Product Liability - Cigarettes and Cipollone: What's Left? What's Gone?

Thomas C. Galligan Jr.
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I. INTRODUCTION

Law ought to make sense. When it does, it is nice for lawyers, who are in the business of trying cases, and judges, who are in the business of deciding them. Sensible law makes everyone's job easier, and it also allows decision makers to focus on primarily factual issues and resolve the concrete disputes before them. Alternatively, given the competing factors and interests involved, one may believe law really never can make total sense. It is, in this view, impossible to explain law as based on economic efficiency, shared morality, or any other grand notion of how a society ought to structure itself. In a world as diverse as ours, in a nation as heterogeneous as ours, one should not be surprised to find that legal doctrine is often in hopeless, almost nonsensical disarray. As such, the most the commentator can do is attempt to interpret what "law" we have and to provide some light (however dim) to the bench and bar. It is in this latter vein that I write this piece.

On June 24, 1992, the United States Supreme Court issued its long awaited decision in Cipollone v. Liggett Group, Inc.1 In Cipollone, the Court considered the extent to which the Federal Cigarette Labeling and Advertising Act of 1965 ("1965 Act")2 and the Public Health Cigarette Smoking Act of 1969 ("1969 Act")3 preempted state tort law claims against cigarette manufacturers. In deciding the case, members of the Court issued three separate opinions. No majority of justices joined in any one opinion. As such, we are left doing some guessing about what is and what is not a permissible state tort law claim against a cigarette manufacturer although one opinion, the plurality written by Justice Stevens, will, no doubt, receive the most attention.

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What I propose to do herein is explain the three opinions. After explaining the opinions in Part II, I will examine, in Part III, the confusing state of the law in which the plurality opinion leaves us. I will do so primarily by employing a hypothetical which reveals the potentially inconsistent results that could arise under the plurality opinion. In Part IV, I will examine what effect Cipollone may have on a Louisiana plaintiff suing for injuries suffered as a result of cigarette smoking. Finally, in Part V, I will draw some brief conclusions.

II. The Case

A. Background

As noted, the Cipollone Court produced three opinions. Four justices signed one, three justices signed another, and two signed the third. Four of the justices found that the 1965 Act did not preempt any tort claims but that the 1969 Act preempted some of the plaintiffs' state tort law claims. Three justices felt that neither the 1965 nor the 1969 Act preempted any tort claims whatsoever. Two other justices believed that the 1965 Act preempted some claims and the 1969 Act preempted even more claims than the first group of four found preempted. As such, given the way the court split, the opinion of the group of four constitutes, in essence, the "law" of the land. In this section, I will spend most of my time discussing this plurality opinion, although it is important to first set forth (briefly) the facts and claims at issue in the lawsuit.

Rose DeFrancesco Cipollone began smoking in 1942, when she was sixteen. She died in 1984 of lung cancer caused by her smoking. The year before her death, she and her husband, Antonio, sued the three manufacturers of the cigarettes she had smoked: Liggett Group, Inc., Phillip Morris, Inc., and Lorillard. When her husband also died, their son, Thomas, continued the suit. The suit was basically a survival and wrongful death action under New Jersey tort law. In the suit, the Cipollones set forth five broad claims against the defendants alleging design defects, failure to warn, breach of express warranty, fraudulent misrepresentation, and a conspiracy to defraud.

In their design defect claims, the Cipollones claimed that the cigarettes Rose had smoked were unreasonably dangerous in design because the defendants did not use a safer alternative design and because the social value of the cigarettes was outweighed by their danger. Specifically, as to the alternative design claim, plaintiffs alleged defendants should have marketed and sold a palladium cigarette which would have been

4. Cipollone, 112 S. Ct. at 2614 (plurality opinion of Stevens, J.).
In their failure to warn claims, the Cipollones alleged that the defendants failed to provide an adequate warning about cigarettes and that the defendants were negligent in the way that they tested, researched, sold, promoted, and advertised the cigarettes involved. As for the express warranty claims, the Cipollones alleged that the defendants had expressly warranted that their cigarettes did not present any significant health consequences. The Cipollones also claimed that the defendants had willfully, through advertising, attempted to neutralize the federally mandated warnings and that the defendants had possessed, but failed to act upon, medical and scientific data which indicated cigarettes were hazardous to health. Finally, the Cipollones claimed that the defendant manufacturers had conspired to deprive the public of the data which they possessed. The defendants argued that a number of the Cipollones' claims were preempted by the relevant federal legislation.

Initially, the district court found that none of the Cipollones' claims were preempted. However, the Third Circuit Court of Appeals reversed and remanded the case. On remand, the district court concluded that all of the Cipollones' post-1965 claims, except the design claims, were preempted by the Federal Cigarette Labeling and Advertising Act of 1965 and the later enacted Public Health Cigarette Smoking Act of 1969. On the merits the district court held that the design, risk/utility claims were barred under a New Jersey statute, which applied to pending cases. The statute basically enacted Restatement (Second) of Torts § 402A comment (i) as the law of New Jersey. As to the alternative safer design claim based on the palladium cigarette the district court directed a verdict for the defendants. The court reasoned that it would be sheer speculation for the jury to conclude that Rose Cipollone would have tried and switched to the palladium cigarette and that, even had she done so, the switch would have realistically reduced her risk of getting cancer. The court did conclude, however, that Cipollone could pursue

6. The Cipollones also filed a general negligence claim alleging a failure to research and test, but the district court granted a directed verdict on that claim reasoning that this alleged failure did not harm Mrs. Cipollone in any independent fashion. Id. at 1499.
warning claims insofar as those claims arose before the effective date of the 1965 statute, January 1, 1966.

The jury that eventually heard the case rejected the Cipollones' pre-1966 fraud and conspiracy claims but found Ligget had breached its pre-1966 duty to warn and its express warranties. Phillip Morris and Lorillard's only exposure, after the earlier rulings, was on the conspiracy and fraud claims, which the jury resolved against the Cipollones. The jury awarded $400,000 in damages against Liggett on the warning and warranty claims. However, damages for failure to warn were not recovered because the jury also found that Cipollone herself was eighty percent at fault in voluntarily encountering a known risk. This finding barred recovery on the tort claim under New Jersey law. However, the damages for breach of express warranty were recoverable because in New Jersey comparative fault is not a defense to a breach of warranty claim.12

After another appeal to the Third Circuit, the Supreme Court granted certiorari to consider the preemption issue.13 As in any preemption case, the starting point for the Court's consideration was the relevant federal legislation.

B. Legislation

Section 4 of the 1965 Act provided for the following warning to be printed on every package of cigarettes: "Caution: Cigarette Smoking May be Hazardous to Your Health."

Section 5(a) of the Act provided: "No statement relating to smoking and health, other than the statement required by Section 4 of this Act, shall be required on any cigarette package." Section 5(b) provided: "No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." The Act had a sunset provision providing that its effect would terminate on July 1, 1969.14 As the termination date neared, activity by the Federal Trade Commission and the Federal Communications Commission to further regulate smoking increased. Consequently, Congress enacted the 1969 Act, which made some changes in the 1965 Act—changes which the Cipollone plurality deemed significant.

Specifically, the 1969 Act strengthened the required warning. It provided that a warning label for cigarettes must state not that smoking

may be hazardous” but that it “is dangerous.” 15 Second, the 1969 Act banned advertising in any medium of electronic communication which was subject to FCC jurisdiction. Third, and most significantly, the 1969 Act changed section 5(b) to provide: “No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.” 16 It is this amended preemption provision which the Supreme Court had before it in Cipollone.

Interestingly, in 1969, Congress did not amend section 2 of the Act which set forth the law’s policies, as follows:

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

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

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health. 17

C. The Plurality: Justice Stevens’ Opinion

Justice Stevens wrote the plurality opinion in Cipollone for the group of four, who joined his entire opinion. The four consisted of: Stevens, Rehnquist, White and O’Connor. After setting forth the background of the applicable legislation, Justice Stevens articulated certain general rules concerning preemption. Stevens stated that where Congress included an express provision dealing with preemption, like section 5(b), and that provision provided a reliable indication of congressional intent with respect to the relationship between the relevant state and federal law then “there is no need to infer congressional intent to pre-empt state laws from the substantive provisions’ of the legislation.” 18 Stevens said


17. Id.

that where Congress has spoken on the preemption issue, "matters beyond that reach are not preempted."\textsuperscript{19} Importantly, Stevens reasoned that the express preemption clauses in \textit{Cipollone} must be read against the backdrop of the "presumption against the preemption of state police power regulations."\textsuperscript{20} This presumption against preemption and the accompanying exclusive effect accorded to express preemption clauses are critical to the interpretation of the opinion. I am not a constitutional law scholar and do not intend to interpret the opinions from a constitutional law perspective (nor to consider its effect, in this piece, on other cases involving preemption issues); however, after summarizing Justice Scalia's position on this point later, I will return to the possible effect of this presumption on future tort claims involving cigarettes. Let me now return specifically to Justice Stevens' plurality opinion.

Construing the 1965 version of section 5(b) in light of the articulated general rules about preemption, the Court held that the 1965 statute did not preempt any state law tort claims.\textsuperscript{21} Justices Blackmun, Souter and Kennedy actually joined in this portion of the opinion. Thus, as to the 1965 Act, Stevens' opinion represents the opinion of the Court, a majority opinion. All tort claims against manufacturers arising before the effective date of the 1969 statute are, and will be, cognizable in state court. They are not preempted. The Court, in reaching this conclusion, reasoned that the 1965 Act only prohibited state rulemaking bodies from mandating statements in advertising which were somehow at variance with, or in addition to, the statement set forth in section 4 of the 1965 Act.\textsuperscript{22}

Moving to the 1969 version of the Act, Stevens' opinion truly becomes a plurality, for here Blackmun, Souter, and Kennedy leave him. Interpreting the language of the 1969 Act, quoted above, Stevens, and those who joined him, decided that the Act did, in fact, preempt certain state tort claims. In reaching this conclusion, the plurality noted that state tort damage actions may constitute "requirements or prohibitions" which are "imposed" by state law. In rejecting the Cipollones' contention that the decisions of common law tort judges do not constitute requirements or prohibitions imposed by state law, the plurality stated that the contention was not only at odds with the plain words of the 1969 Act but "with the general understanding of common law damages actions."\textsuperscript{23} The phrase "no requirement or prohibition" sweeps broadly and suggested no distinction between positive enactments and common

\begin{footnotes}
\begin{footnote}{19} \textit{Id.} at 2618. \end{footnote} \\
\begin{footnote}{20} \textit{Id.} \end{footnote} \\
\begin{footnote}{21} \textit{Id.} at 2618-19. \end{footnote} \\
\begin{footnote}{22} \textit{Id.} at 2619. \end{footnote} \\
\begin{footnote}{23} \textit{Id.} at 2620 (plurality opinion of Stevens, J.). \end{footnote}
\end{footnotes}
law; to the contrary, those words easily encompassed obligations that took the form of common law rules.”  Further, the plurality noted that the basis of a common law damage action is the existence of a legal duty. Stevens cited Prosser and Keeton for this proposition. Justice Stevens went on to state that “it is difficult to say that such actions do not impose 'requirements or prohibitions.'” Stevens cited Prosser and Keeton for this proposition. Justice Stevens went on to state that “it is difficult to say that such actions do not impose 'requirements or prohibitions.'”

The plurality also rejected the argument that common law rules are not “imposed” by state law. However, to the plurality, the 1969 Act did not preempt all state tort law claims. Again, interpreting the appropriate language of the Act “in light of the strong presumption against pre-emption,” Stevens stated that the central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common law damages action constitutes a “requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion,” giving that clause a fair but narrow reading.

The plurality then considered each of the Cipollones’ claims under its “central inquiry.” Stevens began with the failure to warn claims. As noted, the Cipollones had offered two theories concerning defendants’ failure to warn. First, the Cipollones had argued that the tobacco companies were “negligent in the manner that they tested, researched, sold, promoted, and advertised their cigarettes.” Second, they contended that defendants “failed to provide adequate warnings of the health consequences of cigarette smoking.” The Court reasoned that these latter failure to warn claims were preempted “to the extent that they rely on a state law 'requirement or prohibition . . . with respect to . . . advertising or promotion.'” Both failure to warn theories were preempted after 1969 insofar as they required a showing that post-1969 advertising or promotions “should have included additional, or more clearly stated, warnings . . . .” Stevens pointed out, however, that the Act did not preempt

24. Id.
25. Id.
26. Id.
27. Id. (emphasis omitted).
28. Id. at 2621.
29. Id.
30. Id.
31. Id.
32. Id.
33. Id. at 2621-22.
the Cipollones' claims in so far as those claims relied "solely on respondents' testing or research practices or other actions unrelated to advertising or promotion."\(^{34}\)

Interestingly, the plurality found that the Cipollones' express warranty claims were not preempted. To reach this conclusion the Court analyzed the nature of a warranty claim under Uniform Commercial Code (U.C.C.) Section 2-313(1)(a).\(^{35}\) Stevens reasoned that liability for breach of a warranty arises from the content of the relevant warranty. Thus, the requirements that a warranty imposes do not arise from state law but from the warrantor's statements and/or actions. Although the general duty not to breach a warranty might arise from state law, the particular duty in a particular case derives from the warrantor's, (here manufacturers'), own statements. Importantly, the fact that warranties may have been made in advertising or promotion did not alter the plurality's no preemption conclusion.

Turning to the fraudulent misrepresentation claims, the plurality reached contrary conclusions on the two types of fraudulent misrepresentation claims the Cipollones raised. First, the Cipollones alleged that the defendants had fraudulently, through their advertising, neutralized the effect of the required warning labels. Stevens reasoned that this claim was based on "a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking."\(^{36}\) Recognizing that such a rule would be "merely the converse of a state law requirement that warnings be included in advertising and promotional materials,"\(^{37}\) the Court found this portion of the claim preempted. Additionally, the Cipollones claimed fraud and misrepresentation by defendants' "false representation of a material fact [and by] conceal[ment of] a material fact."\(^{38}\) The plurality found that these claims were not preempted. Stevens noted that fraud claims would not be preempted to the extent that they were based on a duty to disclose information to entities, such as a state administrative agency. Significantly, even those fraud claims associated with advertising

\(^{34}\) Id. at 2622.

\(^{35}\) The uniform version of U.C.C. § 2-313 (1)(a), which is codified in N.J. Stat. Ann § 12A:2-313(1)(a) (West 1992), provides:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.


\(^{37}\) Id.

\(^{38}\) Id.
or promotion were not preempted because the predicate duty was not
"based on smoking and health" but rather on a more general
obligation—the duty not to deceive.

... Unlike state law obligations concerning the warning neces-
sary to render a product "reasonably safe," state law pros-
scriptions on intentional fraud rely on a single, uniform standard:
falsity.39

Turning finally to the conspiracy to misrepresent or conceal material
facts, the plurality found that this claim was not preempted for the
reasons applicable to the fraud claims.

D. Justice Blackmun's Opinion

Justice Blackmun, joined by Justices Kennedy and Souter partially
concorded and partially dissented. As noted previously, Blackmun et al.
joined in the plurality's opinion dealing with the 1965 Act; they, too,
felt that the 1965 Act did not preempt any state law tort actions. But,
Blackmun, Souter, and Kennedy dissented from that portion of the
plurality opinion dealing with the 1969 Act. They felt the 1969 Act,
like the 1965 Act, had no preemptive effect on state tort actions.

Blackmun agreed with the plurality that the Court should not infer
preemption beyond that clearly mandated by Congress' language. He
also agreed that the preemptive scope of the acts at issue was governed
entirely by the express language of the statutes' preemption provisions.
He "further agree[d] with the Court that we cannot find the state
common-law damages claims at issue in this case pre-empted by federal
law in the absence of clear and unambiguous evidence that Congress
intended that result."40 Blackmun felt that this rule of interpretation
was as applicable in interpreting ambiguous congressional language as
it was in dealing with implied preemption. As noted, he and those who
joined him agreed that none of the plaintiff's common law damages
claims were preempted by the 1965 Act. But, as noted, he disagreed
with the plurality's interpretation of the 1969 Act.

Blackmun did not find that the language used in the 1969 Act clearly
and unambiguously manifested an intent to preempt state law tort claims.
Although state law may, in an appropriate case, "encompass the common
law as well as positive enactments such as statutes and regulations,"41
he did not think that Congress had used the relevant phrase in that
manner in the smoking and advertising statutes.

39. Id. at 2624.
40. Id. at 2625 (Blackmun, J., concurring, in part and dissenting, in part).
41. Id. at 2627.
Blackmun did not believe that the phrase "no requirement or prohibition" in section 5(b) encompassed common law rules. He felt his reading was supported not only by dictionary definitions of the words but also by the nature of common law damages actions. He pointed out that a manufacturer facing damage awards has a wide range of choices available. For instance, a manufacturer of cigarettes found liable on a failure to warn claim may simply pay the damages and not alter its package or its advertising. Alternatively, a manufacturer might decide not to alter the warning or its advertising and avoid future damages judgments by providing warnings "through a variety of alternative mechanisms, such as package inserts, public service advertisements, or general educational programs."\(^{42}\) Finally, Blackmun pointed out that tort law also has a compensatory function that differentiates it from other forms of regulation.

Examining the legislative history, Blackmun noted the stark absence of any indication that Congress intended to preempt, let alone even deal with, common law damages actions. As he said "there is absolutely no suggestion in the legislative history that Congress intended to leave plaintiffs who were injured as a result of cigarette manufacturers' unlawful conduct without any alternative remedies; yet that is the regrettable effect of the Court's ruling today that many state common-law damages claims are preempted."\(^{43}\)

In the penultimate section of his opinion Blackmun criticized the Court's "crazy quilt of preemption."\(^{44}\) I will deal with this issue more fully below; however, as far as Blackmun was concerned the problem with the plurality opinion was "its frequent shift in the level of generality."\(^{45}\) That is, the plurality had inconsistently indicated that fraudulent misrepresentation claims did not arise out of a duty based on smoking and health but out of a general duty not to deceive, whereas failure to warn claims arose out of smoking and health. Blackmun aptly pointed out that failure to warn claims could just as simply be seen as arising from a general obligation to act reasonably to inform consumers of known risks.

Blackmun found the same logical fallacy in the plurality approach to express warranty claims. There, the plurality stated that express warranty claims were not imposed under state law; however, as Blackmun (and Scalia) pointed out, the plurality did not recognize that liability for breach of warranty arose from a state's "decision to penalize such behavior through the creation of a common-law damages action. . . ."\(^{46}\)

\(^{42}\) \textit{Id.} at 2628.
\(^{43}\) \textit{Id.} at 2630.
\(^{44}\) \textit{Id.} at 2631.
\(^{45}\) \textit{Id.}
\(^{46}\) \textit{Id.}
Blackmun stated that he could "perceive no principled basis for many of the Court's asserted distinctions among the common-law claims, and . . . [could not] believe that Congress intended to create such a hodge-podge of allowed and disallowed claims. . . ." 47 As such, he thought that "Congress never intended to displace state common-law damages claims, much less to cull through them in the manner" 48 the plurality did.

In summary, Blackmun, Souter, and Kennedy joined with the plurality insofar as the 1965 Act was concerned, finding no preemption. However, these three did not join the group of four on the preemptive scope of the 1969 Act; they would have found no state tort claims preempted.

E. Justice Scalia's Opinion

Justice Scalia, joined by Justice Thomas, concurred in part, and dissented in part. Scalia thought the Court's interpretive rule that it would construe express preemption clauses narrowly was "extraordinary and unprecedented." 49 He opined that express preemption clauses should be construed as any other legislative provisions. He argued against any plain meaning or narrow construction rule.

Additionally, Scalia did not think that all types of implied pre-emption were eliminated, or irrelevant, just because there was an express preemption provision involved. 50 Although, Scalia noted that such a proposition may be correct when dealing with implied "field" preemption, because the "existence of an express pre-emption provision tends to contradict any inference that Congress intended to occupy a field broader than the statute's express language defines," 51 Justice Scalia did not think that express preemption provisions eliminated implied pre-emption when state regulation would actually conflict with federal law, or, where state regulation might stand "as an obstacle to the accomplishment and execution' of Congress's purposes." 52 Combining the Court's (recall Blackmun et al. did not disagree with the plurality's interpretive guidelines) two interpretive rules Scalia thought the "extraordinary" result was that a

statute that says anything about pre-emption must say everything;
and it must do so with great exactitude as any ambiguity con-

47. Id.
48. Id.
49. Id. at 2632 (Scalia, J., concurring, in part and dissenting, in part).
50. Id. at 2633-34.
51. Id. at 2633.
52. Id. at 2633 (quoting Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 404 (1941)).
cerning its scope will be read in favor of preserving state power. If this is to be the law, surely only the most sporting of congresses will dare to say anything about pre-emption.\(^{53}\)

Of course, this is a paper about torts and not about constitutional law; however, what the Court says regarding constitutional law is relevant to interpret the effect of the Court's judgment on future tort tobacco claims.

Instead of interpreting the preemption provision as the plurality and the Blackmun group would interpret it, Scalia and Thomas would have interpreted it according to its "ordinary meaning."\(^{54}\) Applying an ordinary meaning rule, Scalia first turned to the pre-1969 failure to warn claims. Scalia thought that the plurality treated the 1965 and 1969 Acts inconsistently. He thought that if the plurality's presumption against preemption required a limited interpretation of the 1965 Act, it also required a limited interpretation of the 1969 Act.

Scalia and Thomas would have found that the failure to warn claims were preempted by both the 1965 and the 1969 Acts. They would also have found preemption of claims "based on respondents' failure to make health-related statements to consumers outside their advertising."\(^{55}\) Turning to the 1969 Act, Scalia agreed with the plurality contention that the language of the 1969 Act reached beyond merely positive enactments by state legislative and administrative agencies. He too felt that general tort law duties could impose "requirements or prohibitions" within the language of section 5(b) of the 1969 Act and that state law included state common law. However, he disagreed with the plurality treatment of the Cipollones' claims.

Scalia noted that the breach of warranty claims were grounded in the proposition that in the course of their advertising and promotion the defendants effectively made statements that cigarette smoking was not unhealthy. He thought making such statements "civilly actionable certainly constitutes an advertising 'requirement or prohibition ... based on smoking and health.'"\(^{56}\) He did not agree with the plurality that liability based on breach of an express warranty was undertaken by the manufacturer itself because "[w]hen liability attaches to a particular promise or representation, it attaches by law."\(^{57}\) It is the background law and not the act itself which makes conduct legally actionable.

As to the post-1969 fraud and misrepresentation claims, Scalia thought the plurality erred. He found the suggestion that the duty to deceive

\(^{53}\) Id. at 2634.

\(^{54}\) Id.

\(^{55}\) Id. at 2635.

\(^{56}\) Id.

\(^{57}\) Id.
was a general one and not a specific one (as related to smoking and health) was "suspect" because "the plurality is unwilling to apply it consistently." Here, he echoed Justice Blackmun's criticism of the plurality's level of generality, noting that the duty to warn, like the duty to tell the truth, transcended "the relationship between the cigarette companies and cigarette smokers; neither duty was specifically crafted with an eye toward 'smoking and health.'"

Scalia contended that the proper analytic framework was to apply what he called a "proximate application" methodology for determining whether a claim invokes duties "based on smoking and health. I would ask . . . whether, whatever the source of the duty, it imposes an obligation in this case because of the effect of smoking upon health." Applying his proximate application test, Scalia would have found that the misrepresentation and fraud claims were preempted.

Finally, Scalia turned to a last concern. That concern was that the plurality opinion would preserve:

not only the (somewhat fanciful) claims based on duties having no relation to the advertising and promotion (one could imagine a law requiring manufacturers to disclose the health hazards of their products to a state public-health agency), but also claims based on duties that can be complied with by taking action either within the advertising and promotional realm or elsewhere. Thus if—as appears to be the case in New Jersey—a State's common law requires manufacturers to advise consumers of their products' danger, but the law is indifferent as to how that requirement is met (i.e., through "advertising or promotion" or otherwise), the plurality would apparently be unprepared to find pre-emption as long as the jury were instructed not to zero in on deficiencies in the manufacturers' advertising or promotion.

Scalia thought the preservation of extra-promotional warning claims was inconsistent with preemption law. It was implausible to Scalia that Congress intended to "save cigarette companies from being compelled to convey such data to consumers through . . . [one] means, only to allow them to be compelled to do so through means more onerous still." Scalia thought that such a requirement would force cigarette manufacturers to effectively give up the advertising and promotion im-

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58. Id. at 2636.
59. Id.
60. Id.
61. Id. at 2637.
62. Id.
63. Id.
64. Id.
munity which the Act provided. As to these extra-promotional warning claims, Scalia thought the test for preemption should be "practical compulsion, i.e., whether the law practically compels the manufacturers to engage in behavior that Congress has barred the States from prescribing directly." Applying his test, Scalia opined that a hypothetical law which required disclosure of risks to a state regulatory agency might survive. However, a state law requiring a cigarette manufacturer to meet a general standard of "fair warning" concerning smoking and health would not.

F. The Plurality's "Response"

The plurality, in a telling footnote, responded to the criticisms Blackmun and Scalia levelled at its shifting level of generality. The plurality stated:

Both Justice BLACKMUN and Justice SCALIA challenge the level of generality employed in our analysis. Justice BLACKMUN contends that, as a matter of consistency, we should construe failure-to-warn claims not as based on smoking and health, but rather as based on the broader duty "to inform consumers of known risks." Justice SCALIA contends that, again as a matter of consistency, we should construe fraudulent misrepresentation claims not as based on a general duty not to deceive but rather as "based on smoking and health." Admittedly each of these positions has some conceptional attraction. However, our ambition here is not theoretical elegance, but rather a fair understanding of congressional purpose.

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

As such, I will not focus on theoretical elegance either; however, in the following sections I will analyze the practical effect of the Cipollone decision on cigarette cases. As noted, the plurality found certain claims preempted and certain claims not preempted. Justice Blackmun, and those who joined his opinion, would have found no tort claims pre-

65. Id.
66. Id. (plurality opinion of Stevens, J.).
empted. Justices Scalia and Thomas would have found more tort claims preempted than the plurality. As a result, the middle road which the plurality took, although it garnered only four votes, appears to be what we tort lawyers must deal with, as the law of the land. Consequently, we must attempt to come to a “fair understanding” of the effect of the various opinions on product liability in tobacco cases.

III. What’s Left?

A. Product Liability Claims

Let me start this discussion with what we now generally call product liability claims. The classic product liability claim is for mismanufacture. These claims arise where the manufacturer has committed some error in the manufacturing process and, as a result, the particular product, as manufactured, deviates from otherwise identical products made by the same manufacturer. Thus, imagine a cigarette which mistakenly contained opium instead of tobacco. Or, imagine a cigarette which mistakenly contained some deleterious substance in addition to tobacco. If this cigarette was different from all other identical cigarettes made by that manufacturer, the deviation would render the product unreasonably dangerous; if the deviation proximately caused injury to a consumer, the manufacturer would be liable. The fact that the manufacturer neither knew nor could have known of the “defect” (mismanufacture) would be irrelevant. The contention that tar and nicotine are dangerous substances included in cigarettes does not form the basis of a mismanufacture claim because all cigarettes contain them. The inclusion of those substances at the intended levels is not a deviation. The mismanufacture claim is based on the product’s deviation from other products of the same line. The paradigm Louisiana mismanufacture case is Weber v. Fidelity & Casualty Insurance Co. In Weber, circumstantial evidence suggested that the involved product, cattle dip, contained more than the intended (designed) amount of arsenic which resulted in personal injury (vomiting) and property damage (dead cattle).

Neither the Cipollone case, nor the cigarette labeling statutes apply at all in the mismanufacture context. That is, the plaintiff who smoked a mismanufactured cigarette and was injured by it would have a product

67. W. Page Keeton et al., Prosser & Keeton on Torts § 99, at 695-96 (5th ed. 1984);

68. The unreasonableness calculation simply determines that the risk the product poses is greater than its utility. Lack of knowledge is no defense in the strict product liability case based on mismanufacture.

69. 259 La. 599, 250 So. 2d 754 (1971).
liability claim under state tort law, assuming the relevant state recognized such claims. The claim would not be preempted by federal law. Of course, one may correctly anticipate that such claims would be remarkably rare.

Secondly, Cipollone and the labelling statutes do not affect design claims. The Cipollone defendants did not claim that the plaintiffs' design claims were preempted. In a design claim, the plaintiff attacks the whole product line. He or she claims that the product, as designed, is unreasonably dangerous. There are two predominate national tests for determining whether a product is unreasonably dangerous in design. One, adopted from a comment to Restatement (Second) of Torts § 402A,70 provides that a product is unreasonably dangerous when it is dangerous to an extent beyond that which the ordinary consumer would anticipate. Thus, if cigarettes posed health risks which the ordinary consumer would not anticipate they might be unreasonably dangerous in design. Of course, any warnings the manufacturer provided would be relevant in determining a consumer's expectations.

Alternatively, many states employ a risk/utility test to determine whether or not a product is unreasonably dangerous in design. If the product's risks outweigh its utility then the product is unreasonably dangerous. Difficult issues often arise concerning the effect of the state of the art on the design claim. Can a defendant prevail by establishing that, at the time that the product left the manufacturer's control, the manufacturer neither knew nor should have known of the product's danger so that the apparent utility of the product was greater than its risk at the time the product left its control? Many states have determined that state of the art evidence is admissible, although there have been certain categories of cases (most notably asbestos cases) where courts have rejected the state of the art defense.71

Returning to cigarettes, the inquiry, under a risk/utility test, would be whether or not cigarettes, as designed, posed more risks to consumers than their usefulness justified? If state of the art evidence was not admissible one would ask whether the actual, not the known risk of a product, was greater than its utility. Because the risks of cigarette smoking have been known since at least 1965, it would appear that this type of claim would most likely arise in cases which arose before 1965. Before the 1988 adoption of its product liability act, Louisiana was one of the states which recognized such an unreasonably dangerous per se claim where state of the art was inadmissible.72 Thus, I will reserve discussion of this issue until Part IV where the effect of Cipollone on Louisiana law is discussed.

70. Restatement (Second) of Torts § 402A cmt. i (1965).
72. Id.
Note that warnings are relevant in risk/utility cases as well as consumer expectation cases. In a risk/utility case, a warning concerning the product’s risks may reduce the likelihood of the warned about risks occurring, thus reducing the overall risk which a product poses.

Of particular importance in design cases is Restatement (Second) of Torts § 402A comment (i) which provides, in part:

The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer. . . . Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful.\textsuperscript{73}

Thus, because tobacco cannot be made safe, one may argue that it is not unreasonably dangerous. On the basis of comment (i), one court has found cigarettes are not unreasonably dangerous in design.\textsuperscript{74}

Another often used route to establishing a design claim is proving the availability of alternative safer designs. As noted, the Cipollones pointed to the palladium cigarette as an alternative safer design for cigarettes. However, the trial court granted a directed verdict on that claim because the Cipollones had not established evidence from which a reasonable juror could do anything but speculate that Rose Cipollone would have switched to the safer cigarette or that it would have significantly reduced her risks of developing cancer. This causation problem appears to be a significant hurdle in a design case based upon alternative safer products, especially when the plaintiff is dead and cannot testify.

In addition to mismanufacture and design claims, a product may be unreasonably dangerous due to the manufacturer’s failure to adequately warn. Obviously, the heart of the \textit{Cipollone} case involves failure to warn claims. Under \textit{Cipollone}, claims that the manufacturer failed to provide an adequate warning on its package would be preempted under section 5(a) of the Act. This is, of course exactly what the Supreme Court “held” regarding section 5(b) and the failure to warn claims relating to \textit{advertising and promotion}. However, in both cases, a question arises. That question is whether a plaintiff can bring a failure to warn suit alleging that a cigarette manufacturer failed to adequately warn outside the context of its package, advertising, or promotion. The crux of such a claim, after \textit{Cipollone}, would be that the manufacturer failed to warn \textit{not} through its package, advertising, or promotion but through alternative means, such as package inserts, public service announcements, or educational programs. It was the “preservation” of such claims that Justice Scalia referred to as indirectly compelling cigarette manufacturers

\textsuperscript{73} Restatement (Second) of Torts § 402A cmt. i (1965).

\textsuperscript{74} Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230 (6th Cir. 1988) (applying Tennessee law).
to do what the states could not force them to do directly. This is particularly true in light of the plurality's presumption against preemption, a presumption to which the Blackmun group also affixed its judicial seal of approval.

The plurality, one will recall, expressly said that the labelling acts did not affect warning claims based "solely on respondents' testing or research practices or other actions unrelated to advertising and promotion." In light of this statement, the presumptions against preemption, and the fair but narrow reading accorded the express preemption clause, extra-promotional warning claims seem alive and well after Cipollone. In fact, the Court may have breathed new life into them with the emphasis both the plurality and Justice Scalia placed on them.

The reader will recall that Justice Scalia was particularly critical, and concerned, that failure to warn claims arising outside the areas of packaging, promotion, and advertising still survived. Actually, if the preemption clause of the Act, section 5(b), is to be read narrowly, there is an argument to be made that while additional warnings on a cigarette package could not be required, additional warnings on a package insert could be required. Extra promotional warnings might be required in other media as well.

One might argue that public service announcements or educational programs are indeed promotional; however, it seems there is an argument to be made, given the language which the plurality used concerning the "fair but narrow" interpretation which section 5(b) required, that all manufacturer-produced communications dealing with the health risk of cigarettes are not promotional.

One commentator, Professor Daynard, points to the plurality statement that "the [Cippollones'] concealment allegations, insofar as they rely on a state law duty to disclose material facts through channels of communication other than advertising or promotions," are not preempted. Daynard lists the following possible ways to warn: "package inserts, press releases, '800' hotlines, spokespeople on radio and TV shows . . . ." Obviously, he does not consider such communications media promotion or advertising. He also believes states could explicitly order such extra-promotional warnings and not run afoul of Cipollone's preemptive reach.

76. Id. at 2621 (plurality opinion of Stevens, J.).
78. Id. at 713.
79. Id.
80. Id.
In response, Professor Schwartz, now a senior partner with the Washington, D.C. law firm of Crowell & Mooring, refers to the same language in the plurality opinion and says:

Some pro-plaintiff advocates have said that these words create a very broad duty to warn outside of the scope of advertising and promotion. These observations do not comport with the factual patterns in traditional product liability law. In general, in products liability cases, warnings are inextricably involved with promotional and advertising material.81

The last sentence seems an overstatement. Although many cases turn on what is on or not on a package, many others relate to instructions, not advertising and promotion, or the lack of a warning on the product itself, again, not advertising or promotion. Aptly, Professor Schwartz does note that after 1969 the risks of smoking were very well known and it is “very unlikely that a court or jury would impose a duty on companies to tell the public about a risk that everyone knew about.”82

In a related context, one thinks of the campaigns which beer manufacturers are now engaged in to inform alcohol drinkers of the risk of drinking and driving. Anheuser Busch Inc., for the past several years, has reminded us, through the media, to “know when to say when.” Elsewhere, it tells us not to drink and drive. In other messages, the brewer promotes “Family Talk About Drinking” to deal with the problems of underage drinking. Are such messages advertising and promotion? Or, are they non-promotional public service announcements to remind us that drinking and driving is a dangerous combination? It seems that the leading alcoholic beverage manufacturers have undertaken to provide society with warnings outside their general advertising, warnings about the risks their products may pose if (as I am sure they would like me to say) the products are misused or abused. Personally, I am aware of no such programs undertaken by cigarette manufacturers.

Ultimately, the question for the Supreme Court, and for inferior courts which must interpret the Cipollone opinions, is whether or not claims that cigarette manufacturers have an obligation to warn outside of advertising, promotion, and packaging are consistent with a “fair but narrow” reading of section 5(b). Ultimately, this will require a determination of just how serious the Supreme Court was when it said that preemption clauses must be read narrowly. If, in fact, the Court is serious about reading sections 5(a) and 5(b) narrowly then Justice Scalia’s concerns are apt and extra-promotional warning claims survive.

82. Id.
B. Negligence

So much for classic product liability claims, what other tort claims survive? It would appear, given the preemption clause and the fair but narrow interpretation which the plurality says it requires, that general negligence claims against cigarette manufacturers would be cognizable. What would be the basis of this general negligence claim? There are several possible avenues. First, one could contend that cigarette manufacturers failed to adequately test to determine the relationship between smoking and health. That is, arguably, one could contend that if cigarette manufacturers had been engaging in adequate health research we would have learned that smoking was dangerous to health way before the Surgeon General’s 1964 report.

Moreover, one might argue that merely making and selling cigarettes, given their known risks, constitutes unreasonable conduct. This obviously would require a finding that 1) cigarette manufacturers knew or should have known of the risks of cigarette smoking and 2) that cigarette manufacturers failed to act reasonably in continuing to produce and sell their products. As Prosser, Keeton, Dobbs, Keeton, and Owen note:

In short, even if a seller [or manufacturer] had done all that he could reasonably have done to warn about a risk or hazard related to the way a product was designed, it could be that a reasonable person would conclude that the magnitude of the reasonably foreseeable harm as designed outweighed the utility of the product as so designed.83

One might call such products “bad” products.84

This negligence claim is precisely the type of claim to which, I believe, Professor Henderson85 would most object. It would involve a jury or judge engaging in social balancing of the risk and utility of cigarettes. Of course, figured into the calculus (as it is in a product liability case as well) either as an element of the plaintiff’s case, or as a defense, would be the fact that, at least since 1965, anyone smoking cigarettes was aware to some degree (and that degree increased) of the serious risks of smoking. Obviously, one could argue that a manufacturer has no duty to protect one from a known risk he or she voluntarily encounters. However, whether an addict has the ability to engage in

83. Prosser & Keeton, supra note 67, § 96, at 688-89. Interestingly, the same claim could be made against a seller or retailer of cigarettes given the widespread knowledge of the risks of cigarette smoking. Here we see most drastically the conflict between letting buyers decide for themselves what they want to buy and holding others liable to protect buyers from their own desires (addictions).
84. Id. at 689.
the type of cool, rational balancing which the tort doctrine of assumption of risk seems to presuppose is an open question. The addict analysis also undercuts the notion that tort liability is designed to force the seller to price its product to include accident costs, thus presenting the consumer with an "accurate" price. This is because the addicts' demand for the product would seem to be inelastic. He will pay the price, no matter how high.

One may wonder whether or not a court ought to impose a special obligation, or a higher degree of care, on the manufacturer of an addictive product. Where a product has an addictive potential which may have a serious effect on health (as I think most do), then should the manufacturer of that product have a particularly high obligation to purchasers of the product to make sure that the product's overall utility outweighs the risks it poses? Of course, one would think that the most apposite duty of a seller of an addictive product (short of not selling it) would be to warn those using the product of its addictive potential. However, such a warning claim relating to cigarettes and the package, promotion, or advertising would appear to be preempted after Cipollone. As noted, an extra-promotional warning claim may well be available.

Whatever one might conclude about such a negligence claim, it would appear that it is not preempted by federal law after Cipollone. As noted, the Cipollone district court directed a verdict on a general negligence claim because it thought the claim was subsumed under the plaintiff's design and warning claims.86

C. Fraud and Misrepresentation

State tort fraud or misrepresentation claims remain actionable after Cipollone. A misrepresentation claim involves a false representation made by the defendant. Usually, the representation must be one of fact. The defendant must have known, or believed, that the representation was false. This is the point at which fault becomes relevant in a misrepresentation case. The misrepresentation may be intentional, negligent, or, in some cases, even innocent. The defendant must have an intention to induce the plaintiff to act or refrain from acting in reliance upon the statement. The plaintiff must justifiably rely upon the defendant's representation in acting or failing to act. Finally, the plaintiff must suffer damages as a result of his or her reliance.87 So, if a cigarette manufacturer made a fraudulent statement in, or outside, advertising or promotion, which was knowingly false and which was intended to and

87. See, e.g., Prosser and Keeton, supra note 67, § 105, at 728.
did justifiably induce reliance which damaged the plaintiff, the claim would be actionable.

As noted above, the fraud claim would not be actionable to the extent that the plaintiff alleged that fraudulent statements undermined the effect of the federally prescribed warnings. Interestingly, the same day that the United States Supreme Court decided the *Cipollone* case it vacated a judgment and remanded a case to the First Circuit Court of Appeals. In that case, the First Circuit had held that fraud and misrepresentation claims were preempted by the labelling acts.88

D. Conspiracy, Intentional Torts and Punitive Damages After *Cipollone*

In addition to fraud claims, as noted, a plaintiff could allege that cigarette manufacturers had conspired to suppress information regarding the dangers of cigarettes. This claim is not preempted. Likewise, it would not seem that an intentional tort claim would be preempted.

A battery is the intentional infliction of a harmful or offensive contact. Intent requires a desire that the contact occurs or a substantial certainty that the harmful contact will occur. Arguably, one could get by a motion to dismiss in a battery case by alleging that cigarette companies were substantially certain that smoking would lead to a harmful or offensive contact (of smoke with lungs). Of course, consent would be the key issue in such a case. If a plaintiff consented to the contact but, due to the failure to provide full information of the health risks of cigarettes, did not know of the true risks of smoking, the consent to the contact may be vitiated. Consent would be less of a hurdle for the plaintiff in a "secondary smoke" case.89

Finally, as an aside, it would seem that *Cipollone* has no affect on state remedial law. The definition and measure of compensatory damages are left to state law. Additionally, *Cipollone* does not affect punitive damages claims against cigarette manufacturers. Thus, if a plaintiff could establish the requisite mental state and a non-preempted substantive claim, then punitive damages should be available after *Cipollone*.

E. Warranty

As the reader recalls, the Supreme Court held that U.C.C. section 2-313 express warranty claims are based on the parties' contract, not state law, and, thus, are not preempted. The U.C.C. provides not only for express warranties but also for implied warranties: the warranty of merchantability and the warranty of fitness for a particular purpose.

89. See infra text at Part IV(A).
The most important of these two is the warranty of merchantability.

Under U.C.C. section 2-314 a seller, which may include the manufacturer, warrants that its product will be merchantable. The concept of merchantability supposes that a product will be fit for its ordinary purposes. In Cipollone, the plurality treated express warranty claims as contract claims which were not preempted. Arguably, an implied warranty claim is also a non-preempted contract claim. As such, extending the logic of the plurality, the section 2-314 implied warranty claim would not be preempted.

The section 2-314 claim arises out of the conduct of the warrantor, in selling its product. Some states provide that implied warranty claims are only actionable for contract damages, leaving tort or personal injury damages to tort cases. Obviously, in such a state, the availability of the U.C.C. section 2-314 claim would not mean much, as damages would be limited to the difference between the value of the cigarettes purchased, as warranted, and as is. However, in a state which allowed recovery of personal injury damages for violation of the warranty of merchantability, the claim would not be preempted. U.C.C. section 2-715(2)(b) provides that personal injury damages may be recoverable for breach of warranty.

IV. THE QUAGMIRE

As Part II outlines, there are many claims still available to the cigarette plaintiff after Cipollone. Interestingly, the ultimate effect of Cipollone may, in many states, be most evident at the pleading stage. This is ironic in light of the fact that the federal rules and most state codes of civil procedure now require only notice pleading. However, Cipollone forces plaintiffs, defendants, and courts to carefully examine pleadings and the causes of action they allege. One recalls footnote 27 to the plurality opinion which stated that although both the general approach of Justice Blackmun and the specific approach of Justice Scalia were theoretically attractive they failed to adequately grasp Congress’ purpose. One may doubt whether the plurality’s compromise provides us with a middle of the road interpretation of Congress’ elusive intent or whether it reminds us that “the middle of the road is for road kill.” A hypothetical may be the best way to present some of the problems and inconsistencies.

93. The quote in text was inspired by the work of Louden Wainwright, III. See, e.g., Louden Wainwright, III, There’s a Dead Skunk in the Middle of the Road.
Imagine a billboard advertising "Ostrich" cigarettes. Under federal law, the billboard must provide the federally mandated warning. So, assume that the billboard states, in a box in the bottom right-hand corner, that smoking is dangerous to health. Likewise, imagine that in the top left-hand corner the billboard states that "Ostrich Cigarettes Are Safe." (I know this is unrealistic but it helps me to make my points and being unrealistic is, according to some, characteristic of my profession.) Suppose also, that on the billboard itself is a beautiful woman standing arm and arm with a handsome man on the beach next to an Ostrich with its head in the sand. Now, the question, under Cipollone and the acts which it interprets, is: what claims are available to a plaintiff who smokes Ostrich cigarettes after seeing the billboard and contracts cancer?

First, can the plaintiff claim that the defendant cigarette manufacturer failed to provide an adequate warning because the phrase "Ostrich cigarettes are safe" effectively undermined the effect of the warning provided? That is, can the plaintiff argue that the defendant should have provided a better warning, or a more thorough warning, in light of the statement that "Ostrich Cigarettes Are Safe?" The answer, under the Cipollone plurality, seems to be no. This is because any decision holding that the warning was inadequate, in light of the statement "Ostrich Cigarettes Are Safe" would be a requirement or prohibition based upon state law which required that the defendant's warnings include "additional, or more clearly stated"94 warnings than those federally mandated. The Cipollone plurality said that such claims were preempted. Thus, the statement "Ostrich Cigarettes Are Safe" would not be actionable as the basis of a failure to warn claim. The statement's alleged undermining of the effect of the required warning is legally, if not actually, irrelevant. On a motion to dismiss this warning claim, a court most probably should, after Cipollone, grant the motion. As noted, perhaps there is another warning claim not related to purchasing, advertising, or promotion; however, any warning claim based on the statement in the advertising itself would seem to be preempted.

What about a statement made through the Tobacco Institute, an organization formed and composed, in part, by cigarette manufacturers? Suppose the Tobacco Institute said "Cigarettes Are Safe." Arguably, a statement by the Institute would not be promotion or advertising. Here again, one would face the question of whether all statements made by the manufacturer of a product constitute promotion and advertising. The plaintiff would also have to establish a connection between the particular manufacturer and the Institute.

Returning to the billboard, what about a claim that the statement "Ostrich Cigarettes Are Safe" was an express warranty, pursuant to U.C.C. section 2-313? I believe, under the *Cipollone* plurality that this claim would not be barred. Pursuant to the plurality opinion, the express warranty claim is one which is based not on state law but upon what the manufacturer said. Here, the manufacturer said that "Ostrich Cigarettes Are Safe." But what about the federally mandated warning on the sign? The warning would raise the question whether the statement "Cigarettes Are Safe" actually formed a part of "the basis of the bargain" as required by the Code. Justice Stevens noted this point in his opinion when he stated that the fact that the terms of a warranty are set forth in advertisements would be irrelevant "though possibly not to the state law issue of whether the alleged warranty is valid and enforceable." The statement about Ostrich cigarettes being safe would also need to be read in light of the fact that most of us now believe that cigarettes are not safe.

How about a fraud claim based on the statement "Ostrich Cigarettes Are Safe?" Again, as noted above, under the plurality opinion, the statement would not be actionable to the extent that the allegation was that the statement undermined the effect of the federally mandated warning. However, it would be actionable to the extent that the plaintiff alleged the statement was your basic lie—*i.e.*, the statement was not true. Plaintiff would also have to establish the other elements of fraud. One might wonder whether or not letting this claim proceed is really consistent with the "fair but narrow" reading of the relevant portions of the cigarette labeling acts; however, it seems a point upon which reasonable minds could disagree and one upon which we could anticipate inconsistent opinions from state and federal lower courts.

As can be seen, the result of *Cipollone*, inconsistently enough, is that various claims based on the statement "Ostrich Cigarettes Are Safe" would be preempted, whereas, others would not. It would be the job of the trial judge in such a case to consider the pleadings carefully and to determine what causes of action were raised, which were preempted, and which were not. Before turning to Louisiana, let me consider a specific context, not at issue in *Cipollone*, but one on which we can anticipate future claims: the secondary smoke problem.

### A. Secondary Smoke Claims

Recent studies have indicated that secondary smoke may be potentially more harmful to health than previously believed. Secondary smoke
is smoke inhaled by a non-smoker who is in physical proximity to a smoker. These studies tell us secondary smokers may suffer serious adverse health consequences from inhaling secondary smoke. As Professor Phillips points out, secondary smoke claims, unlike a direct smoker's claims, are not as susceptible to the defenses of contributory (or comparative) negligence and assumption of the risk. What affect will Cipollone have on secondary smoke claims?

Cipollone should have no affect at all on mismanufacture claims; however, secondary smoke claims would probably not involve mismanufacture claims. The child who inhales some deleterious substance mistakenly placed in a cigarette his or her parent was smoking, however, would have a claim. Additionally, it would seem that secondary smoke victims would have design claims which are not preempted by Cipollone. Once again, one would have to look to state law to determine the applicable elements of this design claim. If the relevant state used the consumer expectation test, one might anticipate that secondary smoke claims could be successful. Query, does Restatement (Second) comment (i)'s notion of the dangerous product and its undertones of individual responsibility and accountability apply when the dangerous product harms someone who has not made a decision to use that product? Comment (i)'s reach would not seem to be that long. If applicable state law considers the risk and utility of cigarettes, the utility to secondary smokers seems rather low.

However, if, under state law, the plaintiff must establish that an alternative design existed which would have minimized the damages from secondary smoke, the issue becomes trickier. Would it have been possible to manufacture a cigarette which posed less danger to victims of secondary smoke? I doubt that such technology would be limited to victims of secondary smoke. That is, if such a cigarette were possible to manufacture, it would no doubt reduce the risk to smokers, as well as secondary smokers. Critically, the availability of devices to reduce smoke in a room or building are most relevant to secondary smoke claims. Their existence seems to favor the manufacturer while implicating the smoker who does not use such a device to protect family members or co-workers. The issue is whether the smoker's failure to take steps to protect secondary smokers shifts responsibility away from the manufacturer. This is a scope of the risk problem, pure and simple (i.e., proximate cause, legal cause, etc.).

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What about a warning claim? What about the obligation of cigarette manufacturers to warn secondary smoke victims that the inhalation of smoke, even by someone not smoking a cigarette, may be hazardous to health? This would seem to be the most likely basis for the secondary smoke victim’s claim. However, note the potential preemption problems under Cipollone. If the claim would involve additional statements in advertising and promotion regarding the risk of secondary smoke then it would seem that a failure to warn claim would be preempted under the express language of the plurality opinion in Cipollone. To the extent that the plaintiff’s claim was based on a failure to warn in other media, the claim might proceed. However, the plurality did say that express preemption clauses were to be read narrowly. In light of this fact, a plaintiff might argue that there is absolutely no evidence that Congress intended, in any way, to affect secondary smokers’ claims. Congress’ concerns about smoking and health involved smokers, not secondary smokers. Thus, one might reasonably conclude that it would be unreasonable to preempt claims by secondary smokers when Congress gave absolutely no indication that it meant to deal with the secondary smoke issue.

What about fraud? There may be two possible avenues available for secondary smoke fraud claims following Cipollone. First, if plaintiffs could establish that manufacturers made false statements regarding the risk of secondary smoke, those claims would not be preempted. The second possible claim is that cigarette companies, through the Tobacco Institute, arguably have made statements that the risks of damage from secondary smoke are not as great as other studies have indicated. Of course, the problem here is that some statements by the Institute, particularly the most recent, have been made in response to scientific studies. The most recent Tobacco Institute’s statements question the validity of studies proclaiming secondary smoke risks. It would be ironic if one were not allowed to publicly question the validity of scientific studies (or at least not to call for additional studies) before drawing a conclusion without incurring liability. To make such statements actionable would seem to be contrary to our shared notions about the value of open debate. Of course, a pattern of bad faith denials may compel a different conclusion. Likewise, if it could be shown that the Tobacco Institute’s statements were knowingly false, then, perhaps, the statements would be actionable.

Thus, with secondary smoke we are left, after Cipollone, with a legal environment where the most promising claim, failure to warn, may be preempted, at least in relation to the package, advertising, or promotion. Other claims involving secondary smoke and cigarettes are available; however, mismanufacture claims seem rare, while fraud claims and design claims may be difficult to establish. Perhaps, here, one could argue that the mere sale of cigarettes poses a risk of unreasonable harm
to victims of secondary smoke, and that it is negligence, in and of itself, to sell cigarettes because of the risks cigarettes pose to secondary smokers. As noted above, such a claim would not be preempted under Cipollone.

V. LOUISIANA CLAIMS

A. Pre-LPLA Claims

Moving from the national scene to Louisiana, I will now address cigarette liability under Louisiana law after Cipollone. It will be necessary to break the discussion down into two sections, one dealing with pre-Louisiana Product Liability Act (LPLA) claims, and the other dealing with post-LPLA claims. The Louisiana Legislature passed the LPLA in 1988 and, in so doing, made some significant changes in Louisiana law.100 Prior to the passage of the LPLA, plaintiffs had several viable theories against product manufacturers: strict product liability, negligence, fraud, and redhibition. Let me begin with the strict product liability claims.

The most cogent and complete discussion of pre-LPLA strict liability law was set forth in Halphen v. Johns-Manville Sales Corp.101 In Halphen, the Louisiana Supreme Court, in response to a certified question, set forth the four ways in which a product could be unreasonably dangerous under pre-LPLA Louisiana law: unreasonably dangerous per se, unreasonably dangerous due to mismanufacture, unreasonably dangerous in design, and unreasonably dangerous for failure to warn.

A product was unreasonably dangerous per se if its danger, in fact, outweighed its utility. (This claim was mentioned in the discussion of design claims in Part II.) In an unreasonably dangerous per se product liability case, state of the art evidence was inadmissible. The unreasonably dangerous per se claim against the cigarette manufacturer would be that cigarettes were unreasonably dangerous per se because the risks they presented outweighed their utility. The risks that cigarettes pose would include the risk of cancer, the risk of heart disease, risks to smoking pregnant mothers, risks to secondary smokers, and all the other health risks with which we have become familiar over the past twenty-five years. The utility of cigarettes, it would seem, would be two-fold: pleasure and economic benefits through sales and jobs.102 Prior to Cipollone, the United States Fifth Circuit Court of Appeals had held that claims that cigarettes were unreasonably dangerous per se were not

100. See John Kennedy, A Primer on the Louisiana Products Liability Act, 49 La. L. Rev. 565 (1989); Galligan, supra note 67.
101. 484 So. 2d 110 (La. 1986).
preempted by the advertising acts.\textsuperscript{103} The United States Supreme Court noted the Fifth Circuit's decision in \textit{Cipollone}.\textsuperscript{104} This decision would seem not to be disturbed.

Last year, in \textit{Gilboy v. American Tobacco Co.},\textsuperscript{105} the Louisiana Supreme Court reversed a finding by the trial court and the first circuit court of appeal that a defendant cigarette manufacturer was entitled to summary judgment on an unreasonably dangerous per se claim. Gilboy had begun smoking in 1940. He was diagnosed with cancer of the lungs and brain in 1986. The court of appeal, in an opinion tinged with notions of personal responsibility, had basically held cigarettes were not unreasonably dangerous per se because the smoker, Gilboy, had assumed the risk of adverse health consequences from smoking. The Louisiana Supreme Court, in an opinion by Justice Watson, reversed. The court's decision answered several key questions concerning the Louisiana Products Liability Act, the role of the jury in an unreasonably dangerous per se case, and the place of assumption of the risk in a cigarette/product liability case after \textit{Murray v. Ramada Inns, Inc.}.\textsuperscript{106}

Justice Watson's opinion began with the risk utility test applicable in an unreasonably dangerous per se case. He indicated that whether the danger in fact of cigarettes outweighed their utility was a question for the jury. On that basis, summary judgment in the defendant's favor had been improper. As Justice Watson stated: "Using Halphen's risk/utility test, a jury must determine whether cigarettes are unreasonably dangerous per se."\textsuperscript{107} Thus, it would seem the jury gets to balance the risks and utility of cigarettes in a Louisiana cigarette unreasonably dangerous per se product liability case. Interestingly, two sentences earlier, Watson wrote: "Since normal use of cigarettes causes lung cancer, the risk from smoking cigarettes is enormous, while its utility is virtually nil."\textsuperscript{108} This is powerful language, indeed. What effect will this language have? Is it a legal conclusion? The first quoted sentence about the jury deciding whether a product is unreasonably dangerous per se would seem to suggest that the statement about the utility of cigarettes is not a legal conclusion. Could Watson's statement be the basis of a motion for directed verdict? Again, the sentence about the jury suggests otherwise, but saying that the utility of cigarettes is virtually nil is pretty strong stuff. Could it be read to the jury as part of an instruction on the risk utility balance? Justice Dennis joined in the court's opinion in \textit{Gilboy}

\footnotesize{\textsuperscript{103} Pennington v. Vistron Corp., 876 F.2d 414 (5th Cir. 1989) (applying Louisiana law).\textsuperscript{104} Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2613 n.2 (1992).\textsuperscript{105} 582 So. 2d 1263 (La. 1991).\textsuperscript{106} 521 So. 2d 1123 (La. 1988).\textsuperscript{107} \textit{Gilboy}, 582 So. 2d at 1264.\textsuperscript{108} Id.}
but preferred not to express any opinion on the utility or risk of cigarettes.\textsuperscript{109}

Of course, saying that the jury must decide whether cigarettes are unreasonably dangerous per se presupposes that the LPLA, which does not provide for this category of recovery, does not apply retroactively. That is precisely what the court in \textit{Gilboy} held. The defendants had argued that the LPLA was merely interpretative and could be applied retroactively.\textsuperscript{110} Justice Watson summarily rejected the defendant's argument stating that "since the Act alters substantive rights, it is not retroactive and does not apply to this lawsuit. A statute that changes . . . law relating to substantive rights only has prospective effect."\textsuperscript{111}

One may wonder whether or not Justice Watson's statements are limited to the substantive aspects of the LPLA and, arguably, inapplicable to purely procedural aspects. You see, the language the court used in \textit{Gilboy} referring to the act as a whole, went beyond its holding. The holding was merely that the LPLA (insofar as it eliminates per se claims) is not retroactive.

Earlier, the United States Fifth Circuit Court of Appeals, in an opinion written by the late Judge Alvin B. Rubin, \textit{Lavespere v. Niagara Machine & Tool Works, Inc.},\textsuperscript{112} had held that Louisiana Revised Statutes 9:2800.56 (2)(b), dealing with the burden of proof on the risk utility balance in a design case, was purely procedural. Thus, the court applied that section of the LPLA retroactively. Justice Watson's opinion in \textit{Gilboy} talks of the "Act" which seems to imply that no part of the LPLA should be applied retroactively. However, Watson did say that no part of the LPLA should be applied "to this lawsuit [\textit{Gilboy}]" leaving open, I suppose, the question of whether \textit{Lavespere} is the law concerning purely procedural portions of the act. In my humble opinion, to the extent the LPLA is substantive, it is clearly not retroactive. To the extent that it may be purely procedural, it probably does not make much difference in the great run of cases whether or not the act is applied retroactively. Unfortunately for the plaintiff in \textit{Lavespere}, \textit{Lavespere} was one of those cases where it did make a difference. On the retroactivity question, Justice Dennis, in \textit{Gilboy}, separately stated: "strictly speaking the Legislature may repeal or change law but it cannot overrule or reverse decisions of the courts interpreting the law."\textsuperscript{113}

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\begin{footnotesize}
109. \textit{Id.} at 1266 (Dennis, J., concurring).
111. \textit{Gilboy}, 582 So. 2d at 1264-65.
112. 910 F.2d 167, reh'g. denied, 920 F.2d 259 (5th Cir. 1990). \textit{Cf.} Miles v. Olin Corp., 922 F.2d 1221 (5th Cir. 1991) (the LPLA's substantive provisions are not to be applied retroactively).
113. \textit{Gilboy}, 582 So. 2d at 1266 (Dennis, J., concurring).
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As for the assumption of the risk issue, Justice Watson indicated that if Gilboy knowingly assumed the risk of smoking, there was a comparative fault question for the jury. Thus, apparently, smoking, despite knowledge of the risk of smoking, would go to reduce recovery, not to bar it. While discussing this issue, the court noted there were factual questions about Gilboy’s competence when he allegedly became addicted to smoking. That is, did he have the ability “to recognize the danger; to appreciate the nature and extent of the risk; and to voluntarily expose himself to that risk . . .?”114 I will return to this comparative fault issue in a moment.

Continuing, the Gilboy court distinguished alcohol, handguns, and assault rifles from cigarettes because all of those other products, unlike cigarettes, can be used safely.115 The normal use of cigarettes, according to the court, is dangerous. The reader will recall that this is precisely what Restatement (Second) of Torts § 402A, comment (i) says.

Justice Watson further noted that the early warnings on cigarettes were “mild” and that federally mandated warnings only began specifically warning about cancer as an effect of smoking one year before Gilboy was diagnosed as suffering from lung and brain cancer. One wonders whether or not the weakness of the warning is a cognizable claim after Cipollone. I believe that the weakness of the warning insofar as it relates to a failure to warn claim is preempted; however, one could argue that the effect of the warning insofar as it relates to the risk of cigarettes in a design case, particularly the probability of harm, may still be considered by the jury. This is analogous to the jury’s consideration of a warning in determining whether or not an express warranty claim has been created. Watson expressly noted this point when, in reference to warnings and unreasonably dangerous per se products, he stated that a warning on an unreasonably dangerous per se product reduces, but does not eliminate, liability. “The adequacy of a manufacturer's warnings is a factor in assessing comparative fault.”116 Additionally, it seems to me, it is a factor in determining a product’s danger-in-fact—the better the warning, the less danger the product would pose. Justice Cole concurred in the result in Gilboy. As noted, Justice Dennis concurred and assigned separate reasons. Justices Lemmon and Marcus did not participate in the case. Judges Lobrano and Norris sat in their stead.

In summary, under Cipollone and Gilboy, the unreasonably dangerous per se claim survives for pre-1988 injuries. In addition, the Halphen opinion of the Louisiana Supreme Court recognized claims for

114. Id. at 1265.
115. Id.
116. Gilboy, 582 So. 2d at 1265.
mismanufacture, design, and failure to warn. The mismanufacture discussion really is no different than the general mismanufacture discussion that appears above.

The Halphen design claims were threefold, a product was unreasonably dangerous in design if: 1) it was unreasonably dangerous per se, 2) alternative safer products existed, and 3) alternative safer designs for the product existed. These pre-1988 claims also seem to be cognizable under Cipollone; however, the plaintiff would have to come up with an alternative product or an alternative design.

Halphen also recognized a failure to warn claim. Here, post-1969 (pre-LPLA) claims are, to the extent they relate to promotion and advertising, preempted under Cipollone. As noted above, Louisiana, like other jurisdictions, may still provide a failure to warn claim for these years, based on the reasoning that a better warning should have been provided outside the package, advertising or promotion.

In addition to product liability claims, a plaintiff, prior to the passage of the LPLA, could have sued a cigarette manufacturer for plain, old negligence under Civil Code articles 2315 and 2316.117 This would be very similar to the unreasonably dangerous per se claim, except that the plaintiff would have to show that the manufacturer knew or should have known of the dangers associated with smoking when it manufactured or sold the product. In a per se case, this knowledge is presumed, but, in a negligence case, knowledge must be proven. Thus, pre-LPLA law on this score was similar to national law on the subject. Additionally, prior to 1988, plaintiffs could have filed fraud claims and any other general tort claims which were then available to them under pre-LPLA Louisiana tort law.

Moreover, under Philippe v. Browning Arms Co.,118 a plaintiff could have cumulated redhibition and tort claims.119 Assuming that a court found that a product that was unreasonably dangerous had a redhibitory defect, the plaintiff would have been entitled to recover not only damages, but also attorney's fees under Civil Code article 2545 which provides that a bad faith seller is liable for attorney's fees. A bad faith seller is one who knows of the defects in the thing sold; a manufacturer is presumed to know of the defects in its thing. Thus, a manufacturer was a bad faith seller liable for attorney's fees.

Before turning to the LPLA itself, some questions arise about the effective date of the LPLA, Cipollone, and defenses, and these questions must now occupy us. I assume that a plaintiff, who developed cancer

118. 395 So. 2d 310 (La. 1980).
or other adverse health consequences as a result of smoking which were discovered and diagnosed prior to 1988, would be allowed to bring pre-LPLA claims. However, what about the smoker who developed cancer prior to 1988 but did not discover it until after the effective date of the LPLA? It would seem that the claim would not be prescribed under the discovery rule, the fourth category of contra non valentem; however, what substantive law would govern the claim? Just because a claim is not prescribed does not mean that it has not otherwise accrued. Arguably, the law at the time of the development of the cancer should control, here, pre-LPLA law. Finally, what about the person who smoked prior to 1988, but did not develop cancer until after 1988? Should the pre-1988 exposure entitle the plaintiff to rely upon pre-LPLA law? Or, is the plaintiff limited to pursuing claims under the LPLA? Or, do two sets of law govern the case? That is, would pre-1988 law govern for say cancerphobia or for causing a disposition for cancer whereas the cancer claim would have to be brought under the LPLA?

Some guidance is provided by the Louisiana Supreme Court's recent decisions in Cole v. Celotex Corp.\textsuperscript{120} and Champagne v. Celotex Corp.\textsuperscript{121} The cases involve questions of comparative fault, contribution, and insurance coverage. In Cole, asbestos workers sought damages for injuries arising from long-term exposure to asbestos from the insurer of their employer's executive officers and from various asbestos manufacturers. The executive officers were liable under the pre-1976 version of the Louisiana Worker's Compensation law.\textsuperscript{122} The Cole plaintiffs subsequently settled with the defendant manufacturers. The third circuit had found that the plaintiff's cause of action accrued before 1976, and neither side contested that finding.\textsuperscript{123} In rendering that decision, the third circuit used the contraction theory.\textsuperscript{124} The supreme court discussed the contraction theory in a footnote to its Cole opinion.\textsuperscript{125} It noted that exposure "is different from contraction."\textsuperscript{126} As the fourth circuit had said in a silicosis case, Faciane v. Southern Shipbuilding Corp.,\textsuperscript{127} injury, in a long-latency occupational disease case, occurs when "the cumulation

\begin{footnotes}
\item[120] 599 So. 2d 1058 (La. 1992).
\item[121] 599 So. 2d 1086 (La. 1992).
\item[123] Cole, 559 So. 2d at 1064 n.16.
\item[125] Cole, 599 So. 2d at 1076 n.54.
\item[126] Id.
\item[127] 446 So. 2d 770 (La. App. 4th Cir. 1984).
\end{footnotes}
of exposure reaches the point where the plaintiff contracts the disease.'" In Faciane, the fourth circuit said:

It seems implicit from much of the medical evidence that once silica dust has so damaged and maimed the body that the fibrogenic effects of silica inhalation will progress independent of further exposure, a disease has been contracted. It is at this point and not before that the consequences of exposure to silica becomes inevitable and in our opinion, actionable. The victim's body has been injured just as surely as if it had been hit by a truck.129

Thus, a cause of action for cancer or other damage from smoking may accrue under the contraction theory before the disease manifests itself. If the contraction theory pointed to pre-1988 contraction, pre-LPLA law would apply. Interestingly, in Cole the Supreme Court of Louisiana noted the difficulties inherent in the contraction theory,130 and left "for another day . . . resolution of the continued viability of the contraction theory in the context in which it arose."131

In Cole itself, pre-1976 law applied to the claims against the insurer of the executive officers because the third circuit found "plaintiffs contracted asbestos-related disease prior to 1976."132 Thus, pre-1976 law was clearly applicable. On a related and critical point, the insurer had contended that the plaintiffs could not recover under pre-1976 law for post-1976 fear of getting cancer. The third circuit rejected that argument because the plaintiffs' "causes of action" accrued before 1976, and the accrued claims would "include prospective damages occurring after 1976, such as fear, pain and suffering, loss of wages . . ."133 Under this logic, contraction of any smoking-related disease prior to 1988 might make other smoking related diseases diagnosed (or even contracted) after 1988 cognizable tort claims under pre-1988 law. Thus, a smoker who has pre-1988 emphysema (as a result of smoking) may be able to maintain an unreasonably dangerous per se product liability claim as to post-1988 cancer. This is potentially critical because the unreasonably dangerous per se claim is not available under the LPLA.134

128. Id. at 773.
129. Id.
131. Id.
133. Id.
134. For a cogent and convincing analysis of the relevant prescription problems and a sensible solution relying on the discovery rule and the disaggregation of particular claims see Cole, 599 So. 2d at 1083-86 (Dennis, J., concurring).
Cole and Champagne also raise interesting questions regarding smoking cases and comparative fault. Suppose that a plaintiff began smoking prior to 1980, when Louisiana passed its comparative fault statute. Should that smoker's recovery be barred by contributory negligence or assumption of the risk if those defenses are established? Or, should post-1980 comparative fault principles apply to the case? In Cole, one issue was whether or not pre- or post-1980 comparative fault law should be used to determine the virile share of settling tortfeasors.135 The plaintiffs had sued the insurer of the executive officers of the place where they had worked, as well as various manufacturers of asbestos. The plaintiffs had settled with the asbestos manufacturers and proceeded to trial against the insurer. At trial, the insurer contended that since the jury had found that the manufacturers were ninety-five percent at fault and the executive officers were only five percent at fault, post-1980 comparative fault principles should apply to determine the virile share of the settling defendants.136 If that had been the case, then the plaintiff would have only been entitled to recover five percent of the damage from the insurer.

The court looked at the legislation creating new Civil Code article 2323 and which made certain substantive changes to Civil Code article 1804, the relevant article for determining the virile share of a settling tortfeasor.137 The Act also made changes to the Code of Civil Procedure.138 The court decided that the time when plaintiffs' causes of action accrued would not be used to determine the applicability of the comparative fault package.

The Act by which the comparative fault package was passed provided that it would not apply to "events" occurring before the effective date of the Act. Thus, the court chose to employ an "events" test, rather than a cause of action test. In this regard, the court determined that where there were sufficient pre-1980 tortious exposures, pre-comparative fault principles would apply even though a disease may not have actually been contracted, or manifested itself, until later.139 In Cole, the court applied pre-comparative fault law and allocated shares by the head and not by percentages of fault. Actually, in Cole, this discussion of events versus accrual of the cause of action was dicta because, as noted, the court of appeal had determined that the plaintiffs' causes of action had accrued prior to 1980. However, in the companion case, Champagne,140 the lower courts had not determined that the plaintiffs' causes of action

135. Cole, 599 So. 2d at 1062-74.
139. Cole, 599 So. 2d at 1066.
had accrued. Thus, in footnote 17 in Cole, the court, referring to Champagne, stated that it refused to rest its decision in Cole on the cause of action logic because that would necessitate an additional hearing in Champagne on whether the Champagne plaintiffs’ causes of action had accrued.141 Thus, the events discussion in Cole, as well as footnote 17, are really more apposite to Champagne. In Champagne, where there was no finding that the plaintiffs’ causes of action had accrued before 1980, the court affirmed the third circuit’s decision to apply pre-1980 law.

One could argue that Cole is clearly distinguishable from a case where a plaintiff is suing a cigarette manufacturer and the plaintiff’s fault is at issue. This is because in Cole the issue was the virile shares of settling defendants. However, in Champagne one of the issues before the court was what law should apply to determine the effect of the plaintiffs’ alleged fault. The Supreme Court of Louisiana held, under its events test, that pre-1980 law, contributory negligence, would apply. Thus, it seems that if the jury in Champagne finds that the plaintiffs are at fault, the plaintiffs’ recovery against the executive officers’ insurer would be barred.

Once again, however, Champagne is distinguishable from a cigarette case. A cigarette case is against a product manufacturer, not negligent executive officers. In Champagne, it was the executive officers’ insurer, not the asbestos manufacturers, who was involved in the appeal and affected by the court’s decision. In Bell v. Jet Wheel Blast, Division of Ervin Industries,142 the Supreme Court of Louisiana held that contributory negligence did not apply in a product liability case. Bell was a pre-comparative fault case. It was a pre-1980 case, and the court still refused to apply contributory negligence as a bar to recovery. In Bell, the court said comparative fault would apply on a case by case basis, by analogy to Louisiana Civil Code article 2323, in product liability cases. This would seem to be true even in pre-1980 cases. The Bell court also hinted that assumption of the risk may be unavailable as a defense to a product manufacturer.

However, the cigarette plaintiff is not necessarily out of the woods on this issue because the court in Cole, in a footnote stated:

As noted by the Third Circuit, contributory negligence was available as a defense to the only defendant in this case, INA, the liability insurer of the executive officers. Several manufacturers and suppliers remain as defendants in the companion Champagne case. Whether contributory negligence or comparative fault is available as a defense to those defendants in the

141. Cole, 599 So. 2d at 1064 n.17.
142. 462 So. 2d 166 (La. 1985).
products liability claims asserted against them is an issue not presented or decided in the present case. See *Bell v Jet Wheel Blast, Division of Ervin Industries*, 462 So. 2d 166 (La. 1985). Whether the quoted language indicates a willingness to re-examine *Bell* is open to question. If not, it would seem the reference to contributory negligence is merely superfluous. As always, only time will tell.

B. Post-LPLA Claims

The LPLA sets forth the exclusive ways in which a product may be unreasonably dangerous. They are unreasonably dangerous in: construction or composition (mismanufacture), design, warning, or because of the breach of an express warranty. Under its terms, the LPLA sets forth the exclusive theories of recovery for a personal injury claimant. What this means is that, in Louisiana, there is no longer a general negligence action against a manufacturer. In the cigarette context, that means that the claim that a cigarette manufacturer is, or was, negligent simply by producing or selling cigarettes is not cognizable. As noted above, such a claim would not be preempted by *Cipollone* and, in most states, a plaintiff could bring such a suit. However, the LPLA does away with such claims. Moreover, the LPLA’s exclusivity means that the LPLA also takes away the plaintiff’s right to recover for fraud or for conspiracy. Recall that portions of these claims were not preempted by *Cipollone*, but, because of the language of the LPLA, they are not available in Louisiana.

Additionally, the LPLA drastically cuts back on the rights of an injured plaintiff to recover in redhibition. Under the LPLA, redhibition damages are limited to economic loss. Thus, in a cigarette case, a redhibition claim would now only be available to allow recovery of the difference between the value of the cigarettes, as warranted, and their value, as is; however, it would not be available for personal injury damages as it was under *Philippe*. Attorney’s fees would not be recoverable in association with the prosecution of personal injury claims.

So what does the act allow? The act would allow, under its construction or composition section, recovery for the mismanufactured cigarette. The deviation from other products manufactured by the same manufacturer would have to be material and, presumably, it would

143. *Cole*, 599 So. 2d at 1068 n.29.
have to render the product unreasonably dangerous. Again, this seems to be a very unlikely avenue for recovery in most cases.

Under the LPLA's design sections,\textsuperscript{149} the plaintiff has to establish that an alternative design existed which would have prevented the plaintiff's damages. I have written elsewhere concerning what "existed" means: whether it means existed at the time the product left the manufacturer's control, or whether it means existed at the time of trial.\textsuperscript{150} However, whatever "existed" means, the plaintiff must establish an alternative design. It seems especially difficult if the alternative design must not adversely impact the utility, \textit{i.e.}, enjoyment, of the product. For instance, one can imagine lettuce cigarettes, or nicotineless tobacco; however, even though these may be healthier products, it would seem that they would be much less desirable to the addicted smoker and probably infeasible. Moreover, the plaintiff must establish proximate cause, a requirement which was fatal to Rose Cipollone's design claims. Thus, the design claim does not seem to be a particularly promising one, either in Louisiana or elsewhere.

The LPLA also provides for a failure to warn claim. The LPLA's failure to warn claim does not seem to be substantially different from national law on the subject. To the extent that a plaintiff claims that additional language should have been used in packaging, advertising, or promotion, the claim would be preempted under \textit{Cipollone}. Of course, the same arguments made above would also apply in Louisiana to the extent that the plaintiff could argue that a tobacco manufacturer had an obligation to warn outside the context of the package, promotion, or advertising. This is, of course, assuming that such an extra package, promotion or advertising warning is consistent with a "fair but narrow" reading of the preemption provisions of the act. As indicated earlier, I believe it is consistent with this "fair but narrow" reading.

Interestingly, even if such a warning claim is cognizable, the LPLA's definition of warning is somewhat reminiscent of Restatement (Second) of Torts § 402A, comment (i). The LPLA provides:

"Adequate warning" means a warning or instruction that would lead an ordinary reasonable user or handler of a product to contemplate the danger in using or handling the product and either to decline to use or handle the product or, if possible, to use or handle the product in such a manner as to avoid the damage for which the claim is made.\textsuperscript{151}

The words "if possible" in the last clause point out that some products just cannot be used safely. As to those products, the manufacturer must

\begin{footnotes}
\item[150] Galligan, supra note 67, at 661-65.
\end{footnotes}
still warn of the risk and give the user the knowledge to decide to decline to use the product.

Interestingly, the LPLA provides that the manufacturer has a continuing duty not only to test its products and gather knowledge about them, but also to warn of any dangers discovered after manufacture (or dangers which should have been discovered). This section of the LPLA essentially establishes a negligence standard for the manufacturer’s continuing duty to warn. This duty may well be applicable to cigarette manufacturers. Should they have done more for smokers who had already bought their products? Should they have told them to consult doctors? Should they have warned them of the cumulative effects of smoking? Of course such a cumulative effect warning could be given with later purchased cigarettes. But there is a difference between warning of future risks from cigarettes about to be smoked and the effect of this later smoking when cumulated with earlier smoking. Under this analytic scenario, the obligation to “warn” may not only be current as to later purchased cigarettes, but continuing as to earlier purchased cigarettes. However, such warning claims would be preempted after 1969 unless based upon an extra-promotional failure to warn.

The LPLA does create a claim for breach of express warranty if the defendant manufacturer makes an express warranty concerning a product which induces its use by the plaintiff or another. This claim would not be preempted under the plurality opinion in Cipollone. To recover, the plaintiff must show statements made by the manufacturer, which rise to the level of an express warranty, and which induced the use of the product. Federally mandated warnings may adversely affect the plaintiff’s ability to prove inducement.

What about post-LPLA secondary smoke claims in Louisiana? Assuming that warning claims, at least those concerning packaging, promotion and advertising are preempted, the only claims that a secondary smoke plaintiff may have would be a warranty claim and an extra-promotional warning claim. It may be difficult for plaintiffs to find express warranties regarding the safety of cigarettes, especially in relation to secondary smoke. This would be an area where a general negligence claim would be particularly appropriate. A secondary smoke plaintiff would allege that it was negligent to sell cigarettes because of the risk which they posed to not just smokers but also secondary smokers; however, as noted, such a claim is not available under the LPLA.

VI. Conclusion

In conclusion, Cipollone raises more questions than it answers. Deciding what is left after Cipollone and what is preempted will require

\[152. \text{La. R.S. 9:2800.57(c) (1991).}\]

\[153. \text{La. R.S. 9:2800.58 (1991); see also Galligan, supra note 67, at 682-85.}\]
a detailed analysis of the pleadings in each individual case. In Louisiana, *Cipollone*, in conjunction with the LPLA, seems to signal even greater inroads into the rights of people injured by smoking. As I indicated at the outset, I came to explain *Cipollone*, not to praise it. But one notes and even may praise the plurality's effort to reach a compromise in their middle of the road interpretation of the cigarette labeling and advertising acts. Only time will tell whether that compromise will turn out to be a legal no-man's-land, where law can never really make sense.