

Spring 2000

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### Recommended Citation

Patricia A. Davidson, Cigar Warnings: Proceed with Caution, 33 J. Marshall L. Rev. 521 (2000)

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## ARTICLES

# CIGAR WARNINGS: PROCEED WITH CAUTION

PATRICIA A. DAVIDSON\*

### INTRODUCTION

The glamorization of cigars throughout the 1990s fueled a sharp increase in cigar consumption in the United States.<sup>1</sup> This trend, which reversed a thirty-year decline in cigar smoking, has enticed many new smokers, including younger men, women and adolescents.<sup>2</sup> While recent data indicates that cigar sales are flattening there are still more cigar smokers today than there were before the boom.<sup>3</sup> Furthermore, current data on youth use suggests cigars, along with other alternative tobacco products such as bidis,<sup>4</sup> have a strong foothold with middle and high school

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\* Staff Attorney, Tobacco Control Resource Center, Inc. at Northeastern University School of Law. Research for this Article was supported by a grant from the Robert Wood Johnson Foundation's Substance Abuse Research Program. The Author gratefully acknowledges the contributions of Alan E. Scott, Esq., who provided research and drafting assistance for the cigarette and smokeless tobacco warning sections of this Article, Christopher Banthin, Esq., Stephen Drobný, Emily McFarling and Saskia Kim for their research assistance, and Professor Richard A. Daynard for his insightful review of an earlier draft.

1. The years 1993-1998 were the years of peak consumption, with sales of large premium cigars beginning to flatten in 1998. See NAT'L CANCER INST., CIGARS: HEALTH EFFECTS AND TRENDS, SMOKING AND TOBACCO CONTROL 1-2 (Nat'l Inst. of Health Monograph No. 9, 1998) [hereinafter CIGAR TRENDS]; FEDERAL TRADE COMMISSION REPORT TO CONGRESS, CIGAR SALES AND ADVERTISING AND PROMOTIONAL EXPENDITURES FOR CALENDAR YEARS 1996 AND 1997, 9 n.15 [hereinafter FTC REPORT TO CONGRESS] (1999) (visited July 27, 1999) <<http://www.ftc.gov/os/1999/cigarreport1999.htm>>.

2. CIGAR TRENDS, *supra* note 1, at 21-53.

3. Mya Frazier, *Cigar Craze Now More Ash Than Smoke*, CINCINNATI BUS. COURIER, Feb. 7, 2000, <<http://bizjournals.com/cincinnati/stories/2000/02/07/story5.html>>.

4. Bidis are flavored, unfiltered cigarettes manufactured in India and sold in the U.S. Russell Sabin, *San Francisco Teens Trying High Nicotine 'Bidi' Cigarettes*, SAN FRANCISCO CHRON., June 19, 1998, at A23. They are produced in a variety of flavors, including chocolate, vanilla, cherry, licorice and mango. *Id.*

age users.<sup>5</sup>

Increases in consumption and positive media attention to the cigar lifestyle prompted a new wave of studies on the health effects of cigar smoking in the 1990s.<sup>6</sup> A number of key studies were summarized in the 1998 National Cancer Institute report, which concluded that cigar smoking causes oral, esophageal, laryngeal and lung cancers.<sup>7</sup> Several other studies have been released since 1998, corroborating and expanding upon the National Institute of Health's (NIH) conclusions about the serious health risks associated with regular cigar smoking.<sup>8</sup>

Faced with alarming data about health effects and consumption, particularly among young people, policy-makers at the state and federal levels have begun to consider stepping up cigar regulation. Cigar warning labels are one of the primary tools lawmakers are examining.

The factors sparking debate about the need for health warnings on cigars are similar to those that propelled Congress to adopt federal warnings on cigarettes and smokeless tobacco. Policy-makers considering the pros and cons of federal and/or state cigar warnings may wish to apply lessons learned from the long and contentious legal policy history wrought by national cigarette labeling.

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5. See, e.g., CENTERS FOR DISEASE CONTROL AND PREVENTION, TOBACCO USE AMONG MIDDLE AND HIGH SCHOOL STUDENTS—UNITED STATES, 1999, at 49-53 (Morbidity and Mortality Weekly Report No. 3, 2000) (stating that the use of alternative tobacco products such as cigars, pipes, and bidis, increased during the 1990s).

6. FTC REPORT TO CONGRESS, *supra* note 1, at 9-13.

7. See CIGAR TRENDS, *supra* note 1, at 19 (stating that the NIH report found that regular cigar smokers who inhale "have an increased risk of coronary heart disease and chronic obstructive pulmonary disease.").

8. See, e.g., Jean A. Shapiro et al., *Cigar Smoking in Men and Risk of Death From Tobacco-Related Cancers*, 92 J. OF THE NAT'L CANCER INST. 333, 335 (2000) (finding through a study of over 137,000 men that cigar smoking is associated with an increased risk of death from cancers of the lung, oral cavity/pharynx and esophagus); Eric J. Jacobs et al., *Cigar Smoking and Death From Coronary Heart Disease in a Prospective Study of U.S. Men*, 159 ARCHIVES OF INTERNAL MED. 2413, 2413 (1999) (finding through a study of over 121,000 men, aged, 30 and older, that smoking cigars increases the risk of early death from coronary heart disease); Carlos Iribarren et al., *Effect of Cigar Smoking on the Risk of Cardiovascular Disease, Chronic Obstructive Pulmonary Disease, and Cancer in Men*, 340 NEW ENG. J. MED. 1773, 1774-75 (1999) (finding through a study of over 17,000 men that cigar smoking can increase the risk of coronary heart disease, constrictive pulmonary disease, and cancers of the upper aerodigestive tract and lung). Unfortunately, all of the health effects studies to date have been limited to men who regularly smoke cigars, a term which generally means daily cigar smoking. Shapiro et al., *supra* at 335. This is a significant limitation since many cigar smokers report smoking less than daily. CIGAR TRENDS, *supra* note 1, at 40. Rigorous studies of the health effects of occasional cigar smoking, an admittedly difficult term to operationally define and empirically measure, are needed.

If federal warning laws and regulations are not carefully drafted, taking into account the dangers of shielding the cigar industry from liability and limiting state and local action, federal laws could create a hazardous environment for the development of public health policies and regulations intended to reduce cigar use. Furthermore, an examination of U.S. cigarette warnings and the bolder warnings by our Canadian neighbors suggest that tobacco-warning messages that fail to account for data explaining the efficacy of the warning could hamper the achievement of public health goals.

Unless these caveats are heeded, it may have been preferable to continue to rely on state-by-state cigar labeling efforts. A concerted effort to include cigars in public health counter-advertising campaigns and funding for additional research on the health effects of cigar smoking, especially occasional smoking might also be undertaken by states. Testing cigar health messages before institutionalizing them and creating a process for updating and targeting messages in response to new health information, changing consumption patterns, and eventual overexposure could also help.

Shortly before this Article went to print, a federal court decision upholding many innovative state tobacco regulations struck the State of Massachusetts cigar warning label law.<sup>9</sup> If the regulations had survived, Massachusetts would have become the second state in the nation to place its own warning label on cigars and the first to require warning messages in cigar advertisements. This development was a catalyst for the recent FTC action with the cigar industry pressing for national warnings as it weighed the costs of complying with multiple state warnings and its chances of obtaining a more favorable deal in Congress.

Part I of this Article analyzes cigar warning labels laws adopted by individual states, describing the history of the California cigar warning label and recent developments in the State of Massachusetts. Part II discusses the lack of a federal cigar warning and national proposals to fill this void, suggesting that policy-makers avoid the pitfalls of the current U.S. cigarette warning label system, particularly preemption. Part III explores questions concerning the efficacy of U.S. tobacco warning label system are explored and contrasted with a bolder approach being considered in Canada. In Part IV, a very recent FTC proposal to establish national cigar warnings through consent orders is discussed and critiqued.

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9. MASS. REGS. CODE tit. 940, § 22.04-22.05 (1996 & Supp. 2000). Consolidated Cigar Corp. v. Reilly, 218 F.3d 30 (1st Cir. 2000). See *infra* Part I for a discussion of the opinion, which dealt with a number of tobacco regulations pertaining to cigarettes and smokeless tobacco, as well as cigars.

## I. STATE CIGAR WARNING LABELS

### A. History of the California Cigar Warning Label

The first and only warning label to date that appears on certain cigar packaging resulted from the settlement of a lawsuit the state of California filed more than ten years ago.<sup>10</sup> Prodded by a coalition of environmental organizations, who initiated the action, the California Attorney General filed suit against twenty-five tobacco companies, eight retail chains and the state's Ingredient Communication Council.<sup>11</sup> The suit was a test case of Proposition 65,<sup>12</sup> a toxic chemical's warning law adopted by popular vote in the state of California.

The California law, which the plaintiffs claimed cigar manufacturers and retailers were violating, provides:

No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual, except as provided in Section 25249.10.<sup>13</sup>

Almost immediately after the suit was filed one of the largest supermarket chains in California, fearing staggering fines and negative publicity, removed all cigars and pipe tobacco from its shelves.<sup>14</sup> Other large California supermarket chains threatened

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10. California *ex rel.* Van de Kamp v. Safeway Stores, Inc., No. 897576 (Cal. Super. Ct. Nov. 29, 1990).

11. Complaint for Penalties, Injunctive and Declaratory Relief, California *ex rel.* Van de Kamp v. Safeway Stores, Inc. (Cal. Super. Ct. Sept. 30, 1988) (No. 897576) (citing CAL. HEALTH & SAFETY CODE § 252489.7 (West 1996 & Supp. 2000)); CAL. BUS. & PROF. CODE § 17200 (West 1996 & Supp. 2000); CAL. CIV. PROC. CODE § 1060 (West 1996 & Supp. 2000).

12. The California Safe Drinking Water and Toxic Enforcement Act of 1986, CAL. HEALTH & SAFETY CODE § 25249.7 (West 1996 & Supp. 2000).

13. *Id.* § 25249.6 (West, WESTLAW through 1999 portion of 1999-2000 Reg. Sess. & 1st Exec. Sess.). There are three express exceptions to the California warning requirement, including "an exposure for which federal law governs warning in a manner that preempts state authority." *Id.* § 25249.10(a) (West, WESTLAW through 1999 portion of 1999-2000 Reg. Sess. & 1st Exec. Sess.). Cigars were apparently considered to be within the purview of the California statute because of the void in federal law and because mainstream tobacco smoke and oral use of tobacco products were included on the state's 1988 list of chemicals known to cause cancer or reproductive toxicity. CAL. CODE REGS. tit. 22, § 12000 (1997 & Supp. 2000) (noting tobacco smoke initially appeared on the list April 1, 1988). The state list is one of the specific triggers for coverage under the California warning law. CAL. HEALTH & SAFETY CODE § 104550 (West 1996 & Supp. 2000). See also *Senate Health and Human Services Committee Analysis, June 1999* (visited August 16, 1999) <<http://www.leginfo.ca.gov/pub/bill/asm/ab1595>>.

14. *Cancer Warning Will Go On Cigars: Settlement of State Suit Expands Tobacco Health-Hazard Labeling*, SAN DIEGO UNION & TRIB., Oct. 19, 1988, at A1 [hereinafter *Cancer Warning*].

to remove cigars and loose leaf tobacco from store shelves as well, if warnings were not added to the products.<sup>15</sup> This pressure was a key factor in producing the settlement<sup>16</sup> and the first cigar warning label requirement in the nation.<sup>17</sup>

Not surprisingly, the language of the California warning label tracks the statutory requirements, stating: "WARNING: This Product Contains Chemicals Known To The State of California To Cause Cancer, And Birth Defects Or Other Reproductive Harm." Furthermore, the cigar industry elected to place the warning on most cigars distributed nationally. Norman Sharp, President of the Cigar Association of America, explained: "Because of the manufacturing and distribution practices of the national cigar manufacturers, . . . it would be impossible for them to label only for California."<sup>18</sup> The industry continues to claim that state specific cigar warning label requirements are unreasonably burdensome.<sup>19</sup>

### 1. *Why Isn't The California Cigar Label Sufficient?*

In view of the recent increase in cigar consumption,<sup>20</sup> startling new statistics about underage use<sup>21</sup> and alarming health data about cigar smoking,<sup>22</sup> critics have taken a second look at the California cigar warning label. On the national level the U.S. Surgeon General,<sup>23</sup> Federal Trade Commission (FTC)<sup>24</sup> and Office

15. *Id.*

16. The defendant retailers and manufacturers also agreed to pay the State of California \$625,000 in fines and \$125,000 in attorneys fees and court costs to settle the case. *California ex rel. Van de Kamp*, No. 897576, at 7-8. See also Richard C. Paddock, *Stores to Pay Fines Over Tobacco Warning Lawsuit: Failure to Post Signs Alerting Consumers Will Cost Eight Chains and Manufacturers Coalition \$750,000*, L. A. TIMES, Nov. 27, 1990, at 3 (noting that eight chain stores and a coalition of manufacturers agreed to pay \$750,000 in fines for not warning consumers that cigars and pipe tobacco can cause cancer and birth defects).

17. In a news account of the settlement, a spokesman for the Environmental Defense Fund which filed the initial complaint, announced: "This loophole for these products has been in federal law for 20 years, and Proposition 65 has closed it in three weeks." *Cancer Warning*, *supra* note 13, at A1.

18. *Id.*

19. See Amended Complaint, *Consolidated Cigar Corp. v. Reilly*, at ¶¶ 28-35 (D. Mass. filed July 1, 1999) (No. 99-CV-11270WGY). See *infra* Part I.B. for a discussion of the case.

20. See *supra* note 1 and accompanying text for a record of the recent increase in cigar smoking.

21. See *supra* note 5 and accompanying text for a discussion of teenage use of tobacco products.

22. See *supra* notes 2, 6-7 and accompanying text for a study of the health effects of cigar smoking.

23. Alec Klein, *Cigar Threat Draws Notice*, THE BALTIMORE SUN, May 27, 1998, at 1A.

24. FTC REPORT TO CONGRESS, *supra* note 1, at 13 nn.36-38. See *infra* Part II for an in-depth discussion of the FTC Report's warning recommendation and

of the Inspector General for the Department of Health and Human Services<sup>25</sup> have all called for federal warning labels on cigars since the NIH Cigar Report was released. A 1999 FTC Report specifically addressed the efficacy of the current California warning label on cigars, concluding:

This warning is not an adequate substitute for federally mandated warnings. It is very often inconspicuous and it is required only on labeling and not in advertising. In addition the warning's generic message does not adequately warn of the specific adverse health consequences associated with cigar smoking.<sup>26</sup>

In tandem with the federal reports calling for cigar warning labels, the states of California and Massachusetts, which are nationally recognized for their strong tobacco control policies and programs,<sup>27</sup> also took action. In California, the governor signed into law a bill that updated and strengthened the warning label requirements for "cigars packaged for sale after September 1, 2000, and shipped for distribution in California."<sup>28</sup>

The new California cigar warning label law requires cigar manufacturers or importers to place one of the following three warnings on cigar packaging:<sup>29</sup>

Warning: Cigars contain many of the same carcinogens found in cigarettes, and cigars are not a safe substitute for smoking cigarettes. This product contains chemicals known to the State of California to cause cancer.

Warning: Smoking cigars regularly poses risks of cancer of the mouth, throat, larynx, and esophagus similar to smoking cigarettes. This product contains chemicals known to the State of California to cause cancer and birth defects and other reproductive

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issues related to federal warnings.

25. OFFICE OF INSPECTOR GENERAL, DEPARTMENT OF HEALTH AND HUMAN SERVICES, YOUTH USE OF CIGARS: FEDERAL, STATE REGULATION AND ENFORCEMENT ii, 17, 25 (1999).

26. FTC REPORT TO CONGRESS, *supra* note 1, at 13 n.37.

27. CENTER FOR DISEASE CONTROL AND PREVENTION, CIGARETTE SMOKING BEFORE AND AFTER AN EXCISE TAX INCREASE AND AN ANTI-SMOKING CAMPAIGN—MASSACHUSETTS, 1990-1996, at 1-6 (Morbidity and Mortality Weekly Report No. 44, 1996).

28. 1999 Cal. Stat. 693 (codified at CAL. HEALTH & SAFETY CODE §§ 104550-52 (West 1996 & Supp. 2000)). A delayed effective date was one of several concessions made to the cigar industry by way of amendments. The original bill, filed by Assemblywoman Carole Migden on February 26, 1999, would have, *inter alia*, become effective January 1, 2000. *Senate Health and Human Services Committee Analysis, supra* note 13. It also initially required warning labels on individual cigars, a provision that was later amended to instead require warnings on boxes containing individual cigars. *Id.* (noting that A. B. 1595 was amended on April 27, 1999).

29. The 1999 California statute provides that these warnings supercede the warnings stipulated to in the settlement of the 1988 case. *See* CAL. HEALTH & SAFETY CODE § 104550(f) (West 1996 & Supp. 2000).

harm.

Warning: Smoking cigars causes lung cancer, heart disease, and emphysema, and may complicate pregnancy. This product contains chemicals known to the State of California to cause cancer and birth defects and other reproductive harm.<sup>30</sup>

While the new California law would have required warning labels on display boxes or containers for the first time, it does not include a size or any detailed format requirements. Rather the statute merely states warnings “shall be displayed in a clear and reasonable manner” using “conspicuous and legible type” that contrasts with other printed material on the cigar package.<sup>31</sup>

Recognizing the potential for federal action on cigar warning labels, the California statute provides that any conflicting federal law enacted subsequent to its effective date (September 1, 2000) will trump the state’s requirements.<sup>32</sup> While this provision leaves ample room for federal preemption of the state’s efforts to regulate cigar warnings, the new law expressly protects specific pending cigar warning litigation filed under Proposition 65 from preemption claims.<sup>33</sup>

However, the new California state warning label, like its settlement-induced predecessor, applies only to cigar packaging and not to cigar advertising.<sup>34</sup> This gap<sup>35</sup> is one of several

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30. *Id.* § 104550(a).

31. *Id.* § 104550(d).

32. The preemption language states: “To the extent this article conflicts with any federal provision enacted subsequent to the effective date of this article that requires cigar manufacturers and importers to provide warning labels on cigars, those federal provisions shall supersede the provisions of this article.” *Id.* § 104552. The FTC cigar warning requirements, if formally adopted by the Commission will supercede the California law. See Letter from Bill Lockyer, Attorney General, State of California, to Robert Pitofsky, Chairman, Federal Trade Commission 5-6 (June 23, 2000) (on file with author).

33. CAL. HEALTH & SAFETY CODE § 1045550(f) (West 1996 & Supp. 2000).

It is the intent of the Legislature that the enactment of this section shall not affect the litigation in *People of the State of California et al. v. General Cigar Company et al.*, San Francisco Superior Court No. 996780; *People of the State of California and American Environmental Safety Institute v. Philip Morris, Inc. et al.*, Los Angeles Superior Court No. BC194217; and *People of the State of California et al., v. Tobacco Exporters International (USA), Ltd. et al.*, San Francisco Superior Court No. 301631.

*Id.* The judge hearing these and many other consolidated cases recently ruled that there is no duty to warn non-consumers about the hazards of second-hand smoke under California Health & Safety Code § 25249.6, effectively ending litigation of the claims in these cases. See *In re Tobacco Cases II*, JCCP No. 4042 (Cal. Super. Ct. Jan. 5, 2000); *State v. General Cigar Co.*, No. 996780 (Cal. Super. Ct. date unknown); *State v. Philip Morris, Inc.*, No. BC194217 (Cal. Super. Ct. date unknown); *State v. Tobacco Exporters Int’l*, No. 301631 (Cal. Super. Ct. Jan. 5, 2000).

34. CAL. HEALTH & SAFETY CODE § 104550(f) (West 1996 & Supp. 2000).

addressed by the more stringent and innovative cigar warning regulations, promulgated by the Massachusetts Attorney General in 1999.<sup>36</sup>

### B. Proposed Massachusetts Cigar Warnings

The challenged Massachusetts cigar warning regulations would have required one of the following rotating labels to appear on machine manufactured cigars (including little cigars) that are manufactured, packaged or imported for sale or distribution in the state.

WARNING: Cigar Smoke Contains Carbon Monoxide And Nicotine, An Addictive Drug.

WARNING: Cigars Are Not A Safe Alternative to Cigarettes Or Smokeless Tobacco Products.<sup>37</sup>

The Massachusetts warning label format requirements are also relatively stringent particularly when compared to the new California law. For example, the Massachusetts warning label must occupy 25% of the front or top panel of the cigar package, whichever is larger.<sup>38</sup> Warning lettering must be either white against a black background or black against a white background and it must contrast all other printed material on the packaging.<sup>39</sup> Unlike the State of California, which does not require any cigar advertisements to bear a warning, under the Massachusetts regulations 20% of the surface area of a cigar advertisement must be set aside for one of the two mandated warning messages.<sup>40</sup> The purpose of the cigar warning requirements, as described in the

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35. The federal laws applicable to cigarettes and smokeless tobacco require warnings to appear in advertisements for the products, although notably the smokeless law exempts billboard advertising. See 15 U.S.C. § 1333(a) (1994); 15 U.S.C. § 4402(a) (1994).

36. MASS. REGS. CODE tit. 940, § 22 (1996 & Supp. 2000). The Massachusetts Attorney General promulgated this set of cigar sales and marketing regulations, which extends beyond requiring warning labels and features a number of advertising and youth access restrictions, under his broadly defined consumer protection authority. See MASS. GEN. LAWS ANN. ch. 93(a), § 2(c) (West 1997 & Supp. 2000). A similar, *albeit* not identical (no warning label requirements), set of regulations applicable to cigarettes and smokeless tobacco products was simultaneously issued. MASS. REGS. CODE tit. 940, § 21 (1996 & Supp. 2000). The affected cigarette and smokeless tobacco companies also filed suit. *Lorillard Tobacco Co. v. Reilly*, No. 99-11118WGY (D. Mass. May 21, 1999). The non-warning related regulations—including advertising and self-service display restrictions on cigars—were upheld by the First Circuit Court of Appeals. *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30 (1<sup>st</sup> Cir. 2000).

37. MASS. REGS. CODE tit. 940, § 22.04(1) (1996 & Supp. 2000).

38. *Id.* § 22.04(2)(a).

39. *Id.*

40. *Id.* § 22.05.

Massachusetts regulation, is to adequately inform consumers “about the health risks associated with cigar smoking, its addictive properties, and the false perception that cigars are a safe alternative to cigarettes . . . .”<sup>41</sup>

Cigar manufacturers filed a complaint in the U.S. District Court of Massachusetts, shortly before the cigar regulations would have become effective, pointing to the California warning in particular to support their argument that multiple, conflicting state warning laws are an unconstitutional intrusion on interstate commerce.<sup>42</sup>

The lower court rejected the industry’s Commerce Clause claim.<sup>43</sup> Relying on a balancing test set forth in *Pike v. Bruce Church, Inc.*<sup>44</sup> it ruled that the cigar industry’s interest in

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41. *Id.* § 22.01(1). Prior to the promulgation of these cigar regulations by the Massachusetts Attorney General the state department of public health proposed warning labels for manufactured cigars. Massachusetts Department of Public Health, *Proposed Amendments: 105 CMR 650.000* (viewed Aug. 29, 2000) <<http://www.magnet.state.ma.us/dph/mtcp/report/ingreg.htm>>. The proposed regulations, which were apparently set aside in favor of the Attorney General’s action, would have required warning labels for manufactured cigars comprising two percent of more of the national market to bear a labels stating, “WARNING: NOT A SAFE ALTERNATIVE TO CIGARETTES,” and comparing the precise yields of nicotine, carbon monoxide and tar for each such cigar brand to cigarettes. *Id.* § 650.106(1). The label would have also included the state’s quit line 800-telephone number. *Id.* Mandatory labels for certain manufactured cigars with less than two percent of the national market share would have borne similar warnings except that the yield comparisons would have been estimates. *Id.* § 650.106 (2), (3). For example, the warnings for manufactured large cigars (with less than two percent of the national market) would have read: “THIS CIGAR YIELDS: UP TO 3 TIMES THE NICOTINE OF A TYPICAL CIGARETTE[;] UP TO 4 TIMES THE TAR OF A TYPICAL CIGARETTE [AND] UP TO 3 TIMES THE CARBON MONOXIDE OF A TYPICAL CIGARETTE FOR EACH gram smoked.” *Id.* § 650.106(3).

42. Amended Complaint, *Consolidated Cigar Corp. v. Reilly*, at ¶¶ 4, 12-32, (D. Mass. filed July 1, 1999) (No. 99-CV-11270WGY). The companies argued, *inter alia*, that the defendant Attorney General promulgated the cigar warning requirements without a finding of deception or unfairness in the way the product is packaged and sold in Massachusetts, that the overwhelming majority of cigars sold throughout the country including in Massachusetts are sold with the label required by the State of California and that there was no finding that the State of California cigar warning was inadequate in any way. *Id.* ¶¶ 28-29. In its order upholding the warning requirement the Massachusetts Federal District Court acknowledged that cigar companies claim that the California warning appears on 90% of all U.S. cigar packages and fear that multiple warning messages could require repeated changes to packaging. *Lorillard Tobacco Co. v. Reilly*, 84 F. Supp.2d 180, 199 (D. Mass. 2000). However, the lower court agreed with the Massachusetts Attorney General that the cigar warning does not impose labeling burdens on cigars outside of Massachusetts. *Id.* “If the Cigar Companies decide to label all of their packages the same way, nationally for efficiency, that is their choice and not the direct result of the Cigar Regulations.” *Id.*

43. *Id.* at 200.

44. 397 U.S. 137, 142 (1970). The court refused to find that the required

maintaining its national packaging system does not outweigh the “strong local interests of the Commonwealth in protecting the health and consumer choice of its citizens.”<sup>46</sup> In rejecting the cigar companies’ argument the court stated:

The Commerce Clause protects the interstate market, not the right to conduct business in the most efficient manner. Although the Cigar Companies may prefer internally to consider the cigar market national in scope, there is no inherent reason why the packaging and advertising cannot be managed locally, *especially when the regulations allow for sticker-based warnings that can be applied as soon as the cigars enter the destination state from the point of manufacture.*<sup>46</sup>

The sticker alternative appears to have been a significant factor in the lower court’s willingness to uphold the warning regulation.<sup>47</sup> Indeed, the court interpreted the language of the warning requirement to mean that the warning sticker need not be affixed to the cigar package until it reaches the last retail merchant in the chain of distribution “so long as the sticker is present by the time any end-consumers are able to view the package.”<sup>48</sup>

Moreover, despite industry claims that packaging changes would be prohibitively costly and complex, the court noted that some cigar companies are already engaging in state-specific packaging to comply with other state laws.<sup>49</sup> For example, John Middleton, Inc., places the California label only on cigars distributed in that state.<sup>50</sup> And, tax laws in other states (e.g., Alabama, Arizona and Iowa) have added cigar packaging requirements that cigar companies are apparently managing to

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cigar warnings were a “per se” violation of the Commerce Clause and instead applied the *Pike* balancing test. *Lorillard*, 84 F. Supp.2d at 200. In applying the *Pike* balancing test, the court reasoned that the cigar companies could not show that the burden on interstate commerce was “clearly excessive” when compared to the local benefits of the cigar warning law. *Id.* at 201.

45. *Lorillard*, 84 F. Supp.2d at 202.

46. *Id.* at 199 (emphasis added). The local interests accomplished by cigar warning labels were identified as educating consumers and informing them of “the undisputed health dangers of cigar smoking.” *Id.* at 201.

47. *See id.* at 203. With regard to the cigar industry’s Commerce Clause claim the court noted, “[r]equiring a warning to be attached before consumers are in a position to see it is unnecessary to effectuate the goals of the law, and poses a significant burden on activities taking place outside the Commonwealth.” *Id.* The court also mentioned the sticker option, among other factors, as a device “to simplify the transition and administration of labeling” in support of its conclusion that the warning labels requirement is narrowly tailored enough to withstand First Amendment scrutiny. *Id.* at 198. *See also supra* Part I.B for a limited discussion of First Amendment issues.

48. *Lorillard*, 84 F. Supp.2d at 202.

49. *Id.*

50. *Id.*

fulfill.<sup>51</sup>

The District Court also refused to find that the cigar warning label requirements violated the First Amendment, applying the four-part test for commercial speech adopted by the U.S. Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.<sup>52</sup> As in most commercial speech cases the court's analysis focused primarily on the questions of whether the regulation directly advanced the government's interest and whether it was narrowly tailored to achieve the stated goal. The lower court first noted that mandatory warning labels "seem particularly suited to advancing the state interest in informing consumers of hazards, because they are delivered at the point of consumption."<sup>53</sup> Dismissing as "disingenuous" the companies' argument that the warnings are not specific enough,<sup>54</sup> the court concluded that the alternating warning messages which alert consumers about some of the contents of cigars and inform them that cigars are not a safe alternative to cigarettes would advance the state's interest.<sup>55</sup>

Finally, the court agreed with the Attorney General that the formatting requirements, exception for hand-rolled cigars, and sticker options were persuasive evidence that the regulation was narrowly tailored.<sup>56</sup> Notably, it expressly rejected the cigar manufacturers' argument that the message size requirements for labels and advertising virtually eliminated print advertising for cigars.<sup>57</sup>

While declaring the warning label packaging and advertising rules satisfied the First Amendment,<sup>58</sup> the lower court limited the

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51. *Id.*

52. 447 U.S. 557, 566 (1980). In *Central Hudson* the U.S. Supreme Court delineated a four part-test for commercial speech under the First Amendment. *Id.* First, the speech "must concern lawful activity and not be misleading" to receive protection under the First Amendment. *Id.* Second, the government must assert a substantial interest to restrict the speech. *Id.* Third, the regulation must directly advance the government's interest. *Id.* Fourth, the restriction must be no more extensive than necessary to serve the government's interest. *Id.* In the Massachusetts case, the parties apparently assumed that the speech in question was legal and did not address the first prong of the *Central Hudson* test. See *Lorillard*, 84 F. Supp.2d at 200. The second prong was easily satisfied with the court finding that "the health effects of cigar smoking on Massachusetts consumers are a substantial state interest . . ." *Id.* at 197.

53. *Lorillard*, 84 F. Supp.2d at 197.

54. The court characterized the industry's argument as "disingenuous" because it suggested that the companies would welcome language that "more clearly condemns their products." *Id.*

55. *Id.* at 198.

56. *Id.*

57. *Id.*

58. *Lorillard*, 84 F.Supp.2d at 198. Several other important First Amendment claims, pertaining to cigarette and smokeless tobacco regulations,

reach of the advertising warning requirement under its Commerce Clause analysis. Specifically, the court found merit to the cigar industry's claim that mandating warning messages in advertisements in national magazines and on the Internet would interfere with interstate commerce.<sup>59</sup> It resolved the problem by construing the regulation narrowly and carving out exceptions. First, it held that "cigar advertisements in magazines or other print media that are truly national in distribution need not include the Massachusetts Warnings."<sup>60</sup> Second, the court created an exception for cigar advertising on the Internet, based in part on its conclusion that the state did not initially intend to capture Internet advertising with this regulation.<sup>61</sup>

Finally, tucked away in its analysis and rejection of the cigar industry's claim that the new cigar warning labels will cripple interstate commerce, the court acknowledged the potential role of preemptive federal legislation. "It may be time for Congress to step in with a national cigar labeling program and preempt the states in this area, but until it does so, it is unreasonable to force Massachusetts to wait and allow its citizens to remain deprived of important consumer health information."<sup>62</sup> Indeed, the pending

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as well as cigar provisions, were also decided in these consolidated cases. For example, limits on outdoor advertising were upheld while point-of-sale advertising restrictions (inside retail stores) were struck down by the district court. *Id.* at 198-203. A discussion of this issue is beyond the scope of this Article.

59. *Id.* at 198-204.

60. *Id.* at 203. However, the warning message must appear in cigar advertisements featured in a "Massachusetts edition" of a national magazine. *Id.*

61. *Id.* The court also observed that "... [i]nternet-based advertising is targeted at no state in particular, but at all states in general." *Id.* "Furthermore, the dynamic nature of text and images appearing on an Internet browser does not lend itself well to a regulation that sets aside a percentage of 'area' of an advertisement." *Id.* The novel issues related to cigar advertising on the Internet and government authority to regulate such advertising will be the subject of another article in this series.

62. *Lorillard*, 84 F. Supp.2d at 202. A deliberate strategy of flooding statehouses with conflicting legislation requiring warning labels on smokeless tobacco was apparently a significant factor in extracting industry concessions when Congress adopted a smokeless warning law without liability protection and with fewer restrictions on state and local regulatory authority. *See* S. REP. NO. 209, at 1 (1985), *reprinted in* 1986 U.S.C.C.A.N 170, 170. *See also* RICHARD KLUGER, *ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS* 563 (1996). At least 23 states were considering adopting smokeless tobacco warnings bills in 1985, shortly before the federal law was enacted. S. REP. 209. Notably, Massachusetts, which adopted the second and more aggressive warning label law for cigars, was the first state in the nation to require warning labels for smokeless tobacco. *Id.* *See supra* Part I.B for a discussion of Massachusetts's cigar warning regulation.

The challenged regulations, including, *inter alia*, the warning label

Massachusetts case may have been a key factor in inspiring industry cooperation with the proposed warning system presently being considered by the FTC.

However, the First Circuit Court of Appeals reversed the district court's decision to uphold the Massachusetts cigar warning regulations, invalidating both the packaging and advertising provisions on Commerce Clause grounds.<sup>63</sup> With regard to the advertising warning requirements the appeals court refused to read in exceptions for cigar advertising on the Internet and in national magazines.<sup>64</sup> Finding that such advertising was covered by the regulations the court concluded that the burden on interstate commerce was excessive.<sup>65</sup> However, the court emphasized that "intrastate" application of the advertising warnings may be permissible and invited the Massachusetts Attorney General to revise the regulation.<sup>66</sup>

The appeals court similarly approached the packaging regulations, finding a single aspect of the requirements unduly burdensome under the Commerce Clause, and refusing to parse the regulations to partially save them.<sup>67</sup> Specifically, the court objected to the imposition of liability on cigar manufacturers for any third party distribution of unlabeled cigars in Massachusetts.<sup>68</sup> Again, noting that it "would find many aspects of the package labeling provisions to pass constitutional muster," the court declined to create an exception, instead leaving it to the Massachusetts Attorney General to "reformulate them, if he so desires."<sup>69</sup>

In view of the proposed FTC Consent Orders establishing national cigar warnings,<sup>70</sup> it seems unlikely that the Massachusetts Attorney General will revise the state warnings. Thus, the First Circuit ruling, coupled with the pending FTC action, will probably chill—if not end state efforts to establish

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packaging and advertising requirements for cigars, are not in effect pending the companies' appeal. *Consolidated Cigar Corp. v. Reilly*, No. 00-1107 (1st Cir. Jan. 31, 2000). Notably since the companies did not challenge a provision requiring retailers who sell hand-rolled cigars, or who display manufactured cigars outside of their original packaging, to post the disputed health warning messages on a sign at least 50 square inches (standard paper size) in a place visible to customers, this regulation is currently in effect in Massachusetts. See MASS. REGS. CODE tit. 940, § 22.06(2)(e) (1996 & Supp. 2000).

63. *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 58 (1st Cir. 2000). The appeals court, however, agreed that the state warnings do not violate the First Amendment. *Id.* at 56.

64. *Id.* at 57.

65. *Id.*

66. *Id.*

67. *Id.* at 57-58.

68. *Consolidated Cigar Corp.*, 218 F.3d at 57.

69. *Id.* at 58.

70. See *infra* Part IV for a discussion of the FTC Consent Orders.

independent warning requirements for cigar packaging and advertising. This topic will be addressed in Part II below.

## II. FEDERAL TOBACCO WARNING LAWS

Cigars have long been exempt from existing federal laws that require warning labels on cigarette packaging and advertising for cigarettes<sup>71</sup> and smokeless tobacco.<sup>72</sup> In 1999 companion bills,<sup>73</sup> were filed a week after the FTC released its Cigar Report<sup>74</sup> calling for warning labels.<sup>75</sup> However, to date, Congress has not taken any action beyond committee assignments on either bill.

Both the Senate and House bills include several significant restrictions on cigar sales and marketing practices<sup>76</sup> in addition to mandating warning labels. The warning label provisions are similar, directing the FTC and the Secretary of Health and Human Services to require health warnings on cigar labels, boxes and other packaging "as may be appropriate to warn cigar users about the health risks presented by cigars."<sup>77</sup> However, only S. 1421 extends the warning requirements to cigar advertising, which the bill broadly defines to include "advertising, and

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71. 15 U.S.C. §§ 1332-33 (1994).

72. *Id.* § 4402(a)(1).

73. COMM. ON COMMERCE, CIGARS ARE NO SAFE ALTERNATIVE ACT, H.R. 2579, 106th Cong. (1999); COMM. ON COMMERCE, SCIENCE & TRANSPORTATION, CIGARS ARE NOT A SAFE SMOKING ALTERNATIVE ACT, S. 1421, 106th Cong. (1999).

74. FTC REPORT TO CONGRESS, *supra* note 1, at 9 n.38. The report acknowledges the FTC's legal authority to impose cigar warning labels under section 5 of the Federal Trade Commission Act, the FTC clearly prefers for Congress to take the lead. *Id.*

75. H.R. 2579, 106th Cong. (1999); S. 1421, 106th Cong. (1999). *See also* Ron Scherer, *Next Target in the War on Tobacco: Stogies*, CHRISTIAN SCI. MONITOR, Aug. 11, 1999, at 3. With regard to his cigar bill Senator Durbin reportedly stated, "The FTC has challenged us." *Id.*

76. For example, H.R. 2579 would require retailers to "ensure that all cigars are located in areas where customers do not have direct access to the cigars." H.R. 2579, 106th Cong. § 3(a)(2) (1999). The Act would also limit sales to "direct, face-to-face exchange," expressly forbidding cigar sales through vending machines, mail-order or the Internet. *Id.* § 3(a)(3) The companion Senate bill, S. 1421, features similar provisions. S. 1421, 106th Cong. § 2(5) (1999).

77. S. 1421, 106th Cong. § 4 (1999). The Findings sections of the companion bills are nearly identical, emphasizing data about health effects and increased consumption, particularly among youth. H.R. 2579, 106th Cong. § 2 (1999); S. 1421, 106th Cong. § 2 (1999). The theme that cigars are not safe alternatives to smoking cigarettes is buttressed by specific comparisons of the two product: "Compared to a cigarette, a large cigar emits up to 20 times more ammonia, 5 to 10 times more cadmium (cancer causing metal) and methylethyl nitrosamine (cancer causing agent), 80 to 90 times more nitrosamines (a highly carcinogenic tobacco-specific agent), 2 to 3 times more tar, and 9 to 12 times more nicotine." H.R. 2579, 106th Cong. § 2(5) (1999); S. 1421, 106th Cong. § 2(5) (1999).

marketing materials and messages.”<sup>78</sup>

Recently, and apparently in response to dramatic new tobacco warnings being considered in Canada, the U.S. Senate filed a bill calling for updated, larger warnings on tobacco products, including cigars.<sup>79</sup> The bill would require warnings in tobacco advertising as well.<sup>80</sup> Notably, the bill would repeal the warning labels laws currently applicable to cigarettes and smokeless tobacco, raising questions about other key provisions, especially preemption.<sup>81</sup>

None of the cigar warning bills before Congress address the intended effect of federal warning labels on state regulatory authority or industry liability. This is a significant omission, leaving unanswered questions about the potential preemptive effect of a national cigar warning label law,<sup>82</sup> a topic explored in the following section.

### 1. *The 1999 FTC Cigar Report*

The 1999 FTC Cigar Report was the culmination of a series of special orders the FTC issued in February of 1998, requiring cigar manufacturers to report sales and marketing data similar to that required of cigarette and smokeless tobacco manufacturers.<sup>83</sup> The Commission needed these special orders to compel production of the data because cigar manufacturers are not covered under the federal reporting laws applicable to the manufacturers of cigarettes and smokeless tobacco.<sup>84</sup>

In its report, the FTC acknowledges that its decision to collect cigar sales and advertising data was based on two factors: (1) the “dramatic upswing in U.S. cigar consumption since 1993 among both adults and adolescents;”<sup>85</sup> and (2) the National Cancer Institute’s report on the serious health effects of cigar smoking (NCI Cigar Monograph).<sup>86</sup> The data only covers a short, specific period of time (1996–1997), but it will provide a baseline for monitoring future cigar advertising and promotional trends.<sup>87</sup>

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78. S. 1421, 106th Cong. § 4 (1999).

79. *Id.*

80. *Id.*

81. *Id.* Repeal of the current warning laws and the effective date of the new warnings and tobacco product ingredient and constituent reporting requirements would be delayed for one year following enactment. *Id.*

82. The FTC Report, discussed in the next section is also silent on preemption. See FTC REPORT TO CONGRESS, *supra* note 1.

83. The FTC issued special orders to Consolidated Cigar Corporation; Swisher International, Incorporated; General Cigar Company, Incorporated; Havatampa Incorporated; and John Middleton, Incorporated. *Id.* at 9.

84. 15 U.S.C. § 1335a, 1337 (1965).

85. FTC REPORT TO CONGRESS, *supra* note 1, at 2.

86. *Id.*

87. The FTC report states that the FTC intends to provide Congress with periodic updated reports on cigars. *Id.*

Congressional establishment of a national cigar warning label is the central recommendation of the FTC Report. Specifically, the FTC recommends that "cigar manufacturers and marketers be required to comply with a system of multiple rotating warnings, similar to the rotational plans in place for cigarettes and smokeless tobacco."<sup>88</sup> Warnings are also recommended for cigar advertising.<sup>89</sup>

The FTC noted in its recommendations that the absence of a national cigar warning, particularly juxtaposed against the ubiquitous Surgeon General's warnings for cigarettes and smokeless tobacco, sends a misleading message that cigar smoking is not a health hazard or that it is a safe alternative to smoking cigarettes.<sup>90</sup>

The FTC relied on the NCI Cigar Monograph's health effects findings in suggesting possible language for cigar warnings. Specifically, the FTC recommended that Congress consider the following three warning labels:

WARNING: Regular cigar smoking can cause cancers of the mouth and throat, even if you do not inhale.

WARNING: Inhaling cigar smoke can cause lung cancer. The more deeply you inhale, the greater your risk.

WARNING: Cigars are not a safe alternative to cigarettes.<sup>91</sup>

The FTC Cigar Report offered no specific guidance as to format, suggesting only that cigar packages should display warnings "clearly and conspicuously."<sup>92</sup>

Unfortunately, the FTC Cigar Report, like the bills pending before Congress, does not acknowledge or address the complex preemption issues associated with the establishment of a federal cigar warning. This topic is discussed below.

### III. THE HISTORY OF CIGARETTE WARNING LABELS: FCLAA PREEMPTION

The preemptive effect of the federal law governing cigarette warning labels has probably had a greater impact on the development of tobacco control law and policy than the warnings

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88. *Id.* at 9. However, the FTC acknowledged that a "rotational plan for cigar warnings should be appropriately tailored to accommodate the relatively small sales volume of many cigar brands and the broad diversity of cigar packaging." *Id.*

89. *Id.*

90. FTC REPORT TO CONGRESS, *supra* note 1, at 9.

91. *Id.* at 10.

92. *Id.* With regard to sales of single cigars, the FTC noted that warning labels could be displayed on containers or appear on signs in retail establishments that sell cigars individually. *Id.*

themselves.<sup>93</sup> In 1964, the pivotal Surgeon General's first report on cigarette smoking and health was issued proclaiming a causal link between smoking and some forms of cancer.<sup>94</sup> The report sparked new action by the FTC, which had regulated tobacco advertisements for years, especially advertisements making health claims.<sup>95</sup> Concluding that the failure to disclose the health risks of smoking in tobacco advertising was a deceptive practice, in June of 1964 the FTC issued a formal regulation requiring all cigarette packages and advertising to carry the following warning label:

WARNING: Cigarette Smoking is Dangerous to Health and May Cause Death From Cancer and Other Diseases.<sup>96</sup>

The FTC health warnings were scheduled to go into effect in January of 1965.<sup>97</sup> However, fearing this negative message would reduce tobacco consumption, the tobacco industry set out to thwart implementation of the warning regulation. First, the tobacco companies adopted a voluntary "Cigarette Advertising and Promotion Code," vowing to reduce excesses in tobacco advertising by policing themselves.<sup>98</sup> Although the FTC initially declined to set aside its regulation, the agency later agreed to delay implementation for one year to permit the new Congress to examine the issue.<sup>99</sup>

The cigarette industry mobilized to shape the warning legislation, agreeing that the Surgeon General's Report could prove to be decisive authority against it in product liability suits.<sup>100</sup> Thus, the industry apparently concluded it would be

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93. See *supra* Part III for a discussion of the efficacy of tobacco product warning labels.

94. U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, SMOKING AND HEALTH, REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE 386 (Public Health Serv. Pub. No. 1103, 1964).

95. Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8,324, 8,325 (1964).

96. *Id.* at 8,325.

97. *Id.*

98. See 110 CONG. REC. 9,160 (daily ed. Apr. 27, 1964) (statement of Sen. Neuberger) (discussing the industry code). See also KLUGER, *supra* note 62, at 279 (depicting symbiotic relationship between an industry geared to sell tobacco at any cost and an American public determined to purchase cigarettes, despite the presence of warning labels); Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,502-05 (1996) (discussing the industry's pattern of violating its advertising code).

99. See KLUGER, *supra* note 62, at 272-73.

100. *Id.* at 280. At this time product liability doctrine was evolving as notions of social justice were softening the earlier traditional doctrine of *caveat emptor* (buyer beware). See RESTATEMENT (SECOND) OF TORTS § 402A (1964) (discussing codified law of "buyer beware"). See also Daniel Givelber, *Cigarette*

advantageous to accept a soft warning label (i.e., one without words like "death" or "cancer"), reasoning that if consumers were aware that a product is dangerous and continued to use it, the defenses of assumption of the risk and contributory negligence could shield the industry from liability.<sup>101</sup>

A pro-industry labeling law was passed by the House Commerce Committee.<sup>102</sup> Its stated purpose was to inform the public of the health hazards of smoking and protect the national economy (i.e., the tobacco industry) from diverse, non-uniform labeling requirements.<sup>103</sup> The bill required warning labels on cigarette packaging only, admonishing: "Caution: Cigarette Smoking May Be Hazardous to Your Health."<sup>104</sup>

Cigarette advertising was exempt from the bill's warning requirements. Indeed, the bill expressly forbade the FTC from requiring "the inclusion in any advertisement of any statement with respect to smoking and health" if the advertised cigarettes were packaged in conformity with the labeling law.<sup>105</sup> Moreover, the House bill went further by expressly barring, in a declaration of preemption, any requirement that advertising for cigarettes (packaged in accordance with the labeling law) include any such statement.<sup>106</sup>

The competing Senate Commerce Committee bill featured an even weaker warning message but would have required the warning to appear in cigarette advertising, along with a listing of tar and nicotine strengths on packages.<sup>107</sup> The cigarette industry, after some lobbying and negotiation, indicated it would accept the stronger wording of the House bill, on the condition that warnings not be required in advertisements.<sup>108</sup> Broadcasters and magazine publishers also reportedly lobbied for this compromise because of

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*Law*, 73 IND. L.J. 867, 872-80 (1998) (discussing the history of Section 402A of the Restatement (Second) of Torts).

101. KLUGER, *supra* note 62, at 280-84. This theory was likely inspired in part by *Pritchard v. Liggett & Myers Tobacco Co.*, 134 F. Supp. 829 (W.D. Pa. 1955), where tobacco industry lawyers were confronted with the question of how they could claim that a plaintiff smoker assumed the risk of smoking (a common industry defense) if the manufacturers explicitly advertised that no risk existed. *Id.* at 290-91.

102. H.R. 3014, 89th Cong. § 1 (1965).

103. *Id.* See also H.R. REP. NO. 89-449, at § 5 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2350 (discussing a requirement of warning labels for cigarette packages).

104. H.R. 3014.

105. *Id.*

106. *Id.* (emphasis added). The imposition of any cautionary statement pertaining to smoking and health other than the message required on cigarette labels under the bill would also have been preempted. *Id.*

107. S. REP. NO. 89-195, at § 4 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2360.

108. KLUGER, *supra* note 62, at 289. See also H.R. CONF. REP. NO. 89-586, at 190 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2367 (discussing differences between the House and Senate Bills).

the substantial revenue they received from tobacco advertisements.<sup>109</sup> The tar and nicotine content requirements were dropped and the final wording of the packaging only warning label simply stated:

Caution: Cigarette Smoking May Be Hazardous to Your Health.<sup>110</sup>

A four-year expiration date on the provision prohibiting statements relating to smoking and health in advertising was written into the 1965 law,<sup>111</sup> at which point Congress would review the effect of the new packaging warning and the industry's self-imposed advertising code. In the meantime, the FTC and Secretary of Health, Education & Welfare were required to submit reports to Congress on the status of cigarette advertising practices, the effectiveness of the warnings and the health effects of smoking.<sup>112</sup> The first FTC report to Congress, filed in 1967, was highly critical.<sup>113</sup> The agency found that the cigarette industry continued to promote the idea that smoking is both harmless and pleasurable, and that the packaging warning had done little to reduce sales.<sup>114</sup> Both the FTC and HEW reports called for the imposition of tougher warning messages on packages and in advertising.<sup>115</sup>

The Federal Communications Commission (FCC) also stepped into the tobacco arena around the same time.<sup>116</sup> In response to a challenge by an anti-smoking attorney activist, the FCC decided to apply its "fairness doctrine"—which requires broadcasters to provide free air time to proponents of opposing views on matters of public controversy—to cigarette advertising.<sup>117</sup> Thus, millions of Americans were exposed to anti-smoking messages for the first time as broadcasters began providing equal air-time in response to cigarette advertising.

In anticipation of the 1969 expiration of FCLAA both the FCC and the FTC issued notices of proposed rule-making to curb cigarette advertising, which would later become central issues in Congress. The FCC proposed banning all cigarette advertising from radio and television<sup>118</sup> and the FTC proposed that all cigarette advertising (broadcasting and print media) carry the

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109. KLUGER, *supra* note 62, at 289.

110. Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, § 2, 79 Stat. 282 [hereinafter Labeling Act].

111. *Id.* § 10.

112. H.R. CONF. REP. NO. 89-506, at 2367-69; KLUGER, *supra* note 62, at 326.

113. 90 CONG. REC. 20,045 (1967).

114. *Id.* at 20,045-47.

115. *Id.* at 20,051; 90 CONG. REC. 12,950 (1967).

116. KLUGER, *supra* note 62, at 303-08.

117. *In re* Complaint Directed to Station WCBS-TV, New York, N.Y., 8 F.C.C.2d 381, 381 (1967), *aff'd*, 9 F.C.C.2d 921 (1967).

118. Advertisement of Cigarettes, 34 Fed. Reg. 1,959, 1,959 (1969) (to be codified at 47 C.F.R. pt. 73).

following warning:

Cigarette Smoking is Dangerous to Health and May Cause Death From Cancer, Coronary Heart Disease, Chronic Bronchitis, Pulmonary Emphysema, and Other Diseases.<sup>119</sup>

However the agency proposals were abandoned in favor of Congressional consideration of the expiring FCLAA.

The 1969 FCLAA legislation ultimately adopted by Congress was once again a compromise shaped by the cigarette industry. Essentially, the industry agreed to end all television and radio advertising in exchange for a slightly stronger warning message on packages than the warning that was currently in effect. The new warning provided:

WARNING: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.<sup>120</sup>

Warning messages, however, were still not required in cigarette advertising.<sup>121</sup>

The most significant change in the new law was the broad preemption language. In addition to expressly forbidding the imposition of other warning requirements on packaging, a limit that was part of the original 1965 FCLAA, the 1969 Act provided:

*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.*<sup>122</sup>

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119. Cigarettes in Relation to the Health Hazards of Smoking, 34 Fed. Reg. 7,917, 7,197 (1969) (to be codified at 16 C.F.R. pt. 408).

120. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 4, 84 Stat. 87, 88 (1970) (codified as amended at 15 U.S.C. § 1334(b) (1994)).

121. *Id.* § 5. The 1969 Act forbade the FTC (through June 1971) from issuing regulations requiring health warnings in cigarette advertising. *Id.* § 7 After the congressional moratorium expired the FTC threatened to file complaints against cigarette companies for failing to warn that smoking is dangerous in their advertisements. *In re Lorillard*, 80 F.T.C. 455, 460 (1972). Ultimately, the FTC and the industry negotiated a resolution through a consent order. *Id.* The order, entered March 30, 1972, required the clear and conspicuous display of the mandated package warnings in all cigarette advertising. *Id.* It also specified size requirements for various media. *Id.* at 461-62. Industry violations of these requirements have been the subject of litigation which the companies ultimately lost. See *United States v. R. J. Reynolds Tobacco Co.*, No. 76 Civ. 813 (JMC), 1981 WL 2027, at \*4 (S.D.N.Y. Feb. 20, 1981) (noting many relevant cases). Later, Congress added the warning in advertisement requirements to the federal statute governing cigarette warning labels. Comprehensive Smoking Education Act of 1984, Pub. L. No. 98-474, 99 Stat. 2200 (codified as amended at 15 U.S.C. § 1333 (1994 & Supp. 2000)).

122. Public Health Cigarette Smoking Act § 5(b) (emphasis added). Compare with the preemption language of the original 1965 Act which 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." See *Federal Cigarette Labeling & Advertising*

This new wording opened a Pandora's Box of legal issues, that the United States Supreme Court ultimately resolved, about whether the warning shielded the cigarette industry from lawsuits.<sup>123</sup>

The new preemption language allowed the industry, with limited success, to challenge local laws attempting to restrict outdoor tobacco advertising.<sup>124</sup> Each of these issues—which have profoundly affected the development of tobacco law and policy—are explored below. The historical lessons learned should be integral to analysis of cigar warning proposals.

### A. Liability Protection

The U.S. Supreme Court resolved the question of whether and to what extent the preemption provisions of FCLAA protect the cigarette industry from lawsuits in *Cipollone v. Liggett Group, Inc.*<sup>125</sup> In that case, the family of a woman who died of smoking-induced lung cancer sued the cigarette manufacturer under a number of legal theories, and the company defended itself by claiming that FCLAA protected them from any liability in connection with her death based on their conduct after its initial enactment in 1965.<sup>126</sup>

The Court, in a plurality decision, ultimately ruled that while the 1965 Act did not preempt any claims, the 1969 FCLAA barred claims based on failure to warn theories after 1969.<sup>127</sup> Notably, the Court also ruled that the 1969 Act did not preempt several other distinguishable state law claims from warning theories, including express warranty, intentional fraud and misrepresentation, or conspiracy.<sup>128</sup> Moreover, the Court held that the preemptive scope of both the 1965 and 1969 Acts were “governed entirely by the express language in section 5 of each Act.”<sup>129</sup>

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Act § 5(a).

123. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 530-31 (1992). See discussion in Part IIA *infra*.

124. Compare *Lindsey v. Tacoma-Pierce County Health Dep't*, 195 F.3d 1065, 1075 (9th Cir. 1999), and *Rockwood v. City of Burlington*, 21 F. Supp.2d 411, 420 (D. Vt. 1998) (striking down ordinances on FCLAA preemption grounds), with *Penn Adver. of Baltimore, Inc. v. Mayor of Baltimore*, 63 F.3d 1318, 1320-21 (4th Cir. 1995), *vacated*, 518 U.S. 1030, 1030 (1996), and *aff'd*, 101 F.3d 332 (4th Cir. 1996) (concluding that such ordinances are not preempted), and *Greater New York Metro. Food Council, Inc. v. Giuliani*, 195 F.3d 100, 109 (2nd Cir. 1999) (holding that certain bans on outdoor advertising are not preempted), and *Federation of Adver. Indus. Representatives, Inc. v. City of Chicago*, 189 F.3d 633, 639 (7th Cir. 1999) (holding the same).

125. 505 U.S. 504, 530-31 (1992).

126. *Id.* at 508-10.

127. *Id.* at 530-31.

128. *Id.* at 531.

129. *Id.* at 517.

The language of the *Cipollone* decision was confusing, and tobacco industry defendants have used it to confuse lower courts about the Supreme Court's holding.<sup>130</sup> Furthermore, while the *Cipollone* ruling allows many claims to go forward, it bars others, including claims that the statutory warning did not adequately warn a plaintiff (or other "reasonable consumers") of the actual dangers of smoking.<sup>131</sup>

The lesson for proponents of cigar warning labels is clear: avoid modeling a federal warning label law after FCLAA or risk barring plaintiffs injured by cigar smoking from the courthouse door. Indeed, when a warning label was added to smokeless tobacco products in 1986, Congress made it clear that the warning requirements did not protect the smokeless industry from lawsuits. The smokeless tobacco warning law provides that "[n]othing in this chapter shall relieve any person from liability at common law or under state statutory law to any other person."<sup>132</sup> Cigar warning label laws should include a similar disclaimer.

### B. State and Local Advertising Regulations

The broad preemption language in the 1969 FCLAA has fueled a number of cigarette industry challenges to local laws restricting tobacco advertising. Should a cigar warning label law mimic the 1969 FCLAA, a similar pattern would likely emerge.

The FCLAA expressly preempts any "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of any cigarettes."<sup>133</sup> Most recently, the Ninth Circuit Court of Appeals struck down a Washington County Health Department ordinance restricting outdoor tobacco advertising, finding that it was preempted by FCLAA.<sup>134</sup> Although this is not the first time a federal court has ruled that FCLAA bars such advertising restrictions,<sup>135</sup> the sweeping language used

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130. See, e.g., *Greisenbeck v. American Tobacco Co.*, 897 F. Supp. 815, 823-24 (D.N.J. 1995) (holding that the preemptive effects of the Labeling Act are broad enough to encompass "mass notifications to customers"); *Sonnenreich v. Philip Morris, Inc.*, 929 F. Supp. 416, 418-19 (S.D. Fla. 1996) (holding that the preemptive effect of the Labeling Act includes "non-promotional communications").

131. A handful of lawsuits have been filed by cigar smokers against cigar manufacturers. Some have been dismissed and at least two are pending. See, e.g., *Allen v. Philip Morris, Inc.*, No. 98-C-2337 (W. Va. 13th Cir. Ct. 1998); *Derner v. Swisher Int'l, Inc.*, No. EV 99-101-C-Y/H (S.D. Ind. filed 1999); *Lonkowski v. R. J. Reynolds Tobacco Co.*, No. 96-1192, 1996 WL 888182 (W.D. La. Dec. 10, 1996); *Rix v. R. J. Reynolds Tobacco Co.*, No. 96-01778-CA (Duval County Ct. date unknown).

132. 15 U.S.C. § 4406(c) (1994).

133. *Id.* § 1334(b).

134. *Lindsey v. Tacoma-Pierce County Health Dep't*, 195 F.3d 1065, 1075 (9th Cir. 1999).

135. See *Rockwood v. City of Burlington*, 21 F. Supp. 2d 411 (D. Vt. 1998).

by the prestigious Ninth Circuit Court of Appeals has captured the attention of tobacco control advocates and legal observers.<sup>136</sup>

Apparently recognizing the importance of the matter and conflict with other circuit court decisions, the Ninth Circuit Court departed from ordinary procedure and considered rehearing the case.<sup>137</sup> Given the split developing among the circuit courts,<sup>138</sup> it is possible the question of whether the FCLAA preempts state and local tobacco advertising laws may eventually reach the United States Supreme Court. In the meantime, however, the industry's persistent legal challenges may discourage localities from taking action to restrict tobacco advertising as the localities weigh the potential costs of protracted, expensive litigation against the wealthy tobacco industry.

Although a thorough legal analysis of these cigarette preemption decisions is beyond the scope of this Article, it is worth noting that the cigarette industry has fully exploited the FCLAA's preemption language and thereby created a legal policy environment that requires localities to avoid mentioning concerns about the health effects of smoking when adopting tobacco advertising restrictions.<sup>139</sup> The narrow and contorted legal

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136. *Lindsey*, 195 F.3d at 1073 (declaring that "a local ban on outdoor advertising is preempted by the FCLAA.").

137. The rehearing was denied. *Lindsey*, 195 F.3d at 1065. In the other case striking a local advertising restriction, the City of Burlington decided to forego an appeal due at least in part to a lack of resources. Telephone interview by Laura Hermer, Staff Attorney, Tobacco Resource Center with John Leddy, partner, McNeil, Leddy & Sheahan, Burlington, Vt. (Dec. 15, 1998). Indeed, in Vermont the plaintiff convenience store owners reportedly reduced the amount of damages the city must pay them from \$70,000 to \$20,000 in exchange for the city's agreement not to appeal. *Burlington Won't Appeal Tobacco Suit Loss; Saves Settlement Money* (visited Nov. 23, 1998) <[http://www.boston.com/daily/news/witon\\_won\\_t\\_appeal\\_tobacco\\_sui.shtml](http://www.boston.com/daily/news/witon_won_t_appeal_tobacco_sui.shtml)>. In the past the industry has boasted about winning cases by wearing the opposing party down financially. *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 421 (D.N.J. 1993). "To paraphrase General Patton, the way we won these cases was not by spending all of [RJR's] money, but by making that other son of a bitch spend all of his." *Id.* (citing to an internal memorandum by R.J. Reynolds Co.).

138. The First, Second, Fourth, and Seventh Circuits have upheld similar local outdoor tobacco advertising restrictions, concluding that they are not preempted by FCLAA. *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30 (1<sup>st</sup> Cir. 2000). *Greater New York Metro. Food Council, Inc. v. Giuliani*, 195 F.3d 100, 109-10 (2d Cir. 1999); *Penn Adver. of Baltimore, Inc. v. Mayor of Baltimore*, 63 F.3d 1318, 1324 (4th Cir. 1995), *cert. granted and judgment vacated, rev'd sub nom.*, *Penn Adver. of Baltimore, Inc. v. Schmoke*, 518 U.S. 1030 (1996), *and aff'd on remand*, 101 F.3d 332, 333 (4th Cir. 1996), *and cert. denied*, 520 U.S. 1204, 1204 (1997); *Federation of Adver. Indus. Representatives, Inc. v. City of Chicago*, 189 F.3d 633, 640 (7th Cir. 1999).

139. *See, e.g., Lorillard*, 76 F. Supp.2d at 133 (distinguishing regulations that restrict advertisements that are based on smoking and health from a regulation requiring tobacco companies to include messages that smoking is illegal for minors).

arguments that municipalities must make to justify their attempts to rid the local landscape of tobacco advertising enticing young people<sup>140</sup> to smoke, defy common sense and make the ordinances difficult to defend.<sup>141</sup>

To survive a legal challenge under FCLAA, a locality must persuade a court that its tobacco advertising law is based on something other than a concern about smoking and health.<sup>142</sup> Successful communities have argued instead that their laws are intended to prevent illegal sales of tobacco to minors.<sup>143</sup> While this is a genuine and laudable law enforcement goal, it is difficult to totally divorce it from the more general goal of preventing young people from taking up the deadly, addictive habit of smoking. Moreover, although lawyers are accustomed to making such distinctions, local public health professionals and elected officials are not, as evidenced by their remarks when adopting tobacco advertising restrictions.<sup>144</sup>

Fortunately the barrier to local regulation erected by FCLAA's preemption language could be avoided by Congress if

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140. See, e.g., John P. Pierce, Ph.D. et al., *Tobacco Industry Promotion of Cigarettes and Adolescent Smoking*, 279 JAMA 511, 511 (1998) (arguing that adolescent exposure to tobacco advertising and marketing is the best predictor of smoking initiation); John P. Pierce, Ph.D. et al., *Smoking Initiation by Adolescent Girls, 1944 Through 1988: An Association With Targeted Advertising*, 271 JAMA 608, 608 (1994) (arguing that tobacco advertising targeted at women caused an increase in smoking by underage females); Paul M. Fisher, M.D. et al., *Brand Logo Recognition by Children Ages 3 to 6 Years Old: Mickey Mouse and Old Joe the Camel*, 266 JAMA 3145, 3145 (1991) (finding that very young children "see, understand, and remember" tobacco advertising and such tobacco advertising could thus pose a health risk).

141. The First Amendment is also a significant obstacle for municipalities interested in restricting tobacco advertising. See, e.g., *Penn Adver. of Baltimore v. Mayor of Baltimore*, 862 F. Supp. 1402, 1406-14 (D. Md. 1994) (holding that an ordinance prohibiting cigarette advertising on billboards located in certain designated areas was not in violation of the First Amendment's protection of free speech because the ordinance satisfied all four prongs of the *Central Hudson* test for assessing the constitutionality of restrictions on commercial speech). Since *Penn Advertising* was decided, most courts reviewing tobacco advertising ordinances have declined to reach the First Amendment issues. See, e.g., *Greater New York Metro. Food Council, Inc. v. Giuliani*, 195 F.3d 100, 110 (1999) (declining to decide the First Amendment issues, but remanding for consideration). Most recently, the First Circuit upheld tobacco advertising restrictions (including cigars) under the First Amendment. *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30 (1<sup>st</sup> Cir. 2000).

142. See *Lorillard*, 76 F. Supp.2d at 133.

143. *Id.*

144. *Penn Adver. of Baltimore, Inc.*, 862 F. Supp. at 1418-19. In *Penn Advertising*, for example, the court dismissed health-related comments made at a hearing on the ordinance by the Hearing Chairman and the Commissioner of Health, concluding that mentioning health concerns about smoking at the public hearing did not alter the stated purpose of the law, which was the prevention of illegal sales of cigarettes to minors. *Id.*

and when it considers national cigar warning label legislation. Put simply, any such federal law should not be modeled on the FCLAA. Instead, Congress should clearly state its intention to permit states and localities to exercise their existing power to regulate cigar sales, distribution, marketing and advertising. Carefully drafted anti-preemption provisions should be inserted in any national cigar warning law to protect state and local authority to regulate cigars and to preserve the right to sue the industry.<sup>145</sup>

In short, the only area arguably deserving of preemption is the content and format of the warning message itself. However, unless and until the U.S. adopts more explicit warnings and creative formatting requirements, an argument against even this limited preemption could still be made from a public health perspective. The efficacy of tobacco warning labels is discussed in the next section.

### III. ARE TOBACCO WARNING LABELS EFFECTIVE?

#### A. U.S. Warnings

As early as 1981 a report issued by the FTC concluded that the cigarette warning message was no longer effective.<sup>146</sup> Several reasons for this conclusion were cited including "evidence" that the message was overexposed and "worn out"; not novel; too abstract and difficult to remember; and unlikely to be perceived as personally relevant by consumers.<sup>147</sup> The report emphasized that the existing warning did not communicate specific information

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145. In previous tobacco control articles co-authored with Professor Peter Enrich, this Author suggested adopting a belt and suspenders approach to drafting of preemption language where the legislation both spells out the narrow area pre-empted and expressly preserves a broader array of rights and authority. See Peter D. Enrich & Patricia A. Davidson, *Local and State Regulation of Tobacco: The Effects of the Proposed National Settlement*, 35 HARV. J. ON LEGIS. 87 (1998); PETER D. ENRICH & PATRICIA A. DAVIDSON, IMPACT OF S. 1530 ON STATE AND LOCAL REGULATORY AND ENFORCEMENT AUTHORITY 1, 1 (Tobacco Control Resource Ctr. Working Paper No. 7, 1998).

146. Request for Comment on Commission Staff Report on Cigarette Advertising, 46 Fed. Reg. 30,699 (Fed. Trade Comm'n 1981).

147. *Id.* During the late seventies the FTC repeatedly recommended changes in the warning message in its annual reports to Congress. See H.R. REP. NO. 98-805, at § 4 (1984), reprinted in 1984 U.S.C.C.A.N. 3718, 3724 (discussing the Comprehensive Smoking Education Act, the history of FTC, and congressional action on warning labels). Notably, the 1977 report recommended, *inter alia*, that a strong warning label be added to little cigar packaging. *Id.* Little cigars had previously been added to the federal ban on electronic advertising in part due to an upswing in consumption, apparently as an alternative to cigarettes. Little Cigar Act of 1973, Pub. L. No. 93-109, 87 Stat. 352 (codified as amended at 15 U.S.C. §§ 1331-40 (1997)).

about the risks of smoking.<sup>148</sup>

Congress responded to the FTC report by adopting some changes to the cigarette warning law, most notably by switching to a rotational system featuring four new specific messages. The "new" warnings, which have been unchanged for sixteen years, state:

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks To Your Health.

SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result In Fetal Injury, Premature Birth, And Low Birth Weight.

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.<sup>149</sup>

For the first time, Congress, instead of the FTC, required warning messages to be carried in cigarette advertising by Congress.<sup>150</sup>

Congress next considered the issue of tobacco warning labels in 1985-1986 when it adopted a law imposing rotational warning label requirements on packaging and advertising for smokeless tobacco products.<sup>151</sup> The rationale articulated in the legislative history of the federal law governing smokeless tobacco warnings is strikingly similar to the arguments and constellation of factors stimulating debate about the need for cigar warnings today. In short, Congress decided to require national smokeless tobacco warning labels when it was confronted with three developments: (1) health data documenting that smokeless tobacco can cause oral cancer and other diseases; (2) consumption data indicating that the use of smokeless tobacco was rising, especially among young people; and (3) the adoption of a state law (and the threat of action in other states) requiring warning labels on smokeless tobacco.<sup>152</sup>

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148. See H.R. REP. NO. 98-805. (Emphasis added).

149. 15 U.S.C. § 1333(a)(1)(1994).

150. *Id.* The long history of Congress diluting FTC rules and orders designed to toughen cigarette warnings may account for the agency's current reluctance to adopt a national cigar warning under its own authority. See *supra* Part II for a discussion of the FTC Cigar Report.

151. Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252, 100 Stat. 30.

152. See S. REP. 99-209, at 475-77, reprinted in 1986 U.S.C.C.A.N. 7; CENTER FOR DISEASE CONTROL, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, PUB. NO. (CDC) 89-8411, REDUCING THE HEALTH CONSEQUENCES OF SMOKING; 25 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL 477 (1989) [hereinafter THE 1989 SURGEON GENERAL'S REPORT].

The current policy climate in which cigar regulation is being considered is reminiscent of this scenario. First, a comprehensive report describing the significant health risks of cigar smoking was released by the National Cancer Institute in 1998, which was followed by several other notable health effects studies.<sup>153</sup> Second, a surge in cigar consumption, contemporaneous with media glamorization of cigar smoking, has been documented.<sup>154</sup> Youth use of cigars has been documented for the first time and the statistics are startling.<sup>155</sup> The confluence of the first two factors galvanized public health officials and sparked debate and action on the need for warning labels. However, it is the emergence of the third factor, the adoption of warnings in more than one state, that will bring the cigar industry to the table.

### 1. 1989 Surgeon General Report

In its silver anniversary issue, the Surgeon General's 1989 report also questioned the efficacy of cigarette warning labels.

Despite the fact that cigarette warning labels have been required since 1966, there are few data about their effectiveness in meeting any objective . . . . In particular there has been little evaluation of the impact of the rotating warning labels required since 1985.<sup>156</sup>

The report cited several studies conducted in the 1980s that were critical of the cigarette warnings.<sup>157</sup> In addition to highlighting specific complaints about the content and format of the warnings, the Surgeon General's Report noted that studies identified the advertising context in which warnings are presented as a significant obstacle to getting a health message across.<sup>158</sup> Finally, citing the difficulty of isolating any effect of warning labels, the report conceded "[i]n sum, there are insufficient data to determine either the independent contribution

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153. CIGAR TRENDS, *supra* note 1, at 1.

154. *Id.*

155. See *supra* note 1 and accompanying text. When the first report of youth cigar smoking was released in 1997, a well-known expert on adolescent smoking, Dr. John Pierce, announced, "[e]veryone's been caught napping." Sheryl Gay Stolberg, *Cigar Fad Reported to be Recruiting Legions of Teen-Agers*, N.Y. TIMES, May 23, 1997, at A3. While very recent data indicates that U.S. cigar consumption has peaked and is now declining, even cigar industry moguls (who publicized the declining numbers) agree that there are more cigar smokers today than ever before and that the industry (if not its customers) is expected to stay healthy. See Frazier, *supra* note 3. Moreover, the most recent and comprehensive report on youth smoking shows that the number of school age children that are smoking cigars has not declined appreciably. TOBACCO USE AMONG MIDDLE AND HIGH SCHOOL STUDENTS—UNITED STATES, *supra* note 5, at 49-53.

156. THE 1989 SURGEON GENERAL'S REPORT, *supra* note 152, at 478-79.

157. *Id.* at 479-80.

158. *Id.* at 489.

of cigarette warning labels to change in knowledge or smoking behavior or the precise role played by warning labels as part of a comprehensive antismoking effort."<sup>159</sup> However, it added that the 1981 FTC Report leading up to the only change in cigarette warning labels since their inception, as well as more recent data reveal many consumers, especially smokers, remain "unaware of even the most rudimentary health risk information about smoking."<sup>160</sup>

While a thorough review of the social science literature on the efficacy of health warnings is beyond the scope of this Article, several empirical studies measuring recall of warnings in cigarette advertising merit discussion.<sup>161</sup> In 1994, a group of researchers who have published several studies on cigarette warnings used eye tracking and recall measures to test and compare adolescents' attention to both the current cigarette warnings and new ones imbedded in cigarette advertising.<sup>162</sup> The study concluded that while the new warnings (developed by a focus group) were much more likely to initially attract the teens' attention, the recall results were not decisive.<sup>163</sup> This finding is consistent with earlier research indicating that it is generally known that the warning box at the periphery of cigarette advertisements is a health message.<sup>164</sup> However, when tested, people remember little more than the fact that a warning exists.<sup>165</sup>

The study noted the U.S. cigarette warning system has not changed since 1984 and some key elements such as the utilization of black and white text on the box have not changed in over thirty years, when the warning law was first established.<sup>166</sup>

The authors challenged lawmakers and public health advocates to consider whether the only message consumers apparently get (that there is a health warning) meets Congressional intent.<sup>167</sup> More optimistically, the authors suggested that "the use of in-ad health warnings can be improved if they are targeted, novel, simple, and tested for effectiveness

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159. *Id.* at 481.

160. *Id.*

161. *See, e.g.,* David W. Stewart & Ingrid M. Martin, *Intended and Unintended Consequences of Warning Messages: A Review and Synthesis of Empirical Research*, 13 J. OF PUB. POLICY & MARKETING 1, 13-14 (Spring 1994) (concluding that warnings inform rather than persuade consumers and consumers selectively respond to warning messages).

162. Dean M. Krugman et al., *Do Adolescents Attend to Warnings in Cigarette Advertising? An Eye-Tracking Approach*, 34 J. OF ADVERTISING RES., Nov./Dec. 1994, at 39, 43-44.

163. *Id.* at 47-49.

164. *Id.* at 50.

165. *Id.*

166. *Id.*

167. Krugman et al., *supra* note 162, at 50.

prior to use.”<sup>168</sup>

To date the U.S. government has not adopted this approach.<sup>169</sup> If Congress takes up cigar warning legislation, a thorough review of the literature, along with a commitment to developing warning messages and a system for updating and monitoring effectiveness ought to be part of the process.<sup>170</sup> Indeed, in a recent article, the authors of the eye-tracking study pointed out that in the U.S., tobacco warning development has largely been a product of negotiations between the industry and government, rather than a process that incorporates the fundamentals of both social science and the art of communication.<sup>171</sup> The authors regard the current warning law as a public health failure, noting that it was not developed or implemented with specific communication goals in mind. Moreover, they characterize it as a gift to the industry, providing it with a key argument in tobacco litigation: “We warned you.”<sup>172</sup> Effective government warnings could emerge from a different process, one which focuses on “develop[ing], target[ing], test[ing] and revis[ing] [warnings] over time.”<sup>173</sup>

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168. *Id.*

169. *But see infra* Part III.B. for a discussion of the Canadian Government’s approach and new warning proposals for the U.S.

170. The American Legacy Foundation, established under the 1998 Multi-State Tobacco Settlement (MSA), and charged with carrying out a nationwide advertising and education campaign to counter youth use of tobacco products and educate consumers about the causes and prevention of diseases associated with tobacco use, is theoretically in a position to include cigar measures (such as the development of effective warnings and counter advertising campaigns) in its agenda. American Legacy Foundation, *MSA Excerpt* (visited May 10, 2000) <<http://www.americanlegacy.org/msa.html>>. Although cigars are not expressly mentioned in the sections of the MSA describing the Foundations’ activities (and the definition of “tobacco products” in the MSA is limited to cigarettes and smokeless tobacco), it is unlikely that the cigarette and smokeless manufacturers would object to using some Foundation resources to target cigar use. American Legacy Foundation, *Master Settlement Agreement, Section II(vv)* (visited May 15, 2000) <<http://www.ash.org/setfull.html>>. Indeed these companies promised to not to oppose any legislation proposing to include cigars in the definition of tobacco products as part of the agreed upon lobbying restrictions under the MSA. *Id.* at Exhibit F.

171. Dean M. Krugman et al., *Do Cigarette Warnings Warn? Understanding What It Will Take to Develop More Effective Warnings*, 4 J. OF HEALTH COMM. 95, 95 (1999).

172. *Id.* At least one prominent tobacco control advocate called for the removal of the warning labels in 1994, claiming that they have done nothing to discourage or reduce smoking and “have produced extraordinary legal protection for the tobacco industry, such that its killer products still thrive today.” Dr. Elizabeth M. Whelan, American Council on Science and Health, *Government-Mandated Cigarette Warning Labels are Hazardous to Health*, 6 PRIORITIES 1, 4 (1994).

173. Krugman et al., *supra* note 171, at 95. The authors also again emphasize that the effectiveness of warnings must be evaluated in their advertising context. “Warnings such as the Surgeon General’s, which are

### B. New Canadian Warnings

The Canadian government, unlike the U.S.,<sup>174</sup> has followed an empirical model, despite encountering repeated legal setbacks in implementing its more ambitious tobacco warning program.<sup>175</sup>

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confined to text-only, black-and-white formats, simply cannot compete with imagery such as the Marlboro Man created by the tobacco companies." *Id.* at 99. In another article, some of these same researchers ask "How effective would the Surgeon General's message be at 200 miles per hour on a Marlboro Grand Prix racing car?" Paul M. Fisher et al., *An Evaluation of Health Warnings in Cigarette Advertisements Using Standard Market Research Methods: What Does It Mean to Warn?*, 2 TOBACCO CONTROL 279, 284 (1993).

174. *MSA Excerpt*, *supra* note 170. The 1997 proposed "global" settlement of the Attorney's General litigation against cigarette and smokeless tobacco manufacturers would have changed the U.S. cigarette and smokeless tobacco warning laws by adopting "Canadian-style" warnings. *Id.* However, the 1997 proposed settlement was rejected by Congress after the industry disavowed it. David E. Rosenbaum, *Tobacco Strategy; When No Means Yes, and Vice Versa*, N. Y. TIMES, Apr. 19, 1998, at 4-5 <<http://archives.nytimes.com>>; Allison Mitchell, *The Tobacco Bill: News Analysis; High Risks on Tobacco*, N.Y. TIMES, June 18, 1998, at A1 <<http://archives.nytimes.com>>. Ultimately, the Multi-State Settlement, which does not change any federal laws, was adopted by the parties to the lawsuits instead. National Association of Attorneys General, *Notice Parties List For All Participating Manufacturers Under MSA (as of 5/8/2000)* (visited June 27, 2000) <<http://www.naag.org/tobac/spmcont.htm>>. Although the only bill purporting to encompass the 1997 proposed settlement's provisions to reach the Senate floor for a vote did not include cigar warnings, (see S. 1415, 105th Cong. (1998)), at least one of the competing bills (in addition to adopting new warning requirements for cigarettes and smokeless tobacco) authorized—but did not require—the Secretary of Health and Human Services "to prescribe such regulations as may be necessary to establish warning labels for other tobacco product packaging, labeling and advertising." See S 1638, 105th Cong. § 575 (c) (1998). Cigars, little cigars and cigarillos, *inter alia*, were expressly included in the bill's definition of "tobacco products." *Id.* § 4 (20).

175. HEALTH CANADA, PROPOSED NEW LABELING REQUIREMENTS FOR TOBACCO PRODUCTS 3 (Consultation Paper, 1999). The Canadian parliament passed its first tobacco product health warning law, the Tobacco Products Control Act (TPCA) in 1988. Health Canada, *The Tobacco Act: History of Labeling* (viewed July 12, 2000) <[http://www.hc-sx.gc.ca/english/archives/releases/2000/2000\\_07ebk5.htm](http://www.hc-sx.gc.ca/english/archives/releases/2000/2000_07ebk5.htm)>. However, implementation was delayed by an industry legal challenge which was finally resolved in 1995 when the Supreme Court of Canada struck down many of the TPCA's provisions. *RJR-MacDonald, Inc. v. Canada (Attorney General)*, Nos. 23460, 23490, 1995 Can. Sup. Ct. LEXIS 69, at \*2-\*3 (S.C.R. Sept. 21, 1995). With regard to the warning labels the Court stated:

The government is clearly justified in requiring the appellants to place warnings on tobacco packaging. The question is whether it was necessary to prohibit the appellants from attributing the message to the government and whether it was necessary to prevent the appellants from placing on their packaging any other information other than that allowed by the regulations. (. . .) It was for the government to show that the unattributed warning, as opposed to an attributed warning, was required to achieve its objective of reducing tobacco consumption among those who might read the warning. (. . .) This it has failed to do.

*Id.* at \*4. In response to the Court's decision, a new law was passed in 1997,

Recently Health Canada announced its intention to require the largest health warnings in the world on tobacco products,<sup>176</sup> using dramatic, colorful visual images,<sup>177</sup> and jargon-free, blunt messages.<sup>178</sup> The proposed changes to the cigarette warnings have attracted the attention of the media as well as Congress in the United States.<sup>179</sup> In addition to the use of color photographs and new messages, the size of the warnings, which will occupy 50% of the display surface on tobacco packages, has sparked debate.<sup>180</sup> Indeed, squeezing out promotional and brand advertising on tobacco packages is one of the acknowledged goals of the new warnings.

While the international media has focused on the dramatic new warnings proposed for cigarettes, changes in the warnings for cigars and other tobacco products have gone unnoticed. Under

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which provided, *inter alia*, for the attribution of health warnings. Tobacco Act, S.C., ch. 13, § 17 (1997) (Can.). Regulations proposed under this new law have also been delayed. *Id.* As a result, the current Canadian tobacco warning label system, one of the most aggressive in the world, has been a voluntary undertaking of the tobacco companies. *Id.* at 3-4.

176. Macksood Aftab et al., *International Cigarette Labelling Practices*, 8 TOBACCO CONTROL 368, 370 (1999).

177. Health Canada (visited May 15, 2000) <[http://www.hc-sc.gc.ca/english/archives/releases/2000\\_07epotos.htm](http://www.hc-sc.gc.ca/english/archives/releases/2000_07epotos.htm)>. The warnings include color photographs of cancerous lungs, diseased hearts and post-stroke brains, attributing the diseased body parts to smoking. *Id.*

178. For example, the message accompanying a color photograph of lung tumors on cigarette packages says: "WARNING: CIGARETTES CAUSE LUNG CANCER. 85% of lung cancers are caused by smoking. 80% of lung cancer victims die within 3 years." Health Canada (visited May 15, 2000) <[http://www.hc-sc.gc.ca/hppb/tobacco/factsheets/e\\_fs13.htm](http://www.hc-sc.gc.ca/hppb/tobacco/factsheets/e_fs13.htm)>.

179. See, e.g., James Brooke, *Canada Seeks to Jolt Smokers with a Picture on Each Pack*, N. Y. TIMES January 20, 2000, at A1 (describing the aggressive Canadian proposals). See also Lautenberg & Lugar Propose Bipartisan Tobacco Labeling Bill, Jan. 19, 2000, available in 2000 WL 7977980 (responding to Canada's announcement of new requirements for cigarette warning labels, two U.S. Senators, Frank R. Lautenberg and Richard G. Lugar, announced that they are drafting a bipartisan bill to revamp American labels); *Canada Unveils New Labels for Tobacco Products Today: Durbin Proposal Requires Bigger, More Graphic Warning to Cover Half of Package*, Jan. 19, 2000, available in 2000 WL 7978002 (Jan. 19, 2000) (following Canada's announcement of new rules that would require warnings and graphic images to cover 50% of a tobacco package, U.S. Senator Richard Durbin announced he would introduce legislation to require similar warnings on U.S. tobacco products); *Smoker's Right to Know and Truth in Tobacco Labeling Act*, 146 CONG. REC. S930-02 (daily ed. Feb. 29, 2000) (statement of Sen. Lautenberg) (introducing new labeling bill).

180. Garfield Mahood, *Warnings That Tell the Truth: Breaking New Ground in Canada*, 8 TOBACCO CONTROL 356, 358-59 (1999). The Canadian Tobacco Manufacturers' Council has complained that that the proposed new warnings "so reduce the size and presentation of the brand elements on the packages as to render them virtually inert." *Id.* This move may be of even greater significance in Canada where tobacco advertising bans have made packaging one of the few remaining tools for product promotion. *Id.*

the draft regulations, a new series of warnings for both packaged and individually wrapped cigars was proposed.<sup>181</sup>

Initially, the proposed requirements for packaged cigars were quite similar to those for cigarettes, basically covering 50% of the display surface.<sup>182</sup> However, the proposed cigar warning provisions were revised pursuant to the comment period.<sup>183</sup> While the final regulations retain many of the original features, including colorful graphics and bold textual warnings, the size and placement requirements were altered.<sup>184</sup> The cigar product leaflet requirement, which initially applied to certain cigar packages<sup>185</sup> (but not individually wrapped cigars), was dropped from the final regulations.

Moreover, the warning messages are not cigar-specific, referring instead to the dangers of tobacco. For example, one warning, accompanied by a graphic color photograph of an open diseased mouth, states "WARNING: Tobacco Use Causes Mouth Disease."<sup>186</sup>

The new Canadian health warning tobacco regulations became law on June 26, 2000, and most manufacturers must begin carrying the new warnings by January 2001.<sup>187</sup> However, several major tobacco companies have already filed suit alleging illegal expropriation of their packaging.<sup>188</sup> The companies are seeking a stay of the regulations pending resolution of their claims. A ruling on the stay is expected in August of 2000. Health Canada believes a stay will not be granted.<sup>189</sup>

#### IV. FTC CIGAR WARNINGS

On June 26, 2000, as this Article went to print, the FTC announced that it was considering entering into a series of consent orders with the seven major U. S. cigar manufactures<sup>190</sup> to

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181. *Proposed Tobacco Products Information Regulations*, GAZETTE DU CANADA, Jan. 22, 2000, at Part I, 151 [hereinafter *Tobacco Products Regs.*].

182. See *id.*

183. See Health Canada, *New Tobacco Regulations: Product Information Labeling and Reporting* (viewed July 12, 2000) <<http://www.hcgc.gc.ca/hppb/tobacco/end/tobacco/legislat/legis.april00.html>>. [hereinafter *New Tobacco Regulations*].

184. New separate rules with varying size requirements were established for cigars sold in boxes and "cigars in bundles." *Id.* Four rotating, bilingual messages must appear on such cigar packaging. *Id.*

185. See *Tobacco Products Regs.*, supra note 181, at Part I, 151.

186. See *New Tobacco Regulations*, supra note 183.

187. Non-Smokers' Rights Association, *Health Warnings On Tobacco Products In Canada* (viewed June 30, 2000) <<http://www.nsra-adnf.ca/english/warnoverview.html>>.

188. Telephone interview with Karen Provd, Health Canada (July 12, 2000).

189. *Id.*

190. Federal Trade Commission, *In the Matter of Swisher International, Inc.*-

require national, uniform health warnings on cigar packages and advertising.<sup>191</sup> The proposed settlement was apparently initiated by the cigar companies in response to their concern about the prospect of multiple state warnings.<sup>192</sup>

### A. *The Procedure*

The FTC followed an abbreviated procedure in issuing the cigar warning requirements.<sup>193</sup> Instead of promulgating regulations, which generally requires notice, public comment, a hearing and promulgation based upon a record,<sup>194</sup> the FTC warning requirements are being issued pursuant to a modified adjudication proceeding. Under section 5(b) of the Federal Trade Commission Act, the FTC may issue a complaint when there is reason to believe that a party has committed (or is committing) an

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*Agreement Containing Consent Order, File No. 002-3199* (viewed Aug. 29, 2000) <<http://www.ftc.gov/os/2000/06/swisherconsent.htm>> [hereinafter *Consent Order*]; Federal Trade Commission, *In the Matter of Consolidated Cigar Corporation- Agreement Containing Consent Order, File No. 002-3200* (viewed Aug. 29, 2000) <<http://www.ftc.gov/os/2000/06/consolidated consent.htm>>; Federal Trade Commission, *In the Matter of Havtampa, Inc.-Agreement Containing Consent Order, FileNo .002-3204* (viewed Aug.29, 2000) <<http://www.ftc.gov/os/2000/06/havatampaconsent.htm>.>; Federal Trade Commission, *In the Matter of General Cigar Holdings, Inc.-Agreement Containing Consent Order, File No. 002-3202* (viewed Aug. 29, 2000) <[http://www.ftc.gov/os/2000/06/generalcigarconsent\\_.htm](http://www.ftc.gov/os/2000/06/generalcigarconsent_.htm)>; Federal Trade Commission, *In the Matter of John Middleton, Inc.- Agreement Containing Consent Order, File No. 002-3205* (viewed Aug.29, 2000) <<http://www.ftc.gov/os/2000/06/middletonconsent.htm>>; Federal Trade Commission, *In the Matter of Lane Limited- Agreement Containing Consent Order,File No. 002-3203* (viewed Aug. 29, 2000) <<http://www.ftc.gov/os/2000/06/lanelimitedconsent.htm>>; Federal Trade Commission, *In the Matter of Swedish Match North America, Inc.- Agreement Containing Consent Order, FileNo.002-3201*(viewedAug.29,2000)<<http://www.ftc.gov/os/2000/06/swedishmatchconsent.htm>>.

191. Federal Trade Commission, FTC Announces Settlements Requiring Disclosures of Cigar Health Risks: Landmark Agreements Require Strong Warnings on Both Packaging and Advertisements (viewed June 26, 2000) <<http://www.ftc.gov/opa/2000/06/cigars.htm>>.

192. See Letter from Gregory N. Connolly, The Commonwealth of Massachusetts, Executive Office of Health & Human Services, Department of Public Health, to Colleagues 1 (July 5, 2000) (on file with author) (urging state departments of health to submit comments to the FTC regarding the proposed cigar warnings and possible amendment to the smokeless tobacco warnings). See also *supra* Part I.A & I.B for a discussion of the California and Massachusetts warnings.

193. The FTC also relied on the consent decree process in 1972 when it extended health warnings to cigarette advertising, as well as packaging. See *supra* Part II.

194. Consumer protection rulemaking (and amendments to rules) is authorized under 15 U.S.C. § 18 (1994). The procedures are defined in 16 C.F.R. §§ 1.7-1.20 (1998).

“unfair or deceptive” act or practice. In this case, it appears that the cigar companies proposed a settlement during the complaint investigation period,<sup>195</sup> potentially dispensing with the need for a hearing<sup>196</sup> and likelihood of a cease and desist order.<sup>197</sup> Instead, the FTC will accept comments for a thirty-day-period and then decide whether to accept or withdraw the agreement.<sup>198</sup> The thirty-day comment period is apparently the only opportunity for public review or participation in the process of establishing a national policy for cigar health warnings.

The draft complaints allege that the seven cigar companies failure to disclose the adverse health effects of regular cigar smoking constitutes an unfair or deceptive practice in violation of section 5 of the Federal Trade Commission Act. Paragraph 4 of the complaint alleges:

In its advertising, labeling and sale of cigars, respondent has failed to disclose that regular cigar smoking can cause several serious adverse health conditions including, but not limited to, cancers of the mouth (oral cavity) throat (esophagus and larynx), and lungs. These facts would be material to consumers in their purchase and use of the product. Respondent's failure to disclose these facts has caused or is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. Therefore, the failure to disclose these facts was, and is, an unfair or deceptive practice.<sup>199</sup>

Furthermore, by relying on a consent decree process (which only applies to parties) instead of rulemaking, the FTC is leaving gaps in the new warning system. While the seven cigar companies which are parties to the proposed agreements apparently comprise 95% of the U.S. cigar market, some manufacturers will not be required to carry warnings on their

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195. See 16 C.F.R. § 2.31 (1998) (permitting potential respondents to proffer a proposed consent order during the investigative process). Here draft complaints were released to the public at the same time as the proposed consent orders. See, e.g., Federal Trade Commission, *In the Matter of Swisher Int'l, Inc.-Complaint, Docket No. C-3964* (viewed Aug. 29, 2000) <<http://www.ftc.gov/os/2000/080swishercomp.htm>> [hereinafter *Complaint*]; *Consent Order*, *supra* note 190.

196. 15 U.S.C. § 45(b) (1994); 16 C.F.R. §§ 2.31-2.34 (1998).

197. A final cease and desist order can function more like a rule than a consent order, in that it may be enforced against parties (other than the original respondent) who are aware of the order. See 15 U.S.C. § 45(m)(1)(B) (1994).

198. The FTC's procedure for entering into consent orders generally involves an offer to settle, negotiation, public comment and acceptance of the final order or other alternatives. See 16 C.F.R. §§ 2.31-2.34 (1998).

199. See, e.g., *Complaint*, *supra* note 195.

packaging.<sup>200</sup>

With regard to cigar advertising, the gap could be even larger. For example, while the warnings purport to apply to Internet advertising,<sup>201</sup> on-line cigar advertising or promotion that is not paid for by one of the seven respondents is not apparently subject to the warning requirements.<sup>202</sup> Indeed, aside from the seven respondent companies, independent retailers may apparently sell as well as promote cigars on-line without posting the FTC warnings. If the FTC had followed a rule-making process exceptions to the warning requirements—and their supporting rationales—would probably have been more clearly defined.

### *B. The Substantive Requirements Of The Proposed Cigar Warnings*

Under the FTC's proposed consent order the seven companies must "clearly and conspicuously" display one of the five following health warnings on their cigar packages and advertisements (as defined by the order):

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Cancers of the Mouth And Throat, Even If You Do Not Inhale;

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Lung Cancer And Heart Disease.;

SURGEON GENERAL WARNING: Cigars Are Not A Safe Alternative To Cigarettes;

SURGEON GENERAL WARNING: Tobacco Use Increases The Risk Of Infertility, Stillbirth, And Low Birth Weight; and

SURGEON GENERAL WARNING: Tobacco Smoke Increases The Risk Of Lung Cancer And Heart Disease, Even In Nonsmokers.<sup>203</sup>

While these messages are certainly more varied and specific than

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200. The consent order's definition of packaging also includes two exceptions. See *Consent Order*, *supra* note 190, at definition 8(a), (b).

201. See *id.* at definition 4.

202. Part VII of the proposed consent orders clarifies, however, that "all cooperative advertisements paid for directly or indirectly, in whole or part, by respondent must bear the required warning." See *id.* at Part VII. This Part also establishes and refers to other exceptions, such as an exception for retailers disseminating a print cigar advertisement with a display areas of 4 square inches or less if the ad only includes the brand name, other identifiers and price. *Id.*

203. *Id.* at Part I.

the California warning currently appearing on many U.S. cigars, the FTC has not indicated that it has evaluated or tested the proposed warnings for effectiveness.

Furthermore, while the addition of a warning directed at the dangers of environmental tobacco smoke is a welcome change, the language of the warning is relatively vague. For example, the reader must infer that the reference to nonsmokers—buried in the second clause of the fifth message—means that environmental tobacco smoke (ETS) is dangerous. And the warning is not specific to cigars, which emit high levels of hazardous environmental smoke.<sup>204</sup> Testing a variety of messages about the dangers of cigar-induced ETS would have been a better way to develop the nation's first ETS tobacco product warning. For example, consumers might perceive a warning stating, "SURGEON GENERAL WARNING: Cigar Smoke Is Dangerous To The Health Of Nonsmokers" as a more direct and understandable ETS message.

The consent orders contain many detailed and varied requirements pertaining to the size, format, rotation and placement of warnings on packages and in covered advertising.<sup>205</sup> Generally, the size requirements are less stringent than either the Canadian or the Massachusetts cigar warnings. For example, while the Massachusetts warnings cover 25% of the package, the FTC warnings would only encompass 8-15% of the cigar pack.

The FTC warning proposal excepts certain types of retail audio advertisements. For example, shelf talkers and "similar product locators with a displace area of twelve (12) square inches or less" are not covered by the warning in advertising requirements.<sup>206</sup> Warnings are not required for purely audio requirements "in a retail store or other place where cigars are offered for sale . . . even if respondent provides an incentive for disseminating the advertisement, so long as the announcement includes only the brand name or product identifier, the price, and the product's location in the store."<sup>207</sup> These exceptions suggest that while cigar manufacturers are willing to accept uniform, relatively small written warnings on their visually complex packages and ads (and some forms of audio warnings, particularly in mixed media)<sup>208</sup> they are not willing to include warnings in auditory media.

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204. See CIGAR TRENDS, *supra* note 1, at 18.

205. See *Consent Order*, *supra* note 190, at Parts II-VI.

206. See *id.* at Part I.

207. See *id.* at Part V.

208. See *id.*

### C. Preemption

In Part X of the consent orders, the FTC attempts to preempt conflicting state of local cigar warning requirements.

IT IS FURTHER ORDERED that the Commission intends that this order provide for a *uniform*, federally mandated system of health warnings on cigar packages and advertisements nationwide. Entry of the order will *uniformly* provide consumers in all states and territories of the United States with clear, conspicuous and understandable disclosures of the health risks of cigar smoking. *The Commission shall consider a state or local requirement for the display of different warnings concerning cigar smoking and health to be in conflict with the requirements of this order, but only to the extent that any such provision requires that the state or local warning appear on any package or advertisement required to display the Federal warnings set forth herein.*<sup>209</sup>

Courts have recognized the FTC's (and other federal agencies') power to preempt state and local laws through the consent decree process.<sup>210</sup> The express preemption language of the consent orders indicates that provisions of state or local laws requiring different warnings on cigar packages or ads that are not covered by the consent orders (either because they are excepted or because the manufacturer is not a party) would not be preempted. Thus, for example, a state or locality could theoretically establish its own warnings for certain excepted ads, such as shelf-talkers a foot or less in length or cigar ads paid for by a non-respondent.

However, the preemption language of the consent orders raises questions about the meaning of the term "display of different warnings *concerning cigar smoking and health*."<sup>211</sup> The phrase "concerning . . . smoking and health" is reminiscent of the broad FCLAA language discussed in Part II of this Article. This similarity raises concern about whether the industry will attempt

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209. See *id.* at Part X (emphasis added).

210. See, e.g., *General Motors Corp. v. Abrams*, 897 F.2d 34, 39 (2d Cir. 1990). In *General Motors Corp.*, the court rejected the New York state attorney general's argument that a federal agency's consent orders should not carry the same preemptive weight as regulations because consent orders "lack the administrative safeguards of a regulation and [do] not reflect a considered policy choice of the agency." *Id.* Instead, the court reasoned that Congress authorized the FTC to fulfill its consumer protection responsibilities under section five of the Federal Trade Commission Act by rule-making or "case-by-case adjudication, including consent orders." *Id.* The court relied on the U.S. Supreme Court decisions recognizing that federal agencies "acting within the scope of its congressionally delegated authority may pre-empt state regulations." See *id.* at 39 (quoting *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986)).

211. See *Consent Order*, *supra* note 190, at Part X (emphasis added). Cf. 15 U.S.C. § 1334(b) (1994).

to claim that other regulations restricting cigar advertising or promotion “concerning smoking and health” are preempted. The language of the consent orders should be tightened to expressly clarify that state and local laws regulating the sale, distribution, marketing, advertising and promotion of cigars—other than those requiring a different, conflicting warning message on packages or ads expressly covered by the FTC orders—are not preempted.

For all practical purposes, in any event, the FTC cigar warnings will probably have a pseudo-preemptive effect on state and local warning laws, discouraging further action to fill the gaps. Indeed the orders may discourage a broader range of state and local action to regulate cigar advertising, marketing and sales.

The consent orders also raise other major preemption questions: whether the warnings provide liability protection to the cigar industry in litigation. Although the consent orders do not expressly address this issue, the respondents, if sued, would probably make this argument. Even parties to cigar liability lawsuits whose packages or ads are not clearly covered by the consent orders might attempt to use the FTC warnings as a shield from liability.

The consent order’s silence on liability protection should be addressed during the public comment period. A possible solution, also suggested in Part II of this Article, would be to insert the “no liability protection” language that appears in the federal law establishing national warnings for smokeless tobacco.<sup>212</sup> Part X of the consent order should expressly disavow any intent to provide liability protection to the respondents or any other party.

#### D. *Updating And Revising The Warnings*

Finally, the FTC consent order is devoid of any requirement that the cigar warning messages be updated in the future.<sup>213</sup> The lack of a sunset provision—coupled with the apparent lack of data evaluating the efficacy of the specific messages and formatting and rotation requirements—suggests that the FTC is establishing

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212. See 15 U.S.C. § 4406(c) (1994) (providing “[n]othing in this chapter shall relieve any person from liability at common law or under State statutory law to any other person.”).

213. The orders provide that the consent orders may be reopened if the size or format requirements for either the cigarettes or smokeless tobacco warnings are changed by amendment to the relevant statute or regulations. See *Consent Order*, *supra* note 190, at Part XIII (emphasis added). However, such modifications are apparently discretionary and limited to size or formatting provisions. The warning messages themselves would not be changed by this process. Furthermore, the size or format of cigar warnings could only be modified “to conform to the same or similar size[s] or format[s]” for cigarettes or smokeless tobacco warnings. *Id.*

a cigar warning system plagued with some of the flaws besetting the U.S. cigarette warning system.

Novelty is an important factor in the effectiveness of the tobacco warnings.<sup>214</sup> Moreover, in the case of cigars, where there are still gaps in the data about health effects (e.g., occasional cigar smoking)<sup>215</sup> the failure to provide for evaluation and updating of the new warnings may be particularly problematic.

#### CONCLUSION

Lawmakers poised to adopt health warning messages for cigar packaging and advertising should carefully consider both the history of U.S. cigarette warning labels and the bolder approach taken by Canada. A national "Canadian-style" warning system featuring graphic colorful photographs and over-sized, plain-spoken messages would be a significant improvement over the stagnant, largely unnoticed warnings on cigarettes in the U.S. today and the cigar warnings recently adopted under consent orders by the FTC. Any federal warning law for cigars should avoid the preemption pitfalls of the current U.S. cigarette warning law by disavowing any intent to limit liability or state and local power to regulate cigar marketing, advertising and sales. The FTC Consent Orders also fall short in this area. Unless federal lawmakers are emboldened to take such an approach to cigar warnings, a pattern of state-by-state experimentation may have been the preferable course.

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214. See *supra* Part III for a discussion of U.S. and Canadian tobacco warning labels.

215. See *supra* notes 6-8 and accompanying text for a discussion of studies on the health effects of cigar smoking.

