacco industry to pay $145 billion to hundreds of thousands of Florida smokers suffering from diseases caused by cigarettes.
FCLAA’s preemption provision does preempt certain state law tort damages claims is probably not the best result. Congress never intended this provision to be used to “immunize” cigarette manufacturers from such claims. In addition, state law tort damages claims serve important functions. Cipollone prevents any regulation of cigarette manufacturers’ behavior and any state-imposed obligations manufacturers owe to their customers. Furthermore, while the states and federal government are allowed to proceed against cigarette manufacturers, individuals, the real victims, are denied the right to seek compensation.

I. BACKGROUND

A. The Enactment of the FCLAA and the Amendments Thereo

In 1964, an advisory committee convened by the Surgeon General of the Public Health Service, issued a report that stated as its central conclusion: “Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action.”\(^\text{19}\) After that report, the Federal Trade Commission, as well as several states, moved to impose various warning requirements in the advertising and labeling of cigarettes.\(^\text{20}\) The FCLAA, originally enacted in 1965, was, therefore, a response to a growing awareness that not only does cigarette smoking pose a significant health threat to Americans, but also that there are potential problems associated with different warning requirements in the labeling and advertising of cigarettes.

The original Act required that the following warning be conspicuously placed on cigarette packages: “CAUTION: Cigarette Smoking May Be Hazardous To Your Health.”\(^\text{21}\) The original Act, however, did not require any warning with respect to cigarette advertising. Section 2 of the Act included an express statement of purpose that read as follows:

It is the policy of the Congress, and the purpose of this Act, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—


the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.22

The original Act also contained an express preemption provision in §5 that was a blanket provision applicable to federal departments and agencies, as well as state and local governments, which provided as follows:

(a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.23

In 1969, the FCLAA was amended by The Public Health Cigarette Smoking Act of 1969.24 The warning was strengthened to read: “WARNING: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.”25 Although the 1969 Act still did not require a warning on cigarette advertising, it did ban cigarette advertising in “any medium of electronic communication subject to [FCC] regulation.”26 Section 5(b) of the preemption provision was changed to read as follows:

(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.27

25. Id.
26. Id.
The portion of the preemption provision relating to advertising, therefore, was changed from a blanket provision applicable to both state and federal entities to one limited in application to state law.

The FCLAA was again amended in 1984 by the Comprehensive Smoking Education Act, which extended the warning requirement to cigarette advertising and billboards. As a consequence of the 1984 amendment, every cigarette package, advertisement, and billboard was required to have one of four different warnings. The 1984 Act also amended the first subsection of the FCLAA's statement of purpose in § 2 to read: "(1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement. . . ."  

B. The Prior Case Law Involving the FCLAA, Including Cipollone  

1. Banzhaf  

The first reported case involving the FCLAA was Banzhaf v. Federal Communications Commission. It dealt with FCLAA's original preemption provision. Specifically, the case addressed the issue of whether an action by the Federal Communications Commission (FCC) was precluded by that preemption provision. Banzhaf considered an FCC ruling requiring radio and television stations carrying cigarette advertising to devote a significant amount of broadcast time to presenting the case against cigarette smoking. The United States Court of Appeals for the District of Columbia held that the FCLAA did not preempt the field of regulation relating to the health problems posed by cigarette smoking. Therefore, the court

29. 15 U.S.C. § 1333(a)(1) (1994). The warnings are as follows:  
SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.  
SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks To Your Health.  
SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result In Fetal Injury, Premature Birth, And Low Birth Weight.  
SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.  
The statute further requires the quarterly alternation of warnings. 15 U.S.C. § 1333(c) (1994).  
31. 405 F.2d 1082 (D.C. Cir. 1968).  
32. Id. at 1087.  
33. Id. at 1085-86. This was known as the "Fairness Doctrine."
held, the FCC had the authority to issue the ruling. 34 The court reasoned that Congress did not intend the FCLAA to curtail the potential flow of information about the hazards of smoking and that Congress simply “did not want cigarette manufacturers harassed by conflicting affirmative requirements with respect to the content of their advertising.” 35

As will be noted later, the Banzhaf case was cited in the legislative history accompanying the 1969 Act when the preemption provision was amended. 36 This may provide some explanation as to why the provision was amended. If the D.C. Circuit’s interpretation of the original provision was correct in Banzhaf, this likely meant that it was possible for states to adopt various regulations similar to the FCC regulation at issue in that case.

2. Cipollone (Third Circuit)

Cipollone v. Liggett Group, Inc. 37 presented the question of whether the FCLAA preempted any or all of the state common law claims brought by plaintiffs. 38 In that case, which would eventually reach the United States Supreme Court, the plaintiffs, husband and wife, alleged in their complaint that the wife developed lung cancer by smoking cigarettes manufactured and sold by the defendants. 39 The plaintiffs’ complaint brought forth claims based on strict liability, 40 negligence, 41 breach of warranty, and intentional tort. 42 The cigarette manufacturers moved for judgment on the pleadings pursuant to Federal Rule

34. Id. at 1089-90. This was a direct appeal from the FCC to the appellate court.
35. Id.
36. See infra notes 384-89 and 392-93 and accompanying text.
37. 789 F.2d 181 (3d Cir. 1986).
38. Id. at 183.
39. Id. Both the husband and wife died during the pendency of this litigation. The wife died first, and the husband continued the prosecution of the action individually and as executor of her estate. Later, after the husband died, the couple’s son became executor of both estates and maintained the action.
40. The plaintiffs claimed that the defendants’ cigarettes were unsafe and defective, that the defendants were subject to liability for their failure to warn of the hazards of cigarette smoking on the basis of strict liability, and that the defendants advertised their products in a manner that neutralized the warning actually provided—warnings made meaningless by the addiction cigarettes created. Id. at 184.
41. The plaintiffs claimed that the defendants were subject to liability for their failure to warn of the hazards of cigarette smoking on the basis of negligence that the defendants negligently advertised their products in a manner that neutralized the warning actually provided. Id.
42. The plaintiffs claimed that the defendants intentionally advertised their products in a manner that neutralized the warning actually provided, those warnings were made meaningless by the addiction created by cigarettes, and that the defendants ignored, failed to act upon, and conspired to deprive the public of medical and scientific data reflecting the dangers associated with cigarettes. Id.
of Civil Procedure 12(c) based on the preemptive effect of the FCLAA.\textsuperscript{43} The district court held that the FCLAA did not preempt any of the plaintiffs' claims.\textsuperscript{44} The Third Circuit allowed an interlocutory appeal and reversed.\textsuperscript{45}

The Third Circuit reviewed the general principles for ascertaining congressional intent to preempt state authority in its opinion.\textsuperscript{46} The court noted that there are two ways Congress can preempt state law. First, Congress can preempt state law by express statement.\textsuperscript{47} Second, even without express language, a court can find an implied intent to preempt.

The court then noted that there are two general ways for a court to find an implied intent to preempt.\textsuperscript{48} First, a court may determine that Congress intended "to occupy a field" in a given area.\textsuperscript{49} Second, even where Congress has not wholly superseded state regulation in a specific area, state law may be preempted "to the extent that it actually conflicts with federal law."\textsuperscript{50} In this second situation, the court reiterated the Supreme Court's holding that such a conflict arises: (1) when "compliance with both federal and state regulations is a physical impossibility,"\textsuperscript{51} or (2) where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."\textsuperscript{52} The Third Circuit, however, emphasized that "in applying these principles, a court must be mindful of the overriding presumption that 'Congress did not intend to displace state law.'"\textsuperscript{53}

In applying the preemption principles in \textit{Cipollone}, the Third Circuit concluded that Section 1334 did not expressly preempt plain-

\begin{itemize}
\item \textsuperscript{43} Id. at 183.
\item \textsuperscript{44} \textit{See Cipollone v. Liggett Group, Inc.}, 593 F. Supp. 1146, 1153-70 (D.N.J. 1984).
\item \textsuperscript{45} \textit{Cipollone}, 789 F.2d 181. The opinion of the Third Circuit appears to address only the preemptive effect of the amended preemption provision. The United States Supreme Court, however, later found that the original preemption provision was at issue in the case as well.
\item \textsuperscript{46} Id. at 185.
\item \textsuperscript{47} Id. (citing Jones v. Rath Packing Co., 430 U.S. 519 (1977)).
\item \textsuperscript{48} Id. (citing Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984)).
\item \textsuperscript{49} Id. As explained by the Third Circuit, this is because 'the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.'
\item \textsuperscript{50} Id. (quoting Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141 (1982)).
\item \textsuperscript{51} Id. (citing Pacific Gas & Elec. Co. v. Energy Resources Conservation & Dev. Comm' n, 461 U.S. 190, 304 (1982)).
\item \textsuperscript{52} Id. (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)).
\item \textsuperscript{53} Id. (quoting Hines v. Davidowitz, 312 U.S. 52 (1941)).
\item \textsuperscript{54} Id. (quoting Maryland v. Louisiana, 451 U.S. 725 (1981)).
\end{itemize}
tiffs' common law claims. The court also concluded that while Congress intended to "occupy a field," it was constrained to say that "Congress intended to supercede entirely private rights of action such as those at issue here." The Third Circuit, however, did find a problem when it looked to the extent to which the plaintiffs' state law claims "actually conflicted" with the FCLAA. The court first noted that it accepted the defendants' assertion that the duties imposed through state common law tort actions have the effect of creating requirements that are "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." The court also noted a number of Supreme Court cases where there was recognition of the regulatory effect of state law tort claims and their potential for frustrating congressional objectives. The court conclude[d] that claims relating to smoking and health that result in liability for noncompliance with warning, advertisement and promotion obligations other than those prescribed in the [FCLAA] have the effect of tipping the [FCLAA’s] balance of purposes and therefore actually conflict with the [FCLAA].

The Third Circuit did not identify which specific claims asserted by the plaintiff were preempted by the FCLAA. The court held, however, that the Act preempts those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes [and] ... where the success of a state law damage claim necessarily depends on the assertion that a party bore the duty to

54. Id. at 185.
55. Id. at 186. The court indicated that it could not say that the scheme created by the FCLAA was not "so pervasive" or the federal interest involved "so dominant," as to eradicate all of plaintiffs' claims. Id. The court also indicated that it could not say that the object of the FCLAA and the character of obligations imposed by it revealed a purpose to exert exclusive control over every aspect of the relationship between cigarettes and health. Id.
56. Id. at 187.
57. Id.
59. The primary purposes of the FCLAA are to warn the public of the hazards of cigarette smoking and to protect national economic interests. See 15 U.S.C. § 1331 (1994).
60. Cipollone, 789 F.2d at 187.
61. The court stated that it was not necessary for it to identify them at that stage of the litigation. Id. at 187-88.
provide a warning to consumers in addition to the warning Congress has required on cigarette packages . . .

3. *Stephen, Palmer, Roysdon and Pennington*

Shortly after the Third Circuit’s decision in *Cipollone*, four other federal circuits issued decisions following it: the Eleventh Circuit in *Stephen v. American Brands, Inc.*; the First Circuit in *Palmer v. Liggett Group, Inc.*; the Sixth Circuit in *Roysdon v. R.J. Reynolds Tobacco Co.*; and the Fifth Circuit in *Pennington v. Vistron Corp.* All four of these cases addressed the issue of whether state tort claims are preempted by the FCLAA. All four were actions brought against cigarette manufacturers in which the plaintiffs challenged the adequacy of the warnings on cigarette packages. Each of the four circuits found that there was no express preemption present. However, like the Third Circuit in *Cipollone*, these courts also found that the FCLAA impliedly preempted the plaintiffs’ claims.

4. *Cipollone* (U.S. Supreme Court)

After the Third Circuit rendered its first decision in *Cipollone*, the United States Supreme Court denied a petition for *certiorari* and the case returned to the district court. The district court found that the plaintiffs’ failure-to-warn, express warranty, fraudulent-misrepresentation, and conspiracy-to-defraud claims were barred by the FCLAA to the extent that they relied on the defendants’ advertising, promotional, and public relations activities after January 1, 1966, the

62. *Id.* at 187.
63. 825 F.2d 312 (11th Cir. 1987).
64. 825 F.2d 620 (1st Cir. 1988).
65. 849 F.2d 230 (6th Cir. 1988).
66. 876 F.2d 414 (5th Cir. 1989).
67. *See Stephen, 825 F.2d at 313* (adopting the decision and reasoning of the Third Circuit in *Cipollone*; *Palmer, 825 F.2d at 625* (holding that the FCLAA impliedly preempted the plaintiffs’ state law tort claim); *Roysdon, 849 F.2d at 234* (agreeing with the Third Circuit in *Cipollone* and the First Circuit in *Palmer* and finding that the plaintiffs’ state law failure to warn claim was implicitly preempted because it “actually conflicted” with the FCLAA); *Pennington, 876 F.2d at 418, 421* (concluding that the FCLAA did not expressly preempt the plaintiff’s products liability claims but that a failure to warn claim “conflicts with Congress’ [sic] clear intent to impose uniform warning and labeling requirements” and “upsets the congressional balance between warning the public of the risks of cigarettes and protecting the national economy.”).
70. Although the district court did not find that the plaintiffs’ design-defect claims were preempted by the FCLAA, the court found that they were barred on other grounds. *See Cipollone v. Liggett Group, Inc.*, 649 F. Supp. 664, 669-72 (D.N.J. 1986).
effective date of the FCLAA.\textsuperscript{71} The case was thereafter submitted to a jury which, in essence, rejected all the fraudulent misrepresentation and conspiracy claims but found that the defendants had breached their duty to warn and their express warranties before 1966.\textsuperscript{72} After the Third Circuit affirmed the district court’s preemption rulings,\textsuperscript{73} the United States Supreme Court granted certiorari to consider the preemption issue.\textsuperscript{74}

In \textit{Cipollone}, the Supreme Court specifically addressed the preemptive scope of both the original and the amended preemption provisions.\textsuperscript{75} With respect to the original preemption provision, a majority of the Supreme Court held that the FCLAA did not preempt state common law damages actions, but superseded only positive enactments by state and federal rulemaking bodies mandating particular warnings on cigarette labels or in cigarette advertisements.\textsuperscript{76} A plurality of the Court then held that the amended provision preempted plaintiffs’ failure-to-warn and fraudulent misrepresentation claims to the extent that they relied on omissions or inclusions in the defendants’ advertising or promotions, but that the amended provisions did not preempt the express warranty or conspiracy claims at all.\textsuperscript{77}

A majority of the Supreme Court supported parts of the opinion discussing the general principals of preemption analysis and the FCLAA’s preemptive scope.\textsuperscript{78} The Court began by acknowledging that “[c]onsideration of issues arising under the Supremacy Clause ‘start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . a Federal Act unless that [is]…

\textsuperscript{71} Id. at 669, 673-75.

\textsuperscript{72} The jury, however, found that the wife “[had] voluntarily and unreasonably encountered a known danger by smoking cigarettes” and that 80% of the responsibility was attributable to her. Cipollone v. Liggett Group, Inc., 893 F.2d 541, 554 (3d Cir. 1990) (summarizing the jury’s findings). Consequently, no damages were awarded to her estate, although the jury awarded damages to compensate her husband for losses caused by the defendants’ breach of express warranty. Id. at 554-55.

\textsuperscript{73} The court of appeals did, however, remand for a new trial on several other issues not related to the preemption issue. See id.

\textsuperscript{74} Cipollone, 499 U.S. 935 (1991). The Supreme Court later indicated that it granted certiorari to resolve a conflict between this case and the New Jersey Supreme Court’s decision in \textit{Deuey v. R.J. Reynolds Tobacco Co.}, 577 A.2d 1239 (N.J. 1990), see infra notes 157-67 and accompanying text, which held that the FCLAA’s amended preemption provision did not preempt similar common law claims. Cipollone, 505 U.S. 504, 508-09.

\textsuperscript{75} Cipollone, 505 U.S. at 514-15.

\textsuperscript{76} Id. at 518-19.

\textsuperscript{77} This resulted in the Supreme Court reversing in part and affirming in part the judgment of the court of appeals. See Cipollone, 505 U.S. at 509.

\textsuperscript{78} Id. at 516-20 (Parts III and IV of the opinion).
the clear and manifest purpose of Congress." 79 This is because "'[t]he purpose of Congress is the ultimate touchstone' of preemption analysis." 80 The Court continued to explain that

Congress' intent may be 'explicitly stated in the statute's language or implicitly contained in its structure and purpose.' 81 In the absence of an express congressional command, state law is preempted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.' 82

The Supreme Court noted that the Third Circuit was not persuaded that the amended preemption provision encompassed state common law claims or that either preemption provision "revealed a congressional intent to exert exclusive congressional control over every aspect of the relationship between cigarettes and health." 83 The Supreme Court then responded to the Third Circuit's conclusion that Congress had impliedly preempted plaintiffs' claims, challenging the adequacy of the warnings on labels or in advertising, or the propriety of the manufacturers' advertising and promotional activities as follows:

In our opinion, the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation. Such reasoning is a variant of the familiar principle of expressio unius est exclusio alterius: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted. In this case, the other provisions of the 1965 and 1969 Acts offer no cause to look beyond § 5 of each Act. Therefore, we need only identify the domain expressly pre-empted by each of those sections. 84

The Supreme Court then discussed each of the two preemption provisions separately. A majority of the Court found that the original

79. Id. at 516 (brackets in original) (citations omitted).
80. Id. (brackets in original) (citations omitted).
81. Id. (citations omitted).
82. Id. (citation omitted).
83. Id. at 516-17.
84. Id. at 517.
preemption provision, which, "on [its] face, . . . merely prohibited state and federal rulemaking bodies mandating particular cautionary statements on cigarette labels (§ 5(a)) or in cigarette advertisements (§ 5(b)),"85 " . . . was best read as having superseded only positive enactments" and therefore did not preempt state-law damage actions.86 A plurality of the Court then found that the amended provision was much broader,87 reaching beyond positive enactments to encompass certain common law claims.88 The plurality concluded that those common law claims containing a legal duty predicated on a "requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion" were preempted.89

In determining whether the amended provision preempted the plaintiffs' common law claims, the plurality analyzed each of the claims individually. The plurality began with plaintiffs' failure to warn claims, which asserted "two closely related theories."90 The first theory was that defendants "were negligent in the manner they tested, researched, sold, promoted, and advertised" their cigarettes.91 The second theory was that defendants failed to provide "adequate warnings of the health consequences of cigarette smoking."92 The plurality held that insofar as either theory required a showing that the defendants' advertising or promotions should have included additional, or more clearly stated warnings, it was preempted.93 The plurality, however, found that plaintiffs' claims that relied solely on defendants' testing or research practices or other actions unrelated to advertising or promotion were not preempted.94

The plaintiffs' claim for breach of an express warranty arose under a state law that provided: "Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise."95 The

85. Id. at 518.
86. Id. at 518-19.
87. Id. at 520 (plurality opinion of Stevens, J.). The plurality explained that this was because it barred not simply statements, but rather any "requirement or prohibition . . . imposed under State law." Id.
88. See id. at 520-24. The plurality specifically noted that its ruling did not mean all common law claims were preempted. Id. at 523.
89. Id. at 523-24.
90. Id. at 524.
91. Id.
92. Id.
93. Id.
94. Id. at 524-25.
95. Id. at 525 (citing N.J. STAT. ANN. § 12A:2-313(1)(a) (West 1962)).
plurality noted that the district court below ruled that this claim "inevitably brings into question defendants' advertising and promotional activities, and is therefore preempted." 96 The plurality, however, disagreed and found that the FCLAA's amended preemption provision did "not sweep so broadly," explaining as follows:

The appropriate inquiry is not whether a claim challenges the 'propriety' of advertising and promotion, but whether the claim would require the imposition under state law of a requirement or prohibition based on smoking and health with respect to advertising or promotion.

A manufacturer's liability for breach of an express warranty derives from, and is measured by, the terms of that warranty. Accordingly, the 'requirement[s]' imposed by an express warranty claim are not 'imposed under State law,' but rather imposed by the warrantor. 97

The plurality further noted:

That the terms of the warranty may have been set forth in advertisements rather than in separate documents is irrelevant to the pre-emption issue (though possibly not to the state-law issue of whether the alleged warranty is valid and enforceable) because, although the breach of warranty claim is made 'with respect... to advertising,' it does not rest on a duty imposed under state law. 98

The plaintiffs in Cipollone also alleged two theories of fraudulent misrepresentation. 99 The first theory alleged that the defendants, "through their advertising, neutralized the effect of federally mandated warning labels." 100 The plurality found that this claim was "predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking." 101 Because the later preemption provision encompasses both requirements and prohibitions, this theory was preempted. 102 The second theory alleged that the defendants engaged in intentional fraud and misrepresentation both by "false representation of a material fact [and by] conceal[ment of] a material

96. Id. (citing Cipollone, 649 F. Supp. at 675).
97. Id. (emphasis original).
98. Id. at 526 (parentheses in original).
99. Id. at 527.
100. Id.
101. Id. The plurality noted that this was "merely the converse of a state-law requirement that warnings be included in advertising and promotional materials." Id.
102. Id.
fact."\textsuperscript{103} With respect to plaintiffs' second theory of fraudulent misrepresentation, the plurality held: (1) that plaintiffs' claims that defendants concealed material facts were "not preempted insofar as they rely on a state-law duty to disclose such facts through channels of communication other than advertising or promotion."\textsuperscript{104} and (2) that even such claims that did arise with respect to advertising and promotions were not preempted since they "[were] predicated not on a duty 'based on smoking and health' but rather on a more general obligation—the duty not to deceive."\textsuperscript{105}

Lastly, the plaintiffs in \textit{Cipollone} claimed a conspiracy among the defendants to misrepresent or conceal material facts concerning the health hazards of smoking.\textsuperscript{106} Since the plurality found that "[t]he predicate duty underlying this claim [was] a duty not to conspire to commit fraud," the plurality held that this claim was not preempted, as it was not a prohibition "based on smoking and health" as that phrase is properly construed.\textsuperscript{107}

It is important to note that only four of the Justices agreed with the above holding with regard to the FCLAA's amended preemption provision.\textsuperscript{108} Three of the Justices found that there was no preemption\textsuperscript{109} based on the amended provision and the remaining two Justices thought that this provision preempted all of the common law claims.\textsuperscript{110}

5. \textit{Lacey, Sonnenreich, Griesenbeck, and Cantley}

After the United States Supreme Court's decision in \textit{Cipollone}, plaintiffs in state law tort damages actions were unsuccessful in asserting claims against cigarette manufacturers, despite their attempts to avoid preemption. In \textit{Lacey v. Lorillard Tobacco Co., Inc.},\textsuperscript{111} the court held that common law claims for the manufacturers' failure to disclose information regarding cigarette ingredients were preempted by the FCLAA.\textsuperscript{112} In \textit{Sonnenreich v. Philip Morris Inc.},\textsuperscript{113} the court found that the FCLAA preempted the plaintiff's claim that cigarette manu-

\textsuperscript{103} \textit{Id.} at 528 (brackets original).
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} \textit{Id.} at 528-29.
\textsuperscript{106} \textit{See id.} at 530.
\textsuperscript{107} \textit{Id.}
\textsuperscript{108} \textit{Id.} at 507 (Stevens, J. plurality opinion, joined by Rehnquist, C.J. and White, & O'Connor, J.J.).
\textsuperscript{109} \textit{Id.} at 531 (Blackmun, J. concurring in part and dissenting in part).
\textsuperscript{110} \textit{Id.} at 544 (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Thomas, J.). It should be noted that Justice Scalia and Justice Thomas would also have found that the original preemption provision preempted the plaintiffs' failure-to-warn claims.
\textsuperscript{111} 956 F. Supp. 956 (N.D. Ala. 1997).
\textsuperscript{112} \textit{Id.} at 964.
\textsuperscript{113} 929 F. Supp. 416 (S.D. Fla. 1996).
facturers had a duty to employ "nonpromotional communications" in order to inform the public of the dangers of cigarette smoking.\textsuperscript{114} In \textit{Griesenbeck v. American Tobacco Co.},\textsuperscript{115} the court held that the plaintiff's claim under a state products liability statute, that a cigarette manufacturer should have warned that smoking while sitting on upholstery when drowsy is dangerous, was preempted by the FCLAA, rejecting the plaintiff's assertion that \textit{Cipollone} applies to advertisements and promotions pertaining only to smoking and health rather than to the safety issue of self-immolation through negligence.\textsuperscript{116} In \textit{Cantley v. Lorillard Tobacco Co.},\textsuperscript{117} the Alabama Supreme Court determined that plaintiff's fraudulent suppression claim was merely a claim for failure to warn and was therefore preempted by the FCLAA.\textsuperscript{118}

6. \textit{Vango Media}

In \textit{Vango Media, Inc. v. City of New York},\textsuperscript{119} a city ordinance required that a minimum of one public health message be displayed for every four tobacco advertisements displayed on certain property and facilities licensed by the city, including taxicabs.\textsuperscript{120} A company in the business of displaying advertising signs on the exterior of city taxicabs challenged the ordinance.\textsuperscript{121} Finding that the phrase "with respect to the advertising or promotion of any cigarettes" in the FCLAA's amended preemption provision must be given a broad meaning, the Second Circuit\textsuperscript{122} held that the ordinance was preempted,\textsuperscript{123} since requiring the company and similar businesses who display cigarette advertising to also display anti-smoking messages, "treads on the area of tobacco advertising" and "implicates § [5](b)."\textsuperscript{124} In so ruling, the court rejected the city's argument that its ordinance imposed no requirements or prohibitions on the content, format, or display of cigarette advertisements and therefore was beyond the scope of § 5(b).\textsuperscript{125} The Second Circuit remarked that had the original pre-
emption provision been in effect, it might have been persuaded by the city’s argument, but it could not be persuaded now because of the more expansive reach of the current provision.\textsuperscript{126} Interestingly, the regulation in \textit{Vango Media} is similar to the FTC's regulation in \textit{Banzhaf}, which, as noted herein,\textsuperscript{127} might have been the impetus to amend the preemption provision.

7. \textbf{Penn Advertising}

\textit{Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore},\textsuperscript{128} dealt with a regulation similar to those at issue in \textit{Lindsey, FAIR, Giuliani, and Reilly} and was discussed in detail in each of those cases. In \textit{Penn Advertising}, a city ordinance prohibited the placement of any sign that “advertise[d] cigarettes in a publicly visible location.”\textsuperscript{129} In that case, the Fourth Circuit purportedly used the same methodology prescribed by the plurality in \textit{Cipollone}, finding that the regulation was not preempted by the FCLAA based on a “location” versus “content” distinction.\textsuperscript{130}

8. \textbf{Harshbarger}

In \textit{Philip Morris, Inc. v. Harshbarger},\textsuperscript{131} cigarette manufacturers and smokeless tobacco manufacturers brought a preemption challenge under the FCLAA and the Comprehensive Smokeless Tobacco

\begin{itemize}
  \item \textsuperscript{126} \textit{Id.} at 74.
  \item \textsuperscript{127} See supra notes 36, infra notes 384-89, and 392-93 and accompanying text.
  \item \textsuperscript{128} 63 F.3d 1318 (4th Cir. 1995), \textit{vacated and remanded on other grounds}, 518 U.S. 1030 (1996), \textit{readopted as modified on remand}, 101 F.3d 332 (4th Cir. 1996).
  \item \textsuperscript{129} \textit{Id.} at 1321. “Publicly visible location” included outdoor billboards, sides of buildings, and freestanding signboards. \textit{Id.} at 1321 n.1.
  \item \textsuperscript{130} The court explained its findings as follows:
    Applying the methodology described in \textit{Cipollone}, to [the ordinance], we conclude that the Federal Cigarette Labeling and Advertising Act does not preempt the ordinance. [The ordinance] limits only the location of signs that advertise cigarettes, but it does not address the content of such advertisements. The ordinance neither imposes a duty nor relieves a burden on cigarette advertisers \textit{based on smoking and health}. Moreover, the ordinance does not limit the ability of cigarette manufacturers to advertise generally in the media. The regulation simply restricts the location of cigarette-advertising signs, irrespective of the nature of the message communicated. A regulation with such a general relationship to cigarette smoking—in contrast to a specific advertising prohibition based on smoking and health—is not preempted by the Federal Cigarette Labeling and Advertising Act. \textit{Were the preemption provision to be interpreted so broadly, the Supreme Court in \textit{Cipollone} could not have allowed the continued prosecution of common law claims for breach of express warranty, misrepresentation, intentional fraud, and conspiracy—all of which relate generally to the effects on health of promoting the sale of cigarettes.}
    \textit{Id.} at 1324 (referencing \textit{Cipollone v. Liggett Group, Inc.}, 505 U.S. 504 (1992)) (emphasis original).
  \item \textsuperscript{131} 122 F.3d 58 (1st Cir. 1997).
\end{itemize}
Health Education Act of 1986\textsuperscript{132} (the Smokeless Tobacco Act) in reference to a state statute that required manufacturers of tobacco products to disclose the additive and nicotine-yield ratings of their products to the state's public health department.\textsuperscript{133} The district court held that the state statute was not preempted by either the FCLAA\textsuperscript{134} or the Smokeless Tobacco Act,\textsuperscript{135} and the First Circuit affirmed.\textsuperscript{136} The First

\begin{itemize}
  \item \textsuperscript{132} 15 U.S.C. §§ 4401-08 (1994).
  \item \textsuperscript{133} Specifically, the state law required "any manufacturer of cigarettes, snuff or chewing tobacco sold in the [state]" to provide the State Department of Public Health with a yearly report that lists for each brand of product (1) any added constituents "in descending order according to weight, measure, or numerical count," and (2) nicotine yield ratings "which shall accurately predict nicotine intake for average consumers." \textit{Harshbarger}, 122 F.3d at 62 (citing MASS. GEN. LAWS ch. 94, § 307B (1996)). Under the statute, the information provided was deemed a "public record," although the health department was prohibited from revealing the information "unless and until the [state] attorney general advises that such disclosure would not constitute an unconstitutional taking." 122 F.3d at 62. Despite this limitation, it appears that the health department would have made the information publicly available and that the statute's purpose was "to further the public health and education in the use of tobacco products." \textit{Id}.
  \item \textsuperscript{134} In addition to the warning messages that are required on cigarette packages and advertisements, the FCLAA contains an ingredient reporting provision that requires cigarette manufacturers to "annually provide the Secretary [of Health and Human Services] with a list of the ingredients added to tobacco in the manufacture of cigarettes which does not identify the company which uses the ingredients or the brand of cigarettes which contains the ingredients." 15 U.S.C. § 1335a(a) (1994). Under this provision [a]ny information provided to the Secretary under subsection (a) of this section [must] be treated as trade secret or confidential information subject to section 552(b)(4) of Title 5 [providing a trade secret exemption for disclosure under the Freedom of Information Act] and section 1905 of Title 18 [criminalizing disclosure of confidential information by federal officers or employees] and [cannot] be revealed, except as provided in paragraph (1) [respecting the Secretary's required report to Congress], to any person other than those authorized by the Secretary in carrying out their official duties.
  \item 15 U.S.C. § 1335(b)(2)(A) (1994). Further, the ingredient reporting provision requires the Secretary to ensure the confidentiality of the provided information through specified procedures, including a designated custodian of the information who, when the information is not in use, "shall store it in a locked cabinet or file" and must keep a record of those inspecting or using the information and a requirement that persons "permitted access to the information [must] be instructed in writing not to disclose the information to anyone who is not entitled to have access to the information." 15 U.S.C. § 1335a(b)(2)(C) (1994).
  \item 135. The Senate Report explains that the Smokeless Tobacco Act, "for the most part, simply extends the provisions of . . . the [FCLAA], to include smokeless tobacco products." S. REP. No. 99-209, at 1 (1986). It contains features similar, but not identical to, the FCLAA. The Smokeless Tobacco Act establishes a rotating warning requirement for package labels and advertising, with specific warnings regarding the potential adverse health effect of smokeless tobacco products. The specific texts of the alternative warnings, all preceded by the word "WARNING," read:
  
  THIS PRODUCT MAY CAUSE MOUTH CANCER.
  THIS PRODUCT MAY CAUSE GUM DISEASE AND TOOTH LOSS.
  THIS PRODUCT IS NOT A SAFE ALTERNATIVE TO CIGARETTES.
  \item 15 U.S.C. § 4402(a)(1) (1994). The Act bans the advertising of smokeless tobacco on radio and television. See 15 U.S.C. § 4402(f) (1994). Similar to the FCLAA, the Act provides for anonymous and aggregate ingredient reporting to the Secretary of Health and Human Services; it also
Circuit found that the state statute was not expressly preempted by the FCLAA.\textsuperscript{137} Although the disclosures were a requirement or prohibition based on smoking and health imposed under state law, they were not imposed with respect to advertising or promotion of any cigarettes.\textsuperscript{138} The court further concluded that there was no implied preemption, an argument the manufacturers based largely on the FCLAA's ingredient reporting provisions.\textsuperscript{139}

\textit{Harshbarger} is the one case involving the FCLAA and the issue of federal preemption that involved neither state law tort damages actions nor local regulations restricting cigarette advertising.

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provides for the Secretary's handling of the information. The Smokeless Tobacco Act, like the FCLAA, has an express preemption provision. There are, however, two noteworthy differences in the preemption provision of the Smokeless Tobacco Act. First, unlike the FCLAA, the Smokeless Tobacco Act contains a "savings clause." It provides: "Nothing in this chapter shall relieve any person from liability at common law or under State statutory law to any other person." 15 U.S.C. § 4406(c) (1994). Second, the preemption provision in the Smokeless Tobacco Act makes it clear that there is no preemption of outdoor billboard advertisements. The Smokeless Tobacco Act's preemption provision reads as follows:

No statement relating to the use of smokeless tobacco products and health, other than the statements required by section 4402 of this title, shall be required by any State or local statute or regulation to be included on any package or in any advertisement (unless the advertisement is an outdoor billboard advertisement) of a smokeless tobacco product.


136. 122 F.3d at 87.

137. \textit{Id}.

138. \textit{Id} at 69-77. The appellate court found that the issue of whether the Smokeless Tobacco Act expressly preempted the state statute was a much simpler one because the wording in that preemption provision read in pertinent part: "No statement relating to the use of smokeless tobacco products and health, other than the statements required by [this act] shall be required by any State or local statute or regulation to be included on any package or in any advertisement . . . of a smokeless tobacco product." \textit{Id} at 77. The court found the phrases "on any package" and "in any advertisement" dispositive to the issue before it. \textit{Id}.

139. The First Circuit found that it was bound by the majority's holding in \textit{Cipollone} that § 5(b) governed the preemptive scope of the 1965 and 1969 versions of the FCLAA and stated it "was not at liberty to address any implied preemption theories based solely on" those versions. \textit{Id} at 78. The court noted that the ingredient reporting provisions, however, were added to the FCLAA in 1984 by the Comprehensive Smoking Education Act, Pub. L. 98-474, 98 Stat. 2200 (1984) (codified at 15 U.S.C. §§ 1331-41) and were not at issue when the United States Supreme Court rendered its opinion in \textit{Cipollone}. \textit{Id}. See 122 F.3d at 78 (citing \textit{Cipollone}, 505 U.S. at 508). The First Circuit stated that it was only engaging in implied preemption analysis to the extent that the manufacturers were relying on the 1984 amendments to the FCLAA. See 122 F.3d at 78.

The First Circuit concluded that the statute did "not impede either purpose expressed in § 1331 because it neither obstructs the congressionally mandated warning labels, nor ... impedes the national economy by imposing a diverse or nonuniform advertising regulation." \textit{Id} at 82. The court further concluded that the purpose of the reporting provisions was to further toxicological research not to effect some type of national uniformity in ingredient reporting and disclosure regulations. \textit{Id} at 85.
9. Chiglo

Chiglo v. City of Preston, Minnesota is a good illustration of a local regulation restricting cigarette advertising that was aimed primarily at retailers, not manufacturers. In Chiglo, the operator of a convenience store brought suit challenging the legality of a city ordinance that prohibited all "point of sale" advertising in retail establishments and only allowed stores to display small signs stating that cigarettes were for sale. The statute prohibited the display of brand names, trademarks, or logos on the signs, although the sign could contain information about the "tar" and nicotine content of the products, as well as their price. The district court found that the ordinance was preempted by the FCLAA. The court noted that unlike the ordinance in Penn Advertising, the ordinance in Chiglo regulated the content of advertisements.

10. Forster

Forster v. R.J. Reynolds Tobacco Co., was a state case that would be cited in the United States Supreme Court's Cipollone decision. In that case, the plaintiff, a smoker who had developed lung cancer, sued both the manufacturer and retailer of cigarettes alleging strict products liability, misrepresentation, breach of warranty, and negligence. The trial court granted summary judgment for the defendants finding that the plaintiff's claims were preempted by the FCLAA, but the court of appeals reversed, holding there was no federal preemption. The court of appeals disagreed with the federal circuit courts' approach to preemption, finding that in such cases the traditional presumption against preemption is "heightened" by the following four factors: (1) the FCLAA did not explicitly preempt state tort claims; (2) the matter involved the state police powers of protecting the health and safety of the public; (3) the legislative

141. Id. at 676.
142. Id.
143. Id. at 678.
144. Id.
145. 437 N.W.2d 655 (Minn. 1989).
146. See Cipollone, 505 U.S. at 509 n.3.
147. See Forster, 437 N.W.2d at 656-57. The plaintiff purportedly began smoking in 1953, therefore, both the original and current preemption provisions of the FCLAA were at issue in this case.
148. Id. at 656.
rev'd 437 N.W.2d 655 (Minn. 1989).
150. See 423 N.W.2d at 696-98.
history of the FCLAA, which the federal appellate court completely disregarded in *Cipollone*, indicated that Congress did not intend to supersede the traditionally state-run area of tort compensation; and (4) given its drastic consequences, preemption would effectively eliminate all means of recourse for the plaintiff. Based on those factors, the state appellate court concluded that "at the very heart of [its] ruling [was] the firm conviction that if there [was] a need to immunize the tobacco industry from tort liability, that decision must be made by Congress in an unambiguous mandate and not by the courts." On appeal, the Minnesota Supreme Court reversed. The court held that state tort claims based on a state-imposed duty to warn are impliedly preempted while other state tort claims are not. The court reasoned that the imposition of state tort damages for failure to warn "would directly conflict with one of the announced purposes of the [FCLAA], namely, to avoid 'diverse, nonuniform, and confusing regulations relating to cigarette smoking and health, and would effectively dismantle the federal plan.'

11. *Dewey*

In *Cipollone*, the United States Supreme Court indicated that it granted certiorari because that case and other federal decisions following it were in conflict with the New Jersey Supreme Court’s decision in *Dewey v. R.J. Reynolds Tobacco Co.* In *Dewey*, the New Jersey Supreme Court held that the FCLAA did not preempt state claims against cigarette manufacturers for failure to warn, design defect, or fraud and misrepresentation in advertising. The trial court in that case concluded that the Third Circuit’s decision in *Cipollone* "com-

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151. *Id.* at 698-99.
152. *Id.* at 700.
153. *Id.*
154. 437 N.W.2d at 662. The court found that neither the original nor the current preemption provision expressly preempted a state common law tort action and that the issue before it was whether federal preemption was to be implied. *Id.* at 658. The court specifically noted that "the phrase 'requirement or prohibition . . . imposed under State law' was too obscure for [it] to say that it [was] an express declaration that state common law tort actions are preempted." *Id.*
155. Specifically, the court held that plaintiff’s claim of strict liability for unsafe design and defective condition were not preempted by the FCLAA. With respect to the misrepresentation claim, the court found that as long as the plaintiff did not claim that the advertising was deceptive because it did not adequately warn, the claim was not preempted. The court also found that to the extent a breach of warranty was based on a duty to warn it was preempted; otherwise it was not. Similarly, to the extent negligence was claimed to be a breach of the duty to warn about the hazard of smoking, it was preempted. *Id.* at 662.
156. *Id.* at 659.
159. See *id.* at 1251.
pelled” a finding that the claims for failure to warn, fraud, and misrepresentation were preempted, and the intermediate appellate court agreed. After noting that decisions of the lower federal courts are not “binding on state courts,” the New Jersey Supreme Court disagreed with the appellate court’s conclusion in Cipollone, as well as with the other courts following it, that state law claims for inadequate warning “actually conflict” with the purposes of the FCLAA.

As the New Jersey Supreme Court explained:

We agree with those courts that hold that the [FCLAA] neither expressly preempts common-law remedies nor impliedly preempts those remedies by pervasively occupying the field of law. Nor is there any indication that compliance with both state and federal law is impossible. We part company, however, with the cited cases to the extent that they conclude that state-law claims for inadequate warning “actually conflict” with the purpose of the [FCLAA].

The court then discussed preemption by actual conflict, stressing that “[a]ctual conflict must be more than ‘hypothetical’ or ‘potential.’” After considering the purpose of the FCLAA, the New Jersey Supreme Court refused to accept the assumption that the regulatory effect of state law damage claims necessitated the preemption of the plaintiff’s claims.

160. Id. at 1241. The trial court, however, like the Third Circuit in Cipollone, did not find that the design defect claim was preempted by the FCLAA.

161. Id. at 1244.

162. Id. at 1246-48.

163. Id. at 1247.

164. Id. at 1247 (citing Pennington v. Vistron Corp., 876 F.2d 414, 418-21 (5th Cir. 1989); Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 234; Palmer v. Liggett Group, Inc., 825 F.2d 620, 625-26 (1st Cir. 1987); Cipollone v. Liggett Group, Inc., 789 F.2d 181, 185-87 (3d Cir. 1986); Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655, 659-60 (Minn. 1989)).


166. For this, the New Jersey Supreme Court relied upon the FCLAA’s express statement of purpose found at 15 U.S.C. § 1331 (1994). The court also made the following two observations with regard to the two purposes announced in the statement. See id. at 1248. First, the court found it “significant that the second goal, the protection of trade and commerce, must be achieved ‘consistent with’ and not ‘to the detriment of’ the first and principal goal—to inform the public adequately that cigarettes may be hazardous to health.” Id. Second, the court noted that “the secondary goal focuses on the need for uniform labeling and advertising regulations as a way of protecting commerce and the national economy, but does not go so far as to restrict the rights of injured consumers.” Id.

167. Id. at 1249. The New Jersey Supreme Court did a thorough examination of other contexts in which the United States Supreme Court commented on the regulatory effect of state damage actions where the question of preemption was present. Id. at 1248-51. The court eventually concluded that if Congress intended to immunize cigarette manufacturers from these claims, “it knew how to do so with unmistakable specificity.” Id. at 1251.
12. Mangini

The California Supreme Court decided Mangini v. R.J. Reynolds Tobacco Company\(^{168}\) after the United States Supreme Court decision in Cipollone. In Mangini, a consumer sued a cigarette manufacturer and its advertising agencies for injunctive relief, asserting claims of unfair business practices and unjust enrichment in connection with the manufacturer’s advertising campaign, which was allegedly targeted at minors.\(^{169}\) The California Supreme Court rejected the manufacturer’s argument that because its cigarettes were labeled in conformity with federal law, it could not be subject to such claims because the claims would be based on underlying health concerns in violation of the FCLAA.\(^{170}\) The court found that Congress did not intend to affect the power of the state with respect to the sale of cigarettes to minors\(^{171}\) and therefore it “surely” did not intend to preempt attempts to prohibit the advertising of cigarettes directed at minors as well.\(^{172}\)

This case is noteworthy because the California Supreme Court rejected the argument that health concerns underlie laws prohibiting selling or furnishing cigarettes to minors.\(^{173}\) The court noted that these laws existed long before the current health concerns regarding cigarettes and that it was the states’ protective role, not health concerns, that primarily motivated such prohibitions.\(^{174}\)

II. FAIR, GIULIANI, LINDSEY, AND REILLY

A. FAIR

In Federation of Advertising Industry Representatives (FAIR) v. City of Chicago,\(^{175}\) the plaintiff, a group of advertisers, brought an action seeking declaratory and injunctive relief against a city ordinance that restricted the public advertisement of cigarette and alcohol products.\(^{176}\) The ordinance essentially banned all publicly visible advertising of tobacco products and then carved out several exceptions.\(^{177}\)

\(^{168}\) 875 P.2d 73 (Cal. 1994).
\(^{169}\) Id. at 74. The advertising campaign featured a cartoon character known as “Joe Camel.”
\(^{170}\) Id. at 79.
\(^{171}\) As will be noted later herein, this is in the legislative history accompanying the 1969 amendment to the FCLAA.
\(^{172}\) See Mangini, 875 P.2d at 81.
\(^{173}\) Id.
\(^{174}\) Id.
\(^{175}\) 189 F.3d 633 (7th Cir. 1999).
\(^{176}\) Id. at 634.
\(^{177}\) Id.
Exceptions included signs located near highways, in certain commercial and manufacturing zoning areas, at certain sports facilities, and inside stores licensed to sell alcohol and cigarette products, as well as signs on commercial vehicles transporting such products, and signs identifying the premises where such products were sold. The ordinance also specifically exempted any sign that contained a generic description of cigarettes or alcoholic beverages.

In its complaint, the plaintiff contended that the ordinance violated the First Amendment, the Contracts Clause, and the Due

178. Id. at 635 n.1. The text of the ordinance read as follows:
(a) No person may place any sign, poster, placard or graphic display that advertises cigarettes or alcoholic beverages in a publicly visible location. In this section, "publicly visible location" includes outdoor billboards, sides of buildings, and freestanding signboards. This section shall not apply to:
1. (A) With respect to cigarettes, the placement of signs, including advertisements, inside any premises used by a holder of a license required by chapter 4-64 of this code; or (B) With respect to alcoholic beverages, the placement of signs, including advertisements, inside any premises used by a holder of a license required by chapter 4-60 of this code; or (C) On commercial vehicles used for transporting cigarettes or alcoholic beverages;
2. (A) With respect to cigarettes, any sign that contains the name or slogan of the premises used by a holder of a license required by chapter 4-64 of this code that has been placed for the purpose of identifying such premises; or (B) With respect to alcoholic beverages, any sign that contains the name or slogan of the premises used by a holder of a license required by chapter 4-60 of this code that has been placed for the purpose of identifying such premises;
3. Any sign that contains a generic description of cigarettes or alcoholic beverages;
4. (A) With respect to cigarettes, any neon or electrically charged sign on premises used by a holder of a license required by chapter 4-64 of this code that is provided as part of a promotion of a particular brand of cigarettes; or (B) With respect to alcoholic beverages, any neon or electrically charged sign on premises used by a holder of a license required by chapter 4-60 of this code that is provided as part of a promotion of a particular brand of alcoholic beverage;
5. Any sign at a special event, as that term is defined in section 10-8-335 of this code;
6. Any sign on a CTA vehicle;
7. Any sign on property owned, leased or operated by the Illinois Sports Facilities Authority;
8. Any sign at Comiskey Park, Soldier Field, the United Center, or Wrigley Field;
9. Any sign on property adjacent to an interstate highway; or
10. Any sign located in a C3 District (Commercial-Manufacturing), a C4 District (Motor Freight Terminal) or any M District (Manufacturing).
(b) This section shall not be construed to permit any display that is otherwise restricted or prohibited by law.
(c) The penalty for violation of this section shall be as set forth in section 11.13 of this Title.

FAIR, 189 F.3d at 635.

179. Id.
Process Clause of the United States Constitution.\textsuperscript{180} It also alleged that the ordinance was preemptioned by the FCLAA and by state law.\textsuperscript{181} On the plaintiff’s motion for summary judgment, the district court held that the FCLAA preempted the ordinance’s cigarette advertising restrictions and that the regulation of alcohol advertising was not severable from the preempted regulation of cigarette advertising.\textsuperscript{182}

On appeal, the Seventh Circuit held that the ordinance was not preempted by the FCLAA to the extent that its provisions served as land-use regulations (including those provisions relating to cigarette advertising).\textsuperscript{183} The court did find that the provision of the ordinance permitting “generic” advertising of cigarettes without regard to any land-use consideration was preempted by the FCLAA.\textsuperscript{184} The appellate court, however, found that this preempted portion of the ordinance was severable, under state law, from the remaining portions of the ordinance.\textsuperscript{185} The court began its preemption analysis with the Supreme Court’s \textit{Cipollone} decision.\textsuperscript{186} The court noted that in \textit{Cipollone} the Court stated that the preemptive scope “is governed entirely by the express language in § 5 of [the FCLAA].”\textsuperscript{187} The Seventh Circuit, however, found that it “[was required to] examine the congressional scheme and legislative history of § 5(b) [of the FCLAA] in order to determine what Congress meant by [the] broad language.”\textsuperscript{188}

\begin{itemize}
\item \textsuperscript{180} Id. at 634.
\item \textsuperscript{181} Id.
\item \textsuperscript{182} Id. at 635-36.
\item \textsuperscript{183} Id. at 639-40.
\item \textsuperscript{184} Id. at 640.
\item \textsuperscript{185} The court of appeals therefore affirmed in part and reversed in part the judgment of the district court below. \textit{Id}.
\item \textsuperscript{186} Id. at 636.
\item \textsuperscript{187} Id. at 637.
\item \textsuperscript{188} Id. The appellate court noted that “every opinion in \textit{Cipollone} . . . relied on legislative history, historical context, legislative purpose, or analysis of the statutory provisions as a whole in interpreting the scope of the preemption mandated by the language of § 5(b) of the [FCLAA].” \textit{Id}. The appellate court also noted that since \textit{Cipollone}, the Supreme Court clarified this issue in \textit{Medtronic, Inc. v. Lohr}, 518 U.S. 470 (1996). \textit{Id}. In \textit{Medtronic}, the Supreme Court acknowledged that although \textit{Cipollone} stated that the scope of the preemption statute must begin with its text, that interpretation “does not occur in a contextual vacuum” and “is informed by two presumptions about the nature of pre-emption.” \textit{Medtronic}, 518 U.S. at 484-85. The court went on to explain the Supreme Court’s discussion of the two presumptions. \textit{FAIR}, 189 F.3d at 637. As the court explained:
\begin{quote}
First, [the Supreme Court] noted, ‘because the States are independent sovereigns in our federal system,’ there has been a presumption that ‘Congress does not cavalierly pre-empt state-law causes of action.’ This presumption, remarked the Court, is especially applicable when Congress legislates in areas traditionally occupied by the historic police powers of the state. Second, continued the [Supreme] Court, in determining whether Congress has preempted such activity, the purpose of Congress must,
The Seventh Circuit then examined the FCLAA in light of the statute's congressional goals. The court found "two important manifestations of congressional intent that shed light on the scope of § 5(b) preemption in this case." The first was the express statement of the purpose of the FCLAA. The court noted that the FCLAA's "legislative history confirm[ed] that the preemption provision was adopted 'to avoid the chaos created by multiplicity of conflicting regulations.'" The second was the fact that "[t]he Senate Report refer[red] to § 5(b) as 'narrowly phrased' and not intended to touch state authority over sales to minors, taxation, indoor smoking, or 'similar police regulations.'" The court concluded that the preemption provision must be read "in light of Congress' desire not only to ensure uniformity of regulation with respect to matters of labeling and advertising, but also in light of the manifest congressional concern in preserving for the states the remainder of their traditional police powers."

The question for the court was whether the ordinance at issue was "the type of police regulation of local concern that Congress intended to preserve." The court found that the ordinance was basically a land-use regulation, and noted that land-use has traditionally been within the police powers of states and municipalities. Thus, the court concluded that the ordinance was within the traditional local police power that Congress wished to preserve under the FCLAA.

The Seventh Circuit found that its conclusion that the ordinance was within the traditional local police power that Congress wished to preserve did not end its inquiry. Another question remained as to "the effect of the [o]rdinance on the federal interest in uniformity of labeling and advertising regulations." As the court explained,

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in every case, be 'the ultimate touchstone.' That intent is discerned, continued the Court, from the language of the Act, the statutory framework and the structure and purpose of the Act as a whole.

Id. (citations omitted). Consequently, the court of appeals concluded that it could not limit its analysis solely to the language of § 5(b). Id. at 637-38.

189. 189 F.3d at 638.
190. Id.
191. Id.
193. Id.
194. Id.
195. Id. at 638-39.
196. Id. at 639.
197. Id.
198. Id.
199. Id.
200. Id.
"[t]his inquiry requires that we focus on the precise sort of regulation that the ordinance requires and determine whether compliance with the ordinance will frustrate or burden the purpose of the federal statute."\textsuperscript{201} The court determined that except in one minor respect, the ordinance would not pose any problem.

The court found that the ordinance provisions regulating the location and type of signs "create[d] no danger of interfering with the FCLAA's advertising and labeling requirements."\textsuperscript{202} These provisions were, therefore, not preempted by the FCLAA. As noted earlier, the court did, however, find that the provision of the ordinance that permitted "a generic, as opposed to brand-specific, mention of a tobacco product[,]" without any consideration of location, "[ran] squarely into the prohibition of the [FCLAA]."\textsuperscript{203} It was therefore, preempted by the FCLAA.\textsuperscript{204}

Despite the court's finding with regard to the one aspect of the ordinance, the other provisions in the ordinance were upheld.\textsuperscript{205} This included those provisions that regulated the location and type of signs relating to cigarette advertising.

B. Giuliani

In \textit{Greater New York Metropolitan Food Council, Inc. v. Giuliani},\textsuperscript{206} the city enacted an ordinance entitled the "Youth Protection Against Tobacco Advertising and Promotion Act." The ordinance prohibited most outdoor advertising of tobacco products (other than tobacco advertisements on motor vehicles) within one thousand feet of any school building, playground, child day care center, amusement arcade, or youth center. It also prohibited most indoor advertising in the same areas if the advertisements could be seen from the street. The ordinance contained one exception to the ban: a single, black-and-white, text-only "tombstone" sign stating "TOBACCO PRODUCTS SOLD HERE" could be placed within ten feet of an entrance to a store where tobacco products were sold.

The plaintiffs, various supermarket and advertising associations, brought a civil rights action pursuant to 42 U.S.C. § 1983 against the city's mayor and two other city officials responsible for enforcing the ordinance. The plaintiffs sought declaratory and injunctive relief

\begin{itemize}
\item \textsuperscript{201} Id.
\item \textsuperscript{202} Id.
\item \textsuperscript{203} Id.
\item \textsuperscript{204} Id.
\item \textsuperscript{205} The appellate court found that the invalid provision could properly be severed from the ordinance under state law. 189 F.3d at 640.
\item \textsuperscript{206} 195 F.3d 100 (2d Cir. 1999).
\end{itemize}
alleging that: (1) the ordinance was preempted by the FCLAA and therefore violated the Supremacy Clause of the United States Constitution; and (2) the ordinance unconstitutionally restricted commercial speech in violation of the First Amendment. On cross motions for summary judgment, the district court, relying on Vango Media, found that the ordinance was preempted by the FCLAA.

On appeal, the Second Circuit held that the FCLAA only partially preempted the ordinance. The court determined that only the ordinance’s “tombstone” provision was preempted. The court found that the ordinance’s remaining restrictions on advertising within a thousand feet of a school, playground, etc., were not preempted.

The court of appeals started its analysis with the FCLAA’s preemption language in amended § 5(b), which states as follows: “No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes, the packages of which are labeled in conformity with the provisions of this chapter.” The appellate court found that “this text provides little insight into the preemptive scope intended by Congress,” explaining as follows:

The ambiguity resides primarily in the open-ended language extending preemption to obligations “with respect to” advertising and promotion of cigarettes. Read literally, these words could be misunderstood to preempt every conceivable obligation having a relationship—however evanescent—to the advertising and promotion of cigarettes.

The court went on to note:

[T]his hyper-literal approach would yield results that Congress surely did not intend. To take an absurd example, it could divest states and municipalities of authority to prevent tobacco advertisers from posting their ads in public buildings even though smoking is legally prohibited there. Or to borrow another example mentioned by our sister circuit, it could lead to the conclusion that states [are] without power to prohibit a cigarette company from handing out free cigarettes in an elementary school yard.

207. For a discussion of Vango Media, see supra notes 119-27 and accompanying text.
208. Accordingly, the appellate court affirmed the judgment insofar as it held that the tombstone provision of the ordinance was preempted under the FCLAA and reversed insofar as it held that the remaining provisions of the ordinance were preempted.
209. Id. at 105 (quoting 15 U.S.C. § 1334(b) (1994)).
210. Id.
211. Id. (quoting FAIR, 189 F.3d at 638).
The appellate court determined that it could not read the FCLAA’s preemption language in that fashion.\footnote{212} Looking beyond the FCLAA’s preemption provision, the court emphasized that “‘the purpose of Congress is the ultimate touchstone,’ and [that] an overly-expansive literal interpretation could subvert the presumption against preemption.”\footnote{213}

The Second Circuit, like the Seventh Circuit in FAIR, cited to the express statement of purpose in § 2 of the FCLAA.\footnote{214} The Second Circuit found that in this statement, “Congress has provided valuable insight into the intended scope of preemption under the FCLAA.”\footnote{215} As the court explained:

Two conclusions emerge when this statement is read in conjunction with the FCLAA’s other provisions. \textit{First}, Congress sought to inform the public about the dangers of smoking by regulating advertising and labeling information. . . . \textit{Second}, recognizing the potential burdens on the national economy that might result from the proliferation of ‘diverse, nonuniform and confusing’ advertising standards, Congress reserved to itself the power to regulate cigarette advertising information.\footnote{216} The court found the FCLAA’s legislative history indicated preemption was needed “to avoid the chaos created by a multiplicity of conflicting regulations.”\footnote{217}

With respect to the preemption issue, the \textit{Giuliani} court found that § 5(b) must be read in the context of: “(1) Congress’s ‘comprehensive Federal program’ to control cigarette advertising information; and (2) its concomitant concern with avoiding ‘diverse, nonuniform, and confusing’ advertising standards.”\footnote{218} The court concluded that one provision of the ordinance at issue presented problems in that

\footnotesize{\textit{Note:} See id. at 105-06.

\footnotesize{\textit{Note:} Id. at 106. The court of appeals found that the district court was wrong to interpret the appellate court’s prior decision in \textit{Vango Media} as suggesting it could not look beyond the FCLAA’s preemption language or consider congressional intent. See id. According to the appellate court, while the analysis of § 5(b)’s preemptive scope in \textit{Vango Media} began with the language of the provision, the court did consider the stated purpose of the FCLAA, its historical context, or its legislative history. Id. The court further emphasized that it “noted [in \textit{Vango Media}] that § [5](b)’s ‘with respect to’ language connotes a potentially expansive preemptive scope,” and that in that case it “gave effect to that language only because [they] found that doing so would implement congressional intent.” Id. “[T]he legislative purpose underlying § [5](b), as discerned not only from the language of that provision, but also from other indicia of congressional intent.” Id.

\footnotesize{\textit{Note:} Id. at 106 (referencing 15 U.S.C. § 1331 (1994)).

\footnotesize{\textit{Note:} Id.

\footnotesize{\textit{Note:} Id. (emphasis original) (citations omitted).


\footnotesize{\textit{Note:} Id. at 106-07.}}
regard: the tombstone provision, which limited advertising information in the restricted areas to black-and-white signs stating "TOBACCO PRODUCTS SOLD HERE" and prohibited colors, nontextual images, and nonconforming messages. This provision "create[d] obligations directly pertaining to the nature and content of advertising information" that "risked the sort of 'diverse, nonuniform, and confusing' advertising standards that Congress sought to avoid." The court held that the tombstone provision was a "requirement . . . based on smoking and health . . . with respect to advertising or promotion of cigarettes" and was therefore preempted under § 5(b).

The Second Circuit reached a different conclusion as to the remaining provisions of the ordinance, which essentially regulated the physical placement of advertising. The court cited the Seventh Circuit's decision in FAIR and the Fourth Circuit's decision in Penn Advertising and held that the remaining provisions of the ordinance at issue were not preempted. Specifically, the court found "that these location restrictions do not impose obligations 'with respect to' advertising as that phrase is used in § 5(b)." The court explained:

[The ordinance's] location restrictions do not implicate the same concerns as the ordinance's tombstone provision or the ordinance in Vango Media. The location restrictions do not touch upon Congress's "comprehensive Federal program" to control cigarette advertising information. The restrictions do not, for example, burden advertisers with a duty to warn. Nor do they impose content and format requirements on advertising information.

Instead, those provisions restrict only the physical placement of tobacco advertising signs in a manner akin to a run of the mill zoning regulation. To be sure, [the ordinance's] restrictions are unusual in that they ban only signs advertising tobacco, and not other products. However, the disparity does not interfere with the congressional purpose underlying the FCLAA. We do not

219. Id. at 107.
220. Id.
221. Id. The appellate court rejected the city's argument that the tombstone provision was not "based on smoking and health" within the meaning of § 5(b), but instead aimed solely at promoting law enforcement—the prevention of illegal sales of tobacco products to children. Id. at 108. The court noted the references in the legislative history of the ordinance to "health" and combating the danger of smoking. Id. The court also noted that "the effect of [the ordinance] was clearly to promote health because the underage tobacco sales prohibitions whose enforcement it explicitly seeks to promote are inherently based on health concerns." Id.
222. Id. at 109.
223. Id.
see—and the [plaintiffs] do not explain—how mere location restrictions can lead to the sort of "diverse, nonuniform, and confusing" advertising standards that Congress sought to avoid when it enacted § [5](b).

While the Second Circuit found that the tombstone provision of the ordinance was preempted by § 5(b), the court found it was severable from the rest of the ordinance under state law. The remaining provisions of the ordinance were therefore valid and enforceable.

C. Lindsey

In Lindsey v. Tacoma-Pierce County Health Department, a combined city-county health department board (the "Board") adopted a resolution banning all tobacco advertisements that could be seen from the street unless the advertisements were presented in a tombstone format. Under the resolution's tombstone exception, licensed tobacco retailers could post price and availability information outside their businesses as long as the advertisements were in plain black type and on a white field without adornment, color, opinion, artwork, or logos. No tombstone advertisement, however, could be displayed if it was visible from a school, school bus stop, bus stop, or sidewalk regularly used by minors to get to school, or within one thousand feet of a school, playground, or public park. The resolution did not regulate tobacco advertisements located inside retail establishments unless the advertisements could be seen from the street.

The plaintiffs, owners of convenience stores that were licensed to sell tobacco products in the state, filed an action against the Board and certain Board employees alleging that the resolution was (1) preempted by the FCLAA; (2) an unconstitutional regulation of commercial speech under the First Amendment of the Constitution; (3) preempted by state law; and (4) an impermissible exercise of the legislative authority beyond the Board's statutory authority. The district court granted summary judgment for the Board, reasoning that (1) the resolution was not preempted by the FCLAA because it only regulated the location and not the content of cigarette advertisements; (2)

224. ld. (emphasis original).
225. ld.
226. 195 F.3d 1065 (9th Cir. 1999).
227. ld. at 1067.
228. ld.
229. ld. at 1067-68.
230. ld. at 1068.
231. Lindsey v. Tacoma Pierce County Health Dep't, 8 F. Supp. 2d 1225 (W.D. Wash. 1998).
the resolution was a constitutional regulation of commercial speech under Central Hudson Gas & Electric Co. v. Public Service Commission\(^{232}\) because it was sufficiently related to the purpose of reducing underage tobacco use and because nonspeech alternatives to the regulation did not exist; (3) the resolution was not preempted by state law because the resolution did not directly regulate indoor advertising; and (4) the Board did not exceed its authority when it adopted the resolution because the resolution was reasonably related to the Board’s authority to enact regulations that promote and improve public health.

On appeal, the Ninth Circuit reversed. The court found that the district court erred when it concluded that the FCLAA did not preempt the resolution.\(^{233}\) The court held that the Board’s ban on outdoor tobacco advertising was preempted by the FCLAA and granted the plaintiffs’ motion for summary judgment on their federal preemption claim.

After a general discussion of preemption,\(^{234}\) the Ninth Circuit noted,

\[ \text{[f]ederal preemption [can] occur when (1) Congress enacts a statute that explicitly preempts state law; (2) state law actually conflicts with federal law; or (3) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in the legislative field.} \]

The court, however, also found that “[w]hen Congress considers the issue of preemption and adopts a preemption statute that provides a reliable indication of its intent regarding preemption, the scope of federal preemption is determined by the preemption statute and not by the substantive provisions of the legislation.”\(^{236}\) The court relied completely on the Supreme Court’s decision in Cipollone for this finding. The court noted that in Cipollone, the Supreme Court indicated that “Congress’ enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted.”\(^{237}\)

Further, as the Supreme Court found in Cipollone, the Ninth Circuit

\(^{232}\) 447 U.S. 557, 566 (1980).

\(^{233}\) 195 F.3d at 1075.

\(^{234}\) Id. The Ninth Circuit began its preemption analysis noting that “[i]ssues of federal preemption arising under the Supremacy Clause... ‘start with the assumption that the historic police powers of the States [are] not to be superseded by... [a] Federal Act unless that [is] the clear and manifest purpose of Congress.’” Id. at 1069 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)). The appellate court, citing Cipollone, also specifically recognized that congressional intent was the “‘ultimate touchstone’ of preemption analysis.” Id.

\(^{235}\) Id. (citing Cipollone, 505 U.S. at 516).

\(^{236}\) Id. (citing Cipollone, 505 U.S. at 517).

\(^{237}\) Id. (quoting Cipollone, 505 U.S. at 517).
concluded that the federal preemption issue in its case was ""governed entirely by the express language' of the FCLAA's preemption statute."\(^{238}\)

Despite the court's suggestion that the scope of preemption was determined solely by the preemption provision and not by the substantive provisions of the legislation, it did note the dual purpose of the FCLAA.\(^{239}\) The court also discussed the original version of the FCLAA's preemption provision,\(^{240}\) finding that the amended version of the FCLAA's preemption provision expanded its scope.\(^{241}\) The court concluded that now "'[t]he plain language of the FCLAA preempts any state law that imposes a requirement or prohibition based on smoking and health with respect to cigarette advertising.'"\(^{242}\)

The court also determined that the express language of the FCLAA preempted the Board's resolution banning outdoor tobacco advertising in the county because the resolution imposed a "requirement or prohibition" that was "based on smoking and health" "with respect to cigarette advertising."\(^{243}\) The court found that the resolution was a "requirement or prohibition" because it expressly prohibited outdoor tobacco advertising in the county and also imposed a requirement on cigarette advertising, in that it required certain advertisements to be printed in the tombstone format.\(^{244}\) The court also found that the resolution was based on "smoking and health" because of statements by the Board that the resolution "pertain[ed] to matters of health and safety of the citizens of [the] [c]ounty" and because the findings included in the resolution to justify the ban on outdoor tobacco advertising extensively referred to the various health risks related to cigarette smoking.\(^{245}\) Lastly, the court found that the resolution was "with respect to cigarette advertising" because it expressly prohibited outdoor tobacco advertisements and regulated point-of-sale availability information.\(^{246}\)

The Ninth Circuit rejected the Board's attempted reliance on the Fourth Circuit's opinion in *Penn Advertising*, which held that a city ordinance prohibiting the placement of any sign advertising cigarettes

\(^{238}\) *Id.* (quoting *Cipollone*, 505 U.S. at 517).

\(^{239}\) *Id.* ("To inform the public about the possible dangers of smoking ... [and] to prevent diverse regulations.").

\(^{240}\) See *id*.

\(^{241}\) *Id.* at 1070.

\(^{242}\) *Id*.

\(^{243}\) *Id*.

\(^{244}\) *Id*.

\(^{245}\) *Id*.

\(^{246}\) *Id*.
in a publicly visible location was not preempted by the FCLAA. The court found that Penn Advertising misconstrued Cipollone in reaching its conclusion because the ordinance in that case regulated the location rather than the content of cigarette advertisements—it was not based on smoking and health. The court also noted that the Seventh and Second Circuits in FAIR and Giuliani turned to the congressional purpose behind the FCLAA for their conclusion that location restrictions do not lead to the “diverse, nonuniform, and confusing” advertising standards that Congress aimed to prevent by the FCLAA. The Ninth Circuit was not persuaded by this, explaining as follows:

The distinction between location and content regulations is not only unsupportable by reference to the text, but the Congressional purpose of § 5(b) supports the preemption of a ban on

\[247. \text{Id. at 1071.} \]
\[248. \text{The Ninth Circuit explained as follows:} \]
\[\text{In Cipollone, the [Supreme] Court had to determine whether state common law actions filed against tobacco companies for failure to warn, breach of warranty, fraudulent misrepresentation, and conspiracy were preempted by the FCLAA. A plurality of the court addressed each common law claim individually stating that} \text{"[t]he central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion,' giving that clause a fair but narrow reading." The plurality opinion expressly recognized that the plain language of the FCLAA is determinative in resolution of preemption issues regarding tobacco advertising.} \]
\[\text{The plurality held that failure to warn claims were preempted by the FCLAA to the extent that such claims required a plaintiff to show that tobacco advertisements should have included additional or more clearly stated health warnings. The plurality reasoned that such failure to warn claims were preempted because they relied on 'a state-law requirement or prohibition . . . with respect to . . . advertising or promotion.' The plurality noted, however, that failure to warn claims based on negligent testing and research practices were not preempted by the FCLAA because such claims were unrelated to advertising and promotional practices.} \]
\[\text{The plurality concluded that express warranty claims were not preempted by the FCLAA because liability for express warranty is imposed, not under state law, but by the warrantor's express actions. The plurality also concluded that the FCLAA did not preempt fraudulent misrepresentation claims because fraudulent misrepresentation claims are based on a state law duty not to deceive rather than a state law duty "based on smoking and health." Likewise, the plurality concluded that the FCLAA does not preempt conspiracy to defraud claims because such claims are based on a duty not to conspire to commit fraud rather than a duty "based on smoking and health." The Cipollone plurality always examined the plain language of the FCLAA to determine preemption issues and never recognized a distinction between content regulations and other regulations like location regulations. The [b]oard's argument and the Fourth Circuit's conclusion that location regulations are distinguishable from content regulations under the FCLAA are, therefore, not supported by the plurality decision in Cipollone.} \]
\[\text{Id. at 1071-72 (citations omitted) (emphasis original).} \]
\[249. \text{Id. at 1072.} \]
outdoor tobacco advertising. As noted in Giuliani, advertisers are forced to comply with diverse local zoning laws; however, this fact does not justify placing additional restrictions solely on tobacco advertisers. Rather, the failure to preempt location restrictions on tobacco advertising will place an unjustifiable burden upon a tobacco advertiser to consult local regulations concerning the placement of tobacco advertisements in every locality in which it wishes to advertise.\(^\text{250}\)

The Ninth Circuit claimed that the conclusion that location regulations could not be distinguished from content regulations under the FCLAA was supported by the fact that the earlier version of the preemption provision only preempted content regulations and that the amended language broadened the scope of preemption beyond content regulation.\(^\text{251}\) The court also maintained that "[i]n order to distinguish the language currently used in § [5](a), from the language currently used in § [5](b), § [5](b) must be read as preempting more than just content regulations."\(^\text{252}\)

D. Reilly

Consolidated Cigar Corporation v. Reilly,\(^\text{253}\) which was decided after Lindsey, Giuliani and FAIR, involved certain regulations promulgated by the state attorney general restricting the sale, promotion, and labeling of tobacco products in an effort to reduce the use of such products by minors. The regulations outlawed certain promotional techniques that purportedly invite illegal tobacco use by minors\(^\text{254}\) as well as:

(a) Outdoor advertising, including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school;

\[^{250}\text{Id.}\] The court went further, stating "[t]he bans on outdoor advertising in FAIR, Giuliani, and [Lindsey] present a good example of the multitude of different regulations tobacco advertisers face" and "precisely the result Congress was trying to avoid in promulgating § [5](b)." \(\text{Id. at 1072-73}\).

\[^{251}\text{Id. at 1074}\].

\[^{252}\text{Id.}\].

\[^{253}\text{218 F.3d 30 (1st Cir. 2000)}.\]

\[^{254}\text{For example, promotional giveaways and mail ordering without age verification. Id. at 37}\].
(b) Point-of-sale advertising . . . any portion of which is placed lower than five feet from the floor of any retail establishment accessible to persons younger than 18 years old, which is located within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school.255

The regulations did provide an exception to the advertising ban that permitted a “tombstone” sign stating “Tobacco Products Sold Here.” The regulations in Reilly further prescribed mandatory warning statements to be included on all cigar labeling and advertising.

In Reilly, three separate lawsuits were filed in federal district court challenging the regulations. These lawsuits were brought by three different groups: cigarette manufacturers, smokeless tobacco products manufacturers, and cigar manufacturers. The cigarette and smokeless tobacco companies claimed that the regulations were preempted by the FCLAA256 and that the regulations violated their free speech rights under the First Amendment. The cigar companies also claimed that the regulations violated their First Amendment right to free speech, and further argued that the cigar warning requirements imposed by the regulations unduly burdened interstate commerce in violation of the Commerce Clause. With respect to the preemption issue, the district court found that only the tombstone provision was preempted and upheld the remaining parts of the regulations as not preempted. The district court also rejected the First Amendment claims, as well as the cigar makers’ Commerce Clause challenge.

In a consolidated appeal, the First Circuit concluded that (1) the regulations were not preempted by the FCLAA, (2) the regulations did not violate the First Amendment, but (3) the parts of the regulations imposing the cigar warning requirements did violate the Commerce Clause and were therefore unconstitutional. The appellate court affirmed the district court rulings regarding preemption and the First Amendment but reversed the district court ruling with regard to the cigar warning requirements. It should be noted, however, that the district court’s ruling that the “tombstone” provision was preempted by the FCLAA was not appealed and was therefore not before the appellate court.257

255. Id.

256. The smokeless tobacco companies apparently joined the cigarette makers’ challenge under the FCLAA, which only applies to cigarettes, because of their contention that the regulations could not be severed to preserve the smokeless tobacco provisions if the cigarette provisions were declared invalid pursuant to that Act.

257. See id. at 37 n.2.
In its general discussion of preemption, the First Circuit relied on the Supreme Court’s decision in *Medtronic*, not *Cipollone*, to determine when a federal law containing specific preemption language preempts a state regulation. The court found that its task was to identify "the domain expressly preempted" by § 5(b), keeping in mind (1) the presumption that Congress does not intend to supplant state regulation in the area of public health and the health of minors without a clear and manifest indication of such preemptory purpose, and (2) that [its] decision must "rest primarily on a 'fair understanding of congressional purpose,'" as informed by the text, the statutory framework and the purpose of the FCLAA as a whole, . . . .

The appellate court then noted that four other federal courts of appeal had addressed the preemptive scope of § 5(b), referencing *Lindsey*, *Giuliani*, *FAIR* and *Penn Advertising*. The court indicated that it found the "decisions in *Giuliani* and *FAIR* to be particularly helpful." The First Circuit noted that *Giuliani* held that "with respect to advertising and promotion" the language of §5(b) could not be given a "hyper-literal" reading and similarly, *FAIR* held that this language could not be viewed with an "uncritical literalism." After noting the Second Circuit’s reliance on the FCLAA’s statement of purpose in *Giuliani*, the First Circuit found that in that case, the Second Circuit “logically concluded” that § [5(b)] was intended to preempt "state regulations that would frustrate federal law by creating a ‘multiplicity of conflicting regulations.’" The First Circuit also noted that the *FAIR* court declined to imply a preemption finding that the placement and manner of outdoor advertising was a matter of traditional local concern. The First Circuit indicated that it was "persuaded by the reasoning" of those two cases that Congress did not intend § 5(b) to preempt the kind of tobacco advertising restrictions imposed by the regulations at issue there. Specifically, the First Circuit concluded that it did "not consider such location restrictions to present the kind of ‘diverse, nonuniform, and confusing’ advertising
standards with which Congress was concerned when it enacted the FCLAA."\(^{266}\)

As noted, the First Circuit did not address the issue of whether the tombstone provision was preempted. The district court in *Reilly*, however, relying on the Second Circuit's decision in *Vango Media*, found that the provision was preempted.\(^{267}\) The court stated that "*Vango Media* stands for the simple proposition that the Act preempts state legislation that specifically requires or prevents the advertisement of a message concerning the relationship between smoking and health."\(^{268}\) The district court had found that the tombstone advertising provision was preempted because although the provision was permissive, it prevented tobacco companies "from carrying any messages whatsoever about the relationship between smoking and health even those permitted or required under the Act."\(^{269}\)

In addition to its ruling on the preemption issue, the First Circuit also found that under the standard *Central Hudson* analysis, the advertising restrictions imposed by the regulations did not violate of any of the three groups of tobacco companies' First Amendment rights.\(^{270}\) The Court did find, however, that both the regulations providing for warnings requirements for advertising of cigars and the labeling provisions related to cigars ran afoul of the Commerce Clause and were invalid.\(^{271}\)

\(^{266}\) Id.

\(^{267}\) For a discussion of *Vango Media*, see supra notes 119-27 and accompanying text.


\(^{269}\) Id.

\(^{270}\) In *Reilly*, the United States Supreme Court has granted certiorari to both cigarette manufacturers and cigar manufacturers. *Consolidated Cigar Corporation v. Reilly*, 218 F.3d 30 (1st Cir. 2000) cert. granted, *Lordillard Tobacco v. Reilly*, 60 U.S.L.W. 3282 (U.S. Jan. 8, 2001) (cigarette manufacturers); *Reilly. Consolidated Cigar Corporation v. Reilly*, 218 F.3d 30 (1st Cir. 2000) cert. granted, Altadis U.S.A. v. Reilly, 60 U.S.L.W. 3282 (U.S. Jan. 8, 2001) (cigar manufacturers). Since the cigar makers are involved and the FCLAA does not relate to them, the case has been viewed as more of an opportunity for the Supreme Court to consider the First Amendment issue—
to determine if the advertising and promotion restrictions at issue in that case should be subject to a more searching review than the "intermediate" scrutiny traditionally applied in commercial speech cases. The preemption issue, however, is also before the court.

\(^{271}\) One section of the regulations made it unlawful "for any persons to advertise or cause to be advertised within [the state] any cigar or little cigar unless the advertising bears one of the warning statements... and the warning statement... comprises 20% of the area of the advertisement and is in the format required." *Reilly*, 218 F.3d at 55. The First Circuit found that this provision, which purportedly applied to advertisements in national magazines sold in the state, as well as to advertising on the Internet if viewed from an Internet terminal in the state, created an "excessive" burden on interstate commerce despite a legitimate public interest. *Id.* at 56.

Another provision made it unlawful to "manufacture, package, import for sale or distribute within [the state] any manufactured cigar or manufactured little cigar the package of which does not bear" the required warning. *Id.* at 56. The First Circuit found that this provision also burdened interstate commerce in an impermissible manner because the regulations imposed liability on the
III. DISCUSSION

A. Some General Observations Relating to Lindsey, Billboards, and the FCLAA

1. In *Lindsey*, the Ninth Circuit, Like Other Courts, Misconstrued the Supreme Court's Discussion of the Preemptive Scope of the FCLAA in *Cipollone* by Not Reading It in Context

*Lindsey*, citing *Cipollone*, found that the federal preemption issue was "governed entirely by the express language" of the FCLAA's preemption statute.\(^2\)\(^7\)\(^2\) The Ninth Circuit completely relied on the Supreme Court's statement in *Cipollone* to that effect. The Supreme Court's statement in *Cipollone*, however, must be read in the specific context it in which was made—state common law damages actions. The Ninth Circuit misconstrued *Cipollone* to the extent that it suggested that the Supreme Court's holding in that regard necessarily applies to contexts other than the one in *Cipollone*.

The Supreme Court's statement in *Cipollone* was made in response to the court of appeals' conclusion that the amended pre-emption provision did not expressly preemp the common law claims at issue, but rather impliedly preempted certain other claims. It was within this context that the Supreme Court's statement was made.\(^2\)\(^7\)\(^3\)

manufacturers for every import, sale or distribution of an improperly labeled package in the state, even if a third party made the sale or the distribution was unconnected with the manufacturer. *Id.* Therefore, manufacturers could not safely label only those packages intended for the state; they had to include this warning on all packages just in case one somehow later appeared in the state. *Id.*

272. 195 F.3d at 1069.

273. This is illustrated by the Supreme Court's discussion, which went as follows:
The Court of Appeals was not persuaded that the pre-emption provision in the 1969 Act encompassed state common-law claims. It was also not persuaded that the labeling obligation imposed by both the 1965 and 1969 Acts revealed a congressional intent to exert exclusive federal control over every aspect of the relationship between cigarettes and health. Nevertheless, reading the statute as a whole in the light of the statement of purpose in § 2, and considering the potential regulatory effect of state common-law actions on the federal interest in uniformity, the Court of Appeals concluded that Congress had impliedly pre-empted petitioners' claims challenging the adequacy of the warnings on labels or in advertising or the propriety of respondents' advertising and promotional activities.

In our opinion, the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' 'there is no need to infer congressional intent to preempt state laws from the substantive provisions' of the legislation. Such reasoning is a variant of the familiar principle of *expression unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of
Cipollone's discussion of the preemptive scope of the FCLAA was in the context of state common law damage claims based on the use of tobacco. The context of Lindsey, however, was a local restriction on tobacco advertising. The question is, then, whether the Supreme Court's holding with regard to the FCLAA's preemptive scope mandates that it is never appropriate to look beyond the preemption statute. That answer is easy. The Supreme Court in Cipollone simply stated "[i]n this case the other provisions of the [FCLAA] offer no cause to look beyond [the preemption statute] § 5." The Supreme Court clearly did not suggest that this would always be the case. The Ninth Circuit misconstrued the Supreme Court's statement by failing to consider its context.

In addition to Lindsey, other courts failed to consider Cipollone's statement regarding the scope of the FCLAA's preemption provision in its proper context. The Second Circuit appears to have made this error in Vango Media,274 the Fourth Circuit in Penn Advertising,275 the First Circuit in Harshbarger,276 and the district court in Reilly.277 The Seventh Circuit in FAIR, however, noted that after Cipollone, the Supreme Court later in Medtronic,278 "took pains to clarify what it meant in Cipollone" while considering a preemption provision in a different statute. In Medtronic, the Supreme Court explained as follows:

As in Cipollone, we are presented with the task of interpreting a statutory provision that expressly pre-empts state law. While the pre-emptive language of [the statute at issue in Medtronic] means that we need not go beyond that language to determine whether Congress intended the [statute] to pre-empt at least some state law, we must nonetheless 'identify the domain expressly pre-empted' by that language. Although our analysis of the scope of the pre-emption statute must begin with its text,

a statute implies that matters beyond that reach are not pre-empted. In this case, the other provisions of the 1965 and 1969 Acts offer no cause to look beyond § 5 of each Act. Therefore, we need only identify the domain expressly pre-empted by each of those sections.

Cipollone, 505 U.S. at 516-17.

274. Vango Media, 34 F.3d at 72 ("Most important, seven members of the [Supreme] Court in [Cipollone] concluded that 'the pre-emptive scope of the . . . Act is governed entirely by the express language in § [5(b)].')."

275. Penn Advertising, 63 F.3d at 1322.

276. Harshbarger, 122 F.3d at 78 (finding that it was bound by the majority's holding in Cipollone that § 5(b) governed the preemptive scope of the FCLAA).

277. Reilly, 76 F. Supp. 2d at 130 ("According to the Supreme Court, the pre-emptive scope of the Act 'is governed entirely by the express language in § 5 [and] there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation.'").

278. 518 U.S. 470 (1996)
our interpretation of that language does not occur in a contextual vacuum.\textsuperscript{279} Since Cipollone, the Supreme Court has specifically suggested looking beyond the "express language" of a preemption statute.

As set forth above, the statement that the preemptive scope of the FCLAA is "governed entirely by the express language" was made in the specific context of state common law damages claims. Since Cipollone, the Court has backtracked from this assertion. Lindsey and other cases dealing with local advertising restrictions clearly address the preemption or nonpreemption issue in a different context, and Cipollone's holding, in that regard, does not necessarily apply to them.

2. Both the Original FCLAA and 1969 Act Targeted the Television, Radio, and Print Media but Did Not Refer to Billboard Advertising Either in the Acts Themselves or in the Legislative Histories Accompanying Them

As noted earlier, the Ninth Circuit suggested in Lindsey that the various local restrictions on tobacco advertising at issue were "precisely the result Congress was trying to avoid in promulgating § [5](b)."\textsuperscript{280} Is it true that the FCLAA was really promulgated to prevent these types of regulations? The Ninth Circuit should look closer at the legislative history of the FCLAA.

The legislative history of the FCLAA demonstrates that when the Act was initially enacted, it focused primarily on television, radio, and print advertising, and not on billboard advertising. The House Report accompanying the 1965 Act explained the issue as follows:

Some proposals have been made in this area, which might lead to severe curtailing or the possible elimination of cigarette advertising. This could have a serious economic impact on the television, radio, and publishing industries in the United States.

After giving consideration to various alternative approaches to the problem, the committee determined that congressional action should be taken in order to dispose of this problem promptly and effectively.\textsuperscript{281} Neither the original Act nor the accompanying legislative history made any reference to billboards.\textsuperscript{282} In the original Act, cigarette advertising did not require health warnings. Rather, compulsory

\textsuperscript{279} \textit{FAIR}, 189 F.3d at 637 (quoting \textit{Medtronic}, 518 U.S. at 484-85).
\textsuperscript{280} \textit{Lindsey}, 195 F.3d at 1074.
\textsuperscript{282} \textit{See id.; FCLAA, Pub. L. No. 89-92, 79 Stat. 282 (1965).}
warnings on the package were required, and the cigarette manufacturing industry had announced the cigarette advertising code. That code prescribed voluntary standards to eliminate certain advertising and promotional practices.\textsuperscript{283} Additionally, this code aimed to eliminate practices such as "(1) [representations] tending to make cigarette smoking attractive to minors; (2) health representations; [and] (3) representations as to the quantity of an ingredient to be found in the smoke of a cigarette, unless such representations are significant in terms of health and based on adequate, relevant, and valid scientific data, or the representations are accompanied by a satisfactory disclaimer as to the significance thereof in terms of health."\textsuperscript{284} Under the code, all cigarette advertising was required to be submitted in advance to an administrator of the code who had the power to prohibit any advertising that did not meet the requirements of the code.\textsuperscript{285} The administrator of the code testified before a House Committee that

he interpret[ed] his powers under the code very broadly, and that he interpret[ed] the term 'advertising' to include not only material broadcast on radio and television and printed in magazines but also to include the labeling on packages, counter displays, and all other materials which can be interpreted as promoting the sale of cigarettes.\textsuperscript{286}

This purported effort of the cigarette industry's self-regulation also does not appear to have included billboards advertising.\textsuperscript{287}

Even when the FCLAA was amended in 1969 by the Public Health Cigarette Smoking Act of 1969,\textsuperscript{288} the legislative history accompanying it was telling. The Senate Report clearly explained that "the purpose of [the amendment was] to provide adequate warning to the public of the hazards of cigarette smoking through strengthening cautionary labeling of all cigarette packages and to prohibit, after January 1, 1971, all television and radio broadcasting of cigarette advertisements."\textsuperscript{289} Senate Report 566, however, also emphasized that there was a "strong desire that the cigarette industry not only honor its statement to carefully limit print advertising so as not to appeal to youth, but that it will also exercise restraint in the overall use of print

\textsuperscript{284} Id. at 2362.
\textsuperscript{285} Id.
\textsuperscript{286} Id. Unfortunately, the text of the FCLAA does not specifically describe the types of advertisements to which it is meant to apply.
\textsuperscript{287} Unless one considers billboards to constitute "materials."
advertising and other forms of promotion."\textsuperscript{290} The legislative history accompanying the 1969 Act also clearly reflects the fact that the FCLAA was primarily aimed at television, radio, and print advertising.\textsuperscript{291} That legislative history did recognize "that the cigarette industry might shift its enormous advertising expenditures on television and radio to advertising in other media."\textsuperscript{292} There is, however, no suggestion that the FCLAA was meant to apply to such advertising in "other media" or to billboard advertising specifically.

3. The FCLAA Did Not Specifically Reference Billboards Until 1984, Well After Even the Amended Preemption Provision Was in Place, and It Distinguishes Them from Other Types of Advertising

The original FCLAA did not reference billboards; neither did the Act after its amendment in 1969.\textsuperscript{293} In 1984, the scope of places that required warnings under the FCLAA was expanded to include both advertising and billboards. This expansion occurred well after the amended preemption provision, which had been in place since 1969.

As noted, the legislative history of the original FCLAA reflects the fact that it was aimed at television, radio, and print media, with no reference to billboards. The amendment in 1969 later prohibited all television and radio broadcasting of cigarette advertisements, but specifically prohibited Federal Trade Commission action on print advertising until on or after July 1, 1971.\textsuperscript{294} It is important to understand that both of the FCLAA’s preemption provisions were adopted within this setting.

The FCLAA did not reference billboards until 1984, when the warning requirement was placed on cigarette advertising. A question is, then, whether the Act’s preemption provisions, in place for more than a decade, were meant to apply to this type of advertising. When Congress enacted the FCLAA, it was concerned about the different states regulating the advertising and labeling of cigarettes.\textsuperscript{295} With respect to advertising, however, the question is whether Congress was concerned about state regulations dealing with billboards or whether it was concerned only with the television, radio, and print media. Again,

\textsuperscript{290} Id. at 2662.
\textsuperscript{291} As with the original Act, the 1969 Act also made no reference to billboards.
\textsuperscript{292} Id. at 2661.
\textsuperscript{293} As noted in previous section, neither did the legislative histories of the original Act or the 1969 Act.
\textsuperscript{294} The Public Health Cigarette Smoking Act of 1969, Pub. L. 91-222, 84 Stat. 87 (codified as amended at 15 U.S.C. §§ 1331-40 (1994)).  As noted, the legislative history indicates that Congress was asking for some voluntary restraint on the part of cigarette manufacturers and advertisers, with regard to print advertising. See supra note 290 and accompanying text.
\textsuperscript{295} See Cipollone, 505 U.S. at 513-14.
the legislative histories accompanying the preemption provisions suggest that Congress was only concerned with the latter.296

In addition to the legislative history, the structure of the FCLAA after the 1984 amendment is also revealing. Section 4(a) of the Act, dealing with the required warnings, describes three different categories with respect to such warnings: packages, advertisements, and billboards.297 The FCLAA by its terms, therefore, distinguishes billboards from advertising. This supports the proposition that prior to the 1984 amendment, the FCLAA did not apply to billboards. If it had, there would be no reason for this distinction.

296. In Cipollone, the Supreme Court noted that the California State Senate had passed a total ban on both print and electronic cigarette advertisements. See id. at 515 n.11.

297. Specifically, § 34(a) reads as follows:

(a) Required warnings; packages; advertisements; billboards
(1) It shall be unlawful for any person to manufacture, package, or import for sale or distribution within the United States any cigarettes the package of which fails to bear, in accordance with the requirements of this section, one of the following labels:

SURGEON GENERAL’S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.
SURGEON GENERAL’S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.
SURGEON GENERAL’S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight.
SURGEON GENERAL’S WARNING: Cigarette Smoke Contains Carbon Monoxide.

(2) It shall be unlawful for any manufacturer or importer of cigarettes to advertise or cause to be advertised (other than through the use of outdoor billboards) within the United States any cigarette unless the advertising bears, in accordance with the requirements of this section, one of the following labels:

SURGEON GENERAL’S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.
SURGEON GENERAL’S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.
SURGEON GENERAL’S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight.
SURGEON GENERAL’S WARNING: Cigarette Smoke Contains Carbon Monoxide.

(3) It shall be unlawful for any manufacturer or importer of cigarettes to advertise or cause to be advertised within the United States through the use of outdoor billboards any cigarette unless the advertising bears, in accordance with the requirements of this section, one of the following labels:

SURGEON GENERAL’S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.
SURGEON GENERAL’S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.
SURGEON GENERAL’S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight.
SURGEON GENERAL’S WARNING: Cigarette Smoke Contains Carbon Monoxide.

As set forth above, the issue is whether the FCLAA's preemption provisions were meant to apply to billboards. The history of the Act does not show that they were. Further, the structure of the Act demonstrates that billboards are distinguished from other advertising.

B. The Problem with the Ninth Circuit's Extensive Reliance on Cipollone

1. Cipollone Addressed the Preemption or Nonpreemption of State Based-Activities in a Very Different Context from That in Lindsey and the Other Cases and, Further, Was Only a Plurality Decision

As the district court in FAIR recognized, "Cipollone address[ed] the preemption or nonpreemption of state-based activities in a very different context" than that which was at issue in FAIR.298 The district court was right, as FAIR and Cipollone involved two entirely different contexts—one involved a state tort damages action and the other local regulations restricting cigarette advertising. FAIR, Lindsey, Penn Advertising, Giuliani, and Reilly present a different question regarding the applicability of the FCLAA's amended preemption provision than does Cipollone. Although the district court in FAIR appreciated this important distinction, 299 there is no indication that this was true with regard to the Ninth Circuit in Lindsey.

Further, Cipollone was only a plurality opinion, although there were parts of the opinion in which a majority of the Supreme Court joined. Parts of the opinion that were only supported by the plurality include references to the amended preemption provision and the methodology prescribed to evaluate whether a particular claim was preempted.300 Lindsey and the other courts, therefore, were not bound by the methodology used to examine the amended preemption provision in Cipollone. In fact, since five of the Justices, a majority of the Court, were highly critical of the plurality's methodology,301 it is


299. While the district court in FAIR accepted Cipollone's teaching in regard to the FCLAA's preemptive scope, the court did not find the opinion too helpful otherwise. See id. ("Cipollone really does not mark out a path for resolution of the issue posed in this case.").

300. The district court in FAIR apparently would not consider or even discuss the parts of the Cipollone opinion that were only supported by the plurality, even though it specifically acknowledged that those parts of the opinion "might have the greatest promise for casting light" on the question in its case. Id.

301. The three-Justice partial concurrence in the judgment and partial dissent authored by Justice Blackmun and the two-Justice partial concurrence in the judgment and partial dissent authored by Justice Scalia.
unclear whether this methodology should be regarded as the Court's view on this matter.

2. The Supreme Court's Plurality Opinion in Cipollone Was a Compromise Decision About the Extent to Which Federal Law Preempts State Law Tort Damages Claims Against Cigarette Manufacturers

In Lindsey, the Ninth Circuit, relied extensively on Cipollone; so too did the appellate courts in Penn Advertising, FAIR, and Giuliani, and the district court in Reilly. However, as noted, Cipollone involved a very different context and was only a plurality opinion. Further, as amply expressed by Justice Blackman, the plurality's decision in Cipollone represented "a compromise position concerning the extent to which federal law preempts persons injured by cigarette manufacturers' unlawful conduct from bringing state common law damages claims against those manufacturers."303

With respect to the amended preemption provision, three of the Justices in Cipollone would have found no express preemption. Two of the Justices, on the other hand, would have found that it preempted all of the state common law claims. A four-member plurality ultimately prevailed, ruling that certain of the state common law claims were apparently "expressly" preempted, while others were not.

The plurality came to its conclusion despite the fact that it joined the majority of the Court in recognizing that "'[t]he purpose of Congress is the ultimate touchstone' of preemption analysis." The plurality, also part of the majority, determined that the issue was "governed entirely by the express language" of the amended preemption provision. As noted, the amended preemption provision read as follows: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." The first question is whether this language expressly preempts state common law damages

302. Remarkably, there is little reference to Cipollone in the opinion of the appellate court in Reilly.
303. 505 U.S. at 531 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).
304. Id. at 507, 531-44 (Blackmun, Kennedy & Souter, J.J.).
305. Id. at 544-55 (Scalia & Thomas, J.J.).
306. Id. at 508-31 (Stevens, White, & O'Connor, J.J. and Rehnquist, C.J.).
actions. If so, a second question is whether it expressly preempts certain state common law damages actions but not others.

Assuming that the explicit language of this provision controls, it seems that one of the two positions by Justice Scalia or Justice Blackmun could be taken—either that all of the state common law damages claims were preempted or that none of them were preempted. Instead, a plurality of the Court chose a middle ground, holding that some of the claims were preempted and some were not. The plurality’s reasoning, in essence, amounts to a determination that Congress “explicitly” intended to preempt certain state common law claims but not others. How does one determine which state common law claims Congress intended to preempt and which ones it did not intend to preempt? Congress apparently determined that those state common law claims where the predicate legal duty constitutes a “requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion” should be preempted.309

The Supreme Court could clearly have taken either the position that all or none of the state common law damages claims were preempted. Instead, the Court chose a compromise that some claims were preempted and some were not. Since Lindsey, Penn Advertising, FAIR, Giuliani, and Reilly do not involve state common law damages actions, the application of the compromise decision in Cipollone to these cases is, therefore, unclear.

3. Despite the Edict in Cipollone to Rely “Entirely” Upon the Express Language of § 5(b), the Plurality Still Proceeded to Examine the Act’s History, Structure, and Purpose to Delineate Its Preemptive Impact

As noted, the Supreme Court in Cipollone indicated that the preemption issue in that case was “governed entirely” by the express language of the FCLAA’s preemption provisions. As recognized by the appellate court in FAIR and the district court in Reilly, one should not literally rely on this purported mandate.

Cipollone has been read to suggest that the scope of the FCLAA’s preemption is determined solely by the preemption statute itself and not by the substantive provisions of the legislation or anything else. A complete reliance on such a suggestion, however, is misplaced.

309. Id. This is the methodology described by the plurality to determine whether such claims are preempted. See Cipollone, 505 at 524 (plurality opinion of Stevens, J.).
First, actions speak louder than words. As the Seventh Circuit in FAIR explained:

In Cipollone, the [Supreme] Court stated that "the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act." Notably, however, every opinion in Cipollone nevertheless relied on legislative history, historical context, legislative purpose, or analysis of the statutory provisions as a whole in interpreting the scope of the preemption provision mandated by the language of § 5(b) of the 1969 Act.310

Similarly, the district court in Reilly noted that "despite the Supreme Court's mandate to rely 'entirely' upon the express language of section 5(b), Cipollone proceeded to examine the Act's 'structure and purpose' to delineate its pre-emptive impact, emphasizing that the 'purpose' of the Act is 'the ultimate touchstone of preemption analysis.'"311 Following the lead of the Supreme Court in Cipollone, the appellate courts in FAIR and Reilly looked beyond the language of section 5(b) and examined other sources to discern the purpose of the FCLAA's preemption provision.312 The appellate courts in Giuliani and Harshbarger also looked beyond the language of the preemption provision.313 Even the Ninth Circuit in Lindsey purportedly did this.314

Furthermore, as noted earlier, the Supreme Court has somewhat retreated from its purported edict in Cipollone, relying entirely upon the express language of the preemption provision in Medtronic, Inc. v. Lohr.315 Medtronic explained that the text of the preemption statute was only the starting point to determine the preemptive scope of a statute.316 Medtronic reemphasized that in determining whether Congress has preempted such activity, the purpose of Congress must, in

310. FAIR, 189 F.3d at 637 (citing Cipollone, 505 U.S. at 513-15, 517, 519-20, 529).
311. Reilly, 76 F. Supp. 2d at 130 (citing Cipollone, 505 U.S. at 516).
312. FAIR, 189 F.3d at 637 ("[W]e must examine the congressional scheme and legislative history of § 5[b] in order to determine what Congress meant. . . ."); Reilly, 218 F.3d at 38 ("[R]elevant to consider the 'structure and purpose of the statute as a whole,' as revealed not only in text, but through the reviewing courts' reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.").
313. Giuliani, 195 F.3d at 106 ("Congress has provided valuable insight into the intended scope of preemption. . . ."); Harshbarger, 122 F.3d at 77 ("[W]e find the explicit preemption language and legislative history [of the FCLAA] insufficient to clearly and manifestly overcome the presumption against preemption of a state's traditional powers to legislate for the health and safety of its citizens.").
314. Lindsey, 195 F.3d at 1073 ("The structure and history of § 1334(b) support our view that a local ban on outdoor advertising is preempted by the FCLAA.").
315. FAIR, 189 F.3d at 637 (referencing Medtronic, 518 U.S. 470).
316. Medtronic, 518 U.S. at 484 (quoting Cipollone, 505 U.S. at 517).
every case, be "the ultimate touchstone." That intent, the Court explained, is discerned not only from the language of the Act, but also from the statutory framework and the structure and purpose of the Act as a whole.318

The suggestion that preemption analysis must be limited solely to the language of § 5(b) is therefore incorrect. The Supreme Court did not do this in Cipollone and has since "clarified" that such a suggestion was not exactly what it intended.

C. There Are Legitimate Criticisms Regarding the Plurality's Opinion in Cipollone

1. The Plurality's Determination That the Amended Preemption Provision Expressly Preempts Certain State Law Claims but Not Others Is Questionable and Operates Much Like Implied Preemption

The plurality opinion in Cipollone, as noted, concluded that certain state common law damages claims were preempted by the FCLAA's amended preemption provision while others were not. This was purportedly based on the application of express preemption. The plurality further suggested that resorting to principles of implied preemption in that case was improper. Assuming arguendo that the explicit language of the amended preemption provision was controlling and that there could be no resort to implied preemption (as set forth below), its conclusion is suspect for a number of reasons.

a. Is There a "Reliable Indicium of Congressional Intent?"

As noted, a majority of the Supreme Court in Cipollone held that the preemptive scope of the FCLAA was "governed entirely" by its preemption provisions. The Court explained that

[w]hen Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' 'there is no need to infer congressional intent to preempt state laws from the substantive provision' of the legislation.319

317. Id. at 485 (quoting Retail Clerks Int'l Ass'n v. Schermerhorn, 375 U.S. 96, 103 (1963)).
318. See id. at 486.
319. Cipollone, 505 U.S. at 517.
The question then is whether these preemption provisions provide a "reliable indicium of congressional intent" with respect to state common law damages claims.

With respect to the original preemption provision, seven of the nine Justices agreed that it did not preempt any of the state common law damages claims. However, as noted, in reference to the amended preemption provision, the Court was split among three different positions. Three of the Justices stated there was no express preemption.\(^{320}\) Two of the Justices would have held that the Act preempted all of the state common law claims.\(^{321}\) Four of the Justices, who would comprise the plurality, determined that certain of the state common law claims were "expressly" preempted, while others were not.\(^{322}\) A majority therefore found that there was at least some express preemption of state common law damages claims by the amended preemption provision.\(^{323}\)

Again, the amended preemption provision reads as follows: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act."\(^{324}\) The first question is, does this language "clearly" or "manifestly" exhibit an intent to preempt state common law damages actions, or are these words in reality far from unambiguous such that they cannot be said clearly to evidence such a congressional mandate? A second question is, if Congress had intended to immunize cigarette manufacturers from these state law tort damages actions, did it know how to do so in clear and unambiguous terms? The answer to the first question appears to be no.\(^{325}\) The answer to the second question is obviously yes.

Despite the Supreme Court's ruling in *Cipollone*, the amended preemption provision does not provide a "reliable indicium of congressional intent" with respect to state common law damages claims. Compounding the problem is the plurality's determination that this

\(^{320}\) Justices Blackmun, Kennedy, and Souter.

\(^{321}\) Justices Scalia and Thomas.

\(^{322}\) Justices Stevens, White, O'Connor, and Chief Justice Rehnquist.

\(^{323}\) Id. This occurs when you add Justices Scalia and Thomas, who would have found that all of the state common law claims were preempted, with the four member plurality of Justices Stevens, White, O'Connor, and Chief Justice Rehnquist, who ultimately determined that certain of these claims were preempted.


\(^{325}\) As noted previously, the Minnesota Supreme Court found that "the phrase 'requirement or prohibition . . . imposed under State law' was too obscure . . . to say that it [was] an express declaration that state common law tort actions are preempted." *Forster*, 437 N.W.2d at 658.
provision expressly preempts certain claims but not others.\textsuperscript{326} As set forth below, none of the other courts that have considered this issue have found any express preemption of state common law damages claims by this provision.

\textit{b. The Other Courts Found No Express Preemption}

In \textit{Cipollone}, the Third Circuit found that the FCLAA’s amended preemption provision did not provide for express preemption of state common law claims. In addition, the Eleventh, First, Sixth, and Fifth Circuits (in \textit{Stephen, Palmer, Roysdon}, and \textit{Pennington}, respectively) all found that there was no express preemption of such claims by this provision. Further, both the Minnesota Supreme Court and the New Jersey Supreme Court (in \textit{Forster} and \textit{Dewey}, respectively) came to the same conclusion. \textit{Cipollone}, therefore, reached its conclusion that there was some express preemption despite the fact that five federal circuit courts and the highest courts in two states found otherwise.

\textit{c. The Methodology Created Operates Much Like Implied Preemption}

The plurality in \textit{Cipollone} described a methodology to determine whether a particular claim is preempted or not: “The central inquiry in each case is . . . whether the legal duty that is the predicate of the common-law damages action constitutes a ‘requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion’” and, if so, if it should be preempted.\textsuperscript{327} The plurality’s methodology, which requires that each of the common-law claims be examined to determine whether it is in fact preempted, operates more like some type of implied preemption than any application of express preemption.

2. Although Justices Blackmun and Scalia Reached Opposite Conclusions in \textit{Cipollone}, Each Makes a Good Argument Criticizing the Plurality Opinion and Both Agree It Created a Confusing Methodology

Although Justice Scalia and Justice Blackmun were on opposite ends of the spectrum in \textit{Cipollone}, both were highly critical of the plurality opinion. Justice Scalia made the argument that the plurality

\textsuperscript{326} As noted earlier, one would have expected a ruling that would have taken one of the positions of either Justice Scalia or Justice Blackmun—that all of the state common law claims were expressly preempted or that none of them were expressly preempted.

\textsuperscript{327} \textit{Cipollone}, 505 U.S. at 524 (plurality opinion of Stevens, J.).
created a new rule on implied preemption. Justice Blackmun challenged the plurality's reasoning that the amended preemption provision preempts some common law damages claims, contending that the plurality disregarded the legislative history accompanying the provision. Both Justice Blackmun and Justice Scalia agreed that the plurality created a confusing methodology for evaluating whether a claim was preempted.

a. Scalia: Plurality Created New Rule on Implied Preemption

Although the plurality in *Cipollone* did not come out and say so directly, it certainly seemed to suggest that since there was an express preemption provision involved in that case, it was wrong for the Third Circuit to resort to the principles of implied preemption. In his separate opinion, Justice Blackmun, who was joined by two other Justices, was more direct, specifically stating that resorting to principles of implied preemption is appropriate "only when Congress has been silent with respect to preemption."328

As noted, five federal appellate courts and the highest court in two states found that the FCLAA's amended preemption provision did not expressly preempt state law tort damages claims.329 Apparently, none of these seven courts knew that it was improper to resort to principles of implied preemption when they considered the possible application of those principles to the cases before them.

The Third Circuit in *Cipollone* agreed with the district court's conclusion that the FCLAA's amended preemption provision did not provide for express preemption of state common law claims; the court found that it "was constrained by the presumption against preemption."330 The appellate court found "support for this determination in Congress's failure to include state common law explicitly within section [5], as it did in numerous other statutes."331 It noted "that just as Congress could have included a reference to preemption of state common law in section [5], it also could have included a 'savings clause' explicitly preserving the continued vitality of state common

328. *Id.* at 532 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

329. Again, these were the Third, Eleventh, First, Sixth and Fifth Circuits in *Cipollone*, *Stephen, Palmer, Roysdon* and *Pennington*, respectively and the Minnesota Supreme Court and the New Jersey Supreme Court in *Forster* and *Dewey*, respectively.


law."  

332 The Third Circuit however, found that § 5's lack of any reference to preemption of state common law was significant because of the presumption against preemption.  

333 The court further noted that "in the absence of a preemption provision encompassing state common law, the Supreme Court has relied generally on principles of implied preemption in evaluating whether a statutory scheme preempts state common law." Accordingly, the court found that it had to examine the issue under the principles of implied preemption.

On appeal, a majority of the Supreme Court held that the pre-emption issue was "entirely governed" by the express language of the preemption provisions. It stated that

When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," "there is no need to infer congressional intent to preempt state laws from the substantive provisions" of the legislation.

The Court also stated that "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." The Supreme Court found that there was "no cause to look beyond" the FCLAA's two preemption provisions to "identify the domain expressly pre-empted by" each one.

Ironically, Justice Scalia, who would have found that all of the state common law claims were preempted by the amended preemption provision, made a good defense for a court's resort to implied preemption despite the existence of an express preemption provision. Justice Scalia found that Cipollone created this new rule and was highly critical of it.

332. Id. at 186, n.5. The court cited to the Occupational Safety and Health Act of 1970, 29 U.S.C. § 653(b)(4) (1994). Id. As noted previously, another example of a statute with a "savings clause" is the Smokeless Tobacco Act.

333. Id.

334. Id. at 185-86.

335. Id. at 186.

336. Cipollone, 505 U.S. at 517.

337. Id.

338. Id.

339. Id.

340. Justice Scalia explained as follows:

[The] . . . new rule that the Court announces: 'When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, . . . we need only identify the domain expressly pre-empted by [that provision].' Once there is an express pre-emption provision, in other words, all doctrines of implied preemption are eliminated. This proposition may be correct
b. Blackmun: Plurality's Reasoning Flawed and Disregarded Legislative History

Justice Blackmun disputed the plurality's conclusion that certain state common law damages actions were preempted by the 1969 Act. First, Justice Blackmun insisted that the plain language of the amended provision clearly fails to require preemption of state common law claims. In addition, he maintained that "there is no suggestion in the legislative history [accompanying the 1969 Act] that Congress intended to expand the scope of the pre-emption provision in the drastic manner that the plurality attributes to it."341

i. The Plain Language of the 1969 Act

Justice Blackmun found that "[g]iven the Court's proper analytical focus on the scope of the express pre-emption provisions at issue [t]here and its acknowledgment that the 1965 Act [did] not pre-empt state common-law damages claims, [that] the plurality's conclusion that the 1969 Act pre-empts at least some common law damages claims is [a] little short of baffling."342 Justice Blackmun's argument in that regard is clear. His position was that the language in the amended preemption provision "no more 'clearly' or 'manifestly' exhibits an intent to pre-empt state common-law damages actions than did the language of its predecessor in the 1965 Act."343

Justice Blackmun did not disagree with the plurality that the phrase "State law," in an appropriate case, could encompass common law as well as positive enactments like statutes and regulations.344 He

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341. Id. at 539 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).
342. Id. at 534.
343. Id.
344. Id. at 535.
did not, however, believe that such a phrase as used in the amended preemption provision "represent[ed] such an all-inclusive reference." Justice Blackmun insisted that the phrase "State law" as used in this provision could not "be understood without considering the narrow range of actions—any 'requirement or prohibition'—that Congress specifically described in § 5(b) as 'imposed under' state law." Justice Blackmun concluded that "[a]lthough the plurality flatly states that the phrase 'no requirement or prohibition' 'sweeps broadly' and 'easily encompass[es] obligations that take the form of common law rules,' those words are in reality far from unambiguous and [cannot] be said clearly to evidence a congressional mandate to preempt state common-law damages actions." Justice Blackmun's position, as he demonstrated, was supported by the common meanings of the terms "requirement" and "prohibition." The term "require," Justice Blackmun noted, means "to ask for authoritatively or imperatively; claim by right and authority" or "to demand as necessary or essential (as on general principles or in order to comply with or satisfy some regulation)"); "prohibition" is an "[a]ct or law prohibiting something" or an "interdiction." Justice Blackmun further noted that there was a "recognized distinction" in the "[Supreme] Court's jurisprudence between direct state regulation and the indirect regulatory effects of common law damages." To justify its decision, the plurality relied on the Court's statement in San Diego Building Trades Council v. Garmon that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief." Justice Blackmun noted that the Supreme Court in two other cases recognized and "explained that Garmon, in which a state common-law damages award was found to be pre-empted by the National Labor Relations Act, involved a special 'presumption of federal pre-emption.'" Further, post-Garmon, as Justice Blackmun noted, the Court in Goodyear Atomic

345. Id.
346. Id.
347. Id.
348. See id. at 535-36.
349. Id. at 536 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1929 (1981) for the definition of the term "require" and BLACK'S LAW DICTIONARY 1212 (6th ed. 1990) for the definition of the term "prohibition").
350. Id. at 538.
352. See Cipollone, 505 U.S. at 537 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).
Corp. v. Miller\textsuperscript{354} and English v. General Electric Co.,\textsuperscript{355} distinguished, for purposes of preemption analysis, "direct state regulation" from the "incidental regulatory effects" of a state damages action, declining in those cases to find certain state damages claims preempted.\textsuperscript{356} Justice Blackmun complained that despite the plurality's acknowledgement that there was

"no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common-law damages actions," the plurality apparently [found] Garmon's statement that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief," sufficient authority to warrant extinguishing the common-law actions at issue in [Cipollone].\textsuperscript{357}

However, Justice Blackmun concluded:

In light of the recognized distinction in [the Supreme] Court's jurisprudence between direct state regulation and the indirect regulatory effects of common-law damages actions, it cannot be said that damages claims are clearly or unambiguously 'requirements' or 'prohibitions' imposed under state law. The plain language of the 1969 Act's modified preemption provision simply cannot bear the broad interpretation the plurality would impart to it.\textsuperscript{358}

\textbf{ii. The Legislative History Accompanying the 1969 Act}

Justice Blackmun also stated that "there [was] no suggestion in the legislative history that Congress intended to expand the scope of the pre-emption provision when it amended the statute in 1969."\textsuperscript{359} In fact, the plurality had to acknowledge that neither party in Cipollone even contended that the amended provision materially altered the preemptive scope of the FCLAA.\textsuperscript{360} The plurality, however, determined that the amended preemption provision was much broader than the

\begin{itemize}
  \item \textsuperscript{354} 486 U.S. 174 (1988).
  \item \textsuperscript{355} 496 U.S. 72 (1990).
  \item \textsuperscript{356} Cipollone, 505 U.S. at 537-38 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). As Justice Blackmun indicated, Goodyear contrasted "direct state regulation" of safety matters with "the incidental regulatory effects" of damages awarded pursuant to a state workers' compensation law, while English dealt with whether state common law damages claims for emotional distress were preempted by federal nuclear energy law. \textit{Id.}
  \item \textsuperscript{357} \textit{Id.} at 537 (citing plurality opinion of Stevens, J. at 521).
  \item \textsuperscript{358} \textit{Id.} at 538-39.
  \item \textsuperscript{359} \textit{Id.} at 539.
  \item \textsuperscript{360} \textit{See id.} at 520 (plurality opinion of Stevens, J.).
\end{itemize}
original provision, despite the legislative history and the fact that neither party made such a contention.  

The legislative history accompanying the amended preemption provision indicates that the 1969 amendment merely "clarified" the 1965 version of § 5(b). As Justice Blackmun stated, the plurality simply dismissed this evidence of legislative intent as the "views of a subsequent Congress." However, as Justice Blackmun explained:

The plurality [was] wrong not only as a factual matter—for the statements of the Congress that amended § 5(b) are contemporaneous, not 'subsequent,' to enactment of the revised preemption provision—but as a legal matter as well. [The Supreme] Court affords 'great weight' to an amending Congress' interpretation of the underlying statute.  

Justice Blackmun made two other observations relating to the plurality and its treatment of the legislative history. First, he observed that "the plurality admit[ted] that 'portions of the legislative history of the 1969 Act suggest that Congress was primarily concerned with positive enactments by States and localities.' He noted that the legislative history explains that the revised preemption provision was "intended to include not only action by State statute but by all other administrative actions or local ordinances or regulations by any political subdivisions of any State." Justice Blackmun found this "list remarkable for the absence of any reference to common-law damages actions."  

Second, Justice Blackmun observed that the plurality acknowledged that Congress made no effort to alter the statement of purpose contained in § 2 of the 1965 Act. Section 2 provides in pertinent part that "commerce and the national economy . . . not [be] impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." Justice Blackmun found "the continued vitality of § 2 significant, particularly in light of the Court's reliance on the same

361. Id. at 529-31.
363. Cipollone, 505 U.S. at 539 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part)(quoting plurality opinion of Stevens, J. at 520).
364. Id. (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-81 and n.8 (1969)).
365. Id. at 540 (quoting plurality opinion of Stevens, J. at 521).
367. Id.
368. Id.
statement of purpose for its earlier conclusion that the 1965 Act [did] not pre-empt state common law damages actions." 370

c. Blackmun and Scalia: The Plurality Created a Confusing Methodology

In a footnote, the plurality in Cipollone acknowledged criticism by both Justice Blackmun and Justice Scalia regarding the methodology it created for evaluating whether a claim is preempted. 371 Both Justices challenged the level of generality employed in the plurality's analysis. As the plurality explained:

Justice Blackmun contends that, as a matter of consistency, we should construe failure-to-warn claims not as based on smoking and health, but rather as based on the broader duty "to inform consumers of known risks." Justice Scalia contends that, again as a matter of consistency, we should construe fraudulent misrepresentation claims not as based on a general duty not to deceive but rather as 'based on smoking and health.' 372

The plurality's response was that:

[a]dmittedly, each of these positions has some conceptual attraction. However, our ambition here is not theoretical elegance, but rather a fair understanding of congressional purpose.

To analyze failure-to-warn claims at the highest level of generality (as Justice Blackmun would have us do) would render the 1969 amendments almost meaningless and would pay too little respect to Congress' substantial reworking of the Act. On the other hand, to analyze fraud claims at the lowest level of generality (as Justice Scalia would have us do) would conflict both with the background presumption against pre-emption and with legislative history that plainly expresses an intent to preserve the "police regulations" of the States. 373

Justice Blackman responded, stating that "[t]he plurality premise[d] its pre-emption ruling on what it terms the 'substantial changes' wrought by Congress in § 5(b), notably, the rewording of the provision to pre-empt any 'requirement or prohibition' (as opposed

370. Cipollone, 505 U.S. at 541 (emphasis original) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citing the plurality opinion of Stevens, J. at 519).
371. Id. at 529-30 n.27 (plurality opinion of Stevens, J.).
372. Id. (emphasis original) (citing opinion of Blackmun, J. at 542).
373. Id. (parentheses original).
merely to any ‘statement’) ‘imposed under State law,’” 374 which, if Justice Blackmun is correct, is not clearly supported either by the plain language of the amended provision or its legislative history.

In addition to being based on a questionable premise, the plurality’s response to the criticism of Justice Blackmun and Justice Scalia does not adequately address “[t]he most obvious problem with [its] analysis, [which] is its frequent shift in the level of generality at which it examines the individual claims.” 375 As Justice Blackmun explained:

For example, the plurality states that fraudulent-misrepresentation claims (at least those involving false statements of material fact in advertisements) are “predicated not on a duty “based on smoking and health” but rather on a more general obligation—the duty not to deceive,” and therefore are not preempted by § 5(b) of the 1969 Act. Yet failure-to-warn claims—which could just as easily be described as based on a “more general obligation” to inform consumers of known risks—implies are found to be “based on smoking and health” and are declared preempted. The plurality goes on to hold that express warranty claims are not pre-empted because the duty at issue is undertaken by the manufacturer and is not “imposed under State law.” Yet, as the plurality itself must acknowledge, “the general duty not to breach warranties arises under state law;” absent the State’s decision to penalize such behavior through the creation of a common-law damages action, no warranty claim would exist. 376

For both Justice Blackmun and Justice Scalia, the problem with the plurality’s methodology was that it was certain to cause difficulty in the lower courts trying to implement it. 377

3. The Amended Preemption Provision Was Not a Substantial Reworking, as Claimed by the Plurality in Cipollone, and the Changes Thereto Were Primarily Clarifications to Prevent the Provision’s Circumvention

As noted, the plurality in Cipollone found that “the plain language of the preemption provision in the 1969 Act [was] much broader” than the original Act. 378 The plurality based this finding on

374. *Id.* at 539 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).
375. *Id.* at 543.
376. *Id.* (parentheses and emphasis original) (citations to plurality opinion of Stevens, J. omitted).
377. *See id.* at 543-44; 555 (Scalia, J., concurring in the judgment in part and dissenting in part).
378. *Id.* at 520 (plurality opinion of Stevens, J.).
the fact that "the later Act bars not simply 'statement[s]' but rather 'requirements[s] or prohibition[s]'." The plurality also explained that "the later Act reaches beyond statements 'in the advertising' to obligations 'with respect to the advertising or promotion' of cigarettes." Further, the plurality determined that the term "State law" was used instead of "State statute or regulation" because Congress intended to include more than regulations. As already suggested by Justice Blackmun, the plurality's determination that these were substantial differences materially altering the preemptive scope of the FCLAA is very questionable.

a. The Change from "Statement" to "Requirement or Prohibition"

Section 5(b) of the original preemption provision read "No statement relating to smoking and health shall be required in the advertising of [properly labeled] cigarettes." Section 5(a) used the same phrase ("No statement relating to smoking and health") with regard to cigarette labeling. It is clear that the 1969 amendment left § 5(a) totally unchanged.

The phrase "requirement and prohibition" in the amended § 5(b) is undeniably broader than the term "statement." An important question is, then, why Congress made this change. Initially, that answer is not easily discernible. It may, however, have something to do with the appellate decision in Banzhaf v. Federal Communications Commission, referenced in the legislative history accompanying the 1969 amendment. The Banzhaf case was the only reported case construing the scope of preemption under the 1965 Act in existence at the time. In that case, the FCC ruled that radio and television stations that carry cigarette advertising must devote a significant amount of broadcast time to presenting the case against cigarette smoking.

The federal court of appeals held that the FCLAA did not preempt such regulation, finding that Congress simply "did not want cigarette manufacturers harassed by conflicting affirmative require-

379. Id.
380. Id.
381. Id. at 523.
383. See id. (emphasis added).
384. 405 F.2d 1082 (D.C. Cir. 1968). The Banzhaf case was discussed earlier. See infra notes 31-41 and accompanying text.
386. As indicated in the legislative history accompanying the 1969 Act, this was an application of the fairness doctrine to cigarette advertising. See S. REP. NO. 91-566 (1970), reprinted in 1970 U.S.C.C.A.N. 2652, 2658.
ments with respect to the content of their advertising.” The court found that the term “statement” in § 5(b) of the original preemption provision meant some type of “affirmative requirement[] with respect to the content of [the] advertising.”

Because of Banzhaf’s interpretation, Congress may have had some concerns that states might attempt to impose regulations similar to the one imposed by the FCC in that case. Clearly, these types of regulations could also result in the imposition of diverse, nonuniform, and confusing regulations. To prevent this from happening, Congress changed the term “no statement” to “[n]o requirement” to ensure that the provision would not be given such a narrow interpretation. Further, as stated by Justice Blackmun, “[i]t is but a small step from ‘affirmative requirement’ to the converse ‘negative requirement’ (prohibition) and from there, to the single explanatory phrase, ‘requirement or prohibition.’”

By replacing the word “statement” with the broader phrase “requirement or prohibition,” Congress simply sought to ensure that states could not circumvent the existing provision by enacting legislation that did not require any particular statement in the advertisement of cigarettes but that could nevertheless result in the imposition of diverse, nonuniform, and confusing regulations. This was not a substantive change, but merely a clarification as suggested by the legislative history.

b. The Phrase “With Respect to the Advertising or Promotion”

The plurality in Cipollone also emphasized the “with respect to the advertising or promotion” language used in the amended preemption provision to suggest that this was a substantive change that illustrated that the preemptive scope of the 1969 Act was greatly expanded. However, there seems little, if any, merit to the plurality’s position. This specific language change was clearly mandated

387. 405 F.2d at 1089-90.
388. Id.
389. Cipollone, 505 U.S. at 540 n.5 (Blackmun, J., concurring in part, concurring in the judgment in part, dissenting in part).
390. Vango Media provides a good example of a local entity attempting to impose a type of regulation similar to the FCC’s regulation in Banzhaf. As noted, in Vango Media, a city ordinance required advertisers to display one antismoking public health message for every four tobacco advertisements displayed on city taxi cabs. By requiring advertisers to display certain messages about smoking and health (other than those required by the FCLAA), the ordinance risked creating nonuniformity with the federally mandated warning scheme in the FCLAA.
391. The plurality explained that “the later Act reached beyond statements ‘in the advertising’ to obligations ‘with respect to the advertising or promotion’ of cigarettes.” See Cipollone, 505 U.S. at 520 (plurality opinion of Stevens, J.).
because of the other change from "statement" to "requirement or prohibition."

Section 5(b) of the original FCLAA read "No statement . . . shall be required in the advertising of any cigarettes. . . ." The question becomes, then, how does it read when the phrase "requirement or prohibition" replaces the term "statement"? That answer is easy: "No requirement or prohibition . . . shall be required in the advertising of any cigarettes . . ." It seems clear that the provision could not be left to read in such fashion. A change in language was necessary to keep the provision's proper construction. The plurality's suggestion that the use of the term "with respect to the advertising or promotion" was deliberately intended by Congress to make the provision broader, therefore, is an overstatement.

Moreover, the use of the term "promotion" in addition to "advertising" does not add much. The two terms in many cases can be used interchangeably. Again, however, the Banzhaf case may provide an even better explanation. The term "promotion" would probably apply to the anticigarette messages in that case while the term "advertising" probably would not. This provision clarified that Congress meant that "diverse, nonuniform and confusing regulations" of this type were also prohibited under the FCLAA.

As set forth herein, there is a logical explanation for the changes by Congress following the decision in Banzhaf. The 1969 amendments were meant as a clarification, as is indicated by the accompanying legislative history. The plurality's determination that these were substantial differences materially altering the preemptive scope of the FCLAA is most questionable.

c. The 1969 Act's "Based on Smoking and Health"

While the plurality in Cipollone found that the change from "statement" to "requirement or prohibition" and the insertion of the "with respect to the advertising or promotion" language in the 1969 Act were substantial differences, it did not reach a similar conclusion with respect to another change in language. The plurality noted that the phrase "relating to smoking and health" in the original Act "was essentially unchanged by the 1969 Act." That phrase, however, was

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393. The same is true of the antismoking messages in Vango Media.
394. The Second Circuit in Vango Media specifically noted that had the original preemption provision been in effect, the court probably would have been persuaded that the ordinance was not preempted. See Vango Media, 34 F.3d at 74.
395. Cipollone, 505 U.S. at 529 (plurality opinion of Stevens, J.).
changed to "based on smoking and health" in the 1969 Act. Contrary to the plurality's claim, this change was just as important as the other two.

The original Act preempted any "statement relating to smoking and health," while the 1969 Act preempted any "requirement or prohibition based on smoking and health." Although a "requirement or prohibition" may be a broader phrase than "statement," the language "based on" is clearly not as broad as the language "relating to" in the original Act. The preemption of a "requirement or prohibition" therefore is more limited in context.

In *Cipollone*, the plurality stated that "Congress intended the phrase 'relating to smoking and health' (which was essentially unchanged by the 1969 Act) to be construed narrowly." 396 The plurality, however, based this on the legislative history accompanying the 1969 Act. 397 That reliance is misplaced for two reasons. First, the Senate Report referenced by the plurality specifically refers to the phrase "based on smoking and health," not "relating to smoking and health." The Senate Report reads, in pertinent part:

The State preemption of regulation or prohibition with respect to cigarette advertising is narrowly phrased to preempt only State action *based on smoking and health*. It would in no way affect the power of any State or political subdivision of any State with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or similar police regulations. 398

Second, as the plurality in *Cipollone* itself suggested with regard to another issue, "the view of a subsequent Congress forms a hazardous basis for inferring the intent of an earlier one." 399 This seems especially true here, where the language purportedly being construed is different from the language being referenced by the subsequent Congress.

Contrary to the plurality's assertion, there is no suggestion that "Congress intended the phrase 'relating to smoking and health' [in the original provision] to be construed narrowly." There was no reason to do so since it simply preempted "statement[s]." However, once the 1969 Act preempted any "requirement[s] [and] prohibition[s]" and

396. *Id.* (parenthesis original).
399. *See Cipollone*, 505 U.S. at 520 (plurality opinion of Stevens, J.).
not just "statement[s]," Congress did clarify that it wanted the new provision to be "construed narrowly." Consequently, the language "relating to smoking and health" was changed to "based on smoking and health." The plurality was wrong to suggest that there was essentially no change in this regard between the 1965 Act and 1969 Act.

Although the 1969 Act may have broadened the term "statement" to "requirement or prohibition," Congress simultaneously narrowed the context of the Act's application by changing the phrase "relating to smoking and health" to "based on smoking and health." This is supported by the plain language of the phrase "based on smoking and health" and the legislative history accompanying the 1969 Act.

d. The Reason the Term "State Law" Was Used

The original FCLAA contained a blanket preemption provision related to advertising that was applicable to federal departments and agencies, as well as to state and local governments. The 1969 Act, which, as noted, outlawed broadcast advertising of cigarettes, separated out congressional direction to the federal administrative agencies, but retained a preemption provision applicable to "state law."

The amended preemption provision preempts any "requirement or prohibition . . . imposed under State law . . ."; Justice Blackmun correctly conceded "that the phrase 'State law,' in an appropriate case, can encompass the common law as well as positive enactments such as statutes and regulations." However, in addition to Justice Blackmun's excellent argument that this phrase, read in proper context, does not support such a construction, the legislative history accompanying the amended provision does not support this. Additionally, there is no other indication that Congress intended to embrace more than regulations.

The legislative history accompanying the amended preemption provision indicates that the term "State law" was simply intended to

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400. S. REP. NO. 91-566 (1970), reprinted in 1970 U.S.C.C.A.N. 2652, 2663. As noted in the legislative history, this was accomplished as a new § 7. However, since broadcast advertising was outlawed, there was no longer any concern about possible action by the Federal Communication Commission, and the congressional direction was only to the Federal Trade Commission. See id.

401. Cipollone, 505 U.S. at 535 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

402. As noted earlier, Justice Blackmun's argument is that this phrase could not be understood without considering the narrow range of action—any "requirement or prohibition"—and that the dictionary definitions of the terms "requirement" and "prohibition" suggest "specific actions mandated or disallowed by a formal governing authority." Id. For a more complete discussion of Justice Blackmun's argument, see infra notes 344-49 and accompanying text.
ensure the inclusion of political subdivisions. As explained by the Senate Report:

In some instances, counties or municipalities exercise their authority over advertising by local ordinances, or regulations, or even occasionally by resolution. In order to avoid the chaos created by a multiplicity of conflicting regulations, however, the bill preempts State requirements or prohibitions with respect to advertising of cigarettes based on smoking and health. This preemption is intended to include not only action by State Statute but by all other administrative actions or local ordinances or regulations by any political subdivision of any State. 403

The legislative history also reveals that the amendment to the preemption provision was made in conjunction with another amendment to the FCLAA, which was adopted "[a]s a perfecting amendment." 404 In § 3, the Act's definitional section, the 1969 Act added a sentence to the definition of "State," making it clear that the term "State" includes any political division of a State. 405

The plurality in Cipollone justified its decision that the term "State law" was meant to include more than regulations, stating:

[W]hile the version of the 1969 Act passed by the Senate preempted 'any State statute or regulation with respect to . . . advertising or promotion,' S. Rep. No. 91-566, p. 16 (1969), the Conference Committee replaced this language with 'State law with respect to advertising or promotion.' In such a situation, § 5(b)'s pre-emption of state law cannot fairly be limited to positive enactments. 406

The term "State law," however, was used instead of "State statute or regulation" simply because Congress wanted to ensure the inclusion of local authority. This explains why there was no "perfecting amendment" with regard to the statement of purpose in § 2 407—Congress never intended the preemption provision to embrace anything more than regulations. The plurality admitted that § 2 "suggested that Congress was concerned primarily with 'regulations'—positive enact-

404. Id.
406. Cipollone, 505 U.S. at 523 (plurality opinion of Stevens, J.).
ments, rather than common law damages.\textsuperscript{408} The plurality, however, was “not persuaded that the retention of that portion of the 1965 Act was a sufficient basis for rejecting the plain meaning of the broad language that Congress added to § 5(b).\textsuperscript{409} The legislative history accompanying the 1969 Act, however, also suggests that Congress was only concerned about regulations and does not support the conclusion arrived at by the plurality that the term “state law” cannot be limited to positive enactments.

Use of the term “State law” was simply intended to “make[] clear that the preemption provision applies to cities, counties, and other political subdivisions of the States as well as to the States themselves.”\textsuperscript{410} There is no basis for the plurality’s finding that the use of this term means anything else.

\textbf{D. The Ninth Circuit’s Opinion in Lindsey Also Has Certain Flaws}

1. Contrary to the Ninth Circuit’s Contention in \textit{Lindsey, Cipollone} Does Provide Support for the Location/Content Distinction That Was First Articulated by the Fourth Circuit in \textit{Penn Advertising}

The district court in \textit{Lindsey} reasoned that the resolution was not preempted by the FCLAA because it only regulated the location, and not the content, of cigarette advertisements.\textsuperscript{411} The Ninth Circuit, however, rejected this reasoning. Apparently, the district court relied on \textit{Penn Advertising}. That reliance is understandable, since \textit{Penn Advertising} addressed the preemption issue in a similar context.

As noted previously, \textit{Penn Advertising} addressed the issue of whether a city ordinance prohibiting the placement of any sign advertising cigarettes in a publicly visible location was preempted by the FCLAA. The Fourth Circuit purportedly applied the methodology described in \textit{Cipollone} and held that the ordinance was not preempted.\textsuperscript{412} The Fourth Circuit’s holding was based on the premise that the ordinance regulated location rather than the content of cigarette advertisements.\textsuperscript{413} The court concluded that a regulation with such a general relationship to cigarette smoking—as opposed to a specific advertising “prohibition based on smoking and health”—was not

\begin{itemize}
\item \textsuperscript{408} \textit{Cipollone}, 505 U.S. at 521 n.19 (plurality opinion of Stevens, J.).
\item \textsuperscript{409} Id. Again, the plurality came to this conclusion despite the fact that both parties “contend[ed] that the 1969 Act did not materially alter the preemptive scope of [the FCLAA].” Id. at 520.
\item \textsuperscript{411} \textit{Lindsey}, 195 F.3d at 1068.
\item \textsuperscript{412} See \textit{Penn Advertising}, 63 F.3d at 1324.
\item \textsuperscript{413} Id.
preempted.\footnote{414} The court in essence found that the ordinance’s general prohibition of all cigarette signs was not a “prohibition based on smoking and health” where it applied irrespective of the nature of the message communicated.\footnote{415} The court further reasoned that if the FCLAA’s preemption provision was “to be interpreted so broadly, the Supreme Court in Cipollone could not have allowed the continued prosecution of common law claims for breach of express warranty, misrepresentation, intentional fraud and conspiracy—all of which relate generally to the effects on health of promoting the sale of cigarettes.”\footnote{416}

In Lindsey, the Ninth Circuit stated that the Fourth Circuit “in Penn Advertising misconstrue[d] Cipollone.”\footnote{417} The Ninth Circuit found that Cipollone did not support the “location versus content distinction.”\footnote{418} The court also rejected the conclusions in Penn Advertising, FAIR, and Giuliani that location restrictions do not lead to the “diverse, nonuniform and confusing” advertising standards that Congress aimed to prevent by promulgating the FCLAA.\footnote{419} Despite the Ninth Circuit’s contention, Cipollone does provide support for the “location versus content distinction.”

The Ninth Circuit is correct that “the Cipollone plurality . . . never recognized a distinction between content regulations and others such as location regulations.”\footnote{420} That observation, however, misses the point. The plurality in Cipollone made it very clear that the preemption provision must be given “a fair but narrow reading.”\footnote{421}

When the Cipollone plurality addressed the plaintiff’s intentional fraud and misrepresentation claims, it determined that even those claims that do arise with respect to advertising and promotions, such as claims based on allegedly false statements of material fact made in advertisements, were not preempted.\footnote{422} The plurality found that “[s]uch claims” were “predicated not on a duty ‘based on smoking and health’ but instead on a more general obligation—the duty not to deceive.”\footnote{423} Crucial to the plurality’s reasoning was its finding “that Congress intended the phrase ‘relating to smoking and health’ . . . [in

\footnote{414}{Id.}
\footnote{415}{See id.}
\footnote{416}{Id.}
\footnote{417}{Lindsey, 195 F.3d at 1071.}
\footnote{418}{Id. The appellate court in Lindsey also noted that the appellate courts in FAIR and Giuliani drew a distinction between location and content regulations. Id. at 1072.}
\footnote{419}{Id.}
\footnote{420}{Id. at 1071-72.}
\footnote{421}{Cipollone, 505 U.S. at 524.}
\footnote{422}{Id. at 528.}
\footnote{423}{Id. at 528-29.}
the original version of the FCLAA’s preemption provision] to be construed narrowly, so as not to proscribe the regulation of deceptive advertising." Moreover, the plurality found, “this reading of ‘based on smoking and health’ is wholly consistent with the purposes of the 1969 Act. State law prohibitions on false statements of material fact do not create ‘diverse, nonuniform, and confusing’ standards.”

In Cipollone, the plurality, therefore, “conclude[d] that the phrase ‘based on smoking and health’ fairly, but narrowly construed, does not encompass the more general duty not to make fraudulent statements.”

Incidentally, it seems even clearer in cases like Penn Advertising, Lindsey, FAIR, Giuliani, and Reilly that Congress intended the phrase “based on smoking and health” to be construed all of a state’s police powers relating to cigarettes and smoking. This appears to have been ignored by the Ninth Circuit in Lindsey. An important consideration in these cases, therefore, is whether the local regulation creates “diverse, nonuniform and confusing standards.” This is the reason why the Fourth Circuit in Penn Advertising found the city’s ordinance, which only regulated “location” and not “content,” so important—simply regulating location does not create the “diverse, nonuniform and confusing standards” that the FCLAA aims to prevent.

It is clear why the distinction between “location” and “content” was so important in Penn Advertising and the other cases. The Ninth Circuit in Lindsey apparently did not understand this point. In fact, the Ninth Circuit went further and suggested that the different regulations at issue in these cases were “precisely the result Congress was trying to avoid in promulgating § 5(b).” As set forth below, these do not appear to be the types of regulations that the FCLAA seeks to prevent.

424. As noted, the Supreme Court claimed that the phrase “relating to smoking and health” “was essentially unchanged by the 1969 Act.” Id. However, as the 1969 Act’s change from “relating to smoking and health” to “based on smoking and health” clearly made it a narrower provision. See infra notes 395-99 and accompanying text.

425. Id. at 529.

426. Id.

427. Id.

428. Id. at 1072-73.
2. The Ninth Circuit in *Lindsey* Ignores the Fact That the FCLAA Relates to the Prevention of Health-Care Warnings in Advertising, Which Location Restrictions Clearly Do Not Implicate

After rejecting *Penn Advertising*’s location/content distinction, the Ninth Circuit suggested that the congressional purpose of the pre-emption provision supported the preemption of these local restrictions on tobacco advertising. The court claimed that if every locality “in this country regulated the location of tobacco advertisement and prescribed certain tombstone formats for availability information signs like [...] in this case, the purpose of the FCLAA would be frustrated because the national economy would be impeded by diverse, nonuniform, and confusing cigarette advertising regulations.”429 Thus, the court concluded that the regulation’s preemption was “not only mandated by the language of the statute but was also consistent with the legislative goals that spawned the FCLAA’s enactment and subsequent expansion.”430 What were “the legislative goals that spawned the FCLAA?” What type of “diverse, nonuniform, and confusing” advertising regulations does the FCLAA seek to prevent? Again, the legislative history of the FCLAA is telling. It shows that the FCLAA was only meant to prevent “diverse, nonuniform and confusing” advertising regulations with regard to health-risk warnings in cigarette advertising, which neither location restrictions nor tombstone formats appear to implicate.

The legislative history accompanying the original Act makes it clear that the Act was only intended to preempt any type of “cautionary statement” or “health-risk warning” in the labeling or advertising of cigarettes. It should first be noted that the House Report began with a section entitled “PRINCIPAL PURPOSE OF THE BILL” that only referenced preempting “cautionary statements” in the labeling and the advertisements of cigarettes.431 Later, specifically with respect to “preemption,” the House Report indicated as follows:

[The legislation] provides that no cautionary statement with respect to smoking and health other than specified in this legis-lation shall be required on any cigarette package; and that no such statement with respect to smoking and health shall be required in advertising for cigarettes packing in conformity with the labeling provisions of this legislation.432

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429. *Lindsey*, 195 F.3d at 1074-75.
430. *Id.* at 1075.
432. *Id.* at 2355 (emphasis added).
In another portion of the legislative history, it was noted that the preemption provision was intended to “preclude any requirement for a health-risk warning in cigarette labeling other than that specified in the [Act] and any health-risk warning requirement for advertising for cigarettes labeled in conformity of the [Act].”\textsuperscript{433}

As noted, the 1969 Act strengthened the warning in the original Act. In the legislative history accompanying it, the “PURPOSE AND SUMMARY OF THE BILL,” which began the Senate Report, indicated that the 1969 Act “[p]rohibit[ed] health-related regulation or prohibition of cigarette advertising by any State or local authority.”\textsuperscript{434} The Senate Report also explained that

the State preemption of regulation or prohibition with respect to cigarette advertising is narrowly phrased to preempt only State action based on smoking and health. It would in no way affect the power of any State or political subdivision of any State with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or similar police regulations.\textsuperscript{435}

Moreover, the fact that the amended preemption provision relates only to health risk warnings is supported by the provision’s language. The provision’s use of the phrase “with respect to the advertising and promotion of cigarettes” must be read in proper context. In this regard, the provision reads, in pertinent part: “No requirement or prohibition . . . with respect to the advertising and promotion of cigarettes the packages of which are labeled in conformity with the provision of this chapter.”\textsuperscript{436} The FCLAA’s amended preemption provision pertaining to advertising, therefore, only applies if the cigarette packages are properly labeled with one of the required warning statements. The question then, is why this qualification is located in the provision pertaining to advertising. The answer is not really a difficult one. This qualification is reflective of the fact that the provision only applies to advertising and promotions related to health-risk warnings.

The Ninth Circuit’s decision in Lindsey, in essence, determined that the FCLAA completely supersedes the Supreme Court decision in Packer Corp. v. Utah,\textsuperscript{437} which recognized a state’s ability to ban outdoor tobacco advertising under its police power. Is there evidence of congressional intent for this? What happened to the assumption

\textsuperscript{433} Id. at 2356.
\textsuperscript{435} Id. at 2663.
\textsuperscript{436} 15 U.S.C. § 1334(b) (emphasis added).
\textsuperscript{437} 285 U.S. 105 (1932).
that federal law does not supersede a state's traditional police powers "unless that [is] the clear and manifest purpose of Congress?"438 Further, what did the legislative history accompanying the 1969 Act mean when it indicated that the FCLAA's preemption provision was "narrowly phrased?" These questions should have been addressed. Unfortunately, the Ninth Circuit did not answer them. The court simply stated that Packer was inapplicable because it pre-dated the enactment of the FCLAA and because it addressed issues irrelevant to Lindsay.439 Packer, however, is a recognition that regulations such as those in Penn Advertising, Lindsey, FAIR, Giuliani, and Reilly have long been held to lie uniquely within the states' traditional police powers. The task before the Ninth Circuit in Lindsey was to scrutinize the relevant statutory language in light of Congress' evident purpose and pertinent case law in order to determine whether Congress intended to preempt such regulations.

What the Ninth Circuit's decision amounts to is the lack of a full understanding of the congressional purpose of the FCLAA. The FCLAA's legislative history shows that preemption was intended to "avoid the chaos created by a multiplicity of conflicting regulations" regarding health-risk warnings in cigarette labeling and in the advertising of cigarettes. If this is in fact true, how do simple location restrictions violate the preemption provision? The Ninth Circuit's blanket assertion that "a tobacco advertiser is faced with diverse and nonuniform tobacco advertising regulations depending solely upon the politics of the locality of the advertising"440 certainly does not address this issue.

In Lindsey, the court's purported reliance on the language, structure, and history of the FCLAA's preemption provision further misses the point. The court claimed that the distinction between content regulations and location regulations could not "be sustained because the [original] statute only preempted content regulations and the 1969 amendments broaden the scope of preemption beyond state laws that regulated only the content of tobacco advertisements."441 The court also claimed that "[i]n order to distinguish the language currently used in § [5](a) from the language currently used in § [5](b), § [5](b) must

438. Cipollone, 505 U.S. at 516 (quoting Malone v. White Motor Corp. 435 U.S. 497, 504 (1978)).
439. Lindsey, 195 F.3d at 1075. The Ninth Circuit was correct that "[t]he specific issues in Packer were whether a statewide ban on outdoor tobacco advertisements that left print advertisements unregulated violated the equal protection clause by creating an arbitrary classification, impermissibly took advertisers' property without due process of law by limiting the freedom of contract, or constituted an impermissible state regulation of interstate commerce." Id.
440. Id. at 1073.
441. Id. at 1074.
be read as preempts more than just content regulations."\[^{442}\] Another way to read these provisions, however, is simply that the FCLAA preempts "statements" regarding health-risk warnings in cigarette labeling and any "requirement or prohibition" regarding health-risk warnings in the advertising of cigarettes. Under this interpretation, the content/location distinction is important regardless of whether a statement, requirement, or prohibition is involved.

The Ninth Circuit's suggestion that these local restrictions were "precisely the result Congress was trying to avoid in promulgating § [5](b)" is questionable. It seems clear that the FCLAA's preemption provision was intended to prevent "diverse, nonuniform, and confusing" local regulations regarding health-risk warnings in cigarette labeling and in the advertising of cigarettes. In addition, it seems clear that such a provision was not intended to foreclose all of a state's police powers with regard to the regulation of tobacco. Location restrictions do not involve health-risk warnings and appear to be properly within a state's historic police powers.

*Lindsey* failed to recognize that the FCLAA was meant to preempt health-risk or health-related requirements or prohibitions "with respect to the advertising or promotion of cigarettes."\[^{443}\] The regulation in *Lindsey*, and the similar regulations in *Penn Advertising, FAIR, Giuliani*, and *Reilly* did not involve the health-risk or health-related requirements or prohibitions that Congress sought to prevent by the FCLAA and, as suggested below, were not "based on smoking and health" within the meaning of that Act.

3. *Lindsey* Confuses the Concept of "Public Health" as a State Police Power with the Phrase "Based on Smoking and Health" as Used in the FCLAA

The Court in *Lindsey* found that the resolution banning outdoor tobacco advertising was "based on smoking and health" because "it pertain[ed] to matters of health and safety of the citizens of [the county]."\[^{444}\] The court also noted that the justifications for the ban on outdoor tobacco advertising referred to the various health risks associated with cigarette smoking.\[^{445}\] This however, is only indicative of the fact that the resolution was a "public health" measure, enacted pursuant to a state police power, and does not necessarily equate to being "based on smoking and health" within the meaning of the FCLAA.

\[^{442}\] Id.

\[^{443}\] *Lindsey*, 195 F.3d at 1070.

\[^{444}\] Id.

\[^{445}\] Id.
The police power is an attribute of sovereignty inherent in every government.446 It clearly includes the power to adopt and enforce laws and regulations, including the power of such laws and regulations to prohibit. Generally, as long as these laws and regulations have a real and substantial relation to the public peace, health, safety, welfare, or morals, and are not arbitrary, discriminatory, capricious, or unreasonable, they will be found valid.447 As a consequence, when a state or local governmental entity adopts a law or regulation under its police powers, it typically specifies at least one of these different areas.

Prior to the FCLAA, it could "not [be] denied that the state [could], under the police power, regulate the business of selling tobacco, products . . . and the advertising connected therewith." 448 Such power could be used both "to prevent the use of tobacco by minors, and to discourage its use by adults."449 The states' concern regarding the use of tobacco products existed long before the FCLAA and the health concerns that underlie it.450 It seems ludicrous to suggest that states lack any power in this regard today because of the discovery of these health concerns.

In essence, Lindsey determined that the Board's resolution qualified as a "health" prohibition under the FCLAA solely because it had been enacted under the state's police power. However, that conclusion is too simplistic. The power to provide for the public health is designed to promote the public health of the community generally.451 The fact that there may have been findings that were included in the resolution referring to the various health risks associated with cigarette smoking does not necessarily mean that the resolution was "based on smoking and health" within the meaning of the FCLAA. The phrase "based on smoking and health" is clearly referencing a more specific

446. Memorial Gardens Ass'n v. Smith, 156 N.E.2d 587 (Ill. 1959). The police power has been reserved to all of the states by the Constitution of the United States. Id. Every state has the power to determine for itself the scope of its police powers and that of its local government entities. The police power is very broad and not subject to precise definition. See Gundling v. City of Chicago, 52 N.E. 44 (Ill. 1898), aff'd, 177 U.S. 183 (1900) ("The regulation of police power is hardly susceptible of exact definition."). The power is a fluid and changing entity because it must respond to political and socioeconomic variations. Professional Investments of America, Inc. v. McCormick, 469 N.E.2d 1357 (Ohio Misc. 1984).


449. Id. at 106.

450. See id. It had been a state policy since 1890 to prevent the use of tobacco by minors and to discourage its use by adults. Id. See also Mangini, 875 P.2d at 81 (noting that laws making it illegal to sell cigarettes to minors existed long before the health concerns surrounding cigarettes existed; the states' protective role motivates such law).

451. See Gundling v. City of Chicago, 176, 340, 52 N.E. 44 (Ill. 1898) (noting that the most important of police powers is that of caring for the health of the community).
relationship between smoking and health than the regulations involved in *Lindsey* and the other cases—it references "legislation that specifically requires or prevents the advertisement of a message concerning the relationship between smoking and health."

*Lindsey* used the sole fact that this was a public health measure to conclude that it was "based on smoking and health." By this logic, would the court have found that the FCLAA was not implicated if the regulation had referenced "welfare" or "public welfare" instead of "health" or "public health," or if the findings regarding the health risks had not been included in the resolution? A court surely would not be bound by the legislature's designation in that regard nor by whether the findings were included or not. By relying on nothing more than the fact that the regulation banning outdoor tobacco advertising was a "public health" measure, the conclusion by the Ninth Circuit that it was therefore a "health" prohibition under the FCLAA is wholly deficient.

**E. Other Thoughts on Lindsey, Cipollone, Federal Preemption, and the FCLAA**

1. The Tombstone Provisions in *Lindsey* and the Other Cases Do Not Appear to Violate the FCLAA Despite the Fact That Each Court Unanimously Found That They Did Violate the Act

As noted herein, the regulations in *Lindsey*, *FAIR*, *Giuliani*, and *Reilly* all contained what were referred to as tombstone provisions.  

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452. See *Reilly*, 76 F. Supp. 2d at 132.
453. As suggested earlier, the real question is whether regulations such as those involved in *Lindsey* and the other cases are health-risk or health-related requirements, or prohibitions that Congress sought to prevent by the enactment of the FCLAA.
454. In *Lindsey*, the regulation banned all tobacco advertisements that could be seen from the street unless the advertisements were presented in a tombstone format. Under the tombstone exception, licensed tobacco retailers could post price and availability information outside their businesses as long as the advertisements were in plain black type on a white field without adornment, color, opinion, artwork, or logos. No tombstone advertisement, however, could be displayed if it was visible from a school, school bus stop, bus stop, or sidewalk regularly used by minors to get to school or within one thousand feet of a school, playground, or public park.

The tombstone provision in *FAIR* acted as one of the exceptions to the ordinance in that case—essentially banning all publicly visible advertising of such products. Under the provision, any sign that contained a generic description of cigarettes or alcoholic beverages was excepted.

In *Giuliani*, the ordinance prohibited most outdoor advertising of tobacco products within one thousand feet of any school building, playground, child day care center, etc. and most indoor advertising in the same areas if the advertisements could be seen from the street. There was one exception to the ban: a single, black-and-white, text-only, tombstone sign stating "TOBACCO PRODUCTS SOLD HERE" could be placed within ten feet of an entrance to a store where tobacco products were sold.

The regulations in *Reilly* essentially outlawed (i) advertisements visible from areas likely to be
In each of these cases, the tombstone provision was found to be preempted by the FCLAA. Despite this unanimity, these conclusions appear questionable because the provisions involved were not health-risk or health-related requirements or prohibitions, which the FCLAA actually intended to prevent.\textsuperscript{455} These tombstone provisions may have been "requirements" or "prohibitions" that were "with respect to advertising or promotion of cigarettes," but they do not appear to have been "based on smoking and health" within the meaning of the FCLAA.

Furthermore, the FCLAA's warning requirement in § 4 is imposed on manufacturers and importers of cigarettes, not retailers.\textsuperscript{456} The Act is meant to apply primarily to brand-specific advertising, not the general price and availability information by retailers that these tombstone provisions usually involve. The suggestion that these tombstone provisions violated the FCLAA because they sidestepped the required warnings is therefore questionable.

2. It Is Noteworthy That the Smokeless Tobacco Act Allows State Damages Actions and Regulation of Outdoor Billboard Advertisements of Smokeless Tobacco Products by State and Local Entities

As noted previously, the preemption provision in the Smokeless Tobacco Act\textsuperscript{457} contains a saving clause with respect to state law damages claims\textsuperscript{458} and it also provides that the Act's preemption provision has no application to billboard advertising.\textsuperscript{459} The legislative history accompanying the Smokeless Tobacco Act indicates that by including provisions in [the Act] which require health warnings on packages and advertisements for smokeless tobacco

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455. The same is true with regard to the court's conclusion in the Chiglo case, see infra notes 140-44 and accompanying text, in that the ordinance in that case that prohibited "point of sale" advertising was preempted by the FCLAA.

456. See 15 U.S.C. § 1333. In fact, the Act specifically states that the warning requirement "does not apply to [either] a distributor or a retailer of cigarettes who does not manufacture, package, or import cigarettes for sale or distribution within the United States." 15 U.S.C. § 1333(d).


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products, and by preempting State and local laws requiring additional health warnings, it does not intend to preempt a State's ability to control the promotion or advertising of tobacco products and does not intend to preempt product liability suits in State or Federal courts based on failure to warn.460

This suggests Congress' disagreement with Cipollone, and further suggests that Congress did not intend the result reached in Lindsey.

3. There Is Probably a More Difficult First Amendment Issue in These Billboard Cases and the FCLAA Should Not Be Used with Federal Preemption Principles Solely to Avoid Addressing the Constitutional Issue

It is clear that the regulations at issue in Lindsey, Penn Advertising, FAIR, Giuliani, and Reilly also present First Amendment concerns. First Amendment challenges to the regulations were asserted in all of these cases. However, the appellate courts did not address the First Amendment issue in Lindsey, FAIR, and Giuliani.461 Only the Fourth Circuit in Penn Advertising and the First Circuit in Reilly addressed this issue. These two cases suggest that the First Amendment issue may present a much more difficult issue for the courts than the preemption one.

The case history of Penn Advertising is noteworthy. In addition to finding that the ordinance was not preempted by the FCLAA, the Fourth Circuit also found that it did not violate the First Amendment.462 After the appellate court's decision, the United States Supreme Court granted certiorari and vacated the judgment, remanding the case for further consideration in light of the Court's recent decision


461. In Lindsey, the district court found that the regulation at issue was a constitutional regulation of commercial speech under the First Amendment in addition to not being preempted under the FCLAA. On appeal, the Ninth Circuit held that the regulation was preempted by the FCLAA and did not address the First Amendment issue. In both FAIR and Giuliani, the district courts did not address the First Amendment issue, finding that the regulations involved therein were preempted by the FCLAA. The appellate courts in those cases therefore did not have the First Amendment issue before them.

462. Both the district court and the court of appeals in Penn Advertising applied the test for assessing the constitutionality of restrictions on commercial speech as established by the United States Supreme Court in Central Hudson Gas & Electric v. Public Service Commission, 447 U.S. 537 (1980). Under this test, a court must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. Id. at 566.
in 44 Liquormart, Inc. v. Rhode Island.\textsuperscript{463} Since 44 Liquormart\textsuperscript{464} dealt with alcohol advertising and not cigarette advertising, the FCLAA was not involved. The Supreme Court's decision in that case was clearly based on First Amendment grounds.\textsuperscript{465} In 44 Liquormart, a plurality of the Supreme Court refused to agree with the assertion that an advertising ban of liquor prices would significantly advance the State's interest in promoting temperance.\textsuperscript{466} That finding appears to have been an important part of the rationale for the resolution of the case, and the Supreme Court apparently thought the First Amendment issue merited some consideration in Penn Advertising. However, after its judgment was vacated and the case was remanded, the Fourth Circuit in Penn Advertising simply found that "44 Liquormart did not require [it] to change [its] decision" and readopted its previous decision.\textsuperscript{467}

The opinion by the First Circuit in Reilly is also noteworthy in this regard. The opinion devotes more attention to the First Amendment issue and appears to view it as the more serious challenge.\textsuperscript{468} Although the First Circuit found that it was bound to apply the Central Hudson test,\textsuperscript{469} the court noted that there were "recent rumblings from members of the Supreme Court and others suggesting that the Central Hudson test may be in need of minor or major modification."\textsuperscript{470} This apparently is accurate, as the United States Supreme

\textsuperscript{463} Penn Advertising of Baltimore, Inc. v. Schmoke, 518 U.S. 1030 (1996). There was no opinion accompanying the Supreme Court's decision, and the Court simply referenced the 44 Liquormart decision without explanation. This is not uncommon for the Supreme Court.


\textsuperscript{465} In 44 Liquormart, a state law banned the advertisement of retail liquor prices except at the place of sale. The district court concluded that the ban was unconstitutional because it did not directly advance the state's asserted interest in the promotion of temperance and was more extensive than necessary to serve that interest. 517 U.S. at 494. The court of appeals reversed the trial court, finding, inter alia, "inherent merit" in the state's argument that competitive price advertising would ultimately increase sales. Id. The Supreme Court reversed the court of appeals, finding the ban "an abridgment of speech protected by the First Amendment." Id. at 489.

\textsuperscript{466} 44 Liquormart, 517 U.S. at 505.

\textsuperscript{467} 63 F.3d 1318 (4th Cir. 1993). The Fourth Circuit did modify the opinion to the extent that it relied on a certain earlier Supreme Court opinion because of the doubt placed on the case by the Supreme Court in 44 Liquormart. The Fourth Circuit, however, specifically noted that the holding in that earlier Supreme Court case was not necessary to its decision upholding the regulation.

\textsuperscript{468} Although there is no reference to the tobacco settlement in the First Circuit's opinion, that settlement should have been entered into prior to the appellate court's rendering of its decision in Reilly. The tobacco settlement may therefore be an explanation as to why the preemption issue was not more hotly debated.

\textsuperscript{469} Intermediate scrutiny is used in commercial speech cases. See supra note 461.

\textsuperscript{470} Apparently, these members of the Supreme Court advocate giving commercial speech greater protection than it currently receives under the Central Hudson test.
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Court has agreed to review the dispute in Reilly in order to consider giving commercial speech broader protection against regulation than is currently provided for under the intermediate scrutiny traditionally applied in commercial speech cases.

As noted, this First Amendment issue may be more difficult for the courts than the preemption issue. That fact, however, should not justify avoiding such issues under the guise of preemption.

CONCLUSION: THE FCLAA SHOULD NOT BE PERMITTED TO "IMMUNIZE" CIGARETTE MANUFACTURES FROM STATE LAW TORT DAMAGES ACTIONS OR ACT AS A "SHIELD" AGAINST THESE LOCAL REGULATIONS RESTRICTING CIGARETTE ADVERTISING

As noted, because they involve different contexts, both Cipollone and Lindsey present different questions regarding the applicability of the FCLAA's amended preemption provision. Consequently, separate conclusions must be made with regard to each.

A. State Common Law Damages Actions

1. The Plurality Decision in Cipollone Was Clearly a Compromise Decision

With respect to the state common law damages claims, the Supreme Court took five different positions with respect to the amended preemption provision's application. An obvious question, then, is which position was best.

The Supreme Court took three different positions in Cipollone, the Third Circuit took a different position from those three, and the New Jersey Supreme Court took a different position than the Third Circuit and the Supreme Court. The plurality in Cipollone found that the language in the amended preemption provision governed, expressly preempting certain state common law claims but not others. The Court also found that there was no need to resort to principles of implied preemption. Three Justices, led by Justice Blackmun, agreed that the language in the amended preemption provision governed, specifically stating that it would be improper to resort to principles of implied preemption but finding that this provision did not preempt any state common law damages claims. Two Justices, in an opinion authored by Justice Scalia, found that the amended preemption provision expressly preempted all state common law damages claims, although the Justices specifically objected to the suggestion that resort to implied preemption would be improper in all cases where there is
an actual preemption provision. The Third Circuit in *Cipollone* held that the amended preemption provision did not expressly preempt state common law damages claims but that certain of these claims were impliedly preempted. The New Jersey Supreme Court also found in *Dewey* that the amended preemption provision did not expressly preempt such claims and then, after considering the issue of implied preemption, further held that there was no implied preemption as well.

Four of the five different positions appear to be legally defensible. The one position that is not defensible is the plurality position in *Cipollone*—that certain state common law claims were expressly preempted. The plurality’s purported finding of express preemption is questionable to begin with and its further determination that the amended preemption provision expressly preempted certain state common law claims and not others makes its position indefensible in this regard. Although it may be the least defensible of the five positions, the plurality’s position is right in the middle in terms of the final outcome: It is not as favorable to plaintiffs as the positions taken by Justice Blackmun and the New Jersey Supreme Court, but it is more favorable to them than the positions of Justice Scalia or the Third Circuit. 471

The plurality’s position in *Cipollone* does not appear to be the best position (in terms of legal correctness) with regard to the state law tort damages claims issue, but it must be understood that it was a compromise position. As set forth below, of the remaining positions, the Third Circuit or the New Jersey Supreme Court’s are probably the best with regard to this issue.

2. The Best Positions Are the Third Circuit and New Jersey Supreme Court’s

Justice Scalia’s position, that the amended preemption provision expressly preempts all the state common law damages claims, may be legally defensible, but it is the weakest of the remaining four positions. As noted, none of the other lower courts that have considered this issue found any express preemption of state common law damages claims by this provision. Nor can it be said that this provision “clearly” or “manifestly” exhibits an intent to preempt such claims.

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471. The *Cipollone* plurality’s position was probably closest to the Third Circuit’s. Unlike the Third Circuit, the plurality determined that claims for express warranty and certain fraudulent misrepresentation claims (those involving false statements of material fact in advertisements) were not preempted at all despite the fact that such claims might arise with respect to advertising and promotion.
Justice Blackmun’s position that the amended preemption provision does not expressly preempt these claims is probably the better position. Justice Blackmun, however, refrained from any further analysis of this issue. As noted, Justice Blackmun stated that it would be improper to resort to principles of implied preemption. However, is this true? Justice Scalia makes a good argument for resorting to principles of implied preemption despite the existence of an express preemption provision.\(^4\)

Clearly, the best position would be one that found no express preemption and then at least considered the possibility of implied preemption. The Third Circuit in \textit{Cipollone} and the New Jersey Supreme Court in \textit{Dewey} both took this position.

The Third Circuit and the New Jersey Supreme Court came to different conclusions with respect to the whether there was any implied preemption. As noted, the Third Circuit found that certain state law claims were impliedly preempted. The New Jersey Supreme Court found no implied preemption of state law damages claims. The question remains, which of these two positions is best?

3. Of the Two Positions, New Jersey Supreme Court’s Is Probably Best

Although neither the Third Circuit nor the New Jersey Supreme Court addressed the preemptive scope of the FCLAA’s original preemption provision, a majority of the United States Supreme Court in \textit{Cipollone} found that it did not preempt state common law damages claims. The Court relied on the statement of purpose in § 2 of the Act for this conclusion. As the Court explained:

This reading comports with the 1965 Act’s statement of purpose, which expressed an intent to avoid “diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.” Read against the backdrop of regulatory activity undertaken by state legislatures and federal agencies in response to the Surgeon General’s report, the term “regulation” most naturally refers to positive enactments by those bodies, not to common-law damages actions.\(^5\)

\(^4\) A good example for this is the \textit{Harshbarger} case, involving a state requirement for tobacco manufacturers to disclose the additive and nicotine-yield rating of their products. How can one say that the First Circuit was wrong in that case to have engaged in implied preemption analysis in order to determine whether the state requirement was valid in light of the FCLAA’s ingredient reporting provisions? The only thing one might question is the conclusion reached by the First Circuit on that issue in finding that there was no implied preemption.

\(^5\) \textit{Cipollone}, 505 U.S. at 519.
As noted with respect to the amended preemption provision, the plurality in Cipollone found that it materially altered the preemptive scope of the FCLAA. The plurality based this on the fact that the amended provision barred "requirement[s] and prohibition[s]" and not simply "statement[s]."474 The plurality also explained that the amended provision "reaches beyond statements 'in the advertising' to obligations 'with respect to the advertising or promotion' of cigarettes."475 The plurality further determined that the use of the term "state law" meant that Congress intended to preempt more than regulations. Section 2 of the Act, however was not changed by the 1969 Act, and the legislative history accompanying the 1969 Act specifically indicated that the amendment to the preemption provision was only meant as a "clarification."476 Quite properly, neither the Third Circuit nor the New Jersey Supreme Court came to the conclusion that the amended preemption provision materially altered the preemptive scope of the FCLAA.

With respect to the application of implied preemption, both the Third Circuit and the New Jersey Supreme Court agreed that the FCLAA did not impliedly preempt those remedies by pervasively occupying the field. Both courts also agreed that there was no indication that compliance with both state and federal law was impossible. The two courts, however, "part[ed] company," as the New Jersey Supreme Court would say, with respect to whether such claims might "actually conflict" with the purposes of the FCLAA.

The Third Circuit found that the FCLAA "represents a carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the national economy."477 The Third Circuit indicated that "this balance would be upset by either a requirement of a warning other than that prescribed [by the Act] or a requirement or prohibition based on smoking and health with respect to the advertising or promotion" of cigarettes."478 Accepting the proposition that "state common law damage actions have the effect of requirements . . . capable of creating 'an obstacle,'" the Third Circuit held: (1) "that the Act preempts those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes" and (2) "that where the success of a state law damage claim

474. Id. at 520.
475. Id.
476. Id. at 523.
478. Id.
necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages such claims are preempted as conflicting with the Act." \( ^{479} \)

The New Jersey Supreme Court, however, was not persuaded by the conclusions of the Third Circuit, explaining as follows:

The Cigarette Act's statement of policy and purpose announces two separate goals: (1) "to adequately inform[] [the public] that cigarettes smoking may be hazardous to health by [the] inclusion of a warning to that effect on each package of cigarettes," and (2) to protect "commerce and the national economy . . . to the maximum extent consistent with this declared policy [by] not impeding it with] diverse, nonuniform, and confusing cigarette labeling and advertising regulations.' It is significant that the second goal, the protection of trade and commerce, must be achieved 'consistent with' and not 'to the detriment of' the first and principal goal—to inform the public adequately that cigarettes may be hazardous to health. \( ^{480} \)

The New Jersey Supreme Court concluded that allowing state common law tort remedies would "further, not impair, the goal of adequately informing the public of the risks of cigarette smoking" and it was only this second goal that could be thwarted if tort claims were allowed to proceed. After discussing other contexts dealing with the regulatory effect of state damages actions, the New Jersey Supreme Court eventually concluded "that had Congress intended to immunize cigarette manufacturers from packaging, labeling, misrepresentation and warning claims, it knew how to do so with unmistakable specificity." \( ^{481} \)

The Third Circuit in Cipollone may be correct that the FCLAA "represents a carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of national economy," \( ^{482} \) but the balance is clearly tilted in favor of the former. While the primary purpose of the FCLAA is to warn the public of the consequences of smoking, \( ^{483} \) the Act's other goal of protecting "commerce and the national economy . . . by not impeding it with] diverse, nonuniform, and confusing cigarette label-

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479. Id.
480. Dewey, 577 A.2d at 1248 (citations omitted).
481. Id. at 1251.
482. See 789 F.2d at 187.
483. See H.R. REP. NO. 449 (1965), reprinted in 1965 U.S.C.C.A.N. 2350 (noting that the Act's "principal purpose" is to "provide adequate warning to the public of the potential hazards of cigarette smoking by requiring the labeling of cigarette packages with the [warning]").
ing and advertising regulations,” is clearly secondary.\textsuperscript{484} From this perspective, the New Jersey Supreme Court’s conclusion that there was no implied preemption of state common law damages claims is the more compelling.\textsuperscript{485}

\textbf{B. Local Regulations Restricting Cigarette Advertising}

The application of the FCLAA’s amended preemption provision to local regulations such as those in \textit{Lindsey, Penn Advertising, FAIR, Giuliani}, and \textit{Reilly} is even more questionable. First, there is a real question as to whether the FCLAA’s preemption provisions were ever intended to apply to billboards. As noted, the legislative history of the FCLAA clearly reflects the fact that this Act was primarily aimed at television, radio, and print advertising, and not billboard advertising. The Act did not reference billboards until 1984, well after even the amended provision was in place. Even then, the Act distinguished billboards from advertising. In addition, it is clear that the FCLAA was not intended to prevent these particular types of regulations. As discussed herein, the amended provision only intended to preempt health-risk or health-related requirements or prohibitions with respect to the advertising or promotion of cigarettes, which these advertising regulations clearly were not.

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The cigarette manufacturers would have one believe that the purpose of the FCLAA was to immunize them from state law damages actions and act as a “shield” against local regulations such as those at issue in \textit{Lindsey, Penn Advertising, FAIR, Giuliani}, and \textit{Reilly}. This, however, is not the case. The FCLAA was clearly not intended to “immunize” cigarette manufacturers by giving them special protection from state law tort damages claims. It also was not intended to act as a “shield” against these local regulations. This should not be allowed to continue and the history of this Act should serve as an important lesson.

\textsuperscript{484} As the New Jersey Supreme Court noted, this is clear from the Act’s statement of purpose. It is also clear from the legislature history of the FCLAA.

\textsuperscript{485} Especially if one accepts the \textit{Cipollone} plurality’s acknowledgment that there is “no inherent conflict between federal preemption of state warning requirements and the continued vitality of state common-law damages actions.” \textit{Cipollone}, 505 U.S. at 521 (Stevens, J. plurality opinion).