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Products Liability and Preemption: A Judicial Framework

BARBARA L. ATWELL*

INTRODUCTION

THE federal government regulates products ranging from drugs such as the DPT vaccine[1] to flammable clothing,[2] and from automobiles[3] to cigarettes[4] to tampons[5] and food.[6] Because the federal government plays such a predominant role in regulating products, it is not surprising that federal preemption has become an increasingly popular defense in recent years in products liability cases.[7] Defendants in products liability cases argue that the state common law tort actions are preempted by federal regulations.[8] If the court accepts the argument, it will not hear the substantive issues plaintiffs raise because the federal regulation controls the case rather than state products liability laws. To the extent the federal preemption defense is successful, the merits of the case are never considered.[9] Instead, the court concludes that compliance with the federal regulation is all that is required and that a state common law tort claim alleging that the product is defective cannot be prosecuted. Since the manufacturers in these cases have complied with all federal regula-

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1. Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-393 (1988); Public Health Service Act, 42 U.S.C. §§ 201-300aaa-13, (1982).
2. Flammable Fabrics Act, 15 U.S.C. §§ 1191-1204 (1988).
3. Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (1988).
4. Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1332-1341 (1988).
5. Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-393 (1988).
6. *Id.*
7. Most of the products liability cases discussed in Part III of this article, for example, were decided after 1985. *See infra* notes 106-227 and accompanying text.
8. For a discussion of the preemption doctrine in general, see *infra* notes 13-56 and accompanying text. For a discussion of the preemption doctrine in cases of alleged products liability see *infra* notes 106-227 and accompanying text.
9. *See infra* notes 13-15 and accompanying text.

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tions, there generally is no basis for compensating the injured victim under federal law, and, if the products liability claim is preempted, the victim cannot be compensated pursuant to state law either. Thus, the question is whether or not the federal regulation alone should govern these cases and displace state products liability laws. In general, federal product regulations have enhanced product safety, but such regulations should not necessarily displace common law products liability claims.

In determining whether to preempt a products liability claim, courts should strive to balance two competing considerations: the preemption doctrine and the policies that underlie products liability law. This balance can be effected in a manner that is fair to both the person injured by a defective product and to its seller; courts should preempt only those cases where there is an express provision which mandates preemption, or where there is a conflict between the federal and state regulations that makes compliance with both impossible. Although there are additional preemption categories that courts must continue to consider, this article suggests that the other categories are generally not appropriate bases for preemption in products liability cases.[10] Products liability laws, in large part, are designed to benefit the public by making it easier for victims of defective products to receive compensation for their injuries.[11] Limiting preemption of products liability claims to cases of express preemption or cases in which compliance with both the state and federal law is impossible furthers the policies underlying products liability laws. Product manufacturers should, however, receive some benefit for compliance with federal regulations. Thus, in order to achieve a fair and equitable balance between protecting the consumer on one hand, and recognizing that the seller of the product has complied with the federal regulation on the other hand, this article suggests that where such compliance is found, damages be limited either to an absolute dollar amount or to compensatory damages.[12]

Part I of this article examines the preemption doctrine while Part II explores the development of the law of products liability. Part III analyzes products liability cases in which the preemption defense has been raised—focusing on cases involving cigarettes and automobiles—and ex-

10. *See infra* notes 235-47 and accompanying text.

11. *See infra* note 84 and accompanying text.

12. *See infra* notes 248-49 and accompanying text. Punitive damages, which are sometimes available under state law, *see, e.g.*, Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565 (6th Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986); Wangen v. Ford Motor Co., 97 Wis.2d 260, 294 N.W.2d 437 (1980); would not be available under this proposal. *See* Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257 (1976).

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amines the approaches taken by the courts. Finally, Part IV articulates a framework for courts to use when the preemption defense is asserted in products liability cases.

I. THE PREEMPTION DOCTRINE

The preemption doctrine emanates from Article VI of the United States Constitution, which mandates the supremacy of federal law over state law.[13] When Congress or some other federal agency regulates a field of law also regulated by the state, the courts must determine whether the state regulation is preempted by the federal regulation.[14] Preemption may be based on an express or implied legislative or regulatory determination that federal law should preempt state law.[15] If a court finds that state law is either expressly or implicitly preempted, the state law cannot stand, and the federal regulation controls.

As the term suggests, express preemption requires an express statement in the federal regulation that prohibits the state regulation at issue.[16] For example, if a federal regulation provided that all widgets produced in the United States must be three-quarters of an inch in diameter, and further provided that "in the interest of uniformity, any state law regulating the diameter of widgets is hereby preempted," a court would find that a state law that allowed one inch widgets was expressly preempted.[17] Express preemption is rare. More often than not, Con-

13. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

14. Preemption may be based not only on federal legislation, but on actions taken by federal administrative agencies pursuant to the authority granted them by such legislation. *See* Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 369 (1988) ("Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation."). *See also* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141 (1982); Although this article discusses and therefore refers primarily to Acts of Congress, the same principles and arguments apply to acts of federal administrative agencies.

15. *See infra* notes 16-56 and accompanying text.

16. *See, e.g.*, Jones v. Rath Packing Co., 430 U.S. 519 (1977).

17. In Jones v. Rath Packing Co., 430 U.S. 519 (1977), the state of California and the federal government each enacted separate regulations governing the extent to which the actual weight of a package of meat could deviate from the stated weight on the package. The federal regulation required that a package of meat contain " 'an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided*, That . . . reasonable variations may be permitted, and exemptions as to small packages may be established, by regulations prescribed by the Secretary.' " *Id.* at 529 (citation omitted). The Secretary of Agriculture promulgated a regulation pursuant to the foregoing authority to permit reasonable variations due to specified factors. *Id.* The

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gress has either been silent on the issue of preemption,[18] or, if it has included a preemption provision, it has not expressly preempted the precise state regulation at issue.[19] In such cases, a court faced with a preemption defense must determine whether the federal regulation preempts state law by implication.

Implied preemption may be based on several different grounds. First, the court may determine that the federal legislation is so comprehensive as to suggest a Congressional intent to occupy the field.[20] If Congress has occupied the field, even compatible state laws are not permitted.[21] The test for such federal exclusivity is whether the federal regulation is so comprehensive as to indicate an intent to occupy the field,[22] and/or whether the need for uniformity suggests that Congress

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federal act also had an express preemption provision that prohibited "the imposition of '[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under' " the Act. *Id.* at 530 (citation omitted). Accordingly, the Court held that a California provision which provided that " 'the average weight or measure of the packages or containers in a lot of any commodity sampled shall not be less . . . than the net weight or measure stated upon the package.' " *Id.* at 526 (citation omitted), was expressly preempted by The Federal Meat Inspection Act. *Id* at 532.

18. *See, e.g.*, Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 712 (1985) (construing the Public Health Service Act).

19. It is possible for Congress to have an express preemption provision in a statute without expressly preempting the precise state regulation in a given case. In Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 377-78 (1988), for example, the Court held that while Congress included an express preemption provision governing depreciation regulations for *inter*state communications, it did not preempt depreciation regulations relating to *intra*state communications. Likewise, in Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984), there were federal regulations that expressly preempted certain safety aspects of nuclear regulation. The Court held, though, that the regulation did not expressly preempt a common law tort claim in which there was an award of punitive damages. *Id.* at 258.

20. *See, e.g.*, City of Milwaukee v. Illinois, 451 U.S. 304, 317 (1981) ("Congress has . . . occupied the field [of water pollution control] through the establishment of a comprehensive regulatory program supervised by an expert administrative agency."); Campbell v. Hussey, 368 U.S. 297, 301 (1961) ("In . . . our view . . . Congress . . . preempted the field and left no room for any supplementary state regulation."); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 234 (1947) ("Congress did more than make the Federal Act paramount over state law in the event of conflict. It . . . terminat[ed] the dual system of regulation."). *Cf.*, Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 212 (1983) ("[T]he Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States.").

21. *Silkwood*, 464 U.S. at 248 ("If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted."); *Pacific Gas*, 461 U.S. at 212-13 ("State safety regulation is not pre-empted only when it conflicts with federal law."); *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982); *Campbell*, 368 U.S. at 302 ("We have then a case where the federal law excludes local regulation, even though the latter does no more than supplement the former."); *Rice*, 331 U.S. at 230.

22. City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 638 (1973) ("[T]he pervasive control vested in EPA and in FAA . . . seems to us to leave no room for . . . local controls."); *Rice*, 331 U.S. at 230 ("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.").

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intended to preempt any state regulation of the same subject matter.[23] It is no simple matter to determine whether Congress has occupied a field and, if it has, further to determine the scope of the occupied field. A court may find that Congress has occupied *a* field, but the field so occupied may not encompass the issue at hand.[24] Instead, the field may be very narrowly defined so as not to preempt the state regulation. In *Silkwood v. Kerr-McGee Corp.*,[25] for example, the Court found that Congress had occupied the field of nuclear safety concerns. Occupation of that field however, did not preempt common law tort claims raised by Karen Silkwood's estate after Silkwood was contaminated with high levels of plutonium, because Congress did not intend to interfere with state common law tort remedies available to those injured by nuclear incidents. Since the field Congress occupied did not encompass plaintiff's tort claim, that claim was considered on the merits and an award of punitive damages upheld.[26]

The second ground upon which implied preemption may be based is a conflict between the state and federal laws. For example, there may be a physical conflict which prevents compliance with both the federal and state provisions.[27] A physical conflict exists when differences in the requirements of federal and state regulations render it impossible to comply with both. In the widget example described above,[28] for example, if there were no express preemption provision but the federal law mandated that all widgets produced in the United States be three-quarters of an inch in diameter, while the state law mandated that widgets produced in that state be one inch in diameter, there would be a physical conflict that would render it impossible for a manufacturer to comply with both the

23. Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 579 (1981) ("It would undermine the Congressional scheme of uniform rate regulation to allow a state court to award as damages a rate never filed with the Commission."); Chicago & North Western Trans. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 326 (1981) ("A system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act."); *Campbell*, 368 U.S. at 301.

24. In *Pacific Gas*, 461 U.S. 190, for example, the Court noted that Congress occupied the field of nuclear safety regulation. It held, however, that a state statute regarding nuclear power was not within the scope of the field occupied by federal regulation since the state provision was enacted for economic rather than safety purposes. *Id.* at 216. Since federal preemption was only of *safety* regulations, *economic* regulations were permitted. *See also* Perez v. Campbell, 402 U.S. 637 (1971).

25. 464 U.S. 238 (1984).

26. *Id.* at 258.

27. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) (no physical conflict).

28. *See surpa* notes 16-17 and accompanying text.

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federal and state regulations. When such a physical conflict exists, federal law controls.

A court may also find that a state regulation conflicts with federal provisions even though physical compliance with both state and federal law is possible. A conflict between state and federal law may be found "where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress."[29] Determining whether there is an "objectives conflict" involves a two-pronged analysis. First, the court must ascertain the purpose of the federal regulation. Second, the court must decide whether the state regulation is compatible with that purpose.[30] This process requires an examination of the language and purposes of both the federal and state regulations to assess their compatibility.[31]

Finally, state and federal laws may conflict because the state law "interferes with the *methods* by which the federal statute was designed to reach" the Congressional goals.[32] Thus, even where the objective of the state and federal laws is the same, the state law may be preempted if it interferes with the manner in which the federal regulation seeks to achieve that goal.[33] In any conflict between state and federal law, whether it is a physical conflict, an objectives conflict, or a methods conflict, the conflict must "necessarily" exist—the mere possibility of a conflict is not enough for a court to find preemption.[34]

The implied preemption doctrine is easy to articulate but difficult to

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29. Hines v. Davidowitz, 312 U.S. 52, 67 (1941). *See also* Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368 (1968); Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983).

30. Making a preemption determination "is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict." Perez v. Campbell, 402 U.S. 637, 644 (1971).

31. Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977) ("This inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written."). Interpreting the federal and state regulations is virtually always required in preemption cases. *See infra* notes 35-38 and accompanying text.

32. International Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987) (Court found that to allow state law claims would interfere with the permit system established by Congress under the Clean Water Act.).

33. *Id.* at 494 ("[I]t is not enough to say that the ultimate goal of both federal and state law is to eliminate water pollution.").

34. Goldstein v. California, 412 U.S. 546, 554-55 (1973):

> We must . . . be careful to distinguish those situations in which the concurrent exercise of a power by the Federal Government and the States or by the States alone *may possibly* lead to conflicts and those where conflicts *will necessarily* arise. 'It is not . . . a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of [state]

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apply.[35] "The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law."[36] Thus, whenever two sets of regulations are being examined for compatibility, the court must engage in the process of statutory construction. The necessary first step in such an analysis is for the court to examine the language of the federal regulation and its legislative history.[37] The court must then compare the language and purpose of the state regulation to determine the question of preemption.[38]

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sovereignty.'" (emphasis in original) (quoting THE FEDERALIST No. 32 at 243 (B. Wright ed. 1961)).

See also Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982) ("The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute.").

35. Palmer v. Liggett Group Inc., 825 F.2d 620, 625-26 (1st Cir. 1987) ("[W]e do not find [the implied pre-emption categories] necessarily helpful, and certainly do not deem them determinative in ascertaining preemption. Rather, the gist of preemption is whether Congress . . . impliedly . . . meant to displace state law or state law concepts in enacting the federal law."). As Professor Tribe has explained, "[t]hese . . . categories of preemption are anything but analytically air-tight. For example, even when Congress declares its preemptive intent in express language, deciding exactly what it meant to preempt often resembles an exercise in implied preemptive analysis." L.TRIBE, AMERICAN CONSTITUTIONAL LAW, at 481 n.14 (1988).

36. Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 369 (1986). *See also* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987) (The "sole task is to ascertain the intent of Congress."); Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 210 (1959) ("[T]he proper approach is to determine whether the continued existence of the state law is consistent with the general purpose of the federal statute by seeking to define the evil Congress sought to remedy and the method chosen to effectuate its cure.") (footnote omitted).

37. The Court often examines, in addition to the language of the statute or other regulation, Congressional Committee Reports, debates, hearings and other sources of legislative history. *See, e.g.*, City of Milwaukee v. Illinois, 451 U.S. 304, 317-18 (1981); City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 634-37 (1973). Although there has been a recent re-emergence of the "plain meaning rule" whereby advocates urge that legislative history be ignored, the better approach to statutory interpretation includes an examination of all relevant material. *See* Farber & Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988):

> American public law has quite properly recognized that statutory meaning is necessarily greatly influenced by statutory context. Legislative history is part of that context, and some aspects of it—such as committee reports—will frequently represent the most intelligent exposition available of what the statute is all about. Legislative history is, after all, merely evidence of intent. That it may not be perfectly reliable evidence is no reason to exclude it from consideration entirely.

Id. at 448. *See also* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538-39 (1947). *See also infra* note 147.

38. The purpose behind the state statute can be dispositive on the issue of preemption. In Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983), for example, the Court noted that the state's prohibition on nuclear power plant construction could conflict with the federal statute. As the Court explained, "a state judgment that nuclear power is not safe enough to be further developed would conflict directly with the countervailing judgment of the NRC [Nuclear Regulatory Commission]. . . that nuclear construction may proceed notwithstanding extant uncertainties as to waste disposal." 461 U.S. 190, 213 (1983). Since Congress had occupied the field of nuclear safety, the state statute would conflict with the federal if it were a safety measure.

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There is a presumption against preemption that affects the analysis of whether express or implied preemption exists.[39] The presumption against preemption is based in part on principles of federalism[40] and a concomitant hesitancy to intrude unduly on state powers. Where areas of traditional state regulation such as health and safety are involved, the Supreme Court has been particularly reluctant to preempt state law.[41] Restraint concerning preemption of state laws addressing health and safety also extends to state tort laws.[42] Because of this presumption

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The state regulation was an economic one rather than one aimed at nuclear safety, though, and since the federal provisions were not designed to address the issue of economic regulation, there was no preemption. *See supra* note 24. This is not to suggest that any avowed state purpose will be given credence by the Court. The rationale for the Supreme Court's adherence to the state's avowed purpose in *Pacific Gas & Electric* was deference to the Court of Appeals for the Ninth Circuit which had thoroughly examined the state regulation. 461 U.S. at 213-14.

39. *See* Maryland v. Louisiana, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law."); Chicago & North Western Transportation Co, v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981) ("Preemption of state law by federal . . . regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.' ") (quoting Florida Lime & Avocado Growers Inc., v. Paul, 373 U.S. 132, 142 (1963)); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). *But see* International Paper Co. v. Ouellette, 479 U.S. 481, 491 (1987) ("Although courts should not lightly infer pre-emption, it may be presumed when the federal legislation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation.") (footnote and citation omitted).

40. Goldstein v. California, 412 U.S. 546 (1973). In *Goldstein*, the Court, quoting from The Federalist, explained:

> An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the [Constitutional] convention aims only at partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States.

Goldstein, 412 U.S. at 552-53 (emphasis in original) (quoting THE FEDERALIST No. 32, at 241 (B. Wright ed. 1961)).

41. *See Rice*, 331 U.S. at 230 ("Congress legislated here in a field which the States have traditionally occupied. . . . So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (citation omitted). *See also* English v. General Elec. Co., 110 S.Ct. 2270 (1990); California v. ARC America Corp., 490 U.S. 93, (1989); Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 716, 719 (1985) (There is a presumption "that state and local regulation of health and safety matters can constitutionally coexist with federal regulation. . . .[T]he regulation of health and safety matters is primarily and historically, a matter of local concern.").

42. Silkwood v. Kerr-Mcgee, 464 U.S. 238, 255 (1984) ("Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted.") ; International Paper Co. v. Ouellette, 479 U.S. 481, 503-04 (1987) (Brennan, J. dissenting). This is not to say that the United States Supreme Court has never preempted a state common-law tort claim. *See, e.g.*, Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981). But the Court proceeds with caution when doing so. *See* Ferebee v. Chevron Chemical

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against preemption, courts are inclined not to preempt a state regulation when the federal regulation is ambiguous about preemption, or where valid arguments can be made both for and against preemption.[43] Alternatively, courts conclude that the area of preemption is so narrow that it permits the state regulation.[44] Thus, when courts construe federal and state laws for compatibility they must do so keeping in mind the presumption against preemption.

In addition to state statutes, state common law causes of action may be preempted because an award of damages can have a regulatory effect.[45] For example, in *San Diego Building Trades Council v. Garmon*,[46] the Court held that a common law claim may be preempted. The issue before the Court in *Garmon* involved the jurisdiction of the National

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Co., 736 F.2d 1529, 1542 (D.C.Cir. 1984), *cert. denied*, 469 U.S. 1062 (1984) (Determination of tort remedies "is a subject matter of the kind . . . traditionally regarded as properly within the scope of state superintendence.") (quoting Florida Lime & Avocado Growers Inc., v. Paul, 373 U.S. 132, 144 (1963)).

To preempt a common law cause of action would often leave the victim with no avenue for redress. Since states have a legitimate interest in compensating tort victims, courts have been hesitant to preempt such claims. *See* Gingold v. Audi-NSU Auto Union, A.G., 389 Pa. Super. 328, 340, 567 A.2d 312, 318 (Pa. Super. Ct. 1989) ("The presumption against preemption is explained on grounds which recognize, among other things, the States' long established interest in providing compensation for victims of torts."); Kociemba v. G.D. Searle & Co., 680 F. Supp. 1293 (D. Minn. 1988). *See also* International Paper Co. v. Ouellette, 479 U.S. 481 (1987). In *Ouellette* the Court did not preempt all state common law nuisance claims. Unlike *Silkwood*, however, there was an express savings clause which left certain authority to regulate water pollution in the hands of the states. *Id.* at 493.

43. *See Gingold*, 389 Pa. Super. at 340-41, 567 A.2d at 319 ("[I]f we are left in doubt as to congressional purpose, we should be slow to find preemption, 'for the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden.' ") (quoting Penn Dairies v. Milk Control Comm'n, 318 U.S. 261, 275 (1943)).

See also Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986), where the Court was confronted with the issue of whether the Communications Act of 1934 preempted state depreciation regulations used to set intrastate rates. In deciding that the Act did not preempt the states' ability to regulate intrastate depreciation, the Court noted that, "[l]ike many statutes, the Act contains some internal inconsistencies, vague language, and areas of uncertainty. It is not a perfect puzzle into which all the pieces fit. Thus, it is with the recognition that there are not crisp answers to all of the contentions of either party that we conclude that [the Act] represents a bar to federal pre-emption of state regulation over depreciation . . . for intrastate ratemaking purposes." *Id.* at 379.

44. *See supra* notes 24-26 and accompanying text.

45. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247 (1959) ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief."); *Silkwood*, 464 U.S. at 249, 256 ("It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damage liability if it does not conform to state standards. . . .").

46. 359 U.S. 236 (1959).

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Labor Relations Board,[47] and the normal presumption against preemption[48] did not apply. Instead there was a presumption in favor of preemption.[49] The Court's decision to preempt the common law claim in *Garmon* does not necessarily affect other cases where the normal presumption against preemption applies. Thus, while common law claims may be preempted, such preemption is relatively rare. In fact, courts have been more reluctant to preempt common law claims where the presumption against preemption was in force,[50] acknowledging that awards of common law damages do not have the same regulatory effect as legislation or administrative regulations.[51] Such awards simply require defendants to pay plaintiffs certain sums of money. They do not mandate any other action by defendants.

In *Silkwood*,[52] the Supreme Court acknowledged this distinction between an award of common law damages and regulation by statute and held that an award of punitive damages was not preempted by federal law, notwithstanding the Court's finding that Congress occupied the field of nuclear safety and that states were therefore prohibited from regulating safety aspects of nuclear development.[53] The Court acknowledged that the juxtaposition of an award of punitive damages with the exclusive power of the federal government to regulate the safety aspects of nuclear development created a certain "tension,"[54] but it concluded that Congress intended to permit that tension to exist.[55] As the Court explained:

> In sum, it is clear that . . . Congress assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents. This was so even though it was well aware of the NRC's exclusive authority to regulate safety matters. No doubt there is a tension between the conclusion that safety regulation is the exclusive concern of the

47. *Id.* at 238.

48. *See supra* note 39 and accompanying text.

49. Garrett v. Ford Motor Co., 684 F. Supp. 407, 410 (D.Md. 1987).

50. Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 186 (1988) ("Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not."); English v. General Electric Co., 110 S.Ct. 2270 (1990).

51. Gingold v. Audi-NSU-Auto Union, A.G. 389 Pa. Super. Ct. 328, 345, 567 A.2d 312, 321 (Pa. Super. Ct. 1989) ("While we do not dispute that common law damage awards can have a regulatory impact, common law claims and regulation by state agencies or legislatures are not identical.") (citation omitted); Ferebee v. Chevron Chemical Co., 736 F.2d 1529, 1541 (D.C. Cir. 1984) ("[A common law damage award may] impose a burden on [defendant] but it is not equivalent to a direct regulatory command.").

52. 464 U.S. 238 (1984).

53. *Id.* at 250.

54. *Id.* at 256.

55. *Id.*

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> federal law and the conclusion that a State may nevertheless award damages based on its own law of liability. But . . . Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less. It may be that an award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to accept.[56]

In addition to express preemption and instances in which Congress has occupied the field, a state law may conflict with federal law because of a physical conflict, an objectives conflict, or a methods conflict. In addition, there is a presumption against preemption and a distinction between regulation by statute and regulation by a common law award of damages. With these principles in mind, the next section briefly discusses the development of the law of products liability in order to lay the foundation for analyzing the cases in section III, in which both products liability claims and preemption claims are at issue.

II. THE DEVELOPMENT AND EXPANSION OF PRODUCTS LIABILITY LAW

Products liability governs an individual's ability to receive compensation for personal injuries or property damage caused by a defective product.[57] Although there are today several theories upon which a plain-

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56. 464 U.S. at 256. Even Justice Blackmun, who, along with Justice Marshall, dissented in *Silkwood*, agreed that an award of compensatory damages would have only an indirect impact on the utility. They dissented because they felt that an award of punitive damages had too great a regulatory effect on defendant and that only compensatory damages should have been awarded. As they explain, "[t]he crucial distinction between compensatory and punitive damages is that the purpose of punitive damages is to regulate safety, whereas the purpose of compensatory damages is to compensate victims." *Id.* at 263. Justices Blackmun and Marshall further described the distinction between direct regulation by legislation and indirect regulation by a common law award of damages:

> When a victim is determined to be eligible for a compensatory award, that award is calculated by reference to the victim's injury. Whatever compensation standard a State imposes, whether it be negligence or strict liability, a licensee remains free to continue operating under federal standards and to pay for the injury that results. This presumably is what Congress had in mind when it preempted state authority to set administrative regulatory standards but left state compensatory schemes intact. Congress intended to rely solely on federal expertise in setting safety standards, and to rely on States and juries to remedy whatever injury takes place under the exclusive federal regulatory scheme. Compensatory damages therefore complement the federal regulatory standards.

Id. at 263-64 (Blackmun, J., dissenting).

57. M. MADDEN, PRODUCTS LIABILITY § 1.1 (2d ed. 1988). The product need not be defective if the cause of action is based on misrepresentation. *Id. See infra* note 85.

tiff may base a products liability claim,[58] until 1916, such claims depended upon privity between plaintiff and the manufacturer.[59] A plaintiff could recover for injuries sustained by a defective product only if he or she was the immediate purchaser or in privity with the seller.[60] A limited exception to the privity rule was established in cases where the product, to the manufacturer's[61] knowledge, was imminently dangerous.[62] In general, *caveat emptor* was the theory of the day.[63] This theory was based on the notion that buyers could protect themselves adequately by getting express warranties regarding product safety from sellers.[64]

Such limited ability to recover for damage caused by defective products perhaps helped spur the industrial revolution forward,[65] but it proved too harsh on victims of defective products.[66] For example, the privity requirement failed to account for purchases through middlemen, gifts, or injuries to bystanders. Moreover, many buyers were unaware that only an express warranty would protect them and therefore they never sought such protection. One response to the general rule of *caveat*

58. A products liability action may be based on breach of warranty (express or implied), negligence, strict liability or misrepresentation. M. MADDEN, *supra* note 57 at § 1.1.

59. Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842), is generally blamed for expanding the privity concept from contracts to torts.

60. W. PROSSER AND KEETON ON TORTS 681 (W. Keeton 5th ed. 1984) (hereinafter "PROSSER ON TORTS").

61. This section generally refers to "manufacturers." The rules set forth below, also apply to middlemen and other sellers as well. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 402A (1965).

62. Huset v. J.I. Case Threshing Mach. Co., 120 F. 865 (8th Cir. 1903).

63. Colorado Mortgage & Investment Co., Ltd. v. Giacomini, 55 Colo. 538, 136 P. 1039 (1913); Berg v. Rapid Motor Vehicle Co., 78 N.J.L. 724 (1910); Daley v. Quick, 99 Cal. 179, 33 P. 859 (1893).

64. PROSSER ON TORTS, *supra* note 60, at 679.

65. Heath v. Sears, Roebuck & Co., 464 A.2d 288, 123 N.H. 512 (1983); Berman v. Watergate West, Inc., 391 A.2d 1351 (D.C. 1978); Atkins v. American Motors Corp., 335 S.2d 134 (Ala. 1976); Dippel v. Sciano, 155 N.W.2d 55, 37 Wis. 2d 443 (1967).

66. Courts dissatisfied with these rigid requirements began to grant relief based on express warranty even where there was no privity. *See, e.g.*, Baxter v. Ford Motor Co., 12 P.2d 409 (Sup. Ct. Wash. 1932). In *Baxter*, plaintiff contended that Ford Motor Company expressly warranted that the windshield window of the car he purchased was made with shatterproof glass. Ford had distributed brochures which claimed that their cars were made with "Triplex shatter-proof glass windshield." Yet when a pebble hit plaintiff's car it caused the glass to shatter and injure plaintiff. The court permitted plaintiff's claim to go forward notwithstanding the fact that plaintiff had purchased the car from a car dealer and there was therefore no privity between plaintiff and Ford Motor Company.

It is not clear whether the *Baxter* court relied on an express warranty theory or whether it found misrepresentation on the part of Ford Motor Co. A products liability claim may be based on misrepresentation, RESTATEMENT (SECOND) OF TORTS § 402B (1966), as long as the misrepresentation is of a material fact that causes reasonable reliance by the consumer. *Id.* In such cases, the product need not be defective since liability is based on the representation by the seller rather than on the product. *Id.*

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emptor was the ruling by the New York Court of Appeals, in *MacPherson v. Buick Motor Co.*[67] *MacPherson* moved products liability law forward by holding that privity between buyer and seller is not necessary where the product is capable of serious injury if negligently made,[68] and that a duty may be owed by the manufacturer of a product not only to the *direct* purchaser but also to the *ultimate* purchaser.[69] Thus, the limitation on liability based on the notion that liability derived from contract was discarded. As Judge Cardozo explained, "[w]e have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law."[70] Other states quickly adopted *MacPherson*, which made negligence a readily accepted theory of liability in products liability cases.[71]

It was the theory of implied warranty, however, made popular by the leading case of *Henningsen v. Bloomfield Motors, Inc.*,[72] which paved the way for strict products liability. Where a court grants relief based on an implied warranty of merchantability,[73] for example, it does so regardless of whether the product manufacturer was negligent and despite the fact that no express warranty was made.[74] Liability based on an implied warranty of merchantability was found in *Henningsen*,[75] despite an express disclaimer of any warranties other than those expressly set forth in the agreement.[76] Moreover, the *Henningsen* plaintiff not only lacked

67. 217 N.Y. 382, 111 N.E. 1050 (1916).

68. *Id.* at 385, 111 N.E. at 1053.

69. In essence, the court recognized the reality of marketing products to middlemen who in turn resell to the ultimate consumers without further inspection or modification of the product. The court in *MacPherson* concluded: "if . . . there is . . . knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully." *Id.*

70. *Id.*

71. PROSSER ON TORTS, *supra* note 60 at 683. ("[MacPherson] found immediate acceptance, and at the end of some forty years is universal law in the United States."); RESTATEMENT (SECOND) OF TORTS § 395 comment a (1965).

72. 32 N.J. 358, 161 A.2d 69 (Sup. Ct. N.J. 1960).

73. An implied warranty of merchantability means "that the thing sold is reasonably fit for the general purpose for which it is manufactured and sold." Henningsen v. Bloomfield Motors, Inc., *Id.* at 370, 161 A.2d at 76.

74. *Id.* at 372, 161 A.2d at 77. *See also* Tuttle v. Kelley-Springfield Tire Co., 585 P.2d 1116 (Okla. 1978); Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958).

75. 32 N.J. 358, 161 A.2d 69 (1960).

76. In *Henningsen*, Chrysler attempted to limit its liability to the replacement of parts for a limited period of time. 32 N.J. at 367, 161 A.2d at 74. It relied on this disclaimer of warranty when

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privity, but had not even purchased the automobile. Instead, it was purchased by her husband from a car dealer and given to plaintiff as a Christmas present.[77]

Greenman v. Yuba Power Products, Inc.,[78] opened a new chapter in the development of products liability law. Although cases such as *Henningsen* approached a strict liability theory, *Greenman* was the first case to declare that liability for injuries caused by defective products may be based on strict liability. Just a few years later, section 402A of the Restatement (Second) of Torts was adopted,[79] which also establishes a strict liability standard in products liability cases[80] and expressly provides that privity between the injured party and the seller is not required.[81] As a result of *Greenman* and its progeny, and section 402A of the Second Restatement of Torts, strict liability has become a widely accepted basis for liability in products liability cases.[82] Strict liability allows the court to address its attention to the safety of the product rather than the conduct of the manufacturer.[83]

> We need not recanvass the reasons for imposing strict liability on the manufacturer. . . . The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers

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plaintiff was injured due to a defective steering mechanism. *Id.* at 369, 161 A.2d at 73. Chrysler contended that its limited warranty provision did not include personal injuries and that it was therefore not liable to plaintiff for the injuries she received. *Id.* at 366-67, 161 A.2d at 73-74.

77. *Id.* at 365, 161 A.2d at 73.

78. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

79. Under § 402A a "seller . . . engaged in the business of selling . . . a product" is subject to "liability for physical harm . . . caused to the ultimate user or consumer, or to his property" if he sells the "product in a defective condition unreasonably dangerous to the user or consumer [and] it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold." § 402A(1).

80. As § 402A(2) provides, the seller may be subject to liability even though he "has exercised all possible care in the preparation and sale of his product."

81. Seller may be strictly liable although "the user or consumer has not bought the product from or entered into any contractual relation with the seller." § 402A(2) (b).

82. PROSSER ON TORTS, *supra* note 60, at 694.

83. Strict products liability has been defined as "liability in tort for harm caused by defective products without any necessity for the plaintiff to show fault on the part of the defendant." HENDERSON & TWERSKI, PRODUCTS LIABILITY 133 (1987). The distinction between applying a strict liability versus a negligence theory of liability is one that courts continue to explore. As the court in Feldman v. Lederle Laboratories, 97 N.J. 429, 450-51, 479 A.2d. 374, 385 (1984), explains:

> The emphasis of the strict liability doctrine is upon the safety of the product, rather than the reasonableness of the manufacturer's conduct. . . . This difference between strict liability and negligence is commonly expressed by stating that in a strict liability analysis, the defendant is assumed to know of the dangerous propensity of the product, whereas in a negligence case, the plaintiff must prove that the defendant knew or should have known of the danger.

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> that put such products on the market rather than by the injured persons who are powerless to protect themselves.[84]

Since 1960, then, there has been a recognized policy of protecting and assisting individuals who have been injured by defective products.

Although the theories supporting products liability claims have expanded, the theory of liability does not end the inquiry. To prevail, a claimant must show that the product was *defective*.[85] Some jurisdictions require that the product be defective and unreasonably dangerous.[86] A product may be deemed defective for various reasons.[87] For example, it may contain a manufacturing flaw,[88] or a design defect.[89] In addition,

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84. Greenman v. Yuba, 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963). Other policies underlying strict products liability have been articulated. For example, Professor Henderson sets forth four goals of strict products liability: "encouraging investment in product safety, discouraging consumption of hazardous products, reducing transaction costs, and promoting loss spreading." Henderson, *Coping with the Time Dimension in Products Liability*, 69 CALIF. L. REV. 919, 931-32 (1981). Henderson also adds that strict products liability "has been supported on the ground that it responds to shared notions of fairness." *Id.* at 934.

85. As Professor Madden explains:

> [I]n a products liability action it is not enough to show only that an injury was caused by a product. Plaintiff is required to prove that the injury was caused by a defect in the product, and this is true whether the plaintiff proceeds on a theory of negligence, warranty, or strict tort liability. In misrepresentation, liability may be imposed for harm caused by a nondefective product, but in a products liability action, it is the *defectiveness* of the product that gives rise to liability. Thus knives may cut, steam may burn, automobiles may crash, and injury may result without liability on the part of the manufacturer or seller, if such injury was not caused by a defect in the product. The burden that the law places upon the manufacturer or seller is not to make or sell products that will not cause injury, but rather to make and sell nondefective products.

M. MADDEN, *supra* note 57, at § 1.1 (emphasis in original).

86. The language of RESTATEMENT (SECOND) OF TORTS § 402A (1966), which provides for strict liability when a product is sold in a "defective condition unreasonably dangerous" is ambiguous. It is unclear whether the product must simply be defective, or whether it must be both defective and unreasonably dangerous. Some courts and commentators, in an attempt to clarify the ambiguity, have devised their own terminology. *See, e.g.*, Phillips v. Kimwood Machine Co., 269 Or. 485, 525 P.2d 1033 (1974) (dangerously defective); Cronin v. J.B.E. Olson Corp., 8 Cal.3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972) (defective); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 14-15 (1965) (not duly safe). The court in *Phillips* felt that the precise terminology was not as important as the underlying concept: "We . . . feel that regardless of whether the term used is 'defective'. . . or 'defective condition unreasonably dangerous' . . . or 'dangerously defective ' . . . or 'not duly safe' . . . the same considerations will necessarily be utilized in fixing liability on sellers; and, therefore the supposedly different standards will come ultimately to the same conclusion." *Id.* at 491 n.3, 525 P.2d at 1036 n.3.

87. A defective product is a product that is not "safe for normal handling and consumption." RESTATEMENT (SECOND) OF TORTS § 402A comment h (1965).

88. Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981); Lantis v. Astec Industries, Inc., 648 F.2d 1118 (7th Cir. 1981); Elsroth v. Johnson & Johnson, 700 F. Supp. 151 (S.D.N.Y. 1988); Bowman v. G.M., 427 F. Supp. 234 (E.D. Pa. 1977).

89. O'Brien v. Muskin Corp., 94 N.J. 169, 463 A.2d 298 (1983); Campbell v. General Motors

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the manufacturer may fail to provide an adequate warning to the consumer.[90] The nature of the defect is important because the proof needed to prevail in a products liability case differs based on the type of defect involved.[91]

A manufacturing flaw exists when the product fails to conform to specification.[92] A design defect is involved when the item *did* conform to specification, but the specification itself rendered the product unsafe. For example, if a plane crashes and the investigation following the crash indicates that the crash was caused by the failure of the manufacturer to properly install the wing flap, rendering this particular aircraft different from others of the same model, the product would be defective based on that manufacturing flaw. Other aircraft of the same model which have the wing flaps properly installed would not be deemed defective.[93] Plaintiff could prove his case by comparing the defective product to the specifications.[94] If, however, the crash was caused by the manner in which the wing flaps are attached in all aircraft of this model, there arguably

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Corp., 32 Cal.3d 112, 649 P.2d 184, 224 Cal. Rptr. 891 (1982); Barker v. Lull Engineering Co., 20 Cal.3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

90. Feldman v. Lederle Laboratories, 97 N.J. 429, 449, 479 A. 2d 374, 384 (1984) (A "defect may take one of three forms: a manufacturing flaw, a design defect, or an inadequate warning."). *Cf.* Bryant v. Technical Research Co., 654 F.2d 1337 (1981); Odgers v. Ortho, 609 F. Supp. 867 (D.C. Mich. 1985); Petty v. U.S., 592 F. Supp. 687 (N.D. Iowa 1983).

Although these are the three most common theories upon which a defect may be based, product defects have been described in other ways as well. *See, e.g.*, Uniform Product Liability Act § 102(2), where a defect is described to include injury or damage caused by the "manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, or labeling of any product."; M. MADDEN, *supra* note 57, at § 1.1 ("[T]he defectiveness of the product may take many different forms: defectiveness in the manufacturing process, in design, inspection or testing, or in labeling or warning.").

Regardless of the type of defect involved in a particular case, the plaintiff must prove causation. Plaintiff must show that the defect in the product was the cause of his or her injury, HENDERSON AND TWERSKI, PRODUCTS LIABILITY 191 (1987), and must also show that the product was manufactured by the defendant. *Id.* at 192.

91. In a strict products liability case based on defective design or manufacturing flaw, plaintiff must show that "the injury resulted from a condition in the product, that the condition was an unreasonably dangerous one, and that the condition existed at the time the product left the defendant's control." M. MADDEN, *supra* note 57, at § 12.21.

92. *See Barker*, 20 Cal. 3d at 429, 573 P.2d at 454, 143 Cal. Rptr. at 235 ("[W]hen a product comes off the assembly line in a substandard condition it has incurred a manufacturing defect.").

93. In an analogous situation involving cars, many states have enacted "lemon laws" to financially protect consumers who purchase cars with serious manufacturing flaws. *See, e.g.*, KAN. STAT. ANN. §§ 50-645 (1988 Supp.); TEX. CIV. CODE ANN. art. 4413 (36) § 6.07 (Vernon 1989 Supp.). *Cf.* Chrysler Corp. v. Texas Motor Vehicle Comm'n, 755 F.2d 1192 (1985); Ford Motor Credit Co., Inc. v. Simms, 12 Kan. App. 2d 363, 743 P.2d 1012 (1987).

94. Proving a manufacturing flaw is not always easy. For example, some parts of the product may be missing or damaged beyond recognition. *See* M. MADDEN, *supra* note 57, at § 12.1.

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would be a design defect. The fact that the manner in which the wing flaps are installed in all similar aircraft creates a risk of accidents is not conclusive on the issue of design defect. The determination of whether a product is defectively designed is a complex one involving several considerations. For example, before a design is deemed defective an assessment of the technology available to make the product safer must be considered along with the costs involved in doing so.[95]

The most common test for determining whether a product is defectively designed is the risk-utility test[96] which attempts to assess whether the product's utility outweighs its risks.[97] The risk-utility test can be viewed as a two-pronged approach. First, a determination must be made whether the risk associated with a product outweighs its utility. If it does, and no safer alternative is available, it should not be on the market.[98] On the other hand, if the utility of a product outweighs its risks, it still may contain a design defect. If the product could be made safer at a reasonable cost, without impairing its utility, the product may be defective for not having been made safer.[99] This does not mean that a manu-

95. *See infra* note 101 and accompanying text.

96. *See, e.g.*, Ortho Pharmaceutical Corp. v. Heath, 722 P.2d 410 (Colo. 1986); Macri v. Ames McDonough Co., 211 N.J. Super. 636, 512 A.2d 548 (N.J. Super. Ct. App. Div. 1986); Voss v. Black & Decker Mfg. Co., 59 N.Y.2d 102, 450 N.E.2d 204, 463 N.Y.S.2d 398 (1983).

97. A second test for determining whether a product is defective is the consumer expectation test. RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965). Under this test the product is defective if it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it with the ordinary knowledge common to the community as to its characteristics." *Id. See also* Larry D. Hudson, LDH, Inc. v. Townsend Associates, 704 F. Supp. 207 (D.Kan. 1988); Barker v. Lull Engineering Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). This test has been criticized because it may not adequately encompass all situations in which a product is in fact defectively designed. *See, e.g.*, Birchfield v. Int'l Harvester Co., 726 F.2d 1131 (6th Cir. 1984); Lester v. Magic Chef, Inc., 230 Kan. 643, 641 P.2d 353 (1982) (Prager, J., dissenting); *Barker*, 20 Cal.3d at 430, 573 P. 2d at 454, 143 Cal. Rptr. at 236 ("[A] product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that . . . the risk of danger inherent in the challenged design outweighs the benefits of such design."); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973). As one judge noted the consumer expectation test focuses on "the mind of the consumer" rather than on the product. *Lester*, at 657, 641 P. 2d at 363 (Prager, J., dissenting). Thus, the consumer expectation test is not used as often today as it was when strict liability was originally adopted as a basis of liability in product defect cases.

If the plaintiff's claim is that the manufacturer either failed to provide a warning or provided an inadequate warning, courts have used both the risk-utility test and the consumer expectation test. Hunt v. City Stores, Inc., 387 So.2d 585 (La. 1980).

98. PROSSER ON TORTS, *supra* note 60, at 699-700.

99. *See* Cipollone v. Ligget Group, Inc., 649 F. Supp. 664, 671 (D.N.J. 1986):

> [Under t]he first prong of risk/utility analysis . . . the . . . question . . . is whether the product's risks outweigh its usefulness as it is employed by the consumer. If so, it would be within that category of "products, including some for which no alternative exists,

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facturer becomes an insurer of its products.[100] Rather a balancing process is required. This balancing generally involves the consideration of seven factors.[101] If, after considering these factors the court concludes that the product could have been designed in a safer manner at a reasonable cost, it may conclude that the design the manufacturer chose was defective.[102]

> [which] are so dangerous and of such little use that under the risk utility analysis, a manufacturer would bear the cost of liability of harm to others." O'Brien v. Muskin Corp., 94 N.J. 169, 184, 463 A.2d 298, 306 (1983). It is only when this prong of risk/utility analysis is decided in the defendant's favor, *i.e.*, when it has already been determined that the product's utility does indeed outweigh its risks, that the adequacy of the defendant's warnings [or design alternatives] even potentially enters the analysis.

100. *See, e.g.*, Honda Motor Co. v. Kimbrel, 376 S.E.2d 379, 383 (Ga. App. 1988) ("The manufacturer is under no obligation to make a machine 'accident proof or foolproof.' ") (citation omitted).

101. These seven factors, sometimes known as the Wade factors, because they were first articulated by Professor Wade in 1973 are:

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

Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837-38 (1973).

The reasonableness of defendant's conduct in creating a particular design or providing a certain warning may also be considered. Feldman v. Lederle Laboratories, 97 N.J. 429, 451, 479 A. 2d 374, 385 (1984) ("When the strict liability defect consists of an improper design or warning, reasonableness of the defendant's conduct is a factor in determining liability. . . . The question in strict liability design defect and warning cases is whether, assuming that the manufacturer knew of the defect in the product, he acted in a reasonably prudent manner in marketing the product or in providing the warnings given.") (citation omitted). The difference between this standard and the standard used in an ordinary negligence case is that knowledge of the defect is imputed to the manufacturer.

102. It is recognized that there are certain products, for example, experimental drugs, which are, to some degree, "unavoidably unsafe," but which nevertheless have great utility. The manufacturer will not be liable simply because there are serious risks associated with such products. RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965), outlines the type of products which would be considered unavoidably unsafe:

> *Unavoidably unsafe products.* There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably

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Even if a product is designed as safely as possible given the state of the art in the industry, it may be defective because the manufacturer either failed to warn of risks associated with the product's use or gave an inadequate warning.[103] A manufacturer may be liable, for example, for "failure to warn adequately when it knows or should know that the product is likely to pose an unreasonable risk without warnings."[104] A manufacturer is not, however, required to warn of dangers that are commonly known.[105]

A case in which preemption is found prevents the plaintiff from having his or her case decided on the merits. No determination of negligence or breach of warranty is made. Nor is a determination made as to whether the product is defective. Thus, a finding of preemption displaces these traditional rules of products liability. The next section analyzes products liability cases in which the preemption defense was raised and examines the various approaches taken by the courts.

III. APPLICATION OF THE PREEMPTION DOCTRINE IN PRODUCTS LIABILITY CASES

When a defendant in a products liability case raises a preemption defense, the court, as in any other case involving preemption, must construe and compare the federal and state regulations to determine whether

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leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, *and accompanied by proper directions and warning,* is not defective, nor is it *unreasonably* dangerous (emphasis added).

103. M. MADDEN, *supra* note 57, at § 10.1. The risk-utility test may also be used for cases alleging failure to warn, although negligence is often a key factor in failure to warn cases. "[F]ailure-to-warn products liability cases have been brought under both negligence and strict liability. Negligence focuses on the conduct of the defendant, while strict liability focuses on the defective product irrespective of the conduct of the defendant. Courts have faced considerable difficulty in applying this theoretical distinction to failure-to-warn actions. . . . '[F]ailure to warn' implies that someone 'failed' to do something he was supposed to do. This characterization translates easily into the language of negligence. It is harder to fit 'failure to warn' under the rubric of strict liability." HENDERSON AND TWERSKI, PRODUCTS LIABILITY 366 (1987).

104. M. MADDEN, *supra* note 57, at § 10.1; HENDERSON AND TWERSKI, PRODUCTS LIABILITY 366 (1987).

105. RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965). "To be adequate, . . . a . . . warning, by its size, location and intensity of language or symbol, must be calculated to impress upon a reasonably prudent user of the product the nature and extent of the hazard involved. The language used must be direct and should, where applicable, describe methods of safe use. An adequate warning should also be timely and should advise of significant hazards from reasonably foreseeable misuse of the product and, where appropriate, antidotes for misuse." M. MADDEN, *supra* note 57, at § 10.1.

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they are consistent and can coexist.[106] The federal government regulates a wide range of products to varying degrees.[107] It is unlikely that the majority of such federal regulations were intended to displace common law tort claims,[108] particularly since tort claims involve areas traditionally regulated by the states.[109] Yet products liability defendants routinely raise the preemption defense. Two products often at issue in products liability preemption (PLP) cases are cigarettes[110] and automobiles.[111] This section focuses on the PLP cases involving these two products in which courts frequently preempt plaintiffs' claims.

A. *Cigarettes*

Individuals who develop lung cancer or some other disease associated with smoking[112] and sue cigarette manufacturers, generally base their claims on several grounds, including negligence, strict liability for design defect or failure to warn, misrepresentation, and breach of warranty. This variety of remedial theories is typical of other products lia-

106. *See supra* notes 36-38 and accompanying text.

107. *See supra* notes 1-6 and accompanying text.

108. As the court in Forster v. R.J. Reynolds Tobacco Co., 423 N.W.2d 691 (Minn. App. 1988), noted in a case involving a claim of preemption based on federal regulation of cigarette labeling:

> "[I]n today's society, virtually every sphere of activity is subject to comprehensive federal regulation. Accordingly, even in the most heavily regulated areas the Supreme Court has recognized federal regulation and state tort law can—and must—coexist. . . . No case illustrates this principle more dramatically than *Silkwood* . . . in which the Supreme Court refused to preempt a punitive damages award—even though the case involved the nuclear industry, one of the more pervasively regulated in the nation.

Id. at 697, *aff'd in part, rev'd in part*, 437 N.W.2d 655 (Minn. 1989).

109. Preemption is less likely to be found in areas traditionally regulated by the state such as health and safety. *See supra* note 41 and accompanying text. This principle has been conceded even by some courts which have gone on to preempt common law tort claims. *See, e.g.*, Cipollone v. Liggett Group, Inc., 789 F.2d 181, 186 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987) ("[T]he Cipollones' tort action concerns rights and remedies traditionally defined solely by state law. We therefore must adopt a restrained view in evaluating whether Congress intended to supersede entirely private rights of action such as those at issue here.")

110. *See generally* Note, *The Smoldering Issue in Cipollone v. Liggett Group, Inc.; Process Concerns in Determining Whether Cigarettes are a Defectively Designed Product*, 73 CORN. L. REV. 606 (1988); Note, *Plaintiffs' Conduct as a Defense to Claims Against Cigarette Manufacturers*, 99 HARV. L. REV. 809 (1986); Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423 (1980).

111. *See* Note, *Federal Preemption: Car-Makers' Cushion Against Air Bag Claims*, 27 DUQ. L. REV. 299 (1989); Miller, *Deflating the Airbag Pre-emption Controversy*, 37 EMORY L.J. 897 (1988).

112. Some of the diseases besides lung cancer, which plaintiffs claim were caused by smoking, include peripheral atherosclerotic vascular disease, Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 232 (6th Cir. 1988), and cancer of the esophagus, Pennington v. Vistron Corp., 876 F.2d 414 (5th Cir. 1989) (claim was that cancer of the esophagus was caused by chemicals in the workplace in conjunction with cigarette smoking).

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bility cases.[113] Except for their failure to warn claims, however, plaintiffs' chance of success on the merits is slim.[114] Plaintiffs' claims in cases involving cigarettes, particularly those based on an inadequate warning, raise a preemption issue because of the Federal Cigarette Labeling and Advertising Act.[115] The Cigarette Act was enacted in 1966 in response to the growing awareness of the health risks associated with cigarette smoking.[116] The Cigarette Act was intended primarily to inform the public of the health risks associated with cigarette smoking, although it also establishes as a subsidiary and competing goal, the protection of the economy.[117] The Cigarette Act specifies the warning label

113. Products liability claims are often based on several alternate theories including negligence, strict liability, misrepresentation and breach of warranty. *See supra* notes 57-84 and accompanying text.

114. This difficulty is due, in part to RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965), which states in pertinent part, "[g]ood tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful." The comments to § 402A also focus on consumer expectations, *id.*, thus causing some courts to conclude that since the dangers of smoking are widely known, the consumer expectation has been met. In Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230 (6th Cir. 1988), for example, the Sixth Circuit directed a verdict for the defendant on this issue finding that cigarettes are neither defective or unreasonably dangerous given the fact that knowledge of the hazards associated with tobacco use is widespread. *Id.* at 236. *But see* Dewey v. Brown & Williamson Tobacco Corp., 225 N.J. Super. 375, 542 A.2d 919 (1988), *aff'd in part, rev'd in part, sub nom.* Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 577 A.2d 1239 (1990), where the court noted that the consumer expectation test did not displace the risk-utility test. Thus, whether " 'defendant had the technological expertise to minimize the unavoidable [i.e., inherent] dangers attendant to cigarette smoking' " could be considered by the jury. 225 N.J. Super. at 380, 542 A.2d at 925 (citation omitted). In Kotler v. American Tobacco Co., 685 F. Supp. 15 (D.Mass. 1988), the court quoted from comment i of § 402A, but, like the court in *Dewey,* noted that plaintiff's design defect claim involved issues of fact for resolution by the jury. As the court in *Kotler* explained, "[p]laintiff alleges that the cigarettes were inadequately tested and designed, and that they contained toxic or carcinogenic ingredients. Plaintiff has sufficiently pleaded that the tobacco was 'bad.' " *Id.* at 20.

115. 15 U.S.C. § 1331-41 (1988). [hereinafter Cigarette Act].

116. A 1964 Report by the Surgeon General's Advisory Committee found that cigarette smoking was related to lung cancer, cancer of the larynx, chronic bronchitis, emphysema, and cardiovascular diseases. H.R. REP. No. 449, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 2350, 2359. The Report concluded that "[c]igarette smoking is a health hazard of sufficient importance to the United States to warrant appropriate remedial action." *Id.* There was a strong public response to this report. *See* Palmer v. Liggett Group, Inc., 825 F.2d 620, 622 (1st Cir. 1987); Dewey v. R.J. Reynolds Co., 121 N.J. 69, 80, 577 A.2d 1239 (1990).

117. Section 1331 of the Cigarette Act provides:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent

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that must be placed on each package of cigarettes.[118] The Cigarette Act also includes a preemption provision,[119] which, it may be argued, expressly preempts failure to warn claims. A close reading of the statutory language, however, illustrates that it simply prohibits states from requiring a label on cigarette packages other than the labels required by the Cigarette Act.[120] It is silent with respect to common law tort claims.[121] Although the states cannot legislate that labels other than those set forth in the Cigarette Act be placed on cigarettes, there is nothing to prevent cigarette companies from discharging their common law duties better by

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consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

118. Under the initial Cigarette Act the required label read:

> Caution: Cigarette Smoking May Be Hazardous to Your Health.

Pub.L. No. 89-92, § 4, 79 Stat. 282, 283 (1965).

After concluding that the initial warning was insufficient, the required warning label was modified in 1970 as follows:

> Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.

15 U.S.C. § 1333 (1965), *amended by* 15 U.S.C. § 1333 (1970).

In 1984, Congress again changed the mandated warnings. Unlike the previous required labels, however, the 1984 amendments require that the cigarette manufacturers rotate four different labels quarterly:

> 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.

15 U.S.C. § 1333 (1984).

The fact that it has been necessary for Congress periodically to strengthen the language of the warnings suggests that the initial warnings were inadequate. Congress has yet to require a warning label which states that cigarette smoking is addictive, although Surgeon General Koop has so found. U.S. DEPT. OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION: A REPORT OF THE SURGEON GENERAL (1988).

119. Section 1334 of the Cigarette Act provides:

> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) 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.

120. *Id.*

121. As section I of this article explains, direct regulation by legislation or administrative action is not equivalent to indirect regulation by a common law award of damages. *See supra* notes 45-56 and accompanying text. *See also infra* notes 159-66 and accompanying text.

electing to include additional warnings, without state compulsion.[122] Since 1985 there have been numerous cases which address the question whether the Cigarette Act preempts common law products liability claims involving inadequate warnings.[123]

To date, all the courts that have considered the question have held that the Cigarette Act does not *expressly* preempt such common law claims.[124] This is because there is no provision in the Cigarette Act that expressly provides that state common law tort claims are preempted;[125] the Act is silent on this issue. Only two things are expressly preempted by the Cigarette Act. First, the state cannot "require" any warning label on packages of cigarettes other than the labels required by the Act.[126] Second, the Act preempts any state "*requirement or prohibition* [relating] to the advertising or promotion of any cigarettes" which have the required label on the package.[127] A successful common law claim does not require a cigarette manufacturer to change either its label or its advertising. It simply requires the defendant to compensate the plaintiff for his or her injuries. Thus, there has been universal agreement that there is no express preemption of failure to warn claims based on cigarette use, mak-

122. *See infra* note 166.

123. *See, e.g.*, Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230 (6th Cir. 1988); Stephen v. American Brands, Inc., 825 F.2d 312 (11th Cir. 1987); Gianitsis v. American Brands, Inc., 685 F. Supp. 853 (D.N.H. 1988); Herlihy v. R.J. Reynolds Tobacco Co., Prod. Liab. Rep. (CCH) ¶ 11,852 (D. Mass. 1988); Kotler v. American Tobacco Co., 685 F. Supp. 15 (D. Mass. 1988); Gunsalus v. Celotex Corp., 674 F. Supp. 1149 (E.D.Pa. 1987); Palmer v. Liggett Group, Inc., 633 F. Supp. 1171 (D. Mass. 1986), *rev'd*, 825 F.2d 620 (1st Cir. 1987); Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146 (D.N.J. 1984), *rev'd*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987); Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 577 A.2d 1239 (1990); Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655 (Minn. 1989); Phillips v. R.J. Reynolds Industries, Inc., 769 S.W.2d 488 (1989); Montana v. R.J. Reynolds Tobacco Co., 1.10 Tobacco Products Liability Rep. 2.229 (N.Y. Sup. Ct. 1986).

124. Pennington v. Vistron Corp., 876 F.2d 414, 418 (5th Cir. 1989) ("We must conclude that the Act does not expressly preempt . . . products liability claims."); Forster v. R.J. Reynolds Tobacco Co., 423 N.W.2d at 693 (Minn. 1988), *aff'd in part, rev'd in part*, 437 N.W.2d 655 (1989) (No court, including the trial court, has found state tort claims are *expressly* preempted by the Act.) (emphasis added); Cipollone v. Ligget Group, Inc., 789 F.2d 181, 185 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987); Roysdon v. R. J. Reynolds Tobacco Co., 849 F.2d 230, 234 (6th Cir. 1988) ("[W]e agree with the other circuits that have addressed this issue that § 1334 of the [Cigarette] Act does not expressly preempt state law claims.").

125. *Id.* Congress has, however, in other statutes, expressly preempted common law claims when it has seen fit to do so. *See, e.g.*, Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. §§ 1715z-17(d), 1715z-18(e) (Supp. II 1984); Copyright Act of 1976, 17 U.S.C. § 301(a); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a), (c) (1).

126. 15 U.S.C. § 1334(a) (1988).

127. 15 U.S.C. § 1334(b) (1988).

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ing it necessary for the courts to determine whether Congress *implicitly* preempted the common law tort action.

Manufacturers argue that the Cigarette Act implicitly preempts plaintiffs action because of Congress' express statement in the Cigarette Act that the purposes of the Act are 1) to have a uniform labelling requirement, and 2) to protect the national economy to the maximum extent possible consistent with protecting public health.[128] Interestingly, many trial level courts have concluded that inadequate warning claims are not preempted, but by and large, such decisions have been reversed.[129] To date, all five of the federal circuit courts and most state appellate courts that have considered the issue have held that the Cigarette Act implicitly preempts failure to warn claims.[130] Significantly, however, the Supreme Court of New Jersey has concluded, despite the Third Circuit holding to the contrary, that the Cigarette Act does not preempt failure to warn claims.[131] The implied preemption analysis involves a determination whether Congress, in enacting the Cigarette Act, occupied the field covered by plaintiff's claim, or whether there is a conflict between the state and federal regulations.[132] There is general agree-

128. *See supra* note 117 and accompanying text.

129. In Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146 (D.N.J. 1984), for example, the district court concluded, after a comprehensive analysis of the issues, that the Cigarette Act neither expressly or implicitly preempted plaintiff's failure to warn claims. The Third Circuit, however, reversed, finding that such claims were implicitly preempted because to allow the claims would disrupt the balance Congress sought to achieve between protecting public health and protecting the economy. 789 F.2d 181, 187 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987). Similarly in Palmer v. Liggett Group, Inc., 633 F. Supp. 1171 (D. Mass. 1986), *rev'd*, 825 F.2d 620 (1st Cir. 1987), the district court's refusal to preempt was reversed by the First Circuit. This procedural history has sometimes been mirrored in the state courts. In Forster v. R. J. Reynolds Tobacco Co., 423 N.W.2d 691 (Minn. App. 1988), *rev'd*, 437 N.W.2d 655 (Minn. 1989), for example, an excellent opinion by the court which concluded that the Cigarette Act did not preempt any of plaintiff's common law tort claims was reversed in part by the Supreme Court of Minnesota. The very recent case of Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 577 A.2d 1239 (1990), constitutes the first state supreme court decision to hold that the Cigarette Act does not preempt failure to warn claims.

130. *See* Pennington v. Vistron Corp., 876 F.2d 414 (5th Cir. 1989); Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230 (6th Cir. 1988); Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987); Stephen v. American Brands, Inc., 825 F.2d 312 (11th Cir. 1987); Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987). The Eleventh Circuit in *Stephen* simply issued a one page per curiam opinion, stating that it was following the Third Circuit opinion in *Cipollone*. ("We adopt the decision and reasoning of the Third Circuit in *Cipollone*.") *Cippollone*, 825 F.2d at 313; Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655 (Minn. 1989). *But see* Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 577 A.2d 1237 (1990).

131. *Compare Dewey*, 121 N.J. 69, 577 A.2d 1239, *with Cipollone*, 789 F.2d 181, *cert. denied*, 479 U.S. 1043. The court in *Dewey* noted that it was not obligated to follow *Cipollone* simply because the Third Circuit covers New Jersey. *Dewey*, 121 N.J. at 80, 577 A. 2d at 1244.

132. As noted above, implied preemption may be based on a finding that Congress occupied the field, leaving no room for any state regulation. Implied preemption may also be based on a conflict

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ment that there is no physical conflict between requiring a cigarette manufacturer to pay tort damages, and adhering to the federal warning label requirement established by the Cigarette Act.[133] Nor have the courts concluded that Congress occupied the field.[134] Instead, they have found implied preemption because of an objectives conflict—reasoning that to allow state common law claims to proceed would interfere with the purposes of the Cigarette Act.[135] In *Cipollone v. Liggett Group, Inc.*,[136] for example, an opinion that has been followed by several other courts,[137] the Third Circuit held that Congress did not occupy the entire field relating to cigarettes and health.[138] It did, however, find a conflict between the Cigarette Act and those of plaintiff's claims "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."[139] The court reasoned that to allow such claims to go forward would disrupt the balance Congress sought to achieve in the Cigarette Act between protecting the public health and protecting the national economy,[140] thus creating "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[141]

Other federal courts of appeals that have addressed the preemption issue have articulated similar reasons for finding implied preemption.[142]

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between the state and federal laws either because of a physical conflict, an objectives conflict or a methods conflict. *See supra* notes 20-33 and accompanying text.

133. Forster v. R. J. Reynolds Tobacco Co., 437 N.W.2d 655, 658 (Minn. 1989); Haight v. American Tobacco Co., 1.2 Tobacco Products Liability Rep. 2.52, 2.59 (S.D. W.Va. 1984).

134. Pennington v. Vistron Corp., 876 F.2d 414 (5th Cir. 1989); Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230 (6th Cir. 1988); Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987); Stephen v. American Brands, Inc., 825 F.2d 312 (11th Cir. 1987); Cipollone v. Liggett Group, Inc., 789 F.2d 181, 186 (3rd Cir. 1986); Kotler v. American Tobacco Co., 685 F. Supp. 15, 18 (D. Mass. 1988); Haight v. American Tobacco Co., 1.2 Tobacco Products Liability Rep. at 2.59.

135. *Pennington*, 876 F.2d at 421; *Palmer*, 825 F.2d at 626; *Roysdon*, 849 F.2d at 234;*Cipollone*, 789 F.2d at 187; Gianitsis Inc. v. American Brands, 685 F. Supp. 853, 859 (1988); *Forster*, 437 N.W.2d at 659; Phillips v. R.J. Reynolds, Prod. Liab. Rep. ¶ 11,810, at 33,859 (CCH) (Tenn. Ct. App. 1988), 769 S.W.2d 488 (1989).

136. 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987).

137. *See, e.g.*, Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230 (6th Cir. 1988); Stephen v. American Brands, Inc., 825 F.2d 312 (11th Cir. 1987).

138. 789 F.2d 181, 186 (3d Cir. 1986).

139. *Id.* at 187.

140. *Id.*

141. *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

142. *See, e.g.*, Roysdon v. R. J. Reynolds Tobacco Co., 849 F.2d 230, 234 (6th Cir. 1988). *See also* Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987), where the First Circuit similarly concluded that a common law tort action "disrupts excessively the balance of purpose set by Congress, and is thus preempted." *Id.* at 626. The Court in *Palmer* refused to try to fit its disposition of

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Courts that preempt tend to focus on two legislative goals: 1) the balance that Congress sought to achieve between warning the public of the hazards associated with cigarette smoking and protecting the economy,[143] and 2) the policy of uniform labeling.[144] The courts have concluded that to allow common law failure to warn claims will frustrate these objectives.

The courts that preempt impede the policies underlying the laws of products liability[145] and the Cigarette Act for four primary reasons. First, the courts finding preemption generally fail to examine the legislative history of the Cigarette Act. They often reason that the statute is clear on its face and that the legislative history need not be consulted for further enlightenment on Congressional intent.[146] This limited analysis is inappropriate for two reasons. First, the normal rules for statutory interpretation suggest that courts generally should consult legislative history.[147] Second, the language of the Cigarette Act is not clear on its face.

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the case into one of the traditional categories of implied preemption—conflict or occupation of the field. Instead, the court noted that "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law. . . . Thus, instead of attempting to fit the Act into some pre-cast mold of 'impossibility' or 'frustration,' we look to the effect the [plaintiffs'] suit will have on the federal scheme set up by Congress." *Id.* at 625-26.

143. *See, e.g.*, Pennington v. Vistron Corp., 876 F.2d 414 (5th Cir. 1989); *Roysdon*, 849 F.2d 230; *Palmer*, 825 F.2d 620.

144. 876 F.2d at 421; 849 F.2d at 234; 825 F.2d 620.

145. As discussed in Section II of this article, the remedial theories have been expanded in products liability laws to help ensure that manufacturers rather than consumers pay the costs associated with defective products. *See supra* note 84 and accompanying text.

146. *See, e.g.*, *Palmer*, 825 F.2d 620 ("Because the language of the Act is straightforward and unambiguous, we need not resort to legislative history to determine congressional intent."); Cipollone v. Liggett Group, Inc., 789 F.2d 181, 186 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987) (No legislative material is "wholly dispositive of the issue before us. Even more important, we find the language of the statute itself a sufficiently clear expression of congressional intent without resort to the Act's legislative history."); Forster v. R.J. Reynolds, 437 N.W.2d 655, 660 (Minn. 1989) ("The best indication of Congressional intent . . . is what Congress said in the statute.").

147. Although there has been some movement toward ignoring legislative history as a means of determining legislative intent, the better approach is to use it in a practical manner. *See* Farber and Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988). In their article Professors Farber and Frickey criticize Justice Antonin Scalia and others who advocate total disregard of legislative history:

> [W]e consider and reject Justice Scalia's argument that legislative intent should be considered irrelevant even when it can be determined. We present a simple model of statutory interpretation using elementary decision theory. This model treats judges as rational decisionmakers who attempt to decipher legislative messages under conditions of uncertainty. Decision theory . . . suggests that statutory interpretation, like other judicial inquiries, is an exercise in practical reason rather than foundationalist formalism. One conclusion derived from the model is that subsequent legislative history should not be . . . rejected. . . . Justice Scalia and some of his fellow Reagan appointees have attempted to narrow the range of tools available to judges in construing statutes by elim-

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It makes no mention of common law tort claims. Thus, adherence to the plain meaning rule is particularly inappropriate in these cases. A survey of the cases involving failure to warn claims reveals that the courts that do not preempt engage in a more thorough statutory construction process. They have shown a greater willingness to analyze the legislative history of the Cigarette Act for guidance.[148]

A second criticism of the courts that preempt is that they treat the goals of protecting the economy and informing the public of health hazards as equal goals. If they examined the language of the Cigarette Act and its legislative history more closely, these courts would learn that the dual but competing purposes which Congress set forth in the Cigarette Act of protecting the public and protecting the economy are not equal goals. Protecting the economy is clearly secondary to that of protecting public health; as the Cigarette Act states, the primary purpose of the act is to keep the public "adequately informed about any adverse health effects of cigarette smoking."[149] Protecting the national economy is a subsidiary purpose to be achieved only "to the maximum extent consistent with the policy of keeping the public informed."[150] The legislative history is consistent with this hierarchy.[151] Permitting tort claims to proceed clearly furthers the goal of keeping the public informed by giving manufacturers an incentive to be as direct and forthright in their warnings as possible.[152] In treating the economic and health purposes of the

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inating any use of committee reports or subsequent legislative history. In our view, this is a step in the wrong direction; judges need as many tools as possible to help them in the difficult task of applying statutes.

Id. at 425, 469. *See supra* note 37 and accompanying text.

148. Palmer v. Liggett Group, Inc., 633 F. Supp. 1171 (D. Mass. 1986), *rev'd*, 825 F.2d 620 (1st Cir. 1987); Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 577 A. 2d 1239 (1990); Forster v. R.J. Reynolds, 423 N.W.2d 691 (Minn. Ct. App. 1988), *rev'd*, 437 N.W.2d 655 (1989).

149. 15 U.S.C. § 1331.

150. *Id. See also Dewey*, 121 N.J. 69, 577 A. 2d 1239 ("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.") (citation omitted).

151. For example, the House Report expressly states that "[t]he *principal* purpose of the bill is to provide adequate warning to the public of the potential hazards of cigarette smoking." H.R. REP. No. 449, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 2350 (emphasis added).

152. *See* Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 577 A. 2d 1239 (1990) ("It is clear that the allowance of such [common law tort] remedies will further, not impair, the goal of adequately informing the public of the risks of cigarette smoking."). Permitting the tort claim furthers the policies underlying products liability laws. Such laws are designed, in part, to provide an incentive to manufacturers to make safer products and to make the manufacturer bear the loss if the product is defective. *See supra* note 84 and accompanying text. A manufacturer that fails to warn or

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Cigarette Act as co-equals, the courts that preempt are failing to achieve the balance Congress sought.[153]

The courts that find preemption also focus on the Cigarette Act's stated goal of uniform labeling regulations.[154] Where the need to comply with varying state laws would be confusing or burdensome, the desire for uniformity may justify a finding of preemption.[155] Thus the strongest argument for a finding of implied preemption may be the congressional purpose to have uniform cigarette labeling.[156] But a careful examination of the Cigarette Act shows that the uniformity desired by Congress was not in the warning labels themselves, but in the regulation of such labels —the act only specifies that it seeks uniform *regulations*—not uniform labelling.[157] More important, to the extent that uniform labeling is a congressional goal it, like the goal of protecting the economy, is subsidiary to the "principal" goal of warning the public of the hazards associated with cigarette smoking. And the uniform labels required by the Cigarette Act will continue to be placed on each package of cigarettes notwithstanding a common law award of damages. The damage award will simply give the manufacturers an incentive to provide additional stronger warnings.[158]

Third, preemption of failure to warn claims fails to recognize the major distinction between direct state regulation by a legislative or administrative body on one hand, and indirect regulation by a common law award of damages on the other. The courts that refuse to preempt plaintiff's claims correctly make this distinction.[159] Moreover, it is a distinction that the Supreme Court recognized in *Silkwood v. Kerr McGee*

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provides an inadequate warning may therefore be liable for placing a defective product on the market. *See supra* notes 103-105 and accompanying text.

153. *See infra* note 241 and accompanying text.

154. *See supra* note 117.

155. *See supra* note 23 and accompanying text.

156. A cigarette manufacturer's liability in a common law tort claim for failure to warn may have the effect of defeating the goal of uniform cigarette labeling. In Palmer v. Liggett Group, Inc., 825 F.2d 620, 627-28 (1st Cir. 1987), the court observed that a damage award would force manufacturers to change their labels. *See infra* note 166 and accompanying text.

157. Section 1331 of the U. C. Act states as one of the purposes not to impede commerce by "nonuniform . . . cigarette labeling . . . *regulations*." (citation omitted) (emphasis added).

158. *See infra* note 166. The desire for uniformity should not make courts forget that they may respond faster than Congress to correct inadequate warnings and should be permitted to do so. Permitting plaintiffs to sue cigarette manufacturers may result in uniformly stronger warnings.

159. Dewey v. R. J. Reynolds Tobacco Co., 121 N.J. 69, 73-74, 577 A.2d 1239, 1248-49 (1990); Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146 (D.N.J. 1984), *rev'd*, 789 F.2d 181 (3d Cir. 1989), *cert. denied*, 479 U.S. 1043 (1987).

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Corp.[160] The Court did not preempt plaintiff's claim for punitive damages even though the Court found " '[s]tates are precluded from regulating the safety aspects of nuclear power' "[161] and that " 'the Federal Government has occupied the entire field of nuclear safety concerns.' "[162] In allowing plaintiff's common law claim for punitive damages, the Court acknowledged that "the promotion of nuclear power is not to be accomplished 'at all costs.' "[163] Since a common law damage award does not result in a directive for defendant to engage in any specified activity other than to pay the judgment, other effects on its behavior were indirect and permissible. Thus, although a state legislative or administrative action attempting to regulate the safety aspects of nuclear safety would have been preempted, a common law award of punitive damages was not.[164] With respect to the cigarette cases, the Cigarette Act clearly bars states from legislating warning labels other than those specified in the Act.[165] A common law award of damages does not mandate that the

160. 464 U.S. 238 (1984). For a description of the facts in *Silkwood see supra* notes 25-26 and accompanying text.

161. 464 U.S. at 250.

162. *Id.* at 249 (quoting Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 205 (1983)).

163. *Id.* at 257 (quoting Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 222 (1983)).

164. *See* English v. General Electric Co., 110 S. Ct. 2270 (1990). It has been suggested that the tobacco industry deserves less protection than the nuclear industry, which is designed to create an alternative energy source:

> The tobacco industry, as contrasted with the nuclear industry, is not developing alternative means of energy to fuel the democracies of the world. Rather, the tobacco industry is promoting a product which is known to cause disease. If the nuclear industry does not deserve protection "at all costs," certainly neither does the tobacco industry.

Forster v. R.J. Reynolds Tobacco Co., 423 N.W.2d 691, 698 (Minn. App. 1988), *rev'd*, 437 N.W.2d 655 (1989). *But see* Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987), where the First Circuit distinguished *Silkwood* from the cases involving the Cigarette Act and concluded that *Silkwood* was not applicable:

> [T]he Atomic Energy Act . . . at issue in *Silkwood*, contains no preemption provision whatever. Moreover, . . . the Act . . . expressly reserves significant authority to the states. . . . Further, the enactment and legislative history of the Atomic Energy Act . . . make clear Congress' explicit judgment that state common law damage actions for injuries caused by nuclear operations should be permitted to continue. . . . For that reason, it was the starting place in *Silkwood*, and common ground among all the parties (as well as among all the Justices of the Supreme Court), that state common law damages actions were *not* preempted; the only issue was the much more refined question of whether *punitive* damages (as opposed to compensatory damages) were preempted. . . . *Silkwood* thus took for granted the answer to the issue that is the central controversy here. It therefore sheds no light at all on the fundamental question in this case.

Id. at 628 (emphasis added).

165. 15 U.S.C. § 1334 (1988). *See* Pennington v. Vistron Corp., 876 F.2d 414, 418 (5th Cir.

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cigarette manufacturers change their warning labels; it simply requires that they pay an individual plaintiff a certain sum of money.[166] Thus the impact of any one case would not necessarily be as widespread as would state legislation.

Fourth, the courts that preempt failure to warn claims give insufficient weight to the fact that common law tort claims involve areas traditionally regulated by the states, and thus that there is a legitimate state interest in providing compensation to victims of defective products.[167]

1989) ("[Section 1334] expressly precludes a state legislature from mandating a warning different from that required by Congress.").

166. *See* Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal,* 53 S. CAL. L. REV. 1423, 1454 (1980). If an award of damages is made and a cigarette manufacturer chooses to enhance its warnings, this indirect impact on its conduct is permissible. In *Dewey*, the New Jersey Supreme Court discussed the options that would remain open to a cigarette manufacturer if it were found liable based on a failure to warn claim:

> [A] manufacturer . . . may change its conduct by (1) adding an additional warning which would not be barred under the Cigarette Act because the preemption section provides that no statement shall be "required," hence, there is no prohibition against a manufacturer "voluntarily" saying more; or (2) placing a package insert in the product, as has been done with a multitude of products; or (3) simply choosing to do nothing and risking exposure to liability.

121 N.J. 69, 90, 577 A.2d 1239, 1249 (1990).

The courts that preempt, however, argue that permitting the common law failure to warn action is itself an indirect requirement of a warning that it should not be permitted. They refuse to permit the state to do indirectly through damages what it could not do directly through prospective warning label compulsion. In Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987), the court stated:

> The District Court held that an award of damages "would have only an indirect effect on defendant's labeling and advertising practices." . . . [Plaintiffs] disingenuously maintain that any monetary damages awarded would not compel a manufacturer to change its label for, after all, "the choice of how to react is left to the manufacturer." This "choice of reaction" seems akin to the free choice of coming up for air after being underwater. Once a jury has found a label inadequate under state law, and the manufacturer liable for damages for negligently employing it, it is unthinkable that any manufacturer would not immediately take steps to minimize its exposure to continued liability. The most obvious change it can take . . . is to change its label. Effecting such a change in the manufacturer's behavior and imposing such additional warning requirements is the very action preempted by § 1334 of the Act.

Id. at 627-28.

167. *Dewey*, 121 N.J. at 90-91, 577 A.2d at 1249 ("[D]efendants' analysis completely ignores the fact that state-tort claims advance a substantial goal apart from regulating behavior: to provide compensation to those injured by deleterious products when that result is consistent with public policy."); Feldman v. Lederle Laboratories, 97 N.J. 429, 461, 479 A. 2d 374, 391 (1984) ("[T]here is a strong state interest in compensating those who are injured by a manufacturer's defective products.")

In Ferebee v. Chevron Chemical Co., 736 F.2d 1529 (1984), plaintiff asserted an inadequate warning claim despite the manufacturer's compliance with the labeling requirement of the Federal Insecticide Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y (1988) ("FIFRA"). FIFRA which, like the Cigarette Act, was enacted in 1966, also includes a preemption provision which states that a "State shall not impose or continue in effect any requirement for labeling in addition to or different

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Courts that have not preempted plaintiffs' claims or have expressed their disagreement with those that preempt tend to show greater concern than the preempting courts for the victims of defective products who otherwise have no redress.[168] These courts also recognize the impact of the tobacco lobby on the compromise Congress reached in passing the Cigarette Act.[169] That compromise permitted the continued existence of the tobacco industry, although requiring that the public be informed of the hazards associated with tobacco use. The courts that have not preempted plaintiff's common law tort claims have also reasoned that since there is a presumption against preemption, federalism warrants such a conclusion.[170]

Even the courts that have preempted have not found that the Cigarette Act is a basis for barring *all* tort claims; they have restricted preemption to claims based on failure to warn.[171] Thus, most courts permit plaintiffs to proceed with a claim that cigarettes are dangerously defective: that the product is defectively designed because its risks outweigh its utility.[172] Proving that the product is, in fact dangerously defective is not

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from those required under this subchapter." 7 U.S.C. § 136v(b) (1988). The court in *Ferebee* refused to preempt plaintiff's claims, acknowledging the state interest in compensating injured victims. *Id.* at 1540.

168. One court asked "whether Congress, without any express statement, has preempted state tort law and left injured victims without a remedy thus conferring tort immunity on the tobacco industry." *Forster*, 423 N.W.2d at 699-700, *rev'd*, 437 N.W.2d at 655. The Court of Appeals of Minnesota held in *Forster* that the plaintiff's claim was not preempted and noted that the presumption against preemption was "heightened" by, *inter alia*, the fact that "if state tort law is preempted, personal injury victims would be left without a remedy—a situation which has not been tolerated by either the United States Supreme Court or the Supreme Court of Minnesota." *Id.* at 696.

169. As the district court in *Cipollone* explained:

> It is ironic that the legislation which the tobacco industry sought so hard to defeat now serves to substantially immunize it from liability; and that deceiving the consuming public and concealing the truth from it is deemed to be an activity which Congress impliedly intended to protect in enacting this legislation. In essence, without any express authority from Congress, a single industry, for the first time in our country's history, may speak what is untrue, may conceal what is true, and may avoid liability for doing so merely by affixing certain mandated warnings to its products and advertising.

Cippollone v. Ligget Group, Inc., 649 F. Supp. 664, 675 (D.N.J. 1986) ("Indeed, the tobacco industry evidently can continue to deny or refute the risks of cigarette smoking with impunity and immunity so long as the little rectangle with the necessary language appears in its advertising and on its cigarette packages.") *Id.* at 667, *aff'd*, 822 F. 2d 335 (3rd Cir. 1987), *cert. denied*, 484 U.S. 976 (1987).

170. Dewey v. R.J. Reynolds, Inc., 121 N.J. 69, 577 A. 2d 1239 (1990); Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146 (D.N.J. 1984), *rev'd*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987).

171. Pennington v. Vistron Corp., 876 F.2d 414 (5th Cir. 1989); Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230 (6th Cir. 1988).

172. *See, e.g.*, Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479

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an easy task, particularly in a case involving cigarettes.[173] The courts have also permitted pre-1966 claims to stand, because such claims arose before the passage of the Cigarette Act.[174] In *Forster*, the court also allowed a claim based on intentional misrepresentation to stand.[175] Nonetheless, the difficulty of proving a design defect under the risk-utility or consumer expectation tests[176] causes the thrust of most plaintiffs' cases to be the inadequacy of the warning. When these claims are preempted, plaintiffs' ability to succeed on the merits is greatly diminished.[177] Courts faced with the issue in the future should thoroughly analyze both the Cigarette Act and its corresponding legislative history, recognize the priorities among congressional goals, and acknowledge that not all types of regulation are equivalent. They must also factor into their analyses the presumption against preemption, which should be given great weight in areas traditionally regulated by the state. By analyzing all these factors, they would conclude that the Cigarette Act does not preempt failure to warn claims.

B. *Automobiles*

In addition to cigarette cases, preemption arguments also arise regularly in automobile cases.[178] These cases generally involve claims that

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U.S. 1043 (1987); Kotler v. American Tobacco Co., 685 F. Supp. 15 (D.Mass. 1988); *Pennington*, 876 F.2d at 417.

173. *See supra* note 114.

174. *See, e.g.*, Forster v. R.J. Reynolds, 437 N.W.2d 655, 663 (Minn. App. 1989); *Kotler*, 685 F. Supp. 15.

175. 437 N.W.2d at 662 (Plaintiff's claim that the manufacturer made affirmative statements which were untrue would be actionable. "If the cigarette manufacturer chooses to provide further information on smoking as it relates to health, these statements, if they meet the requirements for a common law misrepresentation action, would be actionable. . . . The action is based on a duty to tell the truth, not on a duty to warn."). *But see* Cipollone v. Liggett Group, Inc., 893 F.2d 541 (3d Cir. 1990).

176. *See supra* note 114.

177. In Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 235-36 (6th Cir. 1988), the court addressed the merits of plaintiff's design defect claim, and focusing on consumer expectations, held that the cigarettes were neither defective nor unreasonably dangerous: "The normal use of cigarettes is known by ordinary consumers to present grave health risks, but that is not to say that defendant's cigarettes, when they left the hands of the manufacturer . . . were flawed. . . ." *Id.* at 236.

178. *See, e.g.*, Kitts v. General Motors Corp., 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 1781 (1990); Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 110 S. Ct. 1781 (1990); Pokorny v. Ford Motor Co., 714 F. Supp. 739 (E.D.Pa. 1989), *modified*, 902 F. 2d 1116 (3rd Cir. 1990); Kelly v. General Motors Corp., 705 F. Supp. 303 (W.D.La. 1988); Kolbeck v. General Motors Corp., 702 F. Supp. 532 (E.D.Pa. 1988); Reed v. Ford Motor Co., 679 F. Supp. 873 (S.D.Ind. 1988); Staggs v. Chrysler Corp., 678 F. Supp. 270 (N.D.Ga. 1987); Hughes v. Ford Motor Co., 677 F. Supp. 76 (D.Conn. 1987); Baird v. General Motors Corp., 654 F. Supp. 28 (N.D.Oh. 1986); Murphy v. Nissan Motor Corp., 650 F. Supp. 922 (E.D.N.Y. 1987); Richart v. Ford Motor

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the cars were defectively designed because they were not equipped with air bags[179] or some other passive restraint system.[180] Here, unlike the cigarette cases, there is greater disagreement among the courts about whether to preempt. Although the majority have preempted such claims,[181] a significant minority has refused to do so.[182] The preemption

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Co., 681 F. Supp. 1462 (D.N.M. 1988), *rev'd*, 875 F.2d 787 (10th Cir. 1989), *cert. denied* 110 S. Ct. 1781 (1990); Schick v. Chrysler Corp., 675 F. Supp. 1183 (D.S.D. 1987); Wattelet v. Toyota Motor Corp., 676 F. Supp. 1039 (D. Mo. 1987); Vanover v. Ford Motor Co., 632 F. Supp. 1095 (E.D.Mo. 1986); Honda Motor Co. v. Kimbrel, 189 Ga. App. 414, 376 S.E.2d 379 (1988), *cert. denied*, 189 Ga. App. 912, 376 S.E. 2d 379 (1989); Wickstrom v. Maplewood Toyota, Inc., 416 N.W. 2d 838 (Minn. App. 1987), *cert. denied*, 487 U.S. 1236 (1988).

179. *See, e.g.*, Gingold v. Audi-NSU-Auto Union, A.G., 389 Pa. Super. 328, 330, 567 A.2d 312, 314 (Pa. Super. Ct. 1989) (plaintiff claimed car should have been equipped with passive restraints). *See also* Pokorny v. Ford Motor Co., 714 F. Supp. 739, 740 (E.D.Pa. 1989), *modified*, 902 F. 2d 1116 (3rd Cir. 1990), *cert. denied*, 111 S. Ct. 147 (1990) (same); Kolbeck v. General Motors Corp., 702 F. Supp. 532 (E.D.Pa. 1989).

180. A passive restraint is one that involves no action on the part of the passenger, such as airbags or automatic seat belts. Federal Motor Vehicle Safety Standards, 49 C.F.R. § 571, 212 (1989). The claim in most cases is not that such a passive restraint could have helped avoid the initial collision, but that it could have minimized injury in the "second collision,"—the collision "between a passenger and an interior part of the vehicle, following [initial] impact or collision" with an external object. Caiazzo v. Volkswagenwerk, A.G., 647 F.2d 241, 243 n.2 (2d Cir. 1981). As a result of the manufacturers' failure to include such a passive restraint system, the plaintiffs argue that they have suffered "enhanced injuries." *See* Larsen v. General Motors Corp., 391 F.2d 495, 502 (8th Cir. 1968).

There is evidence that cars equipped with airbags would, in fact, help save lives. As early as 1979,the Insurance Institute for Highway Safety concluded that "nearly 39,000 persons died on the nation's highways from 1975 through 1978 who might have been saved by air bags." The Highway Loss Reduction Status Report, Vol. 14, No. 14, p.1 (Sept. 7, 1979). The Insurance Institute went on to criticize the attempt by Congress and the Department of Transportation ("DOT") to further delay the requirement of airbags: "[A] situation may be perpetuated that has gone on for years—the denial to the American motoring public of a crash protection technology that not only has already been thoroughly researched and tested, but also has proved itself in hundreds of violent, real-world car collisions." *Id.* at 1, 6. The same sentiment was voiced by Richard J. Haayen, the president of Allstate Insurance Company in a 1986 article he wrote for the Saturday Evening Post. As he explained: "[D]ramatic tests and 14 years of operating a large research fleet have helped Allstate document the effectiveness of air bags. In all crashes involving deployment in Allstate cars, injuries to drivers and passengers have been limited to, at most, minor cuts and bruises. . . . Their record of preventing or sharply reducing deaths and serious injuries in more than one *billion* miles of actual travel is unparalleled in highway safety annals. Haayen, *The Airtight Case for Airbags*, THE SATURDAY EVENING POST, Nov. 1986, at 38 (emphasis added). At least one member of Congress has also recognized the enhanced safety airbags provide. *See* 131 Cong. Rec. S15839 (Nov. 19, 1985) (Sen. Danforth) ("I am hopeful that more automobile manufacturers will . . . make this life-saving technology available on [a] broad scale.") *But see* 49 Fed. Reg. 28,985 (1984), where then Secretary of Transportation, Elizabeth Dole, opined that "airbags would not save any more lives than the belt system."

181. *See, e.g.*, Taylor v. General Motors Corp., 875 F.2d 816 (11th Cir. 1989) (implied preemption); Kitts v. General Motors Corp., 875 F.2d 787 (10th Cir. 1989) (implied preemption); Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988) (implied preemption); Pokorny v. Ford Motor Co., 714 F. Supp. 739 (E.D.Pa. 1989) (implied preemption); Kolbeck v. General Motors Corp., 702

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question arises in the automobile cases because the National Traffic and Motor Vehicle Safety Act[183] authorizes the Secretary of Transportation to establish safety standards for automobiles.[184] The Federal Motor Vehicle Safety Standards (FMVSS) that have been established pursuant to the Automobile Safety Act permit manufacturers to choose among different restraint systems, depending upon the year in which the car was manufactured.[185] "Mandatory air bags are not [among] the . . . options."[186]

F. Supp. 532 (E.D.Pa. 1988) (implied preemption); Staggs v. Chrysler Corp., 678 F. Supp. 270 (N.D.Ga. 1987) (implied preemption); Baird v. General Motors Corp., 654 F. Supp. 28 (N.D.Oh. 1986) (implied preemption); Cox v. Baltimore County, 646 F. Supp. 761 (D.Md. 1986) (express preemption); Vanover v. Ford Motor Co., 632 F. Supp. 1095 (E.D.Mo. 1986) (express preemption); Schick v. Chrysler Corp., 675 F. Supp. 1183 (D.S.D. 1987); Wattelet v. Toyota Motor Corp., 676 F. Supp. 1039 (D.Mo. 1987); Wickstrom v. Maplewood Toyota, Inc., 416 N.W. 2d 838 (Minn. Ct. App. 1988), *cert. denied*, 108 S. Ct. 2905 (1988) (express and implied preemption).

182. *See Gingold*, 389 Pa. Super. 328, 567 A.2d 312; *Richart*, 681 F. Supp. 1462, *rev'd*, 875 F.2d 787, *cert. denied*, 110 S. Ct. 1781; Garrett v. Ford Motor Co., 684 F. Supp. 407 (D. Md. 1987); Murphy v. Nissan Motor Corp., 650 F. Supp. 922 (E.D.N.Y. 1987).

183. 15 U.S.C. § 1381-1431 (1988) [hereinafter Automobile Safety Act]

184. 15 U.S.C. § 1392 (a) (1988), provides: "The Secretary shall establish by order appropriate Federal motor vehicle safety standards. Each such Federal motor vehicle safety standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms."

185. FMVSS 208 sets forth the safety standards for cars. 49 C.F.R. § 571.208 (1989). The requirements have changed every few years because the DOT continues to change its position with respect to what safety equipment should be required in automobiles. Thus, the FMVSS has had a very checkered history. As one court explains:

> [In 1967] the National Highway Traffic Safety Administration ("NHTSA") of the. . . DOT adopted FMVSS 208, which required the installation of seat belts. 32 Fed. Reg. 2408, 2415 (Feb. 3, 1967). Two years later, the NHTSA published an advance notice of proposed rulemaking, which requested information on "passive occupant restraint systems." 34 Fed. Reg. 11148 (July 2, 1968). NHTSA amended FMVSS 208 in November 1970 to require the installation of passive restraints for front seat passengers, effective July 1, 1973 and for all other passengers, effective July 1, 1974. 35 Fed. Reg. 16927 (Nov. 3, 1970). Four months later, the NHTSA amended FMVSS 208 to postpone the effective dates until August 15, 1973 and August 15, 1975, respectively. 36 Fed. Reg. 4600 (Mar. 10, 1971). FMVSS 208 was further amended in 1972 so that with respect to front seat passengers, automobiles built between August 15, 1973 and August 15, 1975 could be equipped either with passive restraint systems or an ignition interlock system which would prevent the vehicle from starting if lap and shoulder belts were not utilized; by August 15, 1975, rear seat passengers also were to be protected by passive restraints. 37 Fed. Reg. 3911 (Feb. 24, 1982).... In 1974, Congress enacted 15 U.S.C. § 1410b(b)-(d) which . . . prohibited the DOT from requiring airbags . . . without special administrative proceedings and Congressional review. Thereafter, the DOT vacillated on its position regarding passive restraint systems. . . . [The current standard] requires automobiles to be equipped with three-point seat belts until September 1, 1986, when thereafter passive restraint systems become mandatory on a phase-in basis until September 1, 1989.... [49 Fed. Reg.] 29009-10, 28999-29000, 28963[(July 17, 1984)]. However, the passive restraint requirement will be rescinded if, by April 1, 1989, states with two-thirds of the United States population adopt mandatory seat belt laws. *Id.* at 29010, 28963, 28998. (footnotes omitted).

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Like the Cigarette Act, the Automobile Safety Act is designed to protect the public.[187] Unlike the Cigarette Act, however, the twin goals of protecting the public and the economy are not both present under the Automobile Safety Act.[188] Rather, protecting the public from death and injuries resulting from automobile accidents is essentially the sole goal of the Automobile Safety Act.[189] Thus, courts in the automobile cases need not balance competing goals; such balancing underlies many of the preemption findings in the cigarette cases.[190]

In addition, unlike the Cigarette Act, the Automobile Safety Act includes a savings clause that expressly preserves common law claims. Section 1397(c) provides that "[c]ompliance with *any* Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."[191] This savings clause appears to decide the preemption issue in favor of plaintiffs.[192] There are, however, two other provisions of the Safety Act that make the preemption analysis more complex. First, section 1392(d) states that Congress intended to preempt state regulation of motor vehicle safety

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Hughes v. Ford Motor Co., 677 F. Supp. 76, 80-81 (D.Conn. 1987). For another detailed account of the history behind FMVSS, see Miller, *Deflating the Airbag Pre-emption Controversy*, 37 EMORY L.J. 897 (1988).

186. Kelly v. General Motors Corp., 705 F. Supp. 303, 305 (W.D.La. 1988); 49 C.F.R. § 571.208 (1989).

187. 15 U.S.C. § 1381 (1988) provides:

> Congress hereby declares that the purpose of this chapter is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents. Therefore, Congress determines that it is necessary to establish motor vehicle safety standards for motor vehicles and equipment in interstate commerce; to undertake and support necessary safety research and development; and to expand the national driver register.

Uniformity is not an express purpose under this section. *Cf.* Kolbeck v. General Motors Corp., 702 F. Supp. 532, 537 (E.D. Pa. 1988). It is a purpose, however, according to the legislative history of the Act. *See* S. REP. NO. 1301, 89th Cong., 2d Sess. 12 (1966), *reprinted in* 1966 U.S. CODE, CONG. & ADMIN. NEWS, 2709 ("[M]otor vehicle safety standards [should] be not only strong and adequately enforced, but [should also be] uniform throughout the country."); 15 U.S.C. § 1392(d) (1988).

188. 15 U.S.C. § 1381 (1988).

189. "The committee intends that safety shall be the overriding consideration in the issuance of standards under this bill." S. REP. NO. 1301, 89th Cong., 2d Sess. 12 (1966), *reprinted in* 1966 U.S. CODE, CONG. & ADMIN. NEWS, 2709, 2714. Another, subsidiary goal is the desire for uniform safety standards. *Id.* at 2720.

190. *See supra* notes 140-144 and accompanying text.

191. 15 U.S.C. § 1397(c) (1988) (emphasis added).

192. In at least one case, the court suggested that § 1397(c) does decide the issue in favor of the plaintiff. In Reed v. Ford Motor Co., 679 F. Supp. 873 (S.D.Ind. 1988), the court stated, "it [is] difficult to imagine a clearer expression of congressional intent *not* to preempt state common law. Given the unambiguous language of subsection 1397(c) this court has no need to consider the defendant's preemption argument any further." *Id.* at 880 (emphasis added).

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equipment that is not identical to the federal regulations.[193] Second, section 1410b, a 1974 amendment to the Automobile Safety Act, provides that air bags are not to be required by the Department of Transportation unless specific procedural requirements are satisfied.[194] These three sections of the Automobile Safety Act must be construed in a manner that gives effect to all provisions.[195]

Despite the lack of competing goals and the existence of the savings clause, several courts have held that claims of defective design for failure to equip cars with airbags are expressly preempted by the Automobile Safety Act.[196] These courts reason that a state common law damage award is a form of regulation and that such regulation, not being identical to the federal regulation, is impermissible under section 1392(d).[197]

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193. 15 U.S.C. § 1392(d) (1988) provides:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

194. 15 U.S.C. § 1410b(b) (1988) provides:

> (2) Except as otherwise provided in paragraph (3), no Federal motor vehicle safety standard respecting occupant restraint systems may-
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> (A) have the effect of requiring, or
>
> (B) provide that a manufacturer is permitted to comply with such standard by means of, an occupant restraint system other than a belt system.
>
> (3) (A) Paragraph (2) shall not apply to a Federal motor vehicle safety standard which provides that a manufacturer is permitted to comply with such standard by equipping motor vehicles manufactured by him with either—
>
> (i) a belt system, or
>
> (ii) any other occupant restraint system specified in such standard.
>
> (3) (B) Paragraph (2) shall not apply to any Federal motor vehicle safety standard which the Secretary elects to promulgate in accordance with the procedure specified in subsection (c) of this section, unless it is disapproved by both Houses of Congress by concurrent resolution in accordance with subsection (d) of this section.

195. Gingold v. Audi-NSU-Auto Union, A.G., 389 Pa. Super. 328, 587 A.2d 312 (Pa. Super. Ct. 1989) (quoting American Textile Manufacturers Institute, Inc. v. Donovan, 452 U.S. 490, 513 (1981) ("[A]ll parts of a statute, if possible, are to be given effect.")).

196. *See, e.g.*, Heftel v. General Motors Corp., No. 85-1713, slip op. (D.D.C. Feb. 23, 1988), 1988 WL 19615; Vanover v. Ford Motor Co., 632 F. Supp. 1095, 1096-97 (E.D.Mo. 1986); Cox v. Baltimore County, 646 F. Supp. 761, 763 (D.Md. 1986).

197. *See supra* notes 52-56. Although § 1392(d) prohibits the states from enacting regulations different from the federal regulation, it permits states to enact regulations which are identical to the federal regulations. To that extent, § 1392(d) does not preempt the states from regulating automobile safety standards. *Cf.* Garrett v. Ford Motor Co., 684 F. Supp. 407, 409 (D.Md. 1987) ("Congress expressly permit[ted] identical regulation."); Honda Motor Co. v. Kimbrel, 189 Ga. App. 414, 376 S.E.2d 379 (1988) (Georgia automobile safety regulations less stringent than federal regulations under the Safety Act.)

The courts that expressly preempt plaintiffs claims also rely on § 1410b of the Safety Act which

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The courts that find *express* preemption, while paying lip service to the savings clause, essentially ignore it.[198] Their rationale is that section 1397(c) only applies to matters not covered by the FMVSS, or to claims of negligent compliance with the FMVSS.[199] Yet there is nothing in the Automobile Safety Act or its legislative history to support such a narrow construction.[200] The opinions that nevertheless give it this narrow construction are poorly reasoned. Savings clauses must be construed in a manner that furthers rather than impairs congressional intent.[201]

Most of the automobile cases in which preemption has been found have been based on implied preemption. Like the cigarette cases, the courts faced with preemption claims in automobile cases generally do not conclude that Congress has occupied the field,[202] or that there is a physical conflict between the federal statute and the state common law action.

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provides that air bags are not to be required by the Department of Transportation. *See supra* note 194. Section 1410(b) is not an absolute prohibition, however, on the Department of Transportation's ability to require airbags. It simply establishes the procedural prerequisites for doing so. *Id.*

198. *See* Staggs v. Chrysler Corp., 678 F. Supp. 270, 272-73 (N.D.Ga. 1987), where the court, after acknowledging the existence of § 1397(c) in an earlier part of the opinion, went on to state, "even though the.[Automobile Safety] Act does not speak to standards established by common law tort liability, the court concludes that Congress impliedly preempted the area of occupant restraint systems."

199. Cox v. Baltimore County, 646 F. Supp. 761, 764 (D.Md. 1986);Vanover v. Ford Motor Co., 632 F. Supp. 1095 (E.D.Mo. 1986); Hughes v. Ford Motor Co., 677 F. Supp. 76, 83 (D.Conn. 1987).

200. *See* Taylor v. General Motors Corp., 875 F.2d 816, 825 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1781 (1990) ("[W]e are inclined to reject the [defendants'] construction since it would render an entire section of the [Automobile] Safety Act superfluous."); Gingold v. Audi-NSU-Auto Union A.G., 389 Pa. Super. 328, 349; 567 A.2d 312, 323 (Pa. Super. Ct. 1989); Kolbeck v. General Motors Corp., 702 F. Supp. 532, 537 (E.D.Pa. 1988) ("The courts which find express preemption of passive restraint claims construe the savings clause to apply only to matters not covered by [federal safety standards] or in cases of negligent compliance with [them]. I am unable to find a basis to support such a narrow reading of the effect of section 1397(c).").

201. *See, e.g.*, California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987) (Savings clause in Coastal Zone Management Act precluded preemption of state law.); California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (The court relied on savings clauses to conclude that state law was not preempted.). The existence of a savings clause is not conclusive, however, on the issue of preemption. *See, e.g.*, Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987); Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

202. Kolbeck v. General Motors Corp., 702 F. Supp. 532, 536 n.6 (E.D.Pa. 1988) ("The Safety Act clearly was not designed to occupy the entire field of automotive safety standards."); Chrysler Corp. v. Rhodes, 416 F.2d 319, 325 (1st Cir. 1969). It seems clear from the language of the Automobile Safety Act itself that Congress did not occupy the field since § 1397(c) expressly reserves some authority for the states. *But see* Doty v. McMahon, Prod. Liab. Rep. (CCH) ¶ 11,273, at 31,372, 31,373, 1987 U.S. Dist. Lexis 13965 (D.D.C. 1987) ("Congress has legislated so comprehensively in the area of motor vehicle safety through the [Automobile] Safety Act that it has 'left no room for the States to supplement [Federal law.]' " (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

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Instead, they suggest that the purpose of the Automobile Safety Act would be frustrated if the state common law claim was allowed to proceed.[203] Since the FMVSS regulations adopted pursuant to the Automobile Safety Act expressly permit manufacturers to choose among specific types of restraints,[204] the courts reason that a judgment against a manufacturer would effectively preclude the manufacturer from choosing among the permissible restraints.[205] Some courts find a methods conflict, concluding that such common law claims interfere with the "methods by which the federal statute was designed to reach [its goals]."[206]

In the final analysis, it is unimportant whether courts rely on express or implied preemption to preclude plaintiffs' claims. In both instances such findings of preemption fail to do justice to the language of the Automobile Safety Act or to the underlying Congressional intent.[207] A proper construction of the Automobile Safety Act should lead courts to conclude that common law tort claims are not preempted.

There are generally three major flaws in the analyses of the courts that preempt. First, they give insufficient weight to section 1397(c). Second, they place undue emphasis on the goal of uniformity of safety standards. Third, like the courts that preempted the failure to warn claims in

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203. *See, e.g.*, Baird v. General Motors Corp., 654 F. Supp. 28, 32 (N.D.Oh. 1986):

> With respect to standards for occupant crash protection, the Secretary promulgated a regulation that allows manufacturers to choose one of three occupant crash protection safety options.... Court decisions that create common law liability for a manufacturer's failure to install the air bag option in an automobile will effectively force automobile manufacturers to choose the air bag option over other statutorily approved options.... A court decision that removes the element of choice authorized in the occupant crash safety regulations will frustrate the statutory scheme.

See also Kelly v. General Motors Corp., 705 F. Supp. 303, 305 (W.D.La. 1988).

204. *See supra* note 185 and accompanying text.

205. *See* Hughes v. Ford Motor Co., 677 F. Supp. 76, 77 (D.Conn. 1987) ("The manufacturer would ... be faced with a Hobson's choice. If, as here, the choice was for the ignition interlock, the claim would be that the lack of an airbag was a defect. If the choice was an airbag, the lack of an ignition interlock would be claimed to be a defect."); *Kelly*, 705 F. Supp. at 305 ("[R]ecovery in a products liability action for lack of air bags would be an actual conflict with Congressional objectives."); Kitts v. General Motors Corp., Prod. Liab. Rep. (CCH) ¶ 11,725 (Dist. N.M. 1987); 875 F.2d 787 (10th Cir. 1989) (Safety Act was "intended by Congress to pre-empt any non-identical state standards, whether established through the application of common law principles of liability or otherwise.").

206. International Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987). *See supra* notes 32-33 and accompanying text. *See also* Wood v. General Motors Corp., 865 F.2d 395, 408 (1st Cir. 1988), *cert. denied*, 110 S.Ct. 1781 (1990); Pokorny v. Ford Motor Co., 714 F. Supp. 739 (E.D.Pa. 1989), *modified*, 902 F.2d 1116 (3rd Cir. 1990); Kolbeck v. General Motors Corp., 702 F. Supp. 532, 541 (E.D.Pa. 1988); Schick v. Chrysler Corp., 675 F. Supp. 1183 (D.S.D. 1987).

207. *See generally*, Miller, *Deflating the Airbag Pre-emption Controversy*, 37 EMORY L.J. 897, 899 (1988).

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the cigarette cases, they fail to adequately distinguish between indirect regulation by a common law award of damages and direct regulation by a legislature or administrative body.[208]

Section 1397(c) and section 1392(d) are not incompatible. The first addresses and preserves common law claims, while the second restricts other types of state regulation of automobile safety standards. Section 1397(c) is the only provision that expressly addresses common law claims, the kind of claims involved in products liability cases. It states that such claims are to be preserved.[209] Section 1392(d) is a restriction on other kinds of state regulation.[210] As early as 1968, two years after the Automobile Safety Act was enacted, the Eighth Circuit recognized that Congress "intended [the Act] to be supplementary of and in addition to the common law of negligence and products liability."[211] As discussed above, an award of damages pursuant to a common law action is not equivalent to regulation by a state legislature or administrative agency.[212]

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208. Like the courts that preempt in the cigarette cases, the courts that preempt in the automobile cases also fail to recognize the legitimate state interest in compensating the victims of defective products. *See supra* notes 167-68 and accompanying text.

209. *See supra* note 191 and accompanying text. Indeed several courts which have found implied preemption have recognized the faulty reasoning of the courts in which express preemption has been found: "The preemptive language contained in § 1392(d) forecloses the states from implementing their own automobile safety regulations. The statutory language does not, however, directly address the state common law and thus does not provide for express preemption of state common law claims." Baird v. General Motors Corp., 654 F. Supp. 28 (N.D.Oh. 1986) (The court found the cigarette case, *Cipollone* instructive on this point.). *See also* Garrett v. Ford Motor Co., 684 F. Supp. 407, 409 (D. Md. 1987) ("If Congress had intended to expressly preempt state law it presumably would have done so; it certainly would not have included the savings clause.").

210. Section 1392(d) furthers the subsidiary goal of uniform safety standards. It is clear both from the language and legislative history of the act, though, that uniformity is not the key objective of the Safety Act and that automobile manufacturers were to retain flexibility in the design of their products. As the Senate Report provides: "The committee is not empowering the Secretary to take over the design and manufacturing functions of private industry. . . . Manufacturers and parts suppliers will thus be free to compete in developing and selecting devices and structures that can meet or surpass the performance standard." S. REP. NO. 1301, 89th Cong., 2d Sess. 12 (1966), *reprinted in* 1966 U.S. CODE, CONG. & ADMIN. NEWS, 2709, 2712, 2714.

211. Larsen v. General Motors Corp., 391 F.2d 495, 506 (8th Cir. 1968). Another relatively early decision making the same observation is Chrysler Corp. v. Department of Transportation, 472 F.2d 659, 670 n.13 (6th Cir. 1972). *See also* Dawson v. Chrysler Corp., 630 F.2d 950, 958 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981). Neither *Larsen* or *Dawson* involved claims regarding passive restraints.

212. *See supra* notes 52-56 and accompanying text. *See also* Richart v. Ford Motor Co., 681 F. Supp. 1462 (1988), *rev'd*, 875 F.2d 787 (10th Cir. 1989) ("Even though a state tort damage award may have some regulatory effect, it does not impose the same legal obligation as a state regulatory statute.") *But see* Gardner v. Honda Motor Co., Ltd., 145 A.D. 2d 41, 47, 536 N.Y.S.2d 303, 306 (4th Dept. 1988) ("Plaintiff's argument that a jury's finding of negligence in this regard is not regulatory in nature because it does not require manufacturers to install airbags is specious. . . . [I]t would

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An award of damages has a regulatory effect only to the extent that the manufacturer must pay the individual injured. It is not an across-the-board regulation, as are legislation and administrative regulations. Therefore, requiring an automobile manufacturer to pay damages to an injured plaintiff does not deprive it of the right to choose among the options set forth in the FMVSS.[213] Courts that preempt often fail to give proper weight to this distinction between direct and indirect regulation.[214]

> These separate provisions of the Act underscore the differences between regulation and common law compensation. Taking into account that state regulation and state common law torts are different, sections 1392(d) and 1397(c) complement each other well in light of the express purpose of the Act, i.e., the achievement of safety.[215]

Preservation of common law tort claims is compatible not only with the language of the Automobile Safety Act, but also with congressional intent. Both the House and Senate Report explicitly state that Congress intended to preserve common law tort claims under the Automobile Safety Act.[216] In addition, individual members of Congress have echoed

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be a short time before all manufacturers would be required to recall vehicles not so equipped and to install airbags in all new models in order to avoid the risk of liability.")

213. As the court in *Richart* pointed out, "[i]t is true that such award subjects manufacturers to monetary liability, but it does not necessarily impose a legal obligation on manufacturers to change or improve their product design." 681 F. Supp. at 1467, *rev'd*, 875 F.2d 787. Moreover, "[o]rdinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law." California v. ARC America Corp., 490 U.S. 93; 109 S.Ct. 1661, 1667 (1989).

214. *See, e.g.*, Wood v. General Motors Corp., 865 F.2d 395, 410 (1st Cir. 1988), *cert. denied*, 110 S.Ct. 1781 (1990); Cox v. Baltimore County, 646 F. Supp. 761, 763 (D.Md. 1986).

215. Gingold v. Audi-NSU-Auto Union, A.G., 389 Pa. Super. 328, 347-48; 567 A.2d at 322. *See also* Murphy v. Nissan Motor Corp., 650 F. Supp. 922, 927 (E.D.N.Y. 1987), criticizing the court in *Vanover* for its failure to distinguish between common law damage awards and other state regulations.

216. The Senate Report, for example, states that "the Federal minimum safety standards need not be interpreted as restricting State common law standards of care. *Compliance with such standards would thus not necessarily shield any person from product liability at common law.*" S. REP. No. 1301, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 2709, 2720 (emphasis added). The House Report indicates the same intent. "[Section 1397(c) specifically establishes, that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law, particularly those related to warranty, contract, and tort liability." H.R.REP. No. 1776, 89th Cong., 2d Sess. 24 (1966). *See also* 112 Cong. Rec. 19,663, 21,487 (1966).

The RESTATEMENT (SECOND) OF TORTS also recognizes that compliance with legislative or administrative enactments should not necessarily shield a defendant from tort liability. *See* RESTATEMENT (SECOND) OF TORTS § 288C. ("Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take precautions.").

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that view.[217]

Even the 1974 amendment, which prevented the requirement of airbags unless certain procedural prerequisites were satisfied,[218] does not compel preemption of common law claims. Indeed, since the enactment of the 1974 amendment, several courts have held that common law tort claims are not preempted by the Safety Act. In *Garrett v. Ford Motor Co.*,[219] for example, the court explained that permitting the common law tort claims does not "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," noting that the primary purpose is to protect the public and that all other Congressional goals are subsidiary:

> The expressly declared purpose of the Act was to reduce deaths and injuries resulting from traffic accidents. Ford contends that Congress' purpose for the Act was to create uniformity in safety standards. While this was one of Congress' incidental concerns, it was not the primary one. Congress intended the Act to save the lives of automobile passengers through safety standards; not the dollars of automobile manufacturers through uniformity."[220]

Other courts, even those that have preempted plaintiffs' common law tort claims, have "consistently held that the primary objective of Congress in passing the [Automobile Safety] Act was to promote safety and reduce highway deaths and injuries."[221] Since the purpose of the Automobile Safety Act is well-settled, subsidiary goals such as the desire for uniformity should not impair the ability of private individuals to bring common law suits.[222] Congress clearly decided that uniform regu-

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217. *See* 112 Cong. Rec. 21487 (1966) (Senator Magnusson noted that "compliance with Federal standards does not exempt any person from common law liability."). *See also* 112 Cong. Rec. 19,663 (1966) (Representative Dingell commented that "every single common law remedy that exists against a manufacturer" continues to exist under the Act.)

218. *See supra* note 194.

219. 684 F. Supp. 407 (D.Md. 1987).

220. *Id.* at 409.

221. Gingold v. Audi-NSU-Auto Union, A.G., 389 Pa. Super. 328, 334, 567 A.2d 312, 316 (Pa. Super. Ct. 1989). *See also* Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 110 S. Ct. 1781 (1990); Chrysler Corp v. Tofany, 419 F.2d 499 (2d Cir. 1969); Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968); Kolbeck v. General Motors Corp., 702 F. Supp. 532 (E.D.Pa. 1989); Murphy v. Nissan Motor Corp, in U.S.A., 650 F. Supp. 922 (E.D.N.Y. 1987); Garrett v. Ford Motor Co., 684 F. Supp. 407 (D.Md. 1987); Cox v. Baltimore County, 646 F. Supp. 761 (D.Md. 1986).

222. *See* Richart v. Ford Motor Co., 681 F. Supp. 1462, 1469 (D.N.M. 1988), *rev'd*, 875 F.2d 787 (10th Cir. 1989) ("While promoting uniformity was an objective of Congress, its primary goal was to improve and promote automotive safety."); *Murphy*, 650 F. Supp. at 926 ("While promoting uniformity was an indisputable objective of Congress, Congress' primary goal was to improve and promote automotive safety.") Even in *Kolbeck* where the court found implied preemption, it was

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lation is less important than saving lives.

In addition, the Automobile Safety Act establishes a set of *minimum* safety standards and is not designed to thwart a manufacturer's incentive to enhance the safety of its automobiles.[223] Fortunately, some automobile manufacturers, recognizing the enhanced safety feature that air bags provide, have begun, on their own initiative, to offer air bags along with the standard seat belts.[224]

Under traditional rules of products liability, a person injured in an automobile not equipped with air bags may have a good argument that the product is defectively designed. If cars equipped with airbags are significantly safer than those that are not, and the technology exists to equip cars with airbags at a reasonable cost, such a defective design claim may succeed under the risk utility test.[225] But as long as automobile manufacturers are successful in raising the preemption defense, they have

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unwilling to put the goal of uniformity on the same level as the goal of promoting safety. As the court in *Kolbeck* explained, "I am unwilling to conclude that any interest in national uniformity of design standards, standing alone, predominates over the purposes expressly included in the Safety Act." 702 F. Supp. at 539. Uniformity as a goal of the National Traffic and Motor Vehicle Safety Act is set forth not in the language of the statute itself, although the desire for uniformity is presumably the reason for § 1392(d) which prohibits nonidentical regulation by states. The legislative history includes a more direct statement on the desire for uniformity: "[T]he motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but they be uniform throughout the country." S. REP. No. 1301, 89th Cong. 2d Sess. 12 (1966).

223. *See* 15 U.S.C. § 1391(2), which provides that " '[m]otor vehicle safety standards' means a minimum standard for motor vehicle performance." There has been some disagreement on the meaning of this language. *Compare* Kolbeck v. General Motors Corp., 702 F. Supp. 532, 540 (E.D.Pa. 1988) ("[T]he purpose of safety standards is to establish minimum performance standards for automotive safety; they do not establish the standard of conduct required under the common law."); Garrett v. Ford Motor Co., 684 F. Supp. 407 (D.Md. 1987) ("[T]he safety standards were only intended to be bare minimum federal standards."); Honda Motor Co., Ltd. v. Kimbrel, 376 S.E.2d 379 (Ga. App. 1988) (Georgia standards were less stringent than the federal standards. Thus, plaintiff could only recover, if at all, under federal "minimum standards.") *with* Wood v. General Motors Corp., 865 F.2d 395, 414 (1st Cir. 1988), *cert. denied*, 110 S.Ct. 1781 (1990) ("Although the standards are 'minimum' in the sense that a manufacturer may make a vehicle safer than required by federal law, the standards are not 'minimum' in relation to state law."); Hughes v. Ford Motor Co., 677 F. Supp. 76, 77 (D.Conn. 1987) ("Congress has not merely set a minimum standard . . . It has clearly . . . established a minimum standard and a maximum standard.") The legislative history is compatible with the plain meaning of the Act, and provides that the "standards are . . . the required minimum [for] safe performance" but that they do not specify "the manner in which the manufacturer is to achieve the specified performance." S. REP. No. 1301, 89th Cong., 2d Sess. 12 (1966), *reprinted in* 1966 U.S. CODE, CONG. & ADMIN. NEWS, 2714.

224. The Acura Legend, for example, has had air bags as a standard feature since 1988. The Mazda Miata, which was introduced in 1989, is also equipped with air bags. Moreover, beginning with the 1990 car models, a wide variety of cars will be equipped with air bags.

225. For a discussion of the risk-utility test, *see supra* notes 96-102 and accompanying text. Such success would undoubtedly give auto manufacturers an incentive to equip cars with airbags.

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little incentive to improve the safety of their product.[226] The next section sets forth a framework for the judiciary to use as a guide when confronted with products liability cases.[227]

IV. ACHIEVING THE PROPER BALANCE—A FRAMEWORK FOR THE JUDICIARY

To determine whether a state common law tort action is preempted, courts must look at the language and purpose of the federal law and evaluate whether that federal regulation either expressly or implicitly preempts the state action.[228] Generally, as discussed above, the primary objective of federal regulations at issue in the products liability preemp-

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But an award of damages only requires that they pay money to the plaintiff. Again, this indirect regulation was intended by Congress to be preserved. 15 U.S.C. § 1397(c).

226. *Cf.* Ferebee v. Chevron Chemical Co., 736 F.2d 1529, 1541-42 (D.C. Cir. 1984) ("[T]he specter of damage actions may provide manufacturers with added dynamic incentives to continue to keep abreast of all possible injuries stemming from the use of their product so as to forestall such actions through product improvement.").

227. This article has focused on cigarette and automobile cases. The preemption question has also arisen, however, in cases involving a variety of other products such as the DPT vaccine and IUDs. Unlike the cigarette and automobile cases, the courts confronted with the preemption question in the DPT and IUD cases have not preempted common law tort claims. *See, e.g.*,Hurley v. Lederle Laboratories, 863 F.2d 1173 (5th Cir. 1988) (DPT); Foyle v. Lederle Laboratories, 674 F. Supp. 530 (E.D.N.C. 1987); Patten v. Lederle Laboratories, 655 F. Supp. 745 (D.Utah 1987) (DPT); Wack v. Lederle Laboratories, 666 F. Supp. 123, 126-128 (N.D. Ohio 1987); Martinkovic v. Wyeth Laboratories, Inc., 669 F. Supp. 212, 213-215 (N.D. Ill. 1987). While pharmaceuticals should not necessarily be treated the same as cigarettes and automobiles, see Note, *A Question of Competence: The Judicial Role in the Regulation of Pharmaceuticals*, 103 HARV. L. REV. 773 (1990);Note, *Tort Liability for DPT Vaccine Injury and the Preemption Doctrine*, 22 IND. L. REV. 655 (1989), the courts that have confronted the issue in pharmaceutical cases appear to adhere more closely to the presumption against preemption and give greater weight to the states' interest in compensating victims. *See, e.g.*, Foyle v. Lederle Laboratories, 674 F. Supp. 530 (E.D.N.C. 1987); Wack v. Lederle Laboratories, 666 F. Supp. 123 (N.D. Ohio 1987).

They also recognize that the federal government can make mistakes. *See* Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146 (D.N.J. 1984), *rev'd*, 789 F.2d 181 (3d Cir. 1986), *cert denied*, 479 U.S. 1043 (1987), where the district court, refusing to hold that plaintiff's common law tort claims were preempted under the Cigarette Act, noted that there are numerous other areas of federal regulation which do not lead to preemption:

> The federal government regulates many industries, not least of which is the ethical drug industry. The fact that the safety, efficacy, literature and warnings pertaining to drugs are reviewed and approved by the government pursuant to the authority of Congress has never relieved drug manufacturers of liability in tort if the risks exceeded the warnings given. These cases, among others, recognize that even the federal government is fallible. The fact that it finds a product safe or a warning adequate does not necessarily make it so. The private citizen should not be deprived of the opportunity to establish such fallibility and vindicate his or her rights to recover for injuries sustained if supported by competent proofs.

Id. at 1148-49.

228. *See supra* notes 36-38 and accompanying text.

tion cases is to protect the health, welfare and safety of the public.[229] The goal of products liability laws is the same. One of the reasons for expanding the remedial theories available in products liability cases was to provide an incentive for manufacturers to make safer products. Since public safety is the primary congressional concern underlying the federal regulations, common law tort claims that have the same goal should generally be, and under the preemption doctrine, are presumptively permitted to co-exist with federal statutory provisions.[230] In many cases courts inappropriately find that federal law preempts common law claims, treating such claims as identical to regulation by a state legislative or administrative body.[231] In addition, courts often engage in only a superficial construction of the relevant statute,[232] and they often reach conflicting results. This section suggests a framework for the judiciary to use when deciding products liability preemption cases.[233] There are two components to the suggested framework. First, courts should limit the preemption categories upon which they will rely in products liability cases. Second, the courts should limit the damages recoverable in a case where a manufacturer has complied with federal regulations. By adhering to this framework, courts will balance the public's right to safe products and to compensation for injuries resulting from unsafe products, with the manufacturer's right to rely on federal statutory provisions.[234]

Common law products liability tort claims should generally be preempted only when there is an express provision in the federal regulation preempting common law claims or when it would be physically impossible to comply with both the state and federal regulation. The other categories of implied preemption—occupation of the field, objectives conflict and methods conflict—should not generally be relied upon as a basis to preempt products liability claims.[235]

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229. *See supra* notes 149-53, 187-89 and accompanying text.

230. *See supra* note 39-44 and accompanying text.

231. As noted above, there are important differences between the two. A common law award of damages requires defendant to pay a sum of money to the named plaintiff[s]. Although such an award may indirectly impact on other behavior by defendant, it is not a direct state-wide mandate for a manufacturer to engage in specific conduct. *See supra* notes 52-56 and accompanying text.

232. *See supra* notes 146-47 and accompanying text.

233. This framework is intended to serve as a guideline for the judiciary rather than to be used as an absolute rule. *See infra* note 235.

234. This is not unlike the balancing of "the conflict between promoting nuclear power and ensuring safe operation of nuclear plants," Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 265 (1984) (Blackmun, J. dissenting), in which an award of punitive damages was upheld.

235. Of course, each case of preemption involves the interpretation of a specific statute and there may be instances in which there is neither express preemption or physical conflict where it is nevertheless clear, for example from the legislative history, that preemption is appropriate. "The

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Certainly, if there is an express provision preempting state common law tort claims, the court must abide by such provision and preempt the claim; the Supremacy Clause so requires.[236] If there is no such provision, Congress arguably did not intend to preempt the claim.[237] The occupation of the field preemption category is particularly inappropriate to rely upon where no express preemption provision exists. When a court finds that Congress has occupied a field, it must also define the occupied field. Without an express provision preempting common law tort claims, Congress arguably did not intend to occupy the field with respect to common law claims.[238] Thus, occupation of the field is one preemption category which courts should be hesitant to rely upon in products liability preemption cases.

Another category that has commonly been used as a basis for implied preemption is conflict preemption. As discussed earlier there are three types of conflict: physical, objectives and methods.[239] If there is a physical conflict which makes compliance with both federal and state law impossible, the courts must preempt the state law. The other two types of conflict—objectives and methods—will not exist in most products liability cases. The primary objective of Congress in enacting the Cigarette Act, the Automobile Safety Act, and most statutes governing product

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critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 369 (1986). Congressional intent is often ambiguous at best with respect to preemption. Given the presumption against preemption, if courts use as a general guideline that products liability cases should be preempted only in these limited circumstances, they are likely to strike the proper balance between the public's right to safe products and the manufacturer's right to rely on federal regulations.

236. *See supra* note 13.

237. "It is difficult to believe that Congress would remove all means of judicial recourse for injuries negligently caused by a manufacturer without comment or express language." Richart v. Ford Motor Co., 681 F. Supp. 1462, 1466 (D.N.M. 1988), *rev'd*, 875 F.2d 789 (10th Cir. 1989). *See also* Kociemba v. G.D. Searle & Co., 680 F. Supp. 1293, 1300 (D.Minn. 1988) ("If Congress wants to take the extraordinary step of giving drug manufacturers immunity from personal tort actions, it would expressly state such intentions whether by statute or legislative history.); Wack v. Lederle Laboratories, 666 F. Supp. 123, 127 (N.D. Ohio 1987) ("If Congress intends for federal law to preempt state law concerning the labelling and design of DPT, it should expressly state this intention.").

238. As the Supreme Court explained in Hillsborough v. Automated Medical Laboratories, Inc., 471 U.S. 707, 718 (1985):

> [I]f an agency does not speak to the question of pre-emption, we will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to pre-empt. Given the presumption that state and local regulation related to matters of health and safety can normally coexist with federal regulations, we will seldom infer, solely from the comprehensiveness of federal regulations, an intent to preempt in its entirety a field related to health and safety.

239. *See supra* notes 27-33 and accompanying text.

safety is to protect the public. Products liability laws have also developed and expanded over the years to protect public safety.[240] They provide manufacturers with incentives to make their products as safe as possible. Since the objectives of both products liability laws and Congress are to enhance public awareness and safety, the goals are compatible. Thus, permitting common law tort claims to be considered on the merits furthers congressional objectives. It does not stand as an obstacle to accomplishing them. Therefore, it is unlikely that state products liability laws will stand as an obstacle to the accomplishment and execution of the full objectives of Congress.[241]

Preemption has also been based on the theory that the state law "interferes with the *methods* by which the federal statute was designed to reach" the Congressional goals.[242] It is difficult to imagine how the requirement that a seller of a product pay damages to an injured claimant would interfere with any federally prescribed method of achieving a goal. For example, requiring a cigarette company to pay damages to a plaintiff does not interfere with the method Congress has chosen to inform the public of dangers associated with smoking—requiring specified labels. Nor does an award of damages in an automobile case interfere with the method Congress chose to regulate safety equipment. Such an award does not alter the FMVSS, although it may indirectly alter a manufacturer's behavior, resulting in safer cars. Since this preemption category, like occupation of the field and objectives conflict, will rarely be appropriate as a ground for preemption in products liability cases, the only two categories upon which the courts should generally rely to preempt products liability claims are express preemption or a physical inability to comply with both the state and federal laws.

Most cases involve neither express preemption or a physical inability to comply with both the federal statute and a state judicial decision.[243] Instead, as is illustrated by the conflicting opinions of the District Court

240. *See supra* notes 57-84 and accompanying text.

241. Even a Congressional purpose to achieve uniformity, which is sometimes a rationale for a finding of preemption, *see supra* note 23 and accompanying text, should not generally lead to a finding of preemption in a products liability case. Allowance of a cigarette failure to warn claim, for example, will not eliminate the uniform warning required by the Cigarette Act. It may lead companies to include additional stronger warnings. This indirect impact on behavior is permissible under the Cigarette Act and is compatible with the general purpose of Congress to adequately inform the public of the hazards of smoking cigarettes.

242. *See supra* notes 32-33 and accompanying text.

243. This is not surprising since the likely outcome if a plaintiff prevails is an award of money. Such payment of money is unlikely to create a physical inability on the part of the manufacturer to comply with a federal statute, especially if, as discussed below, damage awards are limited.

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and Third Circuit in *Cipollone*,[244] and in the differing conclusions reached in the automobile cases,[245] in many such cases strong, legitimate arguments can be made both to support and to preclude a finding of preemption. In these cases the court does more than simply construe a statute by looking at its language and legislative history. These cases reflect the courts' own policy judgment on the proper disposition of the case.[246] Since there is a presumption against preemption, which is particularly appropriate where traditional areas of state control are involved, the courts should not preempt plaintiffs' claims.[247]

Although the first component of this framework would lead to fewer cases being preempted, product manufacturers should receive some protection for complying with federal regulations. Thus, while allowing the cases to be decided on the merits, courts should limit the amount of damages recoverable by the plaintiff where the manufacturer has complied with the federal statute. The court should restrict the damages awarded by placing a dollar limit on the amount recoverable by a plaintiff from a single incident,[248] or award only compensatory rather than punitive damages.[249]

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244. *See supra* note 129 and accompanying text.

245. *See supra* notes 181-82 and accompanying text.

246. Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 224 (1959) ("[P]re-emption decisions do not uniformly represent the product of sound statutory construction, much less a supportable finding of specific congressional intent. Pre-emption can never be the product of statutory construction alone, since the Court and only the Court can make the final judgment of incompatibility required by the supremacy clause.").

247. *See supra* note 39-44 and accompanying text. *See also* Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 379 (1988) (Court refused to pre-empt state regulation where The Communications Act of 1934 contained "internal inconsistencies, vague language, and areas of uncertainty, and where there were not "crisp answers to all of the contentions" of the parties.) *Id.*

248. *See* Price Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (1957).

249. The dissent in *Silkwood* suggested that preemption may preclude an award of punitive damages while permitting an award of compensatory damages:

> It is to be noted . . . that the same pre-emption analysis [that precludes an award of punitive damages] produces the opposite conclusion when applied to an award of compensatory damages. It is true that . . . [c]ompensatory damages . . . have an indirect impact on daily operations of [the defendant]. . . . The crucial distinction between compensatory and punitive damages is that the purpose of punitive damages is to regulate safety, whereas the purpose of compensatory damages is to compensate victims. Because the Federal Government does not regulate the compensation of victims, and because it is inconceivable that Congress intended to leave victims with no remedy at all, the pre-emption analysis established by *Pacific Gas* comfortably accommodates—indeed it compels—the conclusion that compensatory damages are not pre-empted whereas punitive damages are.

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 263-64 (1984) (Blackmun, J., dissenting) (footnote omitted).

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This framework would serve several purposes. First, permitting the action would satisfy the purpose of tort law to compensate victims injured by defective products.[250] It is possible for a manufacturer to comply with federal regulations but still be found liable under the risk-utility test[251] for a design defect or for an inadequate warning. Allowing products liability claims would further the purposes of products liability law. It maintains the manufacturers' incentive to engage in research and development to create safer products in the future. Otherwise manufacturers of the most dangerous products—those products that Congress has deemed it necessary to regulate—receive what amounts to an immunity from tort claims.[252] Further, the states have a greater interest in protecting the health and safety of its citizens than they have in other areas.[253] As the Third Circuit acknowledged in *Cipollone*:

> [T]he Cipollones' tort action concerns rights and remedies traditionally defined solely by state law. We therefore must adopt a restrained view in evaluating whether Congress intended to supersede entirely private rights of action.[254]

Second, while permitting the common law tort action to be maintained furthers the purposes behind the law of products liability, the limitation on a manufacturer's liability where there has been compliance with the federal statute provides them a measure of protection for that compliance.[255] Placing a limitation on liability is not without

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250. RESTATEMENT (SECOND) OF TORTS § 402A (1965). Section 402A reflects case law making it easier for a plaintiff to recover for injuries sustained by a defective product, by rendering it unnecessary to prove negligence on the part of the seller.

251. For a discussion of the risk-utility test, *see supra* notes 96-102 and accompanying text.

252. Permitting the common law tort claim also helps counter-balance the fact that certain federal laws are the result of compromise following extensive lobbying by product manufacturers. *Supra* note 169 and accompanying text.

253. *See supra* note 42 and accompanying text.

254. 789 F.2d 181, 186 (3rd Cir. 1986). *See also* Forster v. R.J. Reynolds, 423 N.W.2d 691, 696 (Minn. App. 1988) ("[T]he traditional presumption against preemption is heightened by . . . [the fact that] the state law which respondent attempts to displace relates to the health and safety of the citizens of Minnesota and thus falls within the traditional domain of the states."); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("Congress legislated here in a field which the States have traditionally occupied. . . . So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."); Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 206 (1983).

255. As the court in Garrett v. Ford Motor Co., 684 F. Supp. 407, 412 (D.Md. 1987) explained: "Compliance with [federal safety regulations] is [not] entirely irrelevant. Compliance with the Act may be admissible on the issue of care, but it does not create an absolute defense or require that a jury find a defendant's conduct reasonable."

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precedent.[256]

It may be that the likelihood of success on the merits is slim for a plaintiff in cases where the defendant has complied with all federal safety regulations.[257] But likelihood of success on the merits where plaintiff seeks damages is not the test for whether or not the case should go forward. Plaintiffs in these cases should not have more restricted access to the judicial system than others.[258] Perhaps in some cases a directed verdict for the defendant will be appropriate. But at least plaintiffs in such cases will have the issues considered on the merits.

CONCLUSION

The preemption doctrine must be applied cautiously in products liability cases given the fact that tort law involves an area traditionally regulated by the states, there is a presumption against preemption, and indirect regulation by a common law award of damages is not analogous to direct regulation by a state legislative or administrative body. Courts are improperly preempting many products liability cases involving cigarettes and automobiles, thereby hindering rather than furthering congressional intent. Courts in these cases should preempt, as a general rule, only where there is an express statement that Congress intended to preempt or where compliance with both state and federal laws is impossible. Damages available to an injured plaintiff, however, should be confined to either compensatory damages or an absolute dollar amount in cases where a manufacturer has complied with all federal regulations.

256. For example, a limitation on liability for nuclear accidents exists under the Price Anderson Act, PUB. L. NO. 85-256, 71 Stat. 576 (1957), where a $500 million limit on liability for any single nuclear incident was established.

257. In Honda Motor Co., Ltd. v. Kimbrel, 189 Ga. App. 414, 376 S.E.2d 379 (Ga.App. 1988), the court, noting that Georgia law required no more of automobile manufacturers than the Automobile Safety Act, concluded that the failure to equip the automobile with an airbag could not be considered a design defect. *Id.* at 383.

258. It may be that some restraints should be imposed on our overburdened judicial system, but finding preemption in inappropriate circumstances is not the proper way to ease judicial administration.

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