Articles

THE LIABILITY OF TOBACCO COMPANIES—SHOULD THEIR ASHES BE KICKED?*

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Legend has it that, right after the Civil War, the founder of the tobacco industry began peddling tobacco in muslin bags which proudly bore the inscription "*Pro Bono Publico*!"[1] Cigarette packages might bear that inscription today if tobacco companies did not fear liability on the basis that such a promise might constitute a warranty.

Issues ranging from the liability of tobacco companies to the tobacco firms' right to advertise their wares are becoming increasingly important. Despite an almost endless supply of evidence documenting the hazards of smoking,[2] tobacco companies continue to deny that their products are harmful.[3]

A vast quantity of written work has been produced covering a considerable range of issues concerning tobacco.[4] This Article takes a slightly differ-

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* As this article went to print, two courts issued decisions which changed the law relating to smoking and the liability of tobacco companies. The Eleventh Circuit for the U.S. Court of Appeals adopted the reasoning of Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986), in Estate of Stephen v. American Brands, Inc., No. 86-1525 (11th Cir. Aug. 21, 1987). *See* note 309 *infra* and accompanying text. The First Circuit for the U.S. Court of Appeals handed down Palmer v. Liggett Group, Inc., No. 86-1525 (1st Cir. Aug. 25, 1987), reversing a lower court decision discussed in notes 312-29 *infra* and accompanying text.

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1. P. TAYLOR, THE SMOKE RING: TOBACCO, MONEY & MULTINATIONAL POLITICS 23 (1984).

2. Surgeon General Everett C. Koop has estimated that more than 50,000 scientific articles presently demonstrate the hazards of smoking. Curry, *AMA's proposed tobacco-ad ban lights legal fire*, Chi. Tribune, Dec. 15, 1985, § 3, at 21, col. 5 and 24, col. 3.

3. *See, e.g.*, THE TOBACCO INSTITUTE, THE CIGARETTE CONTROVERSY: WHY MORE RESEARCH IS NEEDED (Feb. 1984) [hereinafter THE TOBACCO INSTITUTE, CIGARETTE CONTROVERSY]; THE TOBACCO INSTITUTE, CIGARETTE SMOKING AND CHRONIC OBSTRUCTIVE LUNG DISEASES: THE MAJOR GAPS IN KNOWLEDGE (1984) [hereinafter THE TOBACCO INSTITUTE, CIGARETTE SMOKING]. An R.J. Reynolds Tobacco Company spokesman is cited as denying the proof. CURRY, *supra* note 2.

4. For the health issues, *see, e.g.*, OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, SMOKING AND HEALTH: A REPORT OF THE SURGEON GENERAL (1979) [hereinafter 1979 SURGEON GENERAL'S REPORT]; SMOKING AND HEALTH: REPORT OF THE

ent look at the history of the product, the cases that have been brought against tobacco companies, and some theories that have been propounded. It also proposes new ways to address the proposition that liability for serious harm is overdue. Although much of the discussion in this Article addresses cigarettes, many of the issues concern other tobacco products as well.

HISTORY OF THE PRODUCT—THE PLOT SICKENS

In a recent case in Knoxville, Tennessee, the court rejected a 55 million dollar claim against a tobacco company on the grounds, *inter alia*, that the plaintiff failed to show that the ordinary consumer would not know the potential risks of smoking.[5] The court stated that tobacco has been used for over 400 years and that its characteristics are well known.[6]

It is true that tobacco has been around for some time. The American Indians used tobacco before Columbus "discovered" his new route to the Indies.[7] Spanish explorers brought some tobacco seeds back to Europe,[8] where the crop was grown for "medicinal" purposes.[9]

For the struggling colonies, tobacco was an important cash crop.[10] It was a leading export[11] and was even used as money since money was in short supply due in part to England's prohibition against the colonies minting their own currency.[12]

Although smoking tobacco is no longer regarded as a curative therapy,

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ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (1964) [hereinafter 1964 SURGEON GENERAL'S REPORT]; Baird & Wilcox, *Cigarette Smoking Associated With Delayed Conception*, 253 J.A.M.A. 2979 (1985); Russell & Feyerabend, *Blood and Urinary Nicotine In Non-smokers* [sic], The Lancet, 25 Jan. 1975, at 179; Sandler, Wilcox, Everson, *Cumulative Effects of Lifetime Passive Smoking on Cancer Risk*, The Lancet, Feb. 9, 1985, at 312; and AM. CANCER SOC'Y, 1987 CANCER FACTS & FIGURES (1985).

For the legal issues, *see, e.g.*, Garner, *Cigarette Dependency And Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423 (1980); Edell and Gisser, Cipollone v. Liggett Group, Inc.—*The application of theories of liability in current cigarette litigation*, N.Y. ST. J. MED., at 318 (July 1985); Haskins, *The Tobacco Industry—A Contributor to Asbestos Disabilities*, 34 FED'N. INS. COUNS. Q. 271 (1984); Nathan & Weiner, *Superfund for Asbestos Liabilities: A Sensible Solution to a National Tragedy*, 14 ENVTL. L. REP. 10127 (1984); Note, *Plaintiffs' Conduct as a Defense to Claims Against Cigarette Manufacturers*, 99 HARV. L. REV. 809 (1986); and Comment, *The Proposed Illinois Clean Indoor Air Act: The Right of Nonsmokers To A Smoke-Free Environment*, 18 J. MAR. 177 (1984).

For the economic and political issues, *see, e.g.*, P. TAYLOR, *supra* note 1; and HEALTH PROGRAM OFFICE OF TECHNOLOGY ASSESSMENT, STAFF MEMO: SMOKING-RELATED DEATHS AND FINANCIAL COSTS (Sept. 1985) (neither reviewed nor approved by the Technology Assessment Bd.).

For the tobacco industry position, *see, e.g., The Cigarette Controversy, supra* note 3, and *Cigarette Smoking, supra* note 3.

5. Roysdon v. R.J. Reynolds Tobacco Co., 623 F. Supp. 1189, 1192 (E.D. Tenn. 1985). *See also* Bean & Wallace, *Tobacco Firms Win 2 Rulings Over Liability*, WALL ST. J., Dec. 12, 1985, at 6.

6. *Roysdon*, 623 F. Supp. at 1192.

7. J. ROBERT, THE STORY OF TOBACCO IN AMERICA 3-5 (1967); *see also* J. POMFRET, FOUNDING THE AMERICAN COLONIES 34 (1970).

8. S. MORISON, THE EUROPEAN DISCOVERY OF AMERICA 73 (1974).

9. Tobacco enjoyed a universal reputation in Europe as a remedy for smallpox and a variety of other ailments. M. KRAUS, THE UNITED STATES TO 1865 35 (1970). The doctrine of nicotine therapy was in vogue periodically in the United States. J. ROBERT, *supra* note 7, at 3, 22-3, 126.

10. Tobacco has been hailed as "the salvation of the struggling Jamestown Colony 350 years ago." P. TAYLOR, *supra* note 4, at 171. *See also* C. ANDREWS, OUR EARLIEST SETTLEMENTS 53 (1959).

11. R.C. SIMMONS, THE AMERICAN COLONIES 195 (1976).

12. J. MCCUSKER, MONEY AND EXCHANGE IN EUROPE AND AMERICA, 1600-1775, 117 (1978).

the economic aspects of tobacco have not changed significantly. Indeed, tobacco sales constitute a major portion of the economy from the standpoint of both the gross national product and tax revenues.[13]

The economic influence of tobacco is so pervasive that its cancerous web has created an atmosphere in which the government clearly prefers wealth, not health.[14] The stranglehold maintained by the tobacco industry on the government manifested itself when President Carter appointed a board member of a tobacco company chairman of the President's Council on Physical Fitness and Sports.[15] The history of the tobacco industry's incredible influence on the political scene must be understood in order to fathom why legislation has been no match for this industry.[16]

As for smoking tobacco, extensive use of the product is fairly recent, rather than over 400 years old as suggested by the Knoxville court. The first cigarette making machine was not even invented until the early 1880s,[17] and widespread heavy consumption of cigarettes did not begin in earnest until many years later.[18] As for the effects of smoking, for example, at the begin-

13. *See* P. TAYLOR, *supra* note 4, at 152.

14. *Id. But see* Garner, *supra* note 4, at 1461-63, for a discussion that the wealth provided by tobacco companies is actually costing the economy more than it is worth ("tobacco companies do not pay their way") despite the production of billions of tax dollars.

15. Lutschg, *Why Uncle Sam is still smoking*, 1983 N.Y. ST. J. MED. 1278 (1983). President Carter now admits the error of his ways and has joined the crusade against tobacco products. *See* the Letters to the Editor by Lutschg regarding Carter, and see Carter's response, 255 J.A.M.A. 1015 (1986). Congressmen have obtained compensation from the tobacco industry for speaking at industry functions. Lutschg, *id.* at 1278. Legislation that favors the industry is hardly surprising when such blatant conflict of interest abounds.

16. *See generally* P. TAYLOR, *supra* note 1.

Even government agencies that appear to be independent from the tobacco influence somehow defer to the industry. Thus, when recommending that new warnings were needed, the Federal Trade Commission (FTC) cautioned, "The warning should be large enough to be noticed, but small enough to permit the advertiser to communicate its desired message." FTC STAFF REPORT ON THE CIGARETTE ADVERTISING INVESTIGATION 5-21 (May, 1981) [hereinafter 1981 FTC REPORT]. Because the message of the advertisement is to encourage smoking, one could question the desirability or appropriateness of the size consideration, given that the higher costs generated by increasing the size of advertisements would presumably result in the discouragement of smoking. These presumably higher costs would make distribution of tobacco products less profitable, or would drive up prices, or cut down advertising. The FTC also "attempted to design the rotational warning system to keep costs to a minimum." *Id.* at pp. 5-37. This design loses track of the purpose of warnings; to foster communication of the hazards. Concerned about requiring more space on billboards for the new warnings, the FTC considered exempting billboards from carrying warnings. *Id.* at pp. 5-27 and Appendix D.

17. J. ROBERT, *supra* note 7, at 142. *See also* D.J.K. BALFOUR, NICOTINE AND THE TOBACCO SMOKING HABIT 153 (1984).

18. J. ROBERT, *supra* note 7, at 172, 234. *See also* E. BORGATTA and R. EVANS, SMOKING, HEALTH, AND BEHAVIOR 24 (1968). *See generally* Marwick, *Changing climate seen in efforts to tell public about smoking, health*, 252 J.A.M.A. 2797 (1984). "[C]igarettes became firmly entrenched by the 1920s." Blum, *When 'More doctors smoked camels': Cigarette advertising in the Journal*, 1983 N.Y. ST. J. MED. 1347 (1983). It is suggested that the burgeoning taste for tobacco dates even earlier: "The American Civil War created the great national demand for smoking tobacco. While 80,000 Confederate and Union troops were awaiting the outcome of peace negotiations . . . they tried smoking the local tobacco, for want of anything better to do. They liked the new experience. . . ." P. TAYLOR, *supra* note 1, at 23. Whatever date is accurate, in 1900 the average person consumed approximately 54 cigarettes per year, whereas by 1984, the per capita consumption had leaped to about 3,500 cigarettes per year. *See* Marwick, *supra*, at 2799. These sources do not make clear whether "per capita" consumption means the average consumption "per smoker" or "per person" (including nonsmokers). AM. CANCER SOC'Y, DANGERS OF SMOKING * * * BENEFITS OF QUITTING & RELATIVE RISKS OF REDUCED EXPOSURE (Revised ed. 1980) [hereinafter ACS, DANGERS OF SMOKING] indicates that "per capita" means "per person:" "[I]n 1976 . . . the average smoker

ning of the twentieth century it is believed that almost no lung cancer existed[19] because long-term smoking is necessary to produce that result. Consequently, it seems specious to charge the public (consumers) with intimate knowledge of the scientific characteristics of a product due to its chronological age. One might as well assume that the average person understands calculus because math has been around for so long.

THE HEALTH HAZARD—A KING-SIZE PROBLEM

Despite the abundance of materials demonstrating the hazards of smoking, tobacco companies have steadfastly maintained that unbiased research is needed to resolve the health "controversy."[20] But what bias exists on the part of the medical and scientific community which has produced findings causing tobacco to be referred to as the "brown plague?"[21] In fact, if any bias were to exist, doctors would be likely to favor tobacco since some estimates state that 25% of the health care costs in America are due to tobacco use.[22] It seems unlikely that tobacco companies will declare anyone unbiased unless someone concludes that smoking is harmless or even healthy.[23]

Presuming one can safely adopt the conclusions of the medical and scientific community, smoking causes the death of approximately 350,000 people per year in the United States.[24] Tobacco ". . . has wiped out more people

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spent $240 a year for 506 packages." *Id.* at 62. PHILIP MORRIS INC. ANNUAL REPORT 4 (1984) says, "In 1984, cigarette sales in the United States increased to approximately 600 billion units. . . ." Those figures suggest that the 3,500 cigarettes per year must be based upon the entire population rather than an average consumption "per smoker." Thus, the average smoker consumers considerably more than 3,500 cigarettes per year; assuming that 30 percent of Americans smoke, the average smoker's consumption is closer to 11,666 cigarettes per year (based upon the equation: .30x = 3,500, which produces a figure larger than the average number of packages purchased in 1976, but not out of line with it). One author specifically says that an average smoker consumes more than 11,000 cigarettes annually. Ponte, *Radioactivity: The New-found Danger in Cigarettes*, READER'S DIGEST, Mar. 1986, at 123.

19. P. TAYLOR, *supra* note 1, at 2. Lung cancer among nonsmokers is still rare. Wynder & Graham, *Tobacco Smoking as a Possible Etiologic Factor in Bronchogenic Carcinoma: A Study of Six Hundred and Eighty-Four Proved Cases*, 253 J.A.M.A. 2986 (1985). On the other hand, the tobacco industry maintains that the earlier "absence" of lung cancer may be due partly to inefficient diagnostic techniques at that time. *See* THE TOBACCO INST., CIGARETTE SMOKING AND CANCER: A SCIENTIFIC PERSPECTIVE (1982).

20. *See, e.g.*, R.J. REYNOLDS INDUS. 1984 ANNUAL REPORT 7. It is difficult to imagine that the medical profession and the scientists who have contributed to the mass of evidence against smoking are biased. But if they are, who should conduct such research? Are those hired by tobacco companies unbiased? Tobacco companies have invested tremendous sums of money to investigate the issue. *Id.* at 7. Yet, no findings seriously question the dire results they want to deny. Furthermore, if anyone outside the medical and scientific community performs the research and concludes that tobacco is hazardous, the criticism leveled at such a researcher would undoubtedly change from a lack of impartiality to a lack of expertise.

21. Busch, *'Smoke-free society' is high priority: APHA chief hits 'brown plague'*, Am. Med. News, Dec. 6, 1985, at 12, col. 1.

22. Marwick, *Effects of 'passive smoking' lead nonsmokers to step up campaign*, 253 J.A.M.A. 2937 (1985). Regarding bias in the medical profession, is it pure coincidence that internal resistance to the American Medical Association's moves against tobacco comes from North Carolina's (the leading tobacco growing state) delegation of doctors? *See* Hines, *Ban all tobacco ads, promotion, AMA asks*, Chi. Sun-Times, Dec. 11, 1985, at 36, col. 2.

23. If anyone made such a startling announcement, tobacco firms would either be skeptical or, despite their joy, proceed with extreme caution lest they be found to be making express warranties that tobacco is safe.

24. The "350,000 premature deaths per year attributable to smoking in the United States exceeds (sic) the number of American lives lost in all the wars this country has fought in the 20th

than all the wars of this century."[25] Historically, the total death toll runs into the tens of millions.[26] The numbers begin to seem like money in a Monopoly game, except for the grave seriousness of the problem. Notably, out of every one hundred smokers, twenty-eight will die prematurely: one will be murdered, two will die in traffic accidents, and twenty-five will be killed by Smoking.[27]

Nor is death the sole problem. Many smokers[28] and nonsmokers[29] are among the walking wounded as a result of the hazards. Some researchers believe smoking causes as much as 95% of all lung cancer[30] and about 30% of all cancers.[31] It is regarded as the second greatest cause of cancer, being close behind diet; arguably,[32] it is the single greatest cause of all cancers. Even more deaths from heart disease[33] can be tied to smoking. It is the largest cause of death from chronic obstructive lung disease (COLD).[34] Smoking is also responsible for, or a contributing factor to, a large variety of lesser known problems.[35]

Some hope exists that the death toll might abate somewhat,[36] but that is unrelated to any social conscience on the part of tobacco firms; rather, it is due to a decrease in the smoking rate of individuals largely because of the scare created by the Surgeon General beginning in 1964.[37]

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century." Anthony, *Reducing Smoking in Hospitals: A Time for Action*, 253 J.A.M.A. 2999 (1985). President Carter points out that the daily loss of 1,000 Americans equals the toll one could expect from daily crashes of wide-body jets in New York, Chicago, Los Angeles, and Atlanta, killing everyone on board. Carter, *Closing the Gap: The Burden of Unnecessary Illness*, 254 J.A.M.A. 1359 (1985). And to grasp the horror, one must consider that these numbers include only deaths, not illnesses.

25. P. TAYLOR, *supra* note 1, at 281.

26. *Id.* at 281.

27. OTA STAFF MEMO, *supra* note 4, at 48.

28. For example, on ABC's November 12, 1985 "Nightline" television program, one victim was featured who lost his tongue, legs, and part of his jaw due to smoking.

29. It is estimated that between 500 and 2,500 nonsmokers die annually due to "passive" smoking. *See* Marwick, *supra* note 22. Many more suffer from problems ranging from minor eye irritations to anginal attacks. *See* AM. CANCER SOC'Y, *supra* note 18, at 50. Additionally, nonsmokers suffer economic loss, injury, and death from smoking-related fires. *See* Podgers, *Attack on Cigarettes as Fire Cause Grows*, 67 A.B.A. J. 282-83 (1981); Finley, *Self-extinguishing cigarette urged*, Chi. Sun-Times, May 6, 1981, at 22, col. 1; AM. CANCER SOC'Y, *supra* note 18, at 53.

30. L. Koo et al., *An Analysis of Some Risk Factors for Lung Cancer in Hong Kong*, Abstract, 253 J.A.M.A. 2956 (1985). Some estimates are lower. The American Cancer Society estimates smoking is responsible for 85% of the cancer cases among men, and 75% among women, with an overall estimate of 83%. Even with that lower estimate, 75,000 lives could be spared yearly in the U.S. if smoking were merely halved. AM. CANCER SOC'Y, *supra* note 4, at 17.

31. *See* Goerth, *Anti-Smoking Advocate Plans Litigation Attack on Tobacco Firms*, 1985 OCCUPATIONAL HEALTH & SAFETY 28; AM. CANCER SOC'Y, *supra* note 4, at 17.

32. Goerth, *supra* note 31, at 28. Diet is said to cause 35 percent of all cancers. Perhaps it bears noting that dietary problems involve a complex number of factors and foods rather than one cause such as smoking; therefore, it is arguable that smoking is the single biggest cause of cancer.

33. 1981 FTC REPORT, *supra* note 16 at 1-7; 1979 SURGEON GENERAL'S REPORT, *supra* note 4, at 39.

34. AM. CANCER SOC'Y, *supra* note 18, at 40.

35. *See infra* text accompanying notes 212-85.

36. For the first time in the last fifty years, the rate of lung cancer death for white men has declined because of their recent tendency to smoke less than earlier. However, the rate of lung cancer for both women and blacks is increasing because those groups smoke more than ever. *Good and bad news about lung cancer*, Chi. Tribune, Dec. 3, 1985, § 1 at 16, col. 1.

37. For the adult male population, smoking decreased from 52.6 percent in 1955 to 39.3 per-

CASES—WINNING THE BATTLES, LOSING THE WAR

Tobacco companies boast that they have never lost a case to a consumer, have never settled, and do not expect that picture to change.[38] In the 1950s and 1960s, no cases successfully obtained damages for injuries caused by smoking.[39] Recent cases have been similarly unsuccessful.[40]

Close scrutiny of the older cases demonstrates that they should be regarded as leaky umbrellas rather than as stormproof precedent that protects tobacco companies. In fact, the cases might be precedent against the companies in lawsuits being filed in the 1980s and beyond.

Some of the old cases simply died out because of economic reasons[41] or

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cent in 1975. Female adult smokers decreased from 33.7 percent of the population in 1966 to 28.9 percent in 1975. AM. CANCER SOC'Y, *supra*, note 18, at 64.

When these percentages are analyzed, it becomes obvious that the decrease in the number of smokers does not tell the whole story; one must consider particular groups to better understand the decline. With regard to teenagers (ages 12-18), the percentage of girls who smoked rose from 8.4 percent in 1968 to 15.3 percent in 1974, while the percentage of boys who smoked rose from 14.7 percent to 15.8 percent. *Id.* at 20. Among young people aged 17 and 18, the rate for boys dropped from 30.2 percent in 1968 to 19.3 percent in 1979, while the rate for girls climbed from 18.6 percent to 26.2 percent during the same years. *Id.* at 68. "In 1955, when smoking was just starting to be tied to increased incidence of certain diseases and higher mortality rates, 52% of American men were smokers, and 24% of women." Seligmann, Abramson, Hager, Katz, Carroll, and Starr, *Women Smokers: The Risk Factor*, Newsweek, Nov. 25, 1985, at 76. In 1985, 32 percent of adult males smoked while about 28 percent of adult women did. AM. CANCER SOC'Y, *supra* note 4, at 20.

Differences also exist between particular occupational groups. For example, in 1985 almost 50 percent of male blue-collar workers smoked, as opposed to 26 percent of professional and technical male employees. Fifty-one point one percent of waitresses and as many as 41 percent of nurses' aides and orderlies smoked. The lowest percentage of women smokers was among elementary school teachers at 19.8 percent. At the other end of the scale were black, male, blue-collar workers, who smoked more than whites and were less apt to quit. Curry, *Cigarettes intensify workplace hazards*, Chi. Tribune, Dec. 20, 1985, § 1, at 11, col. 1.

Some of the decline in the smoking population can presumably be attributed to the fact that its ranks are being depleted in large numbers by the very hazards that do more than merely scare people to death.

38. *See e.g.*, PHILIP MORRIS INC. 1984 ANNUAL REPORT, at 46:

> The company and the other cigarette manufacturers have successfully defended all similar prior litigation and have not made any payments in settlement. An adverse development in pending litigation might encourage the commencement of similar litigation. It is not possible to predict the outcome of pending litigation; however, management does not believe that the pending actions will have a material adverse effect upon the financial condition of the company. The company will vigorously defend all such actions.

39. *E.g.*, Hudson v. R.J. Reynolds Tobacco Co., 427 F.2d 541 (5th Cir. 1970); Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962), *question certified on rehearing*, 154 So. 2d 169 (Fla.), *rev'd and remanded*, 325 F.2d 673 (5th Cir. 1963), *rev'd and remanded on rehearing*, 391 F.2d 97 (5th Cir. 1968), *rev'd per curiam*, 409 F.2d 1166 (5th Cir. 1969) (en banc), *cert. denied*, 397 U.S. 911 (1970); Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961), *aff'd on rehearing*, 350 F.2d 479 (3d Cir. 1965), *cert. denied*, 382 U.S. 987 (1966), *modified* 370 F.2d 95 (3d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967); Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964); Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir. 1963), *cert. denied*, 375 U.S. 865 (1963); Cooper v. R.J. Reynolds Tobacco Co., 158 F. Supp. 22, *aff'd*, 256 F.2d 464 (1st Cir. 1958), *cert. denied*, 358 U.S. 875 (1958); Mitchell v. American Tobacco Co., 183 F. Supp. 406 (M.D. Pa. 1960).

40. Deutsch, *Seeking the Culprit In a Smoker's Death*, THE NAT'L L.J., Dec. 30, 1985—Jan. 6, 1986, at 13, col. 1; Bean, *Tobacco Industry's Court Victories Fail to Slow Product-Liability Suits*, Wall St. J., Jan. 30, 1986, § 2, at 33; Roysdon v. R.J. Reynolds Tobacco Co., 623 F. Supp. 1189 (E.D. Tenn. 1985).

41. The expenses of one lawyer suing several tobacco companies totaled over one hundred thousand dollars in out-of-pocket expenditures and more than one million dollars in legal fees. Bean, *Cigarettes and Cancer: Lawyers Gear Up to Battle Tobacco Firms*, Wall St. J., Apr. 29, 1985, § 2, at 27. *See* Garner, *supra* note 4, at 1425-28, for a review of the reasons for earlier decisions and aborted attempts by plaintiffs. .

because of a failure to prove the narrow position alleged.[42] One case was lost because the plaintiff could not show that the defendant's cigarettes caused harm to a substantial segment of the public.[43] In yet another case, the plaintiff lost by not pursuing an implied warranty theory.[44] Several claims failed because the court regarded the risks as unknowable when the plaintiff began to smoke.[45] Cases rejecting liability because of the unforeseeability of the risk should no longer present the same hurdle to plaintiffs[46] since the risks are now so clearly foreseeable to defendants.[47]

In fact, in the 1950s and 1960s, courts generally permitted the question of causation to go to the jury.[48] One court even specifically stated that findings against the plaintiff were based upon unforeseeability that might not

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42. For example, one case involving a claim that certain representations were made by Camel cigarettes was dismissed because the plaintiff tendered no evidence to support the precise representations claimed. *Cooper*, 256 F.2d 464. The plaintiff asserted two representations: "20,000 doctors say that 'Camel' cigarettes are healthful" and " 'Camel' cigarettes are harmless to the respiratory system." Cooper v. R.J. Reynolds Tobacco Co., 158 F. Supp. 22, 24 (D. Mass. 1957). The plaintiff's evidence, however, consisted of ads that "more doctors smoke Camels than any other cigarette" and that Camels will "agree with your throat." The court decided that the evidence "would invite a different line of inquiry of witnesses," and, therefore, dismissed the case because the evidence did not contain the representations alleged. *Id.* at 25.

Another possible explanation exists for plaintiff's phantom ad. Possibly, plaintiff's attorney inadvertently combined two ads in an unacceptable manner and failed to realize the error or to obtain permission to amend the pleadings. Camel advertised that "more doctors smoke Camels" whereas Luckies had advertised, "20,679 Physicians say 'LUCKIES are less irritating' " (the Luckies ad was copyrighted in the 1930s, and a reproduction of it appears on a National Law Journal advertisement for a seminar on Tobacco Litigation).

43. *Hudson*, 427 F.2d at 541. Given the number of deaths and illnesses, an inability to show danger to a substantial segment of the public should no longer prove a stumbling block.

44. Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961), *aff'd on rehearing*, 350 F.2d 479 (3d Cir. 1965), *cert. denied*, 382 U.S. 987 (1966), *modified*, 370 F.2d 95 (3d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967). *See also* Garner, *supra* note 4, at 1427-28.

45. *See, e.g.*, Green v. American Tobacco Co., 409 F.2d 1166 (5th Cir. 1969) (en banc), *cert. denied*, 397 U.S. 911 (1970); Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19, 37-40 (5th Cir. 1963), *cert. denied*, 375 U.S. 865 (1963); Ross v. Philip Morris & Co., 328 F.2d 3, 10-14 (8th Cir. 1964); *Hudson*, 427 F.2d 541.

46. At least not the same kind of hurdle as before—now the wolf will don a new sheepskin, namely "assumption of risk", because the problem has become "so knowable." For a discussion of the "assumption of risk" defense *see infra* text accompanying notes 212-85.

47. In fact, an argument can be made that the risks should have been foreseen at that time as well. *See infra* notes 54-6 and accompanying text.

Garner regards warning labels as dooming the unforeseeability defense. But, except with respect to his theory that smoking is addictive, he considers the labels as presenting an assumption of risk problem. Garner, *supra* note 4, at 1429-30. Regarding notice to consumers, Garner wrote, "the label has also served as a windfall to the tobacco industry." *Id.* Garner also quoted an FTC commissioner as considering use of the product an assumption of the risk due to the label. *Id.*

The lower court in *Cipollone* addressed the fact that the labels themselves certainly notify cigarette companies of the health hazards. Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146, 1162 (D.N.J. 1984), *rev'd in part and remanded*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 907 (1987).

This Article takes the position that the labels were and remain inadequate notice, even beyond the issue of addiction, making the assumption of risk defense futile. *See infra* text accompanying notes 212-85.

48. *See, e.g., Green*, 409 F.2d 1166; *Lartigue*, 317 F.2d 19; *Ross*, 328 F.2d 3; Pritchard v. Liggett & Myers Tobacco Co., 370 F.2d 95 (3d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967).

Contra Hudson, 427 F.2d 541 (summary judgment rendered when court determined that plaintiff's interrogatory answers negated scientific foreseeability, peculiar defects in the cigarettes, and consequences to a substantial segment of the public. None of those missing elements appears to be true any longer).

exist for later cases.[49] It takes many years for some serious hazards to manifest.[50] Cancer has been said to sneak up on a smoker "like a thief in the night."[51] Thus, since in the 1950s and 1960s cases involved smokers who began smoking in the early 1900s, when earlier courts discussed foreseeability, they were addressing the scientific state of the art in the early 1900s, not when the cases were filed.[52]

Some juries actually found liability, leaving only the question of damages, until appellate courts dismissed the claims on the ground that the risks were not foreseeable.[53] Now, however, smokers who develop cancer or heart problems would have begun to smoke at a time when the defendant cigarette companies had or should have had knowledge of the risks.

In fact, as early as 1604, King James I wrote about the hazards of smoking.[54] There were suspected ties to cancer dating back to the early 1900s.[55] Medical studies in the 1950s pointed to the hazards before the famous 1964 Surgeon General's Report which revealed the ties between smoking and cancer.[56] While those earlier "prophets" might have been largely ignored or simply did not provide evidence which persuaded courts that the risks were foreseeable, it would be ridiculous to hold that position today.[57] It seems equally evident that tobacco companies, with their experts and tremendous wealth, either could or should have foreseen the risks by the time current plaintiffs began to smoke.

One case that addressed the statute of limitations involved the defense that it was too late to recover for an injury that occurred decades after the plaintiff began to smoke.[58] The court decided that the statute of limitations should not begin to run until the plaintiff discovered the injury.[59] That holding is equitable and similar to holdings in cases involving other injuries that plaintiffs were not aware of for some time.[60]

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49. *Lartigue*, 317 F.2d at 38 n.40. "The defendant tobacco companies have no more knowledge of the risk of harm than the plaintiff. . . . [t]he advance of scientific knowledge and the forward movement of public policy may suggest a different result in later cases." *Id.*

50. "The time lag for development of cancer is twenty or more years. . . ." BORGATTA and EVANS, *supra* note 18, at 24. *See MD Comments on Defenses in cases of tobacco use*, Am. Med. News, Feb. 7, 1986, (Letters), at 6, col. 1. In Cooper v. R.J. Reynolds Tobacco Co., 256 F.2d 464, 466 (1st Cir. 1958), *cert. denied*, 358 U.S. 875 (1958), plaintiff's decedent alleged that he contracted lung cancer within a few years. The court found the allegation incredible.

51. R.J. Reynolds Tobacco Co. v. Hudson, 314 F.2d 776, 779 (5th Cir. 1963).

52. *See, e.g., Lartigue*, 317 F.2d 19, 37-40.

53. *See, e.g., Pritchard*, 370 F.2d 95.

54. James I, *A Counterblaste To Tobacco* (London 1604) (De Capo Press, 1969). At first, King James was so set against tobacco that he taxed it to discourage its use. Later, deciding to switch rather than fight, he lowered the taxes in an unfortunate effort to increase revenues. *See* P. TAYLOR, *supra* note 1, at 81.

55. 1964 SURGEON GENERAL'S REPORT, *supra* note 4, at 149-50, dates early suspicions of a connection between cigarettes and lung cancer to 1939. Even earlier suspicions were noted from the early 18th century. *Id.* at 196. *See also* Comment, *Smoking In Public: This Air is My Air, This Air is Your Air*, 1984 S. ILL. U.L.J. 665 for a discussion of medical concern dating from 1650.

56. *See, e.g.*, Wynder & Graham, *supra* note 19.

57. Joseph Califano, former Secretary of Health Education and Welfare, said of the 1964 Surgeon General's Report: "The report established that cigarette smoking is causally related to lung cancer in men. It revealed that cigarette smoking is directly related to illness & death from heart disease and other ailments. . . ." 1979 SURGEON GENERAL'S REPORT, *supra* note 4, at i.

58. R.J. Reynolds Tobacco Co. v. Hudson, 314 F.2d 776 (5th Cir. 1963).

59. *Id.* at 780-86.

60. *See* Garner, *supra* note 4, at 1459-61, and the cases cited therein. *See also* Greenberg v.

Although the above mentioned courts declared the lack of foreseeability, other courts have noted the risks of smoking in cases not involving claims against a tobacco company. For example, in *State v. Heidenhain*,[61] the court upheld the conviction of a person who smoked on a street car in violation of a city ordinance. The court declared the ordinance a constitutional exercise of police power, because smoking presents "[n]ot only discomfort, but positive danger to health, from the contaminated air."[62] Similarly in *Illinois Cigarette Service Co. v. City of Chicago*,[63] the court refused to enjoin the city from enforcing its ordinance prohibiting the sale of cigarettes through vending machines. In refusing plaintiff's request, the court pointed out that the ordinance served its stated purpose: to counter the evil of selling cigarettes to minors. Discussing the ordinance, the court observed, "It . . . protects the health of the community. . . ."[64] In *In the Matter of Liggett & Myers Tobacco Company*,[65] the FTC ordered the company to stop advertising that its cigarettes caused no adverse effects. The court noted that not even the tobacco company witnesses entertained the view that smoking is harmless.[66]

Recently, courts have begun to recognize the inherent dangers of tobacco products, particularly in an employee's working environment. Thus, in an extremely important case, the court took judicial notice of the toxic nature of cigarette smoke and held that the employer must provide a safe workplace where smoking would not be permitted.[67] In another case, an employee, who left work due to the harm caused when her employer permitted a violation of its own no-smoking policy, was entitled to recover unemployment compensation and was entitled to reject work where cigarette

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McCabe, 453 F. Supp. 765 (E.D. Pa. 1978), *aff'd* 594 F.2d 854 (3d Cir. 1979), *cert. denied*, 444 U.S. 840 (1979) (for psychiatric patient who sustained injuries as result of sexual relationship during therapy, court held treatment so impaired abilities that plaintiff was unable to discover cause of her injuries, and statute of limitations did not run during treatment or subsequent hospitalization); Witherell v. Weirman, 85 Ill. 2d 146, 421 N.E.2d 869 (1981) (doctors estopped from raising statute of limitations because of reassurances that inadvertently misled plaintiff and induced her to continue taking birth control pills).

As in the tobacco cases, the defendants' assurances were partly responsible for plaintiffs' failure to discover the harm. In the tobacco cases, the companies have constantly assured victims by aggressive ad campaigns which direct one's attention away from the dangers of smoking and deteriorating health.

61. 42 La. Ann. 483, 7 So. 621 (1890).

62. *Id.* at 486, 7 So. at 621.

63. 89 F.2d 610 (7th Cir. 1937).

64. *Id.* at 612. Obviously, cases that address the police power of a government body are addressing issues different than whether a plaintiff should be able to recover from an alleged tort-feasor. However, if the risks were not foreseeable, one wonders why those courts did not adopt the common view that statutes (especially criminal sanctions) should be regarded as unreasonable if they were not designed to achieve some legitimate purpose. Thus, in Alford v. City of Newport News, 220 Va. 584, 260 S.E.2d 241 (1979), the court reversed the conviction of a defendant who violated an ordinance that required restaurants to post a no-smoking sign. The ordinance fell because it was not reasonably suited to its purpose because as little as one table could be set aside under the ordinance and such a sign would then mislead people into thinking they could obtain a smoke-free environment when they could not. Notably, the *Alford* case also implicitly recognizes the hazards of smoking. *Id.* at 243.

65. 55 F.T.C. 354, 360 (1958).

66. *Id.* at 360.

67. Shimp v. New Jersey Bell Telephone Co., 145 N.J. Super. 516, 368 A.2d 408 (1976).

smoke was present.[68] A federal employee who suffered physical harm due to smoke at the workplace was held to be disabled and entitled to disability benefits.[69]

STRICT LIABILITY—DARTBOARD JUSTICE—IS IT STRICTLY FOR OTHER PRODUCTS?

Even if cigarette cases from the 1950s and 1960s were regarded as precedent against new claims, the law has not stagnated. Nor was it ever meant to remain static.[70] The marketplace is no longer one where we presume face-to-face dealings between equally experienced strangers.[71]

At the time of the earlier tobacco cases, strict product liability was not particularly developed nor widely accepted. In 1965, the American Law Institute adopted the following provision:

> § 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the consumer without substantial change in the condition in which it is sold.
>
> (2) The rule . . . applies although

68. Alexander v. Unemployment Ins. App. Bd., 104 Cal. App. 3d 97, 163 Cal. Rptr. 411 (1980).

69. Parodi v. Merit Systems Protection Bd., 690 F.2d 731 (9th Cir. 1982). *But see* Vickers v. Veterans Admin., 549 F. Supp. 85 (W.D. Wash. 1982) (Veteran's Administration had no duty to provide wholly smoke-free environment but was said to have a "duty to make 'reasonable accommodations' to plaintiff's sensitivity to tobacco smoke.") *Id.* at 87.

70. Arguing that tobacco manufacturers should no longer be immune from liability, Judge O'Shea wrote, "Indeed it is the genius of the common law that it changes to meet new conditions." O'Shea, *Alcohol and Tobacco Manufacturers and Sellers: Liability in a Post-*Alvis *Era*, 73 ILL. B.J. 510, 511 (1985).

71. Pridgen & Preston, *Enhancing The Flow of Information In the Marketplace: From Caveat Emptor to* Virginia Pharmacy *And Beyond At the Federal Trade Commission*, 14 GA. L. REV. 635 (1980).

Thus, the privity of contract requirement eroded when Mr. Henningsen presented a new car to his wife for Mother's Day, and she was seriously injured when the car, due to a defect, veered out of control and slammed into a highway sign and brick wall. Moreover, the *Henningsen* court disallowed warranty disclaimers due to the unequal bargaining power of the parties. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 384-85, 161 A.2d 69, 95-96 (N.J. 1960). Even earlier, in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (N.Y. 1916), a case in which the ultimate purchaser was injured when a defective wheel collapsed, the privity requirement for a manufacturer's liability was weakened.

As early as 1944, Judge Traynor rendered his famous concurring opinion in favor of a waitress injured by an exploding pop bottle. He made it clear that he would apply strict liability to put liability where it belongs for defective goods; on the manufacturer. Escola v. Coca-Cola Bottling of Fresno, 24 Cal. 2d 453, 150 P.2d 436 (1944). But, strict liability merely gestated until Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962), when the court declared liability based upon Traynor's persuasive logic. The *Greenman* court held the company liable for a serious injury caused by a defective Shopsmith that caused a block of wood to fly away from the lathe and strike the plaintiff's forehead. The manufacturer was in the best position to absorb and spread the costs, let alone eliminate the danger. Profiting from the sale of goods is one thing; profiteering is another.

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.[72]

That section is now the law in most states.[73] The above Restatement provision would appear to cover claims against tobacco companies. However, a few problems have so far precluded liability under that section.

Section 402A has generally been interpreted to mean that liability exists when a product leaves the manufacturer's hands in a defective condition and the product is unreasonably dangerous to the consumer.[74] However, after seemingly opening the door so victims of tobacco might try to enter, Dean Prosser leaned on the door with Comment i which provided: "Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous."

In order to navigate the rocky road toward recovery, one should proceed to examine the above baggage (defective condition, unreasonably dangerous product, and "good tobacco"). Actually, Comment i is simply meant to clarify the second element (*unreasonably dangerous*) and, therefore, might simply be dealt with as part of the second of two troublesome pieces of luggage (defective condition and unreasonably dangerous product). However, careful examination of all three pieces of luggage makes it clear that the journey should prove successful even if the road is a bit pitted at times.

The birthplace of strict product liability, California,[75] did not mandate that a product be both defective and unreasonably dangerous. In fact, California recently rejected that double burden as unnecessary and undesirable, even misleading one into a dead-end search for some kind of bifurcated element that does not exist.[76] California takes the position that a defective product causing injury suffices to establish liability.

Indeed, the purpose of strict liability is to place liability where the costs of injury will be equitably spread, and where it will lead to fewer injuries. Even if courts require both elements before applying the Restatement, liability should still be found under Section 402A. Toward that end, the "defect defense" utilized by tobacco companies[77] and suggested by Prosser's "good tobacco"[78] comment will be scrutinized.

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72. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

73. *See, e.g.*, Hagan v. EZ Mfg. Co., 674 F.2d 1047 (5th Cir. 1982); PROSSER AND KEETON ON THE LAW OF TORTS § 98, at 693 (5th ed. 1984); D. NOEL & J. PHILLIPS, PRODUCTS LIABILITY IN A NUTSHELL, at 4 (1974) (2d ed. 1981).

74. *See, e.g., Hagan*, 674 F.2d at 1050 (citing jurisdictions requiring both elements); Freund v. Cellofilm Properties, Inc., 87 N.J. 229, 241, 432 A.2d 925, 931 (1981).

75. *See* Escola v. Coca-Cola Bottling of Fresno, 24 Cal. 2d 453, 150 P.2d 436 (1944); Greenman v. Yuba Power Products, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897, 13 A.L.R.3d 1049 (1963).

76. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153 (1972); Cavers v. Cushman Motor Sales, Inc., 95 Cal. App. 3d 338, 157 Cal. Rptr. 142 (1979).

77. *See, e.g., Roysdon*, 623 F. Supp. 1189.

78. RESTATEMENT (SECOND) OF TORTS § 402A Comment i (1965).

THE DEFECTIVE WARNING ARGUMENT—UNPOSTED DANGER SIGNS DON'T SAY MUCH

To begin,[79] while a product is obviously "defective" if it contains something injurious that the manufacturer did not intend,[80] that is hardly an all-inclusive definition of the word. Courts have clearly held that a deficient warning makes an otherwise perfect product defective.[81] Thus, even before strict product liability afforded great protection for consumers, a woman's estate was able to recover due to the failure to warn adequately of danger from a cleaning fluid's toxic fumes.[82] This was true despite rather specific directions on the container because the court decided that the name of the product, Safety-Kleen, lulled one into a false sense of security.[83]

In *Hubbard-Hall Chemical Company v. Silverman*,[84] two farm workers were killed by an insecticide. The insecticide was labeled in considerable detail, including the word "CAUTION" in large print, followed by:

> May Be Fatal If Swallowed, Inhaled, or Absorbed Through Skin. Rapidly Absorbed Through Skin. . . . Wear natural rubber gloves, protective clothing and goggles. In case of contact wash immediately with soap and water. Wear a mask or respirator. . . . Wash hands, arms and face thoroughly with soap and water before eating or smoking. Wash all contaminated clothing with soap and hot water before re-use.[85]

Nevertheless, the court held the defendants liable for a failure to provide an adequate warning. The farm laborers had limited education and little reading capacity. Even compliance with the Federal Insecticide Act did not render the warning adequate. The label was deemed inadequate because it lacked "a skull and bones or other comparable symbols or hieroglyphics. . . ."[86] In the concurring opinion, Chief Judge Aldrich pointed out that "the burden of proof should be upon the defendant to show that the plaintiff did have . . . knowledge" of the danger.[87]

In *Brochu v. Ortho Pharmaceutical Corp.*,[88] the plaintiff recovered for injuries suffered from a stroke allegedly caused by use of oral contraceptives.

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79. Other flaws in the argument that tobacco products are not defective are addressed below. *See infra* text accompanying notes 158-87.

80. Corum v. R.J. Reynolds Tobacco Co., 171 S.E. 78 (N.C. 1933) (fishhook in plug of chewing tobacco); Liggett & Myers Tobacco Co. v. Rankin, 246 Ky. 65, 54 S.W.2d 612 (1932) ("worm" with stingers in plug of tobacco); Foley v. Liggett & Myers Tobacco Co., Inc., 136 Misc. 468, 241 N.Y.S. 233 (1930) (fragments of mouse in tobacco); R.J. Reynolds Tobacco Co. v. Loftin, 99 So. 13 (Miss. 1924) (partially decomposed snake in chewing tobacco); Pillars v. R.J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365 (1918) (human toe in chewing tobacco).

81. Ferebee v. Chevron Chemical Co., 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062 (1985); Brochu v. Ortho Pharmaceutical Corp., 642 F.2d 652 (1st Cir. 1981); Raymond v. Riegel Textile Corp., 484 F.2d 1025 (1st Cir. 1973); Tinnerholm v. Parke, Davis & Co., 411 F.2d 48 (2d Cir. 1969); Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968); Hubbard-Hall Chemical Co. v. Silverman, 340 F.2d 402 (1st Cir. 1965); Freund v. Cellofilm Properties, Inc., 87 N.J. 229, 432 A.2d 925 (1981); Maize v. Atlantic Refining Co., 352 Pa. 51, 41 A.2d 850 (1945).

82. *Maize*, 352 Pa. at 51, 41 A.2d at 850.

83. *Id.* at 55, 41 A.2d at 852.

84. 340 F.2d 402 (1st Cir. 1965).

85. *Id.* at 403.

86. *Id.* at 405.

87. *Id.* at 406.

88. 642 F.2d 652 (1st Cir. 1981).

The product was produced in accordance with the manufacturer's design. Its defect was that no adequate warning conveyed the fact that the contraceptive contained more estrogen than another type of contraceptive available to the consumer and manufactured by the defendant. The court reasoned that it was important to consider the utility and desirability of a product as well as its risks to determine whether it is unreasonably dangerous.[89] The court pointed out that the "absence of proper warning itself renders a product unreasonably dangerous."[90] Compliance with Federal Drug Administration (FDA) standards did not shield the defendants from liability.[91] Notably, although no witnesses testified that the plaintiff would not have had a stroke if not for the contraceptive, the court brushed that aside, concluding that the plaintiff did not have to prove a negative and that there was sufficient evidence to submit the question of causation to the jury.[92]

If these cases seem to turn on the terrible injuries involved, that would not make them distinguishable from cases against tobacco firms which also involve horrible injuries and death. Furthermore, liability for a failure to warn does not even require such injury. In *Addis v. Bernardin, Inc.*,[93] the plaintiff recovered for a commercial loss under an implied warranty of fitness for purpose because the seller's jar lids were not compatible with the buyer's containers for the sealing of salad dressings. In that case, the seller even advised the buyer not to buy the lids.[94]

In *Davis v. Wyeth Laboratories, Inc.*,[95] the court allowed an action against the manufacturer of a polio vaccine where it was alleged the manufacturer failed to provide an adequate warning regarding the risk of contracting polio after vaccination. The court appeared moved by newspaper clippings which not only lacked warnings but gave assurances that the vaccine was safe.[96] Of course, the suit was not against the newspaper, and presumably the defendant did not control what was published in the papers. Plaintiff was a 39 year old healthy male who took part in a mass innoculation and shortly thereafter became paralyzed when he contracted polio. The court remanded and the plaintiff subsequently recovered damages due to the inadequate warning, rather than due to any impurity in the drug. It was not even possible to know whether he contracted polio from the vaccine or from the virus that motivated the vaccination program.[97] It is not clear what choice he would have made as to whether to be vaccinated had the warning been adequate because his risk of contracting polio from the vaccine and from the virus was not remarkably different.[98] One might speculate that he

89. *Id.* at 655.
90. *Id.* at 659.
91. *Id.* at 658.
92. *Id.* at 661.
93. 226 Kan. 241, 597 P.2d 250 (1979).
94. *Id.* at 246, 597 P.2d at 254. This case reaches a questionable conclusion because the losses are strictly commercial and because the buyer disregarded advice against buying the product. However, it does demonstrate that personal injury is not necessary to recover for losses resulting from a failure to warn of problems presented by a product.
95. 399 F.2d 121 (9th Cir. 1968).
96. *Id.* at 125.
97. *Id.* at 122, 131 n.20.
98. *Id.* at 124.

would have foregone the shot because it would not necessarily improve his chances of escaping polio.

In *Reid v. Eckerds Drugs, Inc.*,[99] a consumer sprayed himself with an aerosol deodorant while getting ready for work. After doing so, he struck a match to light a cigarette, burst into flames, and was seriously injured.[100] His cause of action was based upon a breach of the implied warranty of merchantability due to the container's inadequate warnings because the label failed to warn of all of the product's dangerous propensities.[101] Directing a user not to spray the product toward a flame did not communicate that a risk would continue after the product settled on one's body. Thus, a warning that a product is combustible is insufficient when the warning is too general to communicate the gravity of the danger.[102] This was true even though the consumer's injury was apparently an isolated incident.

Moreover, failing to supply an adequate warning results in liability even if the product is obviously dangerous to the ordinary consumer. Thus, in *Rumsey v. Freeway Manor Minimax*,[103] the manufacturer of a roach poison was liable for the resulting death of a child who swallowed its product since the warning failed to spell out that no antidote existed. The fact that the court considered it common knowledge that a poison might kill was insufficient to shield the manufacturer due to the common law duty to "warn of the full extent of the danger."[104]

Since an inadequate warning renders a product defective, it becomes important[105] to examine the adequacy of the warning concerning the risks of smoking to determine whether cigarettes might be regarded as defective for strict product liability purposes.

THE WARNINGS—WHAT WE HAVE HERE IS A FAILURE TO COMMUNICATE

For the sake of argument, assume[106] that the warnings present on packages of cigarettes[107] are adequate. This should still not preclude most of the cases that could presently be filed. Cigarettes contained no warnings until

99. 40 N.C. App. 476, 253 S.E.2d 344 (1979).
100. *Id.* at 478, 253 S.E.2d at 346.
101. U.C.C. § 2-314 (1978).
102. *Reid*, 40 N.C. App. at 484, 253 S.E.2d at 349, 350.
103. 423 S.W.2d 387 (Tex. Civ. App. 1968).
104. *Id.* at 393.
105. Important, not imperative. *See infra* text accompanying notes 158-87, regarding the defective nature of cigarettes themselves, rather than merely considering the defective nature of the warnings.
106. This assumption is overly generous since the facts indicate the gap in consumer knowledge is a wide chasm. *See* 1981 FTC REPORT, *supra* note 16, at 3-10. In 1981, the FTC concluded that "the warning is neither noticed nor read by the vast majority of people." *Id.* at 4-7. "Only 2.4% of adults . . . read the . . . warning." *Id.* at 4-8.

If the labels are not being read or recalled, how can people be expected to know the hazards? Some educational process takes place through televised public service announcements (PSAs). However, while between 1967 and 1971 such PSAs were frequently televised, the FTC concluded in 1981 that they had become "virtually invisible." *Id.* at 5-6. Even when shown, they frequently were not aired during prime viewing time. *Id.* "Of the two messages monitored, one failed to reach . . . 91.5% of the homes in America with TV's." *Id.* at 5-7.
107. Despite the fact that chewing tobacco, pipes, and cigars are all hazardous, only cigarettes currently contain any warnings. Therefore, any user harmed by tobacco products which bear no

1966;[108] even as late as 1971, advertisements contained no health warnings.[109] Many people currently ill or dying from the serious consequences of smoking probably began smoking before those warnings came into being.[110] Diseases victimizing people may have begun before the warnings were instituted. Even if the diseases had not taken hold, because smoking is addictive,[111] the warnings were too little, too late. One should not be able to tie an anchor to your feet, push you into the lake, and then escape liability on the grounds that he yelled "swim" as you were going under for the third time.

Additionally, for the sake of argument, assume cigarettes are not addictive and that the question turns on whether the warnings are adequate to shield tobacco firms from liability. In 1966, the Cigarette Labeling and Advertising Act[112] became effective. There is reason to believe that tobacco firms privately welcomed the warnings, since such warnings would obviously serve as a potential defense in litigation.[113] Pursuant to the Act, cigarette packages had to bear the following label: "Caution: Cigarette Smoking *May* Be Hazardous to Your Health" (emphasis added). That caution neither particularizes hazards nor says that any exist; it merely represents that it is possible that some hazard might exist, and the hazard, if it exists at all, might mean nothing more than the creation of a temporary smoker's cough or sore throat.

In 1968, Professor Banzhaf petitioned the FCC to require significant television time for nonsmokers to combat the implications of televised commercials promoting cigarettes. When the FCC granted the request, the Tobacco Institute and numerous tobacco firms appealed the FCC determination.[114] Ruling in favor of the FCC grant, the court concluded that the cigarette warning was inadequate, stating: "They merely flash dan-

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such warnings should not face the defense that the product bears an adequate warning of the hazards.

108. Federal Cigarette Labeling And Advertising Act, Pub. L. No. 89-92, § 4, 79 Stat. 283 (1965), *amended* 15 U.S.C. § 1333 (1970) (current version at 15 U.S.C. § 1333 (1984)).

109. 1981 FTC REPORT, *supra* note 16, at 7. Even now, many advertisements fail to display warnings in a manner that can be seen effectively. For example, billboards (almost half of which advertise cigarettes) often contain warnings in print too small to be legible from the distances they are generally viewed, let alone the fact "observers" often pass by the advertisement at speeds which permit notice of the message tobacco companies wish to promote but at speeds that preclude notice of "squint print." *Id.* at App. D (the FTC takes no responsibility for the author's use of the phrase "squint print"). The FTC sued the tobacco companies due to that problem, and the court denied the defendants' motion for summary judgment. *See* 46 Fed. Reg. 30699, 30701 (1981). *See, e.g.*, U.S. v. Brown & Williamson Tobacco Corp., 1978-1 Trade Cas., (CCH) ¶ 74,635.

Similarly, vending machines often cover up the warnings or contain them at a location unlikely to be seen.

110. "The time lag for development of cancer is twenty or more years. . . ." BORGATTA & EVANS, *supra* note 18, at 24. Other serious problems also take years to manifest themselves. *See* Am. Med. News, *supra* note 50.

111. *See* Garner, *supra* note 4. "[O]nce a smoker is addicted, any subsequent information he receives . . . is largely irrelevant." *Id.* at 1441. The warnings, though changed in 1970 and 1985, still fail to signify the addictive nature of cigarettes.

112. Federal Cigarette Labeling and Advertising Act, *supra* note 108.

113. P. TAYLOR, *supra* note 1, at 16. Indeed, it has been suggested that the warnings may prove to be the most important defense available to tobacco companies. *See* Bean, *supra* note 40, at 33. *See infra* text accompanying notes 294-329.

114. Banzhaf v. F.C.C., 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

ger signals without either particularizing the danger or providing facts on which it may be appraised. . . . [T]he need for an abundant and ready supply of relevant information is too obvious to need belaboring."[115]

Congress also regarded the 1966 warning as inadequate and amended the label in 1970 to require: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health."[116] While that warning is an improvement because it adds the support of the Surgeon General, and while it changes the admonition from "caution" to "warning," and changes the danger signal from "may be hazardous" to "is dangerous," it still fails to particularize any dangers. It also still fails to give any indication whether the danger is a temporary cough or sore throat or some permanent harm of an unspecified nature. No notion is given that death might be the result, or that one might suffer in some other manner. Of course, it is arguable that people generally knew the danger without being told, and that argument will be addressed momentarily; but if people knew without being told, it is not clear why Congress troubled itself with creating labels or why tobacco firms fought their use.

Congress also regarded the 1970 warning as inadequate[117] and amended the label again so that new labels had to be printed on cigarette packs beginning in October, 1985.[118] Now, on a quarterly rotating basis,[119] the following four warning labels must appear on cigarette packs:

> 1—"SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy."
>
> 2—"SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health."
>
> 3—"SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight."
>
> 4—"SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide."[120]

Even if these four labels are adequate warnings, it is imperative to bear in mind that they have been utilized only since October, 1985, and therefore hardly preclude claims relating to injuries incurred before that date. More significantly, while the warnings have improved, they are still inadequate. To determine that, these warnings will be examined seriatim and then together.

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115. *Id.* at 1089.

116. Federal Cigarette Labeling And Advertising Act, *supra* note 108.

117. The FTC expressly regarded the 1970 warnings as ineffective. *See* 1981 FTC REPORT, *supra* note 16, at 20. That conclusion was based partly upon the fact that the warnings were "overexposed and . . . simply worn out," but also represents a decision that the warnings were ineffective in a variety of ways.

118. Federal Cigarette Labeling And Advertising Act, *supra* note 108.

119. One reason the FTC favored rotating the warnings quarterly, rather than monthly, was that a quarterly system would cost less for the tobacco industry. This appears to be another example of the government's unaggressive approach to the tobacco industry.

Nothing axiomatic mandates quarterly warnings; for instance, Sweden uses 16 rotating messages. *See* 1981 FTC REPORT, *supra* note 16, at App. C.

120. Federal Cigarette Labeling And Advertising Act, *supra* note 108.

The first new label appears to do what prior warning labels failed to do; it particularizes some health hazards. But it fails to state the gravity of the listed problems.[121] It does not even hint that death might result from these diseases or what the chances of contracting such illnesses happen to be. For example, one court received evidence that one out of nine or ten smokers contracts lung cancer.[122] As discussed earlier, a more recent study demonstrates that twenty-five out of one hundred smokers will die prematurely.[123] That one-in-four figure does not consider the balance of the smokers, many of whom will contract illnesses that might not kill them but may burden their lives severely.[124] The first warning label does not paint an adequate picture of the deadly game of Russian Roulette that one engages in when lighting a cigarette. Since not all of the problems listed in the first label lead to death, it seems unfair to suppose that people will automatically assume death is the gist of the warning. Nor does this list warn that one might suffer hospitalization, amputation, or bankruptcy[125] as a result of smoking. In fact, when the label addresses pregnancy complications, Congress is back to utilizing the word "may." That word not only leaves one to doubt that it is a hazard,[126] but also leaves one in doubt about the nature of the complications. If they occur, should a pregnant woman expect more frequent nausea, miscarriage, or a child with birth defects? And, perhaps many unsophisticated readers who look at a warning containing the word "may" might be left with the impression that it qualifies the other dangers in the list too.[127]

Many smokers begin their deadly addiction in their teenage years or even earlier.[128] Some do not read well[129] or do not understand the dangers even if they know the words. In fact, young healthy people are present-

121. Arguably, the list is so patently serious that no one needs to add what is obvious. By that logic, the warning could make the point more easily by simply listing one or two problems and not bothering with others. Furthermore, it is well known that it takes a great deal to scare one away from cigarettes. Even a label that specified that an insecticide may be fatal to humans was not regarded as sufficient because no skull and crossbones or other symbols were employed. *See* Hubbard-Hall Chemical Co. v. Silverman, 340 F.2d 402 (1st Cir. 1965). In MacDonald v. Ortho Pharmaceutical Corp., 394 Mass. 131, 475 N.E.2d 65 (1985), the court said a jury could determine liability because a warning failed to specify the word "stroke," a result that was determined although the label and warning pamphlet specified that abnormal blood clotting in the brain, the lay equivalent of a stroke, might lead to death. In Rumsey v. Freeway Manor Minimax, 423 S.W.2d 387, 393 (Tex. Civ. App. 1968), the court held a manufacturer of a poison liable for an inadequate warning even though ordinary consumers recognize that poison can kill.

122. Green v. American Tobacco Co., 325 F.2d 673 (5th Cir. 1963), *cert. denied*, 397 U.S. 911 (1970).

123. OTA STAFF MEMO, *supra* note 4, at 48.

124. *See MacDonald*, 394 Mass. at 131, 475 N.E.2d at 72 (1985) (warning was inadequate because the label failed to warn that there might be fates worse than death).

125. *See* Wolinsky, *Hospital group warns of financial peril to uninsured*, Chi. Sun-Times, Feb. 6, 1986, at 26, col. 4.

126. The doubt raised by the word "may" was enough to result in the 1970 amendment of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1333-40 (1982).

127. In the Matter of Liggett & Myers Tobacco Co., 55 F.T.C. 354, 370 (1958). In that case, considering the deceptive nature of an ad, the commissioner recognized that the buying public does not carefully study each word, but instead gathers an impression from its "over-all context." *See also* Pridgen & Preston, *supra* note 71, at 644-46.

128. 1979 SURGEON GENERAL'S REPORT, *supra* note 4, § 17 at 5. *See* Garner, *supra* note 4. The 1981 FTC REPORT, *supra* note 16, at 1-3, points out that: "This is especially significant because the earlier one begins to smoke, the stronger the habit is likely to become and the more difficult it will be to break." Of course, the warnings are completely devoid of this important piece of information. Incidentally, the FTC reference to smoking as a "habit" should not be regarded as the official

oriented and appear to be less influenced by warnings that relate to the future.[130] Recognition of that fact is one reason the law protects minors with doctrines such as attractive nuisance[131] or the right to disaffirm contracts.[132] Warning labels that are not understood might as well be written in a foreign language; they are analogous to hidden terms of a contract.[133]

However, should the first warning label be regarded as adequate or even brilliant, then it is a shame that it appears only one-fourth of the year[134] and is absent while the other labels are circulating. Even if warning labels become over-worn by constant long-term display, inserts could be utilized for cigarette packages, or the message could appear at varying locations or in changing formats, for example.

The second new warning label fails to specify the risks to which the label alludes. Once again, consumers are left to play a deadly guessing game. In a society where people experiment with everything from drugs to fast cars, general declarations that something is serious are hardly likely to accomplish the task.[135] In fact, the second label does not even go that far; it merely suggests that cessation of smoking "greatly reduces serious risks." That "caveat" might convey the impression that it is already too late, so one might as well continue smoking, or worse, that reduction or even elimination of the risk can be accomplished at any time in the future.

The third warning label addresses pregnant women. That label contains many flaws. While it is true that pregnant women suffer risks other smokers do not face, it does not follow that only pregnant women are subject to risks. So why draft a warning label that makes the reader regard the message as insignificant unless the reader is a pregnant woman? Presumably, young boys and girls, men, older women, women who cannot become pregnant, and women who do not plan to be pregnant or who are ignorant of their pregnancy have nothing to fear. Furthermore, the caution again states that the danger *may* exist, leaving the reader to speculate about the odds or whether any danger even exists. The label does not even suggest that a woman could not simply quit smoking whenever she wishes and terminate the

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position that it is not addictive, since the report frequently reiterates the addictive characteristics of smoking.

129. In Campos v. Firestone Tire & Rubber Co., 98 N.J. 198, 485 A.2d 305 (1984), the court, in dicta, recognizes that many in the U.S. workforce are illiterate, so that symbols might be necessary to communicate hazards.

The court in P. Lorillard Co. v. F.T.C., 186 F.2d 52, 58 (4th Cir. 1950), sustained an order of the FTC that found certain tobacco advertisements to be deceptive. Regarding the way consumers understand ads, the court said, quoting another court, ". . .'The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous, who in making purchases, do not stop to analyze, but are governed by appearances and general impressions.' "

130. 1979 SURGEON GENERAL'S REPORT, *supra* note 4, § 1 at 33 and § 17 at 6.

131. *See, e.g.*, Brody, *Will tobacco companies lose their immunity to smokers' suits?*, Chi. Daily L. Bull., Dec. 18, 1985, at 2. *See also* RESTATEMENT (SECOND) OF TORTS § 339 (1965).

132. *See* RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981).

133. Williams v. Walker-Thomas Furniture Co., 198 A.2d 914 (D.C. App. 1964), 121 U.S. App. D.C. 315, 350 F.2d 445 (D.C. 1965) (terms written in a manner that consumers would be unlikely to understand them); Cutler Corp. v. Latshaw, 374 Pa. 1, 97 A.2d 234 (1953) (a confession of judgment clause on the back of a contract with attention drawn away from the onerous clause).

134. *See generally* 1981 FTC REPORT, *supra* note 16.

135. *See generally* 1981 FTC REPORT, *supra* note 16.

risks mentioned. Nor does the label address many complications of pregnancy that are worse than the ones mentioned. For example, while it mentions "fetal injury," it does not spell out that smoking during pregnancy contributes to miscarriages, intellectual impairment, brain hemorrhaging, and sudden infant death syndrome.[136]

The fourth warning label declares that cigarette smoke contains carbon monoxide. A car gives off carbon monoxide, thus one's garage contains it when starting a car or driving into the garage. Yet, no one is expected to give up driving or entering a garage. In fact, it is unlikely that many people will really appreciate the problem being "stressed." Research teaches that carbon monoxide exposure presents risks ranging from temporary visual impairment to heart problems and death.[137] If smokers or potential smokers learn much from this warning label other than a seemingly useless piece of trivia, it is simultaneously gratifying and highly surprising.[138]

With regard to the total impact of the labels, it is submitted that this is a situation where the total is considerably less than the sum of the parts, because the labels will not produce an adequate warning of smoking hazards. Due to the rotating nature of the labels, for half of the year while the second and fourth labels appear,[139] no specific hazards are mentioned. For one-fourth of the year, while the third label appears, significant groups are likely to feel immune to hazard. Indeed, many new smokers might start during the use of such a misleading label and become addicted before learning that they have made suicidal moves. Typically, people do not understand general warnings.[140] Many people may be unable to quit smoking and may simply learn nothing useful from the warnings.[141] Because stress burns nicotine from the system quickly and, therefore, brings on cravings more rapidly than normal, it is ironically possible that health warnings will prove stressful and, therefore, serve to induce more smoking.[142]

Cigarette warning labels might be improved in numerous ways.[143] For example, they still fail to mention the addictive nature of cigarettes.[144] Ad-

136. Seligmann, *supra* note 37, at 76, 77.

137. 1981 FTC REPORT, *supra* note 16, at 1-35. Carbon monoxide from cigarette smoke, and presumably from pipes and cigars, is particularly dangerous to developing fetuses and to persons with preexisting conditions such as heart or lung problems. It is even a factor in "first causing heart disease." *Id.*

138. Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 86 (4th Cir. 1962), involved the death of an infant who drank furniture polish. The container had a label which said, *inter alia*, "contains refined petroleum distillates." With regard to whether the mother who bought the product could know what that meant, the court concluded, "[that] sentence could hardly be taken to convey any conception of the dangerous character of this product to the average user." *Id.* at 86.

139. Because many companies must publish the labels on various brands, and because they do not all publish the same labels at once, obviously it is possible that all of the labels will appear somewhere at all times during the year. But, it is not unlikely to suppose that many people will pay little or no attention to labels other than on the pack of cigarettes they happen to pick up at a given time. Indeed, it has been estimated that merely one in fifty smokers reads the warning labels. *See* Lutschg, *supra* note 14, at 1278.

140. *See* 1981 FTC REPORT, *supra* note 16.

141. Garner, *supra* note 4, at 1441.

142. *See generally* 1979 SURGEON GENERAL'S REPORT, *supra* note 4, at 16-8.

143. The litany of unmentioned problems discussed in this paragraph is hardly exhaustive; by way of additional examples, see *infra* text accompanying notes 211-84.

144. *See* Garner, *supra* note 4, at 1437.

ditionally, they fail to mention that death is likely to result from smoking.[145] They fail to advise that smoking is hazardous for nonsmokers.[146] They fail to spell out many lesser known, but serious problems.[147] They fail to mention that the hazards of smoking include economic ruin.[148] They fail to inform one that, due to the addictive nature of smoking, that first cigarette might constitute a commitment to spending thousands of dollars during the course of one's life.[149] They fail to spell out that some cigarettes might be less hazardous than others,[150] or that there might be a less dangerous way to smoke.[151] Except for the reference to pregnant women, they fail to spell out that certain groups of people are particularly susceptible to the hazards.[152] The labels do not take into account that many Americans do not read or understand English; one solution is to use warnings that employ other languages or utilize symbols such as a skull and crossbones.[153] Labels might be considerably more conspicuous.[154] No logical reason mandates that the labels must be in small, cryptic words on the sides of cigarette packs; instead, for example, warnings could be in various shapes with bold, colorful backgrounds, type, and symbols on every side of each pack, carton, and advertisement.[155]

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145. Each year, over one out of seven deaths is the result of smoking. Hersh, *Cigarette Smoking Injuries: A Theory For Recovery Against the Federal Government*, TRIAL, Apr. 1983, at 72. Fully one-fourth of the smoking population will die prematurely. *See* OTA STAFF MEMO, *supra* note 4, at 48. These deaths result in the loss of between 4.6 years and 8.3 years of life expectancy on the average, depending upon whether one is a very light or heavy smoker. *See* AM. CANCER SOC'Y, *supra* note 18, at 12.

146. That hazard is especially present for certain groups of persons, such as young children or people with other health problems. *See* 1979 SURGEON GENERAL'S REPORT, *supra* note 4, § 11 at 29.

147. *See, e.g.*, Seligmann, *supra* note 37, at 76, 77. *See also* 1964 SURGEON GENERAL'S REPORT, *supra* note 4; 1979 SURGEON GENERAL'S REPORT, *supra* note 4.

148. *See* Wolinsky, *supra* note 125, at 26, col. 4.

149. If one becomes addicted at age fifteen, smokes an average quantity of cigarettes, and suffers no decrease in life-expectancy, then one can anticipate an outlay of approximately $40,000 just to buy cigarettes. That figure assumes an average cost of $1.25 per pack and does not even take into account any inflation or loss of income from the money wasted on tobacco products. That figure does not take into account any medical expenses due to illness or lost income from a shortened life expectancy. It is difficult to fathom why we pass legislation such as the Truth-In-Lending Act to spell out interest rates when one obtains a car or home, but we require no communication of such dire economic consequences associated with smoking.

150. While the evidence is conflicting over whether any cigarettes are less hazardous than others, the American Cancer Society takes the position that low tar and nicotine cigarettes significantly reduce some of the risks. *See* AM. CANCER SOC'Y, *supra* note 18, at 8, and that low tar, low nicotine cigarettes might at least offer an easier stepping stone to breaking the addiction. *See* AM. CANCER SOC'Y, *supra* note 4, at 19. Additionally, the American Cancer Society maintains that filter tips reduce risks by 24 percent to 49 percent. AM. CANCER SOC'Y, *supra* note 18, at 8; 1979 SURGEON GENERAL'S REPORT, *supra* note 4, § 14 at 29, re charcoal filters.

151. Although smoking without inhaling is not safe, inhaling increases the danger. Another important factor is how much of a cigarette is consumed, with greater consumption meaning greater harm. *See* AM. CANCER SOC'Y, *supra* note 18, at 7. One explanation for the different health statistics for men and women is the different smoking technique of the two sexes. Perhaps it is negligent not to supply instructions on how to smoke.

152. 1981 FTC REPORT, *supra* note 16, at 4-34.

153. Hubbard-Hall Chemical Co. v. Silverman, 340 F.2d 402, 405 (1st Cir. 1965).

154. 1981 FTC REPORT, *supra* note 16, at pp. 4-10. The 1970 warnings, in effect until late 1985, were referred to as being "in a small inconspicuous rectangle."

155. 1981 FTC REPORT, *supra* note 16, at 21. Indeed, of the nine shapes tested by the FTC for effectiveness in communicating health warnings, the rectangular shapes employed by tobacco firms proved to be the worst method for educating the public. *Id.*, at 5-19. The Report points to the fact

As to whether more or less information should be disseminated, perhaps the words of the Tobacco Institute should be heeded: "[F]ull, free and *informed* discussion about the cigarette controversy is in the public interest. . ." (emphasis added).[156] In fact, even the Tobacco Institute does not go so far as to expressly declare cigarettes safe; instead it says: "It is important to note that neither those scientists nor the tobacco industry made or make any claims other than *it is not known whether smoking has a role in the development of various diseases. . . .*"[157] If, contrary to the weight of the evidence, the answer boils down to one of uncertainty, how should the doubt be resolved? It is submitted that any doubt should be resolved in favor of health, not wealth. At a minimum, the public should be more specifically informed of the risks by an industry that itself straddles the fence on the answer to what it proclaims to be a controversial question.

DEFECTIVE CIGARETTES—THE BAD THINGS ABOUT "GOOD TOBACCO"[158]

As discussed, the inadequacy of cigarette warning labels is enough to render cigarettes a defective product under modern product liability law. Additionally, the tobacco product itself harbors defects known to tobacco companies which, nevertheless, remain uncorrected. Arguably, the mere production and sale of goods as dangerous as tobacco products constitutes negligence.[159]

One of the most significant and obvious defects of cigarettes concerns their fire hazard, which renders them a danger to life and property.[160] Yet, tobacco companies remain uninterested in an already patented invention that makes it difficult for cigarettes to ignite common fabrics,[161] although

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that the warnings are the "least novel, most redundant element in any cigarette advertisement," whereas one's attention is drawn to novel information. *Id.* at 4-12.

156. Inside front cover of THE TOBACCO INSTITUTE, *supra* note 3.

157. *Id.* at 2.

158. RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965). The discussion of what is wrong with tobacco, as well as the conclusion that tobacco products are defective, is not intended to take anything away from the high esteem in which Prosser is deservedly held. Rather, one should simply consider the fact that much has been learned since the original characterization of tobacco as "good;" the law has changed since that utterance, and Prosser is unfortunately no longer alive to comment on whether he would recant on this crucial issue.

159. Sigmon, *Cigarette Smoking Injuries: A Theory For Recovery Against the Federal Government*, TRIAL, Apr. 1983, at 64, 66.

> Neither tobacco nor cigarettes have a known safe use or any utility, other than the false sense of pleasure derived from the alleviation of the symptoms of nicotine addiction. Therefore, the continued production and sale of tobacco and tobacco products after their potential harm had been scientifically established may itself constitute actionable negligence.

Id. at 66.

160. AM. CANCER SOC'Y, *supra* note 18, at 53. From 1971-78, smoking caused 40.2 percent of the fatal fires with a known ignition source, or approximately 2,500 deaths each year. Smoking related fires were responsible for 313 million dollars in property damage in 1977 and 25,000 injuries. In 1975 alone, smoking caused about 225,000 fires.

While tobacco companies like to couch the discussion in terms of personal choices and responsibility for one's own decisions, 39 percent or about 1,000 innocent victims of the annual carnage from fires are nonsmokers. McGuire, *Cigarettes and fire deaths*, 1983 N.Y. ST. J. MED., at 1296, 1297 (1983).

161. Hunyadi, *Atlantic City man has spent 20 years studying cigarettes*, Trenton Times, Trenton, N.J., Feb. 18, 1980, at B1, col. 1.

production of such a cigarette would be relatively simple. Various patents to manufacture safer, self-extinguishing cigarettes have existed for over fifty years;[162] in fact, European cigarettes[163] and a few American brands[164] apparently do extinguish much more rapidly than most other American brands. In defense of its refusal to produce such a cigarette, the industry was quoted as saying: "We might cut down on an insignificant number of people dying in fires. But at the same time we would be increasing the number of people who would contract lung and heart disease due to the increased tar and nicotine."[165] Perhaps the tobacco industry opposes production of self-extinguishing cigarettes because it fears greater exposure to liability for those injured in cigarette-caused fires,[166] or because self-extinguishing cigarettes could extinguish many sales.[167]

Although no "safe" cigarette exists, some cigarettes are considered less hazardous because they contain less tar and nicotine.[168] Cigarettes expose smokers to more than 2,000 chemical compounds,[169] many of which are established carcinogens.[170] Less toxic cigarettes can be produced, yet tobacco companies continue to produce and distribute more toxic cigarettes and neglect to adopt existing patents which would make them less danger-

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162. Wass, *Life Savers: Self-Extinguishing Cigarettes*, The Wash. Post, June 1, 1980, § D at 2, col 3.

163. Goerth, *supra* note 31, at 28, 29. Pipes and cigars extinguish when unattended. Cigarette companies add citrates to cigarette paper so they will not extinguish. *Id.*

164. McGuire, *supra* note 160, at 1296.

165. This commentary by the industry should be scrutinized since it obviously admits the lethal effects of tar and nicotine denied so blatantly at other times. Wass, *supra* note 162, § D at 2, col. 3. Under one patented process, the addition of sodium silicate to cigarette paper actually reduces tar, nicotine, and carbon monoxide. *Id.*

166. *Id.* Obviously, a self-extinguishing, longer-lasting cigarette would also result in fewer sales for tobacco companies. The Tobacco Institute opposes legislative requirements for self-extinguishing cigarettes because government regulation is regarded as a move to dominate the tobacco industry. *See also* McGuire, *supra* note 160, at 1297, to the effect that cigarettes are intentionally designed so as to promote sales rather than with an eye for safety.

And while the industry complains that it cannot create a fire-safe cigarette, some brands are already less hazardous than others.

167. McGuire, *supra* note 160, at 1297.

168. AM. CANCER SOC'Y, *supra* note 4, at 21; AM. CANCER SOC'Y, *supra* note 18, at 8-9. In fact, some distinctions are drawn between the types of filters, because charcoal filters are considered less hazardous than other types. *But see* 1979 SURGEON GENERAL'S REPORT, *supra* note 4, at xiii, to the effect that low tar and nicotine is no less hazardous, and to the effect that smokers may get more of those harmful substances because they will smoke more to compensate for the lower intake per cigarette. *Compare* 1981 FTC REPORT, *supra* note 16, at 1-49, taking the position that lower tar and nicotine is less harmful, with page 1-54 which hedges on the issue.

169. Ponte, *supra* note 18, at 123, 125. According to Ponte, there are more than 4,000 chemicals. According to AM. CANCER SOC'Y, *supra* note 18, at 23, more than 2,000 chemical compounds are involved.

1981 FTC REPORT, *supra* note 16, at 1-51, points to the Surgeon General's reports regarding the impossibility of assessing the relative risks of additives because manufacturers did not disclose information about the additives. It is submitted that, given the yearly carnage from smoking and the probable reliance that some consumers place on the fact that the government permits the continued sale of cigarettes, if the companies refuse to submit such information, such conduct should result in an estoppel that shifts any burden of proof for injuries onto the industry or even calls for the imposition of punitive damages.

170. 1979 SURGEON GENERAL'S REPORT, *supra* note 4, at xii. Many substances, including nicotine, carbon monoxide, and ammonia are found in higher concentrations in sidestream smoke than in mainstream smoke. *Id.* at 11-6. Tobacco products are refined by the use of additives, humectants, tobacco casings and flavor-enhancing compounds. Humectants are suspected of causing smoke toxicity, and glycols are thought to adversely influence the risk of bladder cancer. *Id.* at 14-63.

ous.[171] Tobacco products are refined with dangerous additives, compounds, and processes.[172]

Though everyone apparently agrees that filtered cigarettes are less hazardous (albeit still deadly) than unfiltered ones,[173] the industry continues to manufacture unfiltered cigarettes, thereby ignoring obvious precautions. Yet, unfiltered cigarettes come with no warning that they are more dangerous than filtered ones, and filtered cigarettes come with no comparisons to inform a buyer that the type being purchased is more hazardous than other types.

A manufacturer will be held liable if it does "not take available and reasonable steps to lessen or eliminate the danger of even a significantly useful and desirable product."[174] With current technology, tobacco companies have the ability to lessen the risk of cigarette dangers by reducing or eliminating defects without significantly affecting the product's intended use.[175]

A recent study shows that "good tobacco" is extremely "good" at radiating the body, creating hot spots that make smokers and even nonsmokers living time bombs.[176] Moreover, the travesty is caused by a variety of factors including some correctable ones such as the way crops are fertilized and the types of filters utilized. Herbicides, pesticides and insecticides used in the cultivation of tobacco plants collect on the plants and may directly or indirectly leave a residue which eventually makes its way into a smoker's lungs.[177]

An alarming fact regarding tobacco growing methods concerns the industry's use, for the past several decades, of phosphate-rich fertilizers; these fertilizers produce radioactive polonium-210 as a by-product of decay.[178] Polonium-210 emits highly localized, ionizing alpha radiation, the same sort given off by an atomic bomb.[179] Radioactive elements are quickly absorbed by the sticky resin on tobacco leaves,[180] become insoluble particles when the tobacco burns,[181] and as the smoke is inhaled, enter the smoker's lungs on a

171. Wass, *supra* note 162, § D at 2, col. 3.

172. 1979 SURGEON GENERAL'S REPORT, *supra* note 4, at 14-63. *See supra* note 169.

173. Apparently some types of filters might be better than others. Charcoal filters reduce some toxic gases in cigarette smoke, yet not all filters contain charcoal. 1979 SURGEON GENERAL'S REPORT, *supra* note 4, at 14-29. *But see* AM. CANCER SOC'Y, *supra* note 4, at 21, to the effect that certain filtered brands are worse than others, and some filtered cigarettes "deliver more carbon monoxide than those without filters."

174. Brochu v. Ortho Pharmaceutical Corp., 642 F.2d 652, 655 (1st Cir. 1981) (*quoting* Thibault v. Sears, Roebuck & Co., 118 N.H. 802, 807, 395 A.2d 843, 846 (1978)). The First Circuit discussed the factors used to balance the utility against the danger of high-estrogen birth control pills. It determined that, although the drug had a utilitarian purpose, the manufacturer was still liable for a consumer's stroke because the pharmaceutical company itself produced a safer, lower-dosage birth control pill and had failed to warn the physician of the potentially harmful effects of high-dosage pills.

175. *See supra* note 103.

176. *See* LUNG CANCER: CAUSES AND PREVENTION 263-72 (M. Mizell & P. Correa ed. 1984) [hereinafter LUNG CANCER]; Ponte, *supra* note 18, at 124.

177. 1979 SURGEON GENERAL'S REPORT, *supra* note 4, at page 14-18.

178. *See* LUNG CANCER, *supra* note 176; Ponte, *supra* note 18, at 124.

179. Ponte, *supra* note 18, at 125.

180. *Id.* at 124.

181. Due to the 21.4 year half-life of radioactive lead-210, five years after smokers had quit smoking, they still had almost as much lower-lung radioactivity as did active smokers. *Id.* at 125.

search-and-destroy mission throughout the body.[182] Thus, "good tobacco" is processed poorly and is consequently defective, notwithstanding Dean Prosser's overly generous characterization.

If "good tobacco" were not already bad enough to kill, there is evidence that manufacturers have used asbestos filters in the past.[183] Asbestos itself is deadly, as is tobacco. Their synergistic one-two punch may have silenced many hapless victims.[184]

Restatement of Torts § 402A Comment i, like the earliest cigarette warning label, says "smoking *may* be harmful" (emphasis added). Now, like the earlier warning, that comment should simply be ignored because scientific evidence clearly makes the comment a misleading understatement.

Perhaps Prosser's "good tobacco" comment should be considered another way. Because that Restatement comment was published shortly after the Surgeon General's 1964 report, it is likely that it was prepared without any consideration of the evidence contained in that report, let alone any benefit of subsequent studies that made tobacco's now recognized character increasingly grim. Finally, Prosser was a heavy smoker and probably viewed tobacco and smoking differently than an objective observer.[185] Even if these assumptions are incorrect, it is now clear that tobacco is not good, that it is more than merely "harmful", and that the law should not stagnate on the basis of the Restatement comment. It is incomprehensible that a legal thinker as profound as Prosser would have expected or desired to place the law in a state of suspended animation ignoring later developments, societal needs, and information. An inherent recognition of the need for courts to be flexible is apparent in Prosser's introduction to his renowned book, where he states: "[Ours is a] . . . system of precedent on which the entire common law is based, under which a rule once laid down is to be followed until the courts find good reason to depart from it. . . ."[186] Commenting on his own handiwork, he noted:

> The form of the Restatement is perhaps unfortunate, in that it seeks to reduce the law to a definite set of black letter rules or principles, ignoring all contrary authority—since the law of torts in its present stage of development does not lend itself at all readily to such treatment. There is room for suspicion that the courts have tended to cite the Restatement when they are already in agreement with it, and to ignore it when they are not, so that the impressive list of references to it in the cases may be somewhat misleading. . . .[187]

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182. Daily, the average smoker receives about 30 times more exposure to polonium-210 than does a nonsmoker. *Id.* at 125. Annually, a pack and a half a day smoker endures a dose of radiation equal to what his skin would be exposed to with about 300 chest x-rays. *Id.* at 123.

183. Blum, *supra* note 18, at 1351.

184. Studies show that asbestos workers who smoke have approximately 92 times more likelihood of contracting cancer than nonsmokers with the same exposure. *See* AM. CANCER SOC'Y, *supra* note 18, at 23.

185. 1979 SURGEON GENERAL'S REPORT, *supra* note 4, at 17-8 (smokers view smoking more favorably than nonsmokers).

186. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 15 (4th ed. 1971).

187. *Id.* at 20.

REASONABLY DANGEROUS V. UNREASONABLY DANGEROUS PRODUCTS—SPEAKING OF SEMANTICS

In order for strict liability to attach, the Restatement and some jurisdictions[188] require that a product be both defective and unreasonably dangerous.[189] Comment i defines "unreasonably dangerous" as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[190] Recently, California refused to adopt the "unreasonably dangerous" requirement in *Cronin v. J.B.E. Olson Corp.*,[191] holding that the requirement thwarted the purpose of strict liability by unnecessarily adding another element to the plaintiff's burden of proof.[192]

Even in jurisdictions that require the additional proof of "unreasonable danger,"[193] consumers have demonstrated that certain products are unreasonably dangerous because they are more dangerous than contemplated. A birth control pill, prescribed without a warning, was unreasonably dangerous when effective lower dosage pills were available.[194] Moreover, an unnecessary danger presents an unreasonable danger even if a product is utilitarian.[195] A gearshift knob that absorbed ultraviolet rays, shattered on impact and impaled a passenger,[196] and a nightgown that caught fire within two seconds of contact with a hot grill were declared unreasonably dangerous products.[197] The birth control pill, the gearshift knob, and the nightgown each functioned adequately for its usual purpose, but each contained a hidden danger uncontemplated by the ultimate consumer although regarded as reasonably foreseeable by the manufacturer.

Somewhat like the pill, gearshift knob, and nightgown, a cigarette functions "adequately" in its obvious purpose—that is, if you light one end, a cigarette will burn and enable smoke to be inhaled through its opposite end.[198] And, like the other products, cigarettes contain latent dangers un-

188. D. NOEL & J. PHILLIPS, *supra* note 73, at 3, states, "[T]he majority of courts have regarded 'unreasonably dangerous' as inseparable from the definition of defect." Professors Noel and Phillips went on to suggest, "Perhaps the semantic confusion might have been avoided if § 402A had read 'unexpectedly dangerous.'" *Id.* at 4.

189. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

190. *Id.* at Comment i.

191. 8 Cal. 3d 121, 123, 104 Cal. Rptr. 433, 435, 501 P.2d 1153, 1155 (1972).

192. The stated policy behind strict liability is to relieve the plaintiff's proof problems inherent in negligence and to impose on a manufacturer the cost of injuries caused by a defective product. The purpose of the "unreasonably dangerous" language is to establish some ceiling that precludes sellers from becoming insurers in all cases. However, the fact that sellers are not always insurers should not be distorted to the proposition that they are not liable even when protection is warranted. Sellers enjoy protection by requiring the plaintiff to show a defect and requiring the defect to have proximately caused the injury. *Id.* at 133, 104 Cal. Rptr. at 442, 501 P.2d at 1162.

193. Some courts have eliminated the "unreasonable danger" element, while others have eliminated the "defective condition" requirement. *See, e.g.*, Hagan v. EZ Mfg. Co., 674 F.2d 1047, 1050 (5th Cir. 1982) (citing relevant cases).

194. Brochu v. Ortho Pharmaceutical Corp., 642 F.2d 652 (1st Cir. 1981).

195. *Id.* at 656-57. *See also* RESTATEMENT (SECOND) OF TORTS, § 402A comment k (1965), which protects from strict liability the manufacturer of a product, such as a drug, which is unavoidably dangerous, but which carries the proper warning.

196. Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969).

197. Raymond v. Riegel Textile Corp., 484 F.2d 1025 (1st Cir. 1973).

198. Unlike the pill, gearshift knob, and nightgown, cigarettes are not particularly utilitarian. Therefore, less protection should be afforded their manufacturers, not more.

known to consumers. Their defects cause unnecessary, uncontemplated fires, economic loss, disease, disablement, and death. Such dangers are especially remote to young people,[199] and studies show that even adults do not truly comprehend the dangers associated with smoking.[200] Consumers should not be blamed entirely for failing to appreciate the problem since they are faced with conflicting messages. On the one hand, scholars proclaim various hazards; on the other, tobacco companies mount Herculean campaigns to equate smoking with health, social status, glamour, and sex. Tobacco companies obfuscate the evidence of any danger.[201]

Tobacco companies are likely to compare their products to alcohol, contending that the reasons for liability for tobacco products are no greater than for alcohol. In that area, a court denied recovery for excessive consumption of alcohol, saying its effects are commonly known.[202] Regardless of whether that decision was wrong or right, alcohol is distinguishable from cigarettes in some meaningful ways. Consuming alcohol produces almost immediate results, thereby alerting even a naive consumer to its potential. In contrast, most dire consequences of cigarettes are not apparent until many years after beginning to smoke.[203] With alcohol, one might pleasantly sleep off the consequences whereas the "sleep" produced by smoking is neither pleasant nor curative. Also, alcohol, unlike cigarettes, has some utilitarian functions.[204]

Unlike the products noted above, cigarettes are of questionable utility.[205] Even the so-called relaxation enjoyed by smokers is simply relief from anxiety induced by a craving for nicotine.[206] That form of relaxation is analogous to the "pleasure" one gets when pain subsides after striking one's thumb with a hammer, but such "pleasure" is hardly good reason for a normal person to intentionally inflict pain in order to look forward to relief. In determining whether a product is unreasonably dangerous, courts look to the social utility and desirability of a product,[207] allowing wider latitude when a product serves an especially important societal function.[208]

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199. 1979 SURGEON GENERAL'S REPORT, *supra* note 4, at 1-33 and § 17. Young people are present-oriented.

200. 1981 FTC REPORT, *supra* note 16. A 1978 Roper study (discussed in the FTC report) shows how little the general population understands the hazards of smoking. *See* 46 FED. REG. 30699, 30700 (1981).

201. *See* AM. MED. NEWS, *supra* note 50. Consider also the cryptic messages in PHILIP MORRIS INC. ANNUAL REPORT (1984), and R.J. REYNOLDS INDUS. 1984 ANNUAL REPORT.

202. Garrison v. Heublein, Inc. 673 F.2d 189, 192 (7th Cir. 1982).

203. AM. MED. NEWS, *supra* note 50.

204. THE AMERICAN MEDICAL ASSOCIATION FAMILY MEDICAL GUIDE 412 (1982). Rowan, *Don't allow freedom to go up in smoke*, Chi. Sun-Times, Dec. 14, 1985, at 17, col. 4. Moderate consumption of alcohol is healthy. Gill, et al., *Stroke And Alcohol Consumption*, 1041-46, Vol. 315, No. 17, NEW ENG. J. MED. (Oct. 23, 1986).

205. 1964 SURGEON GENERAL'S REPORT, *supra* note 4, at 355. The report lists questionable attributes of smoking—weight reduction, relaxation, etc. Of course, one arguably "utilitarian function" might be the economic impact of the product. However, that is not a utilitarian function so much as an economic by-product resulting from the large scale distribution of a deadly product. The same logic that exalts the economics as utilitarian makes cocaine, heroin, and murder utilitarian because people will pay money to obtain them.

206. *See Matter of Liggett*, 55 F.T.C. at 376.

207. *Brochu*, 642 F.2d at 655.

208. *But see* Garrison v. Heublein, Inc., 673 F.2d 189, 192 (7th Cir. 1982), where an alcoholic beverage was deemed not unreasonably dangerous because the court concluded that there is com-

In the above cases, the products were extremely functional and yet, except for alcohol, in each case the court determined that a defect or flaw caused unreasonable danger and, therefore, held the manufacturer liable for ensuing injuries.[209] If it is agreed that cigarettes serve no real utilitarian purpose, or at best a limited one, courts should be more willing than they have been to hold tobacco companies liable for the harm caused by the latent defects and unreasonable dangers of cigarettes.

When considering causes of action against tobacco companies, courts have stated the policy for food products is the same policy that should be used to measure tobacco companies, that is, "the burden of any accidental injuries caused by such products [items for human consumption] should be placed upon those who produce and market the products and know the risks."[210]

One should consider that a separate requirement that a product be "unreasonably dangerous" is questionable for another reason. Application of the label "unreasonably dangerous" begs the question since the characterization is a legal conclusion, not an enlightening test. Measurement of that legal label cannot take place through empirical means. It is submitted that society will be better off, and lawyers will be able to better advise clients, if the law minimizes the number of situations when guessing games and gut hunches become the basis upon which liability rests. By comparison, the requirement that an injury takes place can be determined empirically. The question of whether the product was defective, though more complicated than whether the plaintiff was injured, is much closer to fact than legal conclusion. Presumably, the requirement that a product should be unreasonably dangerous should be dispensed with, or the courts should agree that the requirement is met in tobacco cases since the damages done are extensive in nature, excessive in number, and not expected by the mass of consumers. If contemplation by victims is to be the determining factor, should the doctrine of products liability become obsolete if manufacturers boldly pin warnings on their products admitting their products are "unreasonably dangerous when defective?"

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mon knowledge of its dangers. It bears noting that, in moderation, alcohol consumption is healthful; therefore, the underlying policies which protect a manufacturer of utilitarian products do not exist for the manufacturer of toxic products.

Compare Rumsey v. Freeway Manor Minimax, 423 S.W.2d 387 (Tex. App. 1968), where the court held a roach poison unreasonably dangerous despite common knowledge that such products could kill.

209. Liability exists in many cases. For example, consider the dram shop cases and a recent case that even placed liability on a private person who served liquor to a 19 year old at his daughter's wedding party. Longstreth v. Gensel, 377 N.W.2d 804 (Mich. 1985). *See also* Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984); 53 A.L.R.3d 1285 (liability for giving liquor to minors); 97 A.L.R.3d 528 (common law actions for damages from sale of liquor or habit-forming drugs).

210. Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19, 34 (5th Cir. 1963), *cert. denied*, 375 U.S. 865 (1963). The court's reason for denying damages had to do with the perceived unforeseeable harm. *See also* Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964). Any recognition that the same policy should be imposed should be regarded as recognition that tobacco (a nonutilitarian product) deserves less protection, not the same, and certainly not more.

ASSUMPTION OF RISK—THE FOOL VERSUS THE KNAVE

Before discussing a smoker's assumption of risk problem, it might be noted that nonsmokers who suffer damages from passive smoking certainly should not be held to assume any of the risks that smokers might be argued to assume.[211] With regard to smokers, twenty years ago, litigation against tobacco companies was unsuccessful largely because the dangers of smoking were considered unforeseeable. Nevertheless, the Fifth Circuit boldly declared "the advance of scientific knowledge and the forward movement of public policy may suggest a different result in later cases."[212] Since then, thousands of documents have been published with carefully studied conclusions underscoring the harmful consequences of smoking.[213] With incredible legerdemain, tobacco companies manage to assert, on the one hand, that there is no conclusive evidence of the harm of smoking,[214] and, on the other, that the dangers of smoking are generally known[215] and, consequently, assumed by smokers.[216]

Generally, assumption of risk is a plaintiff's consent to relieve a defendant of its duty to the plaintiff. When a plaintiff, with full knowledge of the risk involved, voluntarily enters a situation, that plaintiff is usually held to have accepted the risk of any resultant harm.[217] However, because the basis of the defense is consent, in order for the plaintiff to assume the risk, he must know the facts and must also comprehend and appreciate the danger.[218] Moreover, even when a plaintiff voluntarily enters a potentially harmful situation, there is no assumption of risk when there has been an assurance of safety, when a defendant has left a plaintiff no reasonable alternative,[219] or when a defendant deprives a plaintiff of freedom of choice.[220] If, because of age or lack of information or experience, the plaintiff does not understand the situation, he will not be held to assume a risk.[221] These qualifications are especially relevant in tobacco cases because most consumers do not fully understand the risks, because tobacco companies frequently assure (ex-

211. Reynolds, *Extinguishing Brushfires: Legal Limits On The Smoking of Tobacco*, 53 U. CIN. L. REV. 435, 462-63 (1984).

212. *Lartigue*, 317 F.2d at 38.

213. *See* 1979 SURGEON GENERAL'S REPORT, *supra* note 4; *see generally* Doll, *Smoking and Death Rates*, 251 J.A.M.A. 2854 (1984); Curry, *AMA's proposed tobacco-ad ban lights legal fire*, *supra* note 2, § 3, at 21, col. 5 (over 50,000 scientific articles); AM. CANCER SOC'Y, *supra* note 18.

214. *See generally* P. TAYLOR, *supra* note 1; THE TOBACCO INSTITUTE, CIGARETTE CONTROVERSY, *supra* note 3; THE TOBACCO INSTITUTE, CIGARETTE SMOKING, *supra* note 3; THE TOBACCO INSTITUTE, *supra* note 19; THE TOBACCO INSTITUTE, SMOKING AND HEALTH 1964-1979: THE CONTINUING CONTROVERSY, (1979) [hereinafter THE TOBACCO INSTITUTE, SMOKING AND HEALTH].

215. *See* Haskins, *supra* note 4. The Tobacco Institute contends that 90 percent of the public is aware of the health hazards of smoking.

216. In *Roysdon*, the court dismissed the plaintiff's claim for a failure to make a prima facie case of product liability. The court said the harmful nature of cigarettes is commonly known.

217. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 439-40 (4th ed. 1971).

218. *Id.* at 447. A plaintiff is held to assume the risk without specific knowledge only when he is on an equal footing with the defendant regarding knowledge of the harm. For example, a guest who accepts a gratuitous ride in someone's car assumes the risk of the car's unknown defects. *Id.* at 449.

219. *Id.* at 450-51. Prosser cites a case in which the carrier supplied a defective railroad car; because the shipper's only alternative was to let its cabbages rot, the shipper was not held to have assumed the risk.

220. *Id.* at 451.

221. *Id.* at 447-48.

pressly and impliedly) the public of the safety of smoking, and since many consumers are deprived of their choices due to the addictive nature of tobacco products.[222]

Should ordinary consumers be held to understand and assume risks which the tobacco industry does not admit and purportedly fails to believe exist? Ordinary consumers are unlikely to have studied the mountain of technical material regarding the hazards of smoking. And the industry, which is undoubtedly steeped in such studies, holds itself out as a disbeliever.[223] This incredible disbelief is either blatant bad faith that invites punitive damages or at least disallowance of this affirmative defense; on the other hand, it may be a good faith disbelief, in which case consumers might not appreciate the risks either. If conglomerate giants with their experts and means of knowledge can truly fail to appreciate the risks, why should consumers be held to some loftier standard? By analogy, in a case where neither a car dealer nor the manufacturer could pinpoint the problems with a new car, the court did not hesitate to assist the consumer by levying liability on

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222. *See supra* text accompanying notes 211-21; *see infra* text accompanying notes 223-84.

223. *See* THE TOBACCO INSTITUTE, CIGARETTE CONTROVERSY, *supra* note 3, at 2. "[T]he cause or causes of lung cancer and other diseases has *not* been scientifically proved. . . *it is not known whether smoking has a role in the development of various diseases.* . . ." *Id. See* THE TOBACCO INSTITUTE, CIGARETTE SMOKING, *supra* note 3, at 2-3. "A causal relationship between smoking and either chronic bronchitis or emphysema has not been established scientifically." *Id. See* THE TOBACCO INSTITUTE, *supra* note 19, at 2. "[W]hether tobacco smoke plays any role in cancer causation is still undetermined." *Id.*

It also bears noting that The Tobacco Institute's rebuttal to the Surgeon General's conclusions sometimes obscures the issue. For example, it says: ". . .A one-sided attack on cigarette smoking as *the* causal agent [of lung cancer] does nothing to advance the search for its cause—and its cure." (emphasis added) *Id.* at 26. The Surgeon General's reports, both 1964 and 1979, conclude that cigarette smoking is *a* cause, not *the* cause. Moreover the attack (not one-sided—unlike the industry which invariably supports its interest, the Surgeon General's reports and other studies have frequently refused to condemn smoking as a causal factor for some studied diseases) certainly does much to advance "prevention" if not the "cure" if it helps to eliminate a cause of the disease. 1981 FTC REPORT, *supra* note 16, at 1-58 and 5-10. According to the FTC, the industry basically makes four arguments:

> (1) Epidemiological evidence, which establishes a correlation between smoking and the incidence of a disease, cannot be used to establish a causal link between smoking and that disease no matter how strong the epidemiological evidence. (2) Smoking cannot be identified as a cause of a particular disease without a full understanding of how that disease develops and the specific agent in cigarette smoke that leads to its development (disease etiology). (3) Unidentified individual (constitutional) differences between smokers and nonsmokers, and not smoking itself, explain why smokers suffer from certain diseases more often than nonsmokers. (4) All of the studies which have been used to establish a link between smoking and health are flawed in design and methodology.

1981 FTC REPORT, *supra* note 16, at 1-58. For specific responses to each industry point, see that report which, for example, points out that the dose response relationship of smoking and disease flaws the phantom genetic or other constitutional difference between smokers and nonsmokers. It is also submitted that the industry's second argument is not only flawed, but that it is in bad faith if tobacco companies refuse to supply information about some of the additives to cigarettes. *See* 1981 FTC REPORT, *supra* note 16, at 1-52. With regard to their attack on the design and methodology of the studies which demonstrate the health hazards of smoking, one should consider the methodology employed by tobacco companies. For example, *Matter of Liggett* concerned a tobacco company's advertisement that a certain brand of cigarettes caused no adverse effects on the nose, throat, or accessory organs. When the FTC attacked the ads, the company defended on the grounds, *inter alia*, that it was merely reporting facts. It turned out that its report was based upon a consulting firm's "experiment" that utilized its own employees as subjects, did not bother to monitor the information supplied, used infrequent medical examinations of the subjects, and even ignored complaints from the subjects that contradicted the findings.

the manufacturer, which was in a better position to determine the existence of problems.[224] Average smokers are obviously less sophisticated than tobacco companies, have less time and fewer resources to invest in scientific research, and should not be held to a standard of knowledge greater than tobacco firms. On the other hand, it is sometimes difficult to keep track of what the industry thinks about the underlying risks, so it becomes difficult to decide whether to conclude that their knowledge is dictated by good or bad faith; either way, the consumer should not be held to a higher standard of knowledge than the industry professes.[225]

Some of the general risks of cigarettes are known to most people, but many specific dangers are not.[226] Typically, assumption of risk is not a valid defense when only a general danger is realized.[227] About one-third of smokers do not realize that smoking is dangerous even without inhaling.[228] Cigarette warnings fail to notify consumers of nicotine addiction[229] and other specific dangers and, therefore, fail to arm consumers with enough information to make educated decisions regarding whether or not to smoke. Recently, Massachusetts held that because the user of an oral contraceptive is often deeply involved in the decision regarding the birth control method she chooses, the manufacturer had a duty to state in detail all known and suspected risks associated with the product.[230] Similarly, in deciding whether to smoke, a consumer is often the sole decision maker and may rely on read-

224. Ventura v. Ford Motor Corp., 180 N.J. Super. 45, 433 A.2d 801 (1981), involved an action by the buyer of a new car which repeatedly stalled. When the dealer cross-claimed against the manufacturer for indemnification, the court held the dealer should not be denied indemnification for its inability to diagnose the problem when Ford's own expert could not find the problem.

225. When not directly addressing the question of their views on the health issue, tobacco industry spokesmen sometimes slip into admissions that there are serious health hazards. Wass, *supra* note 163, § D at 2, col. 3. Thus, Tobacco Institute spokesman Walker Merryman argued against manufacturing self-extinguishing cigarettes because the increased tar and nicotine content would increase the number of people who would contract cigarette-related diseases. The PHILIP MORRIS INC. ANNUAL REPORT, *supra* note 18 at 11, implies that smoking can be dangerous for some persons: "We also believe that the preponderance of scientific evidence indicates that the presence of cigarette smoke causes no health impairment to a *healthy* non-smoker (sic)." (emphasis added).

226. Sigmon, *supra* note 159 at 64, 66. The typical consumer is ignorant of the synergistic effects of tobacco and products such as alcohol; and although many people are aware of some causal relation between lung cancer and smoking, most are unaware of the risk that smoking may cause or contribute to other cancers.

Studies show that consumers have a more difficult time remembering general or abstract information, are more likely to consider it personally irrelevant, and are less likely to consider health information at all without more specific information. 1981 FTC REPORT, *supra* note 16, at 3-6.

227. In order for most people to be able to appreciate and then act on potential risks, they must have specific knowledge of the dangers. The 1981 FTC REPORT, *supra* note 16, at 3-6 through 3-9, lists 3 reasons why specific knowledge is important: 1) specific knowledge is crucial to a true understanding of how dangerous smoking is; 2) specific knowledge is relevant to an awareness of the personal application of the danger; and 3) people do not remember general or abstract principles and do not consider them personally relevant.

228. 1981 FTC REPORT, *supra* note 16, at 3-15.

229. *See* Garner, *supra* note 4, at 1429-31; *supra* text accompanying notes 158-87.

230. MacDonald v. Ortho Pharmaceutical Corp., 394 Mass. 131, 475 N.E.2d 65 (1985). The court pointed out that the oral contraceptive

> stands apart from other prescription drugs in light of the heightened participation of patients in decisions relating to [its] use . . .; the substantial risks affiliated with the product's use; the feasibility of direct warnings by the manufacturer to the user; . . . and the possibility that oral communications between physicians and consumers may be insufficient or too scanty standing alone fully to apprise consumers of the product's dangers. . . .

Id. at 136, 475 N.E.2d at 70.

ily available information when making the decision. Before a smoker should be held to have assumed the risks of smoking, tobacco manufacturers should be responsible for warning of all known and suspected dangers, and warnings should be written in a conspicuous, clear manner.[231]

Children who begin smoking may not understand either specific or general risks. Youths are present-oriented[232] and are not expected to abide by the same legal standards as adults.[233] Special allowances are made for the inability of young people to understand and appreciate the consequences of their acts in traditional tort, contract, and criminal law.[234] Making similar allowances in product liability law for minors who are unsophisticated and become addicted to nicotine is "wholly congruent with the treatment the law accords minors in these other contexts."[235] Thus, minors should not be held to understand the risks; by the time their "understanding" matures, addiction renders any new information relatively useless.

Tobacco companies market a product that is addictive without warning of that risk or of how quickly and firmly the addiction takes hold.[236] In fact, the industry denies that smoking is addictive, claiming it is "merely" habit-forming.[237] The imposition of assumption of risk and consequent denial of recovery for a smoker contravenes the tenets of product liability when the product is so dangerous that its mere use (as promoted by the manufacturer) is argued to be an assumption of risk.[238] Therefore, it is patently unfair to permit tobacco firms to hide behind such semantics; at least the tobacco companies could spell out the "habit-forming" nature of their product and how many persons find it so difficult to break the "habit." If the question is even close, who should bear the brunt of the harm done—the victim who uses the toxic product or the person who distributes it?

Even if courts conclude that some risks are understood, it does not follow that all of them are. Arguably, most people are aware that there is some

231. *Compare* the Consumer Credit Protection Act of 1968, 15 U.S.C. § 1602(j), which states " '[A]dequate notice' . . . means . . . clearly and conspicuously so that a person against whom it is to operate could reasonably be expected to have noticed it and understood its meaning. . . ."

232. A young person who may be completely undeterred by the possibility of lung cancer in the remote future could well be deterred by the immediate possibility of addiction. Brody, *supra* note 131.

Some young people do not even have a firm grip on reality; for example, 87 percent of youngsters believe in Santa Claus, and 69 percent of nine and ten year olds do. *Poll shows 87% of kids believe in Santa*, Chi. Sun-Times, Dec. 25, 1985, at 70, col. 2.

233. Brody, *supra* note 131. In tort law for negligence, a special standard of care exists for minors; in contract law, minors have the right to repudiate contracts made during minority; and in criminal law, special standards of waiver of Miranda rights apply. Minority can generally be raised successfully as a defense against even a favorite of the law, a holder in due course. *See* U.C.C. § 3-305(2)(a) (1985).

234. Brody, *supra* note 131.

235. *Id.*

236. *See* Garner, *supra* note 4, at 1430; Marwick, *supra* note 18; R. CAMPBELL, PSYCHIATRIC DICTIONARY 12-13, 163, 271 (5th ed. 1981). *See* 1981 FTC REPORT, *supra* note 16, at 1-46. The 1964 SURGEON GENERAL'S REPORT, *supra* note 4, referred to smoking as an habituation because it was not clear whether withdrawal symptoms resulted from quitting. By the time of the 1979 SURGEON GENERAL'S REPORT, *supra* note 4, the conclusion that smoking is addictive had become clear.

237. Following that semantic route, breathing is not necessary to live, but is merely a desirable pastime designed to prolong life.

238. Ireland, *Cigarette Smoking Injuries: A Theory For Recovery Against the Federal Government*, TRIAL, Apr. 1983, at 64, 67.

harm in smoking.[239] However, even though there is much general awareness that smoking does not promote health, it is well established that the general public does not appreciate even the "well-known" dangers of smoking.[240] For example, a Gallup poll showed that 24% of heavy smokers are unaware or do not believe that smoking is hazardous.[241] In a separate study, 30% of the people polled for an FTC study were not even aware of the relationship between smoking and heart disease; that is especially glaring since "heart disease is the chief contributor to premature death caused by smoking."[242] Consumers may be aware that smoking is associated with some illnesses, but most do not know, for example, which diseases are smoking related, and they are not aware of the increased likelihood of suffering from those diseases.[243] Nor is there much knowledge of the relationship between smoking and the risk of premature death.[244] Additionally, although even teenagers think that smoking is "habit-forming,"[245] it is unlikely that, unless already experienced with some sort of addiction, the average consumer really understands how immediate the onset[246] of nicotine addiction is or the near impossibility of overcoming this addiction.[247] Probably very few are aware that smoking is responsible for more than 20% of the days missed from

239. *See* 1981 FTC REPORT, *supra* note 16, at 3-5 and 4-8, which cites a Gallup study. Twenty-four percent of heavy smokers and 17 percent of all smokers do not "know the very basic fact that smoking is hazardous to health."

240. With regard to warnings that circulated before late 1985, the FTC report considers the literature commonly read (e.g., weekly news magazines, newspapers, and "women's" or family magazines) as providing little information on the details of diseases associated with smoking and little on the extent of the hazards. Labels were at best misleading and hardly carried enough information to suffice as warnings. *See* 1981 FTC REPORT, *supra* note 16.

For example, the report stated:

> Over 30% of the public is unaware of the relationship between smoking and heart disease. Nearly 50% of all women do not know that smoking during pregnancy increases the risk of stillbirth and miscarriage. Approximately 30% of those polled do not know about the relationship between smoking, birth control pills and the risk of heart attack. . . . [A]pproximately 20% of those polled do not know that smoking causes cancer.
>
> . . .[A]mong those polled in the 1980 Roper study, 30% of the population and 41% of the smokers did not know that a typical thirty-year old male shortened his life expectancy *at all* by smoking.

Id. at 9-10.

241. *Id.* at 3-5.

242. *Id.* at 1-7.

243. *Id.* at 3-32. For example, experts "estimate that about 30% of smokers in this country will suffer from chronic bronchitis."

244. *Id.* at 3-6.

245. Eighty-four percent of teenage smokers say smoking is habit forming. AM. CANCER SOC'Y, *supra* note 18, at 58. *See also* 1981 FTC REPORT, *supra* note 16.

246. Smoking is more addictive than heroin. Marwick, *supra* note 18, at 2797 (quoting Dr. Pollin, former Director of Nat'l Inst. on Drug Abuse). Russell, *Cigarette Dependence: I—Nature and Classification*, 1971 BRIT. MED. J. 330 (8 May 1971), a teenager need smoke only twice to have a 70 percent chance of smoking for the next 40 years. *See* Garner, *supra* note 4, at 1434, and the sources cited therein, to the effect that more than a single cigarette yields an 85% chance of becoming addicted. Addiction at early ages is significant because of the misconception by young people that it is safe to experiment with smoking. *Id.* at 1433. This is especially significant because illness and death are related to how long one has been smoking. *See* 1964 SURGEON GENERAL'S REPORT, *supra* note 4, at 89.

247. For example, consider the facts regarding smokers who try to quit. Three of four smokers either want to quit or have tried and failed. Only one quarter ever succeeds. Russell, *supra* note 4, at 330. Some estimates suggest that 90% of smokers have tried to or wish to quit. *See* P. TAYLOR, *supra* note 1, at 235.

work.[248]

Even if courts conclude that many or most people know that cigarettes cause lung cancer, it is not necessary to conclude that even that risk is assumed.[249] What does "lung cancer" mean to the average person?[250] An analogy might be drawn from the case that held that a consumer might not understand that abnormal blood clotting in the brain which might be fatal meant that a stroke was possible, nor that it might involve a fate worse than death.[251] It might be speculated that, based upon the confidence many people place in doctors and newspaper reports concerning the advances in cancer research, many people conclude that lung cancer is something bad but not necessarily fatal.[252] They may not appreciate that there is only a five percent survival rate for this terrible disease.[253] They may not appreciate that much pain, hospitalization, and financial ruin might ensue, nor realize the tremendous strain on loved ones caused by losing this gruesome gamble. They may not contemplate any or all of the grief, considering that many consumers are present-oriented,[254] or illiterate,[255] or of less than average intelligence, or burdened by more than one of such limitations.

Not only is the consumer unaware of the gravity of the more "commonly known" risks,[256] but he is also ignorant of many specific and lesser-known dangers.[257] The typical consumer is ignorant of the harmful synergistic effects caused by the use of tobacco and other products such as alcohol, asbestos, chlorine, cotton dust, coal dust, and rubber fumes.[258] Thus, many consumers remain unaware of the extra risk endured not merely by smoking but also by smoking in combination with their jobs. Although many are aware of some causal relationship between smoking and lung cancer, most are not aware of the risk that smoking may cause or contribute to other cancers such as cancer of the pancreas, stomach, and cervix.[259] Women smokers are especially prone to little known risks such as pregnancy

248. 1981 FTC REPORT, *supra* note 16, at 1-8.

249. "Approximately 20% of those polled do not know that smoking causes cancer." 1981 FTC REPORT, *supra* note 16, at 10.

250. ". . . lung cancer . . . [is] underestimate[d]. . . ." Marwick, *supra* note 18, at 2799.

251. MacDonald v. Ortho Pharmaceutical Corp., 394 Mass. 131, 475 N.E.2d 65 (1985).

252. 1981 FTC REPORT, *supra* note 16, at 23. According to one study, "80% of teenagers and 75% of adults underestimated the risk of death from lung cancer, while another 9% of teens and 14% of adults said they 'didn't know.' " *Id.*

253. *Id.* at 3-23.

254. 1979 SURGEON GENERAL'S REPORT, *supra* note 4, at 17-6.

255. Campos v. Firestone Tire & Rubber Co., 98 N.J. 198, 485 A.2d 305 (1984).

256. The 1981 FTC REPORT, *supra* note 16, at 13, points out that "annually more than one out of every seven deaths in this country are smoking related."

257. *See generally* 1981 FTC REPORT, *supra* note 16, for summaries of studies assessing knowledge of the general population regarding smoking hazards.

258. AM. CANCER SOC'Y, *supra* note 18, at 23. Asbestos workers who smoke have 92 times the risk of cancer of nonsmokers. The synergistic effects of tobacco and industrial agents such as nickel, chromate, and vinyl chloride are listed in AM. CANCER SOC'Y, *supra* note 4, at 17.

The 1981 FTC REPORT, *supra* note 16, at 1-17, points out the synergistic relationship between cigarettes and alcohol.

259. *See* Sigmon, *supra* note 159, at 64, 66. *See* 1979 SURGEON GENERAL'S REPORT, *supra* note 4, at 1-15 to 1-17; AM. CANCER SOC'Y, *supra* note 4, at 29-30. Cancer of the esophagus is synergistic with alcohol consumption; smoke dissolves in alcohol and hence results in greater penetration of the tissues. The likelihood of urinary, bladder, and kidney cancer seems to increase with occupational exposures to dyestuffs, leather, printing inks, and paint. *Id.* at 32.

complications,[260] which include problems such as difficulty with conception, birth defects, intellectual impairment, and death, and the synergistic effects between tobacco and birth control pills.[261] If consumers do not appreciate well-known hazards, it is likely that they do not assume the risk of other hazards. How many do not know of the danger smoking poses for bystanders? Perhaps some would be dissuaded from smoking if they realized that babies born to mothers who are smokers exhibit impaired reading ability,[262] and that a child has twice the risk of developing bronchitis or pneumonia during its first year if both parents smoke.[263]

A midwestern farmer stuck tobacco in his ear for 30 years and developed cancer of the ear.[264] Tobacco products also affect the body in a number of other surprising ways. For example, due to the negative effect on one's circulation, smoking makes one more susceptible to frostbite,[265] gangrene,[266] and amputation.[267] A smoker tends to heal less quickly.[268] A smoker does not react to medications in the same manner as a nonsmoker; thus doctors who prescribe medications to patients on some concept of the "normal" person might not really be prescribing properly for smokers.[269] Perhaps due to the impairment of psychomotor skills, studies have shown that airline pilots who smoke have considerably more accidents than nonsmoking pilots.[270] Similarly, studies also show that accidents in factories

260. AM. CANCER SOC'Y, *supra* note 4, at 46-47.

261. *Id.* at 51. A 1975 study demonstrated a 200% increased risk of stroke for those who take the pill and smoke one pack of cigarettes per day. The combined effects of smoking and pill use might enhance the risk of thromboembolism or cardiovascular disease.

The Food and Drug Administration now requires a warning label on the inserts for oral contraceptives which states, ". . .Women who use oral contraceptives should not smoke." 21 C.F.R. § 310.51 (1980).

262. AM. CANCER SOC'Y, *supra* note 4, at 47.

263. *Id.* at 50.

264. *Smoking's Not-So-Safe Alternative*, Insight: The Wash. Times, at 64 (Feb. 3, 1986).

265. *See Health Quiz*, FAMILY CIRCLE, at 63, 67 (Jan. 21, 1986); THE AMERICAN MEDICAL ASSOCIATION FAMILY MEDICAL GUIDE 412-13 (1982).

266. THE AMERICAN MEDICAL ASSOCIATION FAMILY MEDICAL GUIDE 412-13 (1982).

267. Amputation becomes more likely for a smoker because of the greater likelihood of gangrene and its consequences. *Id.*

268. *See* Mosely and Finseth, *Cigarette Smoking: Impairment Of Digital Blood Flow And Wound Healing In The Hand*, THE HAND, Vol. 9, No. 2, at 97 (1977); Mosely, Finseth, and Goody, *Nicotine And Its Effect On Wound Healing*, PLASTIC & RECONSTRUCTIVE SURGERY, Vol. 61, No. 4, at 570 (Apr. 1978); Rees, Liverett, and Guy, *The Effect of Cigarette Smoking on Skin-Flap Survival in the Face Lift Patient*, PLASTIC & RECONSTRUCTIVE SURGERY, Vol. 73, No. 6, at 911 (June, 1984).

269. Surveys show that only 25% of doctors actively advise their patients not to smoke. *See* 1979 SURGEON GENERAL'S REPORT, *supra* note 4, at 19-12. Doctors who do not at least warn their smoking patients of this danger might open themselves to malpractice suits. Arguably, depending upon how the hypothetical norm is determined for prescription purposes, nonsmokers might not be given the right prescriptions either.

270. AM. CANCER SOC'Y, *supra* note 18, at 37. *See generally Health Applications of Smokeless Tobacco Use* (Consensus Conference) 255 J.A.M.A. 1045, 1047 (Feb. 28, 1986). That "accidents" are likely to be caused by a smoker, ex-smoker, or one who simply must abstain temporarily for some reason (for example, working in an environment where smoking is not permitted) is not surprising since the craving for tobacco may cause one to "become irritable, anxious, and restless with accompanying sleep and gastrointestinal disturbances. His concentration and judgment may become impaired and psychomotor performance diminished." Garner, *supra* note 4, at 1432; 1979 SURGEON GENERAL'S REPORT, *supra* note 4, at 16-14. Given that fact, it might constitute negligence to fail, in advance of boarding, to supply passengers with notice of that statistic and notice of whether the pilot is a smoker or a person who has just quit and is suffering agitation or other withdrawal symptoms. Or, it might be a good idea to allow only nonsmokers to be pilots.

more frequently involve smokers than nonsmokers.[271] Because nonsmokers outnumber smokers, those types of statistics are even more important than they seem at first blush. The reasons for such "accidents" are not entirely clear; they might result from the fact that smokers have their attention distracted by lighting a cigarette, from the fact that one hand is preoccupied by the tobacco product, or from irritability incurred while temporarily abstaining from smoking in the work environment. These "accidents" may also result from withdrawal symptoms while trying to quit altogether, from coughing, from impaired attentiveness and cognitive skills due to carbon monoxide or irritants contained in tobacco smoke, or from some unholy combination of such causes or others not listed.[272] As a result of these facts, and the added expense to employers from excess lost work due to illness of smokers, many employers are openly favoring nonsmokers in their hiring practices.[273] Thus one of smoking's less-known hazards is career impairment.

Despite ads that portray the beautiful people as those who smoke, many people are not aware that smoking literally causes unattractiveness due to skin problems.[274] For example, smoking causes crow's feet[275] or line wrinkling[276] that might make some women start to look like the macho men portrayed in cigarette ads.[277] Doctors are beginning to take the position that they should advise smokers not to have face-lifts[278] because of the frightening fact that smokers are more likely than nonsmokers to suffer from deterioration in looks, rather than improvement, due to skin sloughing.[279]

Additionally, one should consider that many people who presently do not worry about the hazards of smoking might change their minds one day and then face the added problems of living in fear of cancer, heart disease, and the myriad of other side-effects of tobacco, not to mention the added expenses of medical monitoring if one becomes concerned enough to want medical observation for peace of mind.

In short, consumers may not understand the risks and can hardly be said to assume them. Furthermore, a conclusion that many or most people do "know" the risk overlooks that even tobacco firms concede that 10 percent of the population does not;[280] that means almost six million smokers do

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271. *See* 1979 SURGEON GENERAL'S REPORT, *supra* note 4, at 7-15.

272. 1981 FTC REPORT, *supra* note 16, at 1-35.

273. *See* Curry, *supra* note 37, § 1, at 11, col. 1; Weis, *The Fiery Debate Over Smoking at Work*, 1984 BUS. & SOC'Y REV. 4 (Fall 1984).

274. *See infra* text accompanying notes 330-407.

275. *Smoking leads to telltale gaunt look*, The Daily Herald, Dec. 21, 1985, at 3, col. 1.

276. *Id.*

277. The condition is sometimes called "smoker's face." *Id.*

278. Unfortunately, if doctors fail to advise patients of any or all of the various health hazards, the possibility of malpractice actions arises. Seemingly, doctors should take an aggressive advisory approach with patients, lest they become legally responsible for the ailments caused by smoking.

279. Rees, Liverett, and Guy, *supra* note 268, at 911. Skin sloughing is usually a temporary condition in which patches of skin literally fall off, leaving raw flesh exposed.

280. *See Warning Labels on Cigarettes*, 92 U.S. NEWS & WORLD REPORT 53 (June 21, 1982). By comparison, the FTC concluded that "17% of all smokers and 24% of heavy smokers do not know the very basic fact that smoking is hazardous." 1981 FTC REPORT, *supra* note 16, at 4-8.

The 10% concession is significant. First, it leaves millions uninformed about life-threatening facts. Second, when deciding if an ad is a deceptive practice, the FTC employs the rule of thumb

not appreciate even "commonly known" risks. In fact, given the dire results of smoking and the large number of smokers, the more logical presumption is that most people do not fully comprehend the risks.

Even if the assertion made by the court in *Roysdon v. R.J. Reynolds Tobacco Co.*,[281] were true (that tobacco has been used for over 400 years and that its consequences have been fully explored), it takes quite a leap of faith to charge everyone with all of such "acquired knowledge" unless one presumes a cosmic source of information on tap for every person who begins to smoke. The body of knowledge contained in over 50,000 documents reporting the hazards of smoking must be carefully gleaned rather than inherited unconsciously. Applying the logic of *Roysdon*, has the time come to dispense with warning labels on power mowers, various medications, electrical transformers, and a variety of other products which mankind should now recognize as dangerous?

In any event, assumption of risk is no longer a complete bar to strict liability in many jurisdictions.[282] The modern view of strict liability is that, as with comparative fault in negligence cases, juries are capable of determining the allocation of fault between parties to strict liability actions.[283] Even if a court were to determine that a smoker bears some responsibility for smoking-related injuries, the doctrine of comparative fault would allow recovery, at least to the extent that a jury would find the tobacco company responsible for the plaintiff's injuries.

Tobacco companies have acquired a recent penchant for saying people should be responsible for their choices.[284] That attitude not only implicitly admits the dangers they deny, it also overlooks that this self-righteous yardstick should measure them as well. Tobacco companies choose to manufacture and distribute a product that disfigures and kills. Should not the companies be responsible for their choice?

STATE OF THE ART—CAN THE FOX BE TRUSTED TO GUARD THE CHICKENS?

As it relates to warning cases, the state of the art defense provides that when a danger is undiscovered at the time of marketing, and is undiscoverable given the state of scientific knowledge, a manufacturer cannot be held liable for its failure to warn of unforeseeable danger.[285] Prior to *Beshada v. Johns-Manville Products Corp.*,[286] most courts held that a manufacturer's duty to warn required warning only of knowable hazards.[287] However,

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that it is deceptive if as few as nine percent of the public is misled. 1981 FTC REPORT, *supra* note 16, at 4-21.

281. *Roysdon*, 623 F. Supp. at 1192.

282. *See* Coney v. J.L.G. Indus. Inc., 97 Ill. 2d 104, 454 N.E.2d 197 (1983); *see also* O'Shea, *supra* note 70, at 510, 515.

283. *Coney*, 454 N.E.2d at 202-03. *See also*, Annot., *Applicability of Comparative Negligence Doctrine To Actions Based on Strict Liability in Tort*, 9 A.L.R.4th 633 (1983).

284. That position was expressed on the ABC television show "Nightline" (November 12, 1985).

285. Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 202, 447 A.2d 539, 542 (1982).

286. 90 N.J. 191, 447 A.2d 539 (1982).

287. Haskins, *supra* note 4, at n.191. However, as early as 1932, the Second Circuit held the owners of tug boats liable for coal lost in a gale because the tugs had no radio receiving set. In dicta,

Beshada held that a defendant's knowledge is irrelevant to its duty to warn under strict liability.[288] Under the court's reasoning, because knowledge is imputed (to distinguish strict liability from a negligence claim) to a manufacturer whether or not the manufacturer actually knows or could have known of the danger, a state of the art defense is not applicable in failure to warn cases.[289]

Tobacco companies should not be able to assert successfully a state of the art defense against plaintiffs injured by smoking. First, there is evidence that the tobacco industry was or should have been aware of smoking hazards during the early 1900s;[290] therefore, even under more traditional case law, the industry should not escape liability even to those who began smoking fifty or sixty years ago by claiming unforeseeability.[291] Second, tobacco companies continue to produce cigarettes which do not meet the current state of scientific knowledge.[292] Finally, courts have ruled that the state of the art is not a defense in failure to warn cases and perhaps have even limited the defense to negligence causes of action.[293] The state of the art should be a consideration in determining an appropriate industry standard, not the absolute criterion for determining what is safe; otherwise, one shudders to think about the standard of safety which would be mandated by an industry which enjoys impunity and does not mind peddling poison.

PREEMPTION—EVEN A DOG GETS HIS DAY IN COURT!

Recently, cigarette companies have argued that the Cigarette Labeling

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the court stated that even though some tugs did not use radios, industry custom was no defense to liability. The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932).

288. *Beshada*, 90 N.J. at 209, 447 A.2d at 549. By contrast, the state of the art defense is a proper defense in a negligence claim where a manufacturer's liability turns on a failure to exercise reasonable care in the face of foreseeable harm. *Id.* at 204, 447 A.2d at 546. *See also* Gelsumino v. E.W. Bliss Co., 10 Ill. App. 3d 604, 609, 295 N.E.2d 110, 113 (1973), where the court held the state of the art is irrelevant to strict liability and is merely a factor to be regarded in determining negligence.

289. The court granted plaintiffs' motion to strike Johns-Manville's state of the art defense. Johns-Manville argued that at the time it manufactured the asbestos products which caused plaintiffs' injuries, there was no scientific evidence of the hazards of asbestos, and consequently it should not be held to a duty to warn of unknown and unforeseeable dangers. *Beshada*, 90 N.J. at 193, 196, 447 A.2d at 542, 545 (1982).

290. *See supra* note 288.

291. *In the Matter of Liggett & Myers Tobacco Co.*, 55 F.T.C. 354 (1958); Crocker v. Winthrop Lab., Div. of Sterling Drug, Inc., 514 S.W.2d 429, 432 (Tex. 1974) (liable even if not known); Barker v. Lull Engineering Co. Inc., 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443 (1978) (focus on product, not conduct). Consider that suspicions of danger are not entirely new. 1964 SURGEON GENERAL'S REPORT, *supra* note 4, at 149 (early suspicion), 196 (suspicion dated to early 18th Century). Ads have alluded to health: "And Now—Chesterfield First to Give You Scientific Facts in Support of Smoking. . . . [M]edical specialist stated . . . '[E]ars, nose, throat & accessory organs . . . not adversely affected. . . ." Chesterfield ad, LIFE (Jan. 26, 1953), at back cover. *See generally* Blum, *supra* note 18, at 1347.

292. For example, technology is available to produce self-extinguishing cigarettes, to significantly reduce tar and nicotine, and to greatly reduce other chemicals which enter tobacco as a result of the growing process. At one time, some micronite filters were made with asbestos, a product which produces a lethal synergistic interaction with tobacco. Also, fertilizers and herbicides have been used in tobacco cultivation though known to be hazardous. *See supra* text accompanying notes 158-87.

293. Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 203 n.6, 447 A.2d 539, 546 n.6 (1982). For example, the court specifically refused to address whether a state of the art defense is applicable to safety device cases.

and Advertising Act[294] shields them from state common law liability. They argue that federal legislation creates an irrebuttable presumption that a smoker assumes the risk of harm once a tobacco company has complied with federal labeling requirements.[295] Additionally, they argue that federal regulation prohibits not only other state or government regulation in the area, but also any state common law suits premised on inadequate labeling or advertising;[296] and that state common law claims are incompatible with federal legislation.[297]

Generally, courts have held a manufacturer liable for injuries caused by its product even when there was complete compliance with federal labeling requirements.[298] Thus, despite compliance, an insecticide company was held liable when a warning label was found inadequate because no symbol was used.[299] A manufacturer that complied with the federal Flammable Fabrics Act was liable when a nightgown caught fire upon touching a hot grill,[300] and manufacturers of oral contraceptives have been held responsible for injuries caused by birth control pills despite FDA approval of the pills.[301] Should tobacco companies fall outside the parameters of such cases?

Regarding the issue of preemption, tobacco companies have had mixed success in suits recently litigated. In *Cipollone v. Liggett Group, Inc.*,[302] Judge Sarokin of the U.S. District Court of New Jersey dismissed the tobacco industry's arguments for preemption, holding that lack of preemption for state common law claims does not set a new standard for cigarette labeling.[303] It merely tells tobacco companies that if they choose to continue making defective products, they will have to pay damages to injured consumers. In discussing Congress' intent regarding whether the Labeling Act was meant to preclude common law actions, the court concluded that it was "inconceivable that Congress intended to leave victims with no remedy at all."[304]

In overturning the District Court, the Third Circuit agreed with Judge Sarokin that there was no express preemption provision in the language of

294. 15 U.S.C. §§ 1331-1340 (1982). *See supra* text accompanying notes 106-58.

295. Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146 (D.N.J. 1984), *rev'd in part and remanded*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 907 (1987).

296. *Id.* at 1151.

297. *Roysdon*, 623 F. Supp. 1189. The court found the intent of Congress to have uniformity in warnings would be thwarted if plaintiffs were allowed to bring state common law actions.

298. *See* Garner, *supra* note 4, at 1453.

299. Hubbard-Hall Chemical Co. v. Silverman, 340 F.2d 402, 405 (1st Cir. 1965). In another case, a chemical manufacturer was held liable when a warning that complied with regulations was not read. The court observed that an adequate warning label might have been read by *someone* in the workplace. Ferebee v. Chevron Chemical Co., 736 F.2d 1529, 1539 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062 (1985).

300. Raymond v. Riegel Textile Corp., 484 F.2d 1025 (1st Cir. 1973).

301. Brochu v. Ortho Pharmaceutical Corp., 642 F.2d 652 (1st Cir. 1981).

302. Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146 (D.N.J. 1984), *rev'd in part and remanded*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 907 (1987).

303. *Id.* at 1170-71. The District Court denied defendant's motion for judgment on the pleadings and granted plaintiff's motion to strike defendant's preemption defenses, allowing plaintiffs the right to a trial on the merits. On appeal, that ruling was reversed. Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 907 (1987).

304. *Id.* at 1153, *quoting* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 263 (1984) (Blackmun, J., dissenting).

the statute.[305] However, after paying lip service to the principle that "a court must be mindful of the overriding presumption that 'Congress did not intend to displace state law,' "[306] the court of appeals declared that implied preemption exists in the Cigarette Labeling Act because state law conflicts with the federal statute. Specifically, the court held that state law actions are preempted when they challenge the adequacy of cigarette package warnings or advertising. The court went on to hold that when the success of a state law claim relies upon the tobacco company's duty to provide additional warnings, that claim is preempted as well.[307] It is submitted that Judge Sarokin's in-depth decision is to be preferred over Judge Hunter's curt conclusions.[308] Moreover, Judge Hunter's decision might be an example of the worst type of judicial decision, one that is not impartial.[309]

The *Roysdon* court agreed with R.J. Reynolds that Congress' intent was to protect cigarette companies from exposure to tort liability.[310] In a brief and cryptic opinion, the court held that the purpose of labeling uniformity would be thwarted if states were allowed to impose a duty on cigarette companies which goes beyond the congressionally mandated warning.[311]

Recently, the district court in Massachusetts also had to decide the outcome of a motion to dismiss based upon the allegedly preemptive effect of federal law. In *Palmer v. Liggett Group, Inc.*,[312] the court denied Liggett Group's motion, asserting that preemption of state claims would effectively immunize the tobacco industry from all liability—an outcome Congress surely did not intend.[313]

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305. Cipollone v. Liggett Group, Inc., 789 F.2d 181, 185 (3rd Cir. 1986), *cert. denied*, 107 S. Ct. 907 (1987).

306. *Id.* at 185, *quoting* Maryland v. Louisiana, 451 U.S. 725, 746 (1981). Judge Hunter determined that common law claims would conflict with federal law because the regulatory effect of state claims would tip the balance between health warnings and the health of the national economy too far in favor of health warnings. Cipollone v. Liggett Group, Inc., 789 F.2d 181, 187 (3rd Cir. 1986), *cert. denied*, 107 S. Ct. 907 (1987).

307. *Id.* at 187.

308. Judge Mazzone agrees. Palmer v. Liggett Group, Inc., 633 F. Supp. 1171 (D. Mass. 1986).

309. Judge Hunter's decision recently came under attack because he failed to disclose that he had defended a major tobacco company in similar litigation prior to becoming a judge. Because the litigation in which Hunter was involved in the 1960s was so similar, there is at least an appearance of impropriety and serious potential for a highly biased decision. Plaintiff's lawyers filed a motion to overturn Hunter's ruling, charging that the undisclosed representation created an "appearance of partiality." Riley, *Cigarette Case Conflict Claimed*, NAT'L L.J., Sept. 15, 1986, at 3, col. 1. Nevertheless, the U.S. Supreme Court refused certiorari on *Cipollone* and let the circuit court's decision stand. *Cipollone, cert denied*, 107 S. Ct. 907 (1987). Therefore, the last chapter on this vital issue remains unwritten and awaits a decision on the merits by the U.S. Supreme Court.

310. *Roysdon*, 623 F. Supp. at 1191. The court dismissed that part of plaintiff's claim based on inadequate warnings before trial.

311. *Id.* It is notable that Tennessee, where *Roysdon* was decided, is one of the leading producers of tobacco. It is puzzling that *Roysdon* did not even bother to distinguish the *Cipollone* District Court opinion, which was completely on point. Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146 (D.N.J. 1984), *rev'd in part and remanded*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 907 (1987).

312. Palmer v. Liggett Group, Inc., 633 F. Supp. 1171 (D. Mass. 1986). As this article went to print, the Court of Appeals for the First Circuit reversed the *Palmer* decision. Palmer v. Liggett Group, Inc., No. 86-1525 (1st Cir. Aug. 25, 1987). Although *Palmer* does not represent the current state of the law, the author believes the discussion of the case and its rationale remains valuable.

313. *Id.* at 1176. Congress passed the Cigarette Labeling Act and its subsequent revisions with full knowledge of the civil suits pending in courts around the country. *Id.* at 1179. Further, while the Smokeless Tobacco Health Education Act of 1986 was pending, Senator Kennedy remarked that

The court found unpersuasive the tobacco industry's claim that successful common law suits would impose new labeling requirements. Recent U.S. Supreme Court cases have determined that the effect of compensatory and punitive awards is not regulatory, thereby providing payment for plaintiffs for resulting injuries.[314] *Palmer* held that it is not "impossible," contrary to the tobacco industry's contention, for a tobacco company to be found liable and at the same time adhere to federal labeling requirements. The industry may add warnings to those federally mandated if the warnings are held inadequate, or it can pay for any harm caused.[315]

Congress certainly could have explicitly preempted or provided for state common law actions if it had desired to do so, but instead remained silent on this pivotal issue.[316] Perhaps that silence bespeaks a message. The legislature is clearly influenced by tobacco lobbyists, includes "representatives" of the tobacco industry, and is well aware of the tobacco industry's attendant economic benefits.[317] Congress is so controlled by the tobacco interests that it capitulated on the issues of death and addiction on labels. Seemingly, what it meant to do for the industry, it did. In fact, the Labeling Act contains a preemption provision which, rather than eliminating consumers' rights to sue tobacco companies, merely prohibits legislative and executive regulations.[318] Subsequent to enactment of the Labeling Act, the *Cipollone* District Court ruled against the preemption defense;[319] given that the Act was amended after that ruling without eliminating the right, it should be presumed that Congress did not intend to foreclose the right to pursue such cases in court. Congress' silence on preemption, therefore, can be interpreted to mean that federal labeling requirements set only a minimum standard.[320]

Not merely the silence, but a word employed in the Labeling Act also conveys a message. The Act specifically provides that its purpose, *inter alia*, is to insure that "the public may be adequately informed" and that "commerce and the national economy may be . . . protected to the maximum extent *consistent* with this declared policy. . . ."[321] (emphasis added). Because Congress clearly considered the economic interests of the tobacco industry and the country, the word *consistent* is not a mere redundancy. It

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passage of the legislation was not intended to "preempt products liability suits in State or Federal courts based on failure to warn." Congress' actions indicate that it must have believed that suits against tobacco companies would not frustrate its objective of uniform warnings. *Id.* at 1179.

314. *Id.* at 1175. *See also* the cases cited therein.

315. *Id.* at 1177.

316. Congress is not always silent on preemption issues. *See, e.g., Cipollone*, 593 F. Supp. at 1154, where the court refers to defendant's appendix which contains examples of fifty federal statutes with savings clauses specifically allowing for state common law causes of action. The District Court also pointed out that statutes sometimes explicitly include common law within preemption provisions. *Id.* Savings clauses, when employed, are frequently narrowly construed in order to preserve common law actions. *Id.* at 1154 n.5. The court decided that Congress could easily have extinguished state causes of action if it desired to do so. *Id.* at 1153. On appeal, the case was reversed in part and remanded, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 907 (1987). *See also* Palmer v. Liggett Group, Inc., 633 F. Supp. 1171 (D. Mass. 1986).

317. *See* P. TAYLOR, *supra* note 1, at 151-167.

318. *Cipollone*, 593 F. Supp. at 1161.

319. 593 F. Supp. 1146 (D.N.J. 1984).

320. *Id.* at 1170.

321. Federal Cigarette Labeling And Advertising Act, *supra* note 109.

qualifies the industry's protection, so the statute means something remarkably different than it would if it had been written without that word. Therefore, it follows that while the industry was not required to go beyond the label imposed by the Act, nothing in the Act requires a conclusion that the industry is not subject to common law rules which are consistent with the Act's purpose. As by-products of common law liability, the industry might decide to remedy the products' defects or to include more health information in its ads than the minimum required by Congress, but that is consistent with a purpose of informing the public.[322] Providing more data in its ads is not inconsistent with what the industry does anyway, as will be discussed in the next paragraph. Nor does common law liability mandate the industry change the warning label one iota.[323] Because the industry has long maintained that the hazards of smoking have not been proven, and because it has successfully defended lawsuits by consumers before, it might simply continue with the Act's labels even if it is held liable from time to time. In other words, common law liability would simply impose the costs of proven harm on the industry that creates the harm, hardly a novel result in law and hardly a result that violates the purpose of the Act.

Interestingly, preemption is another arena in which the industry proclaims itself judge and jury. When it wishes to include more than what the Labeling Act calls for, it does not regard itself as preempted from doing so. Thus, pursuant to agreement[324] rather than by statutory or regulatory fiat,[325] companies list the level of tar and nicotine in an obvious statement regarding the health issue. In fact, it chooses not merely to state a level, but to do so in a manner that appears to add government approval, similar to finding "U.S. Approved" stamped on a cut of meat.[326]

In *Banzhaf v. F.C.C.*,[327] the court of appeals held that antismoking groups had a right to free television time to address the public, notwithstanding the Labeling Act. Thus, the Act did not even preempt the communication of information, an area that cuts much closer to the issues contained in the Act than the question of common law liability for harm caused by smoking.

Our system of law, as Congress is aware, is based largely on common law. Judge Sarokin discusses the history of the Act in depth to examine the question of whether Congress has barred consumers from the courts to determine the merits of their claims.[328] Before eliminating one's right to a day

322. *See Palmer*, 633 F. Supp. at 1177-78; *Cipollone*, 593 F. Supp. at 1156.

323. *See Palmer*, 633 F. Supp. at 1177; *Cipollone*, 593 F. Supp. at 1156.

324. Letter to FTC Signed by Tobacco Companies (Brown & Williamson Tobacco Corporation; Laurus & Brother Company, Inc., Trading as the House of Edgeworth; Liggett & Myers Incorporated; Lorillard, a Division of Loew's Theatres, Inc.; Philip Morris U.S.A.; R.J. Reynolds Tobacco Company; Stephano Brothers; United States Tobacco Company) (Agreement to disclose tar and nicotine content) (Dec. 17, 1970). *See also* 1981 FTC REPORT, *supra* note 16, at 4-5.

325. 1981 FTC REPORT, *supra* note 16, at 4-5.

326. For example, Carlton recently ran an ad that proclaimed in bold print, ". . .U.S. GOV'T LATEST REPORT: . . . A whole *carton* of Carlton has less tar than a single *pack* of . . . [other named brands]." TIME, at back cover (Dec. 6, 1982).

327. 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

328. For example, the legislative history included considerable discussion of how the Act might affect an assumption of risk defense. *Cipollone*, 593 F. Supp. at 1162-63. If the Act preempted

in court, we should require, as did Judge Sarokin in *Cipollone*, and Judge Mazzone in *Palmer*, a clear statement of that purpose.[329] Eliminating such a right would do more than carve out an undeserved favorite position for the tobacco industry. It would elevate the industry above the law.

EXPRESS WARRANTIES—PROMISE 'EM ANYTHING

Warranty law is somewhat confusing because it is difficult to determine where that law stands, having a history of one leg rooted in torts and the other planted in contract law.[330] Regardless of its history and what label one favors, for some time cases have placed liability on producers of food[331] and other products[332] for intimate bodily use.

Cigarettes are clearly designed for human consumption, though the result is frequently reversed. Even court decisions in the 1950s and 1960s dismissing claims against tobacco firms made it clear that the same policies governing food cases should govern tobacco lawsuits.[333] Other tobacco cases also demonstrate that compelling result.[334]

The question remains that, even if one concludes that similar policy considerations invite consumer protection in this area, can one fairly impose warranty liability on tobacco companies? To answer the question, this section briefly considers the express warranty doctrine and then turns to whether "statements" by tobacco companies appropriately fit the modern view of warranty law.

As noted by Prosser, early America adopted *caveat emptor* as the way to handle consumer problems.[335] Thus, a sale of wood described as brazillito was not treated as a warranty though the wood turned out to be peachum (an inferior type of wood), because the court decided that a specific warranty was not made.[336]

With the exception of "consumer law" in the tobacco field to date, the law has advanced, leaving behind an approach very close to the benevolence bestowed by feudal landlords on their serfs in the Middle Ages. Thus the advance can be found, for example, in England in 1893, when the court enforced a contract where a "reward" was advertised to consumers who would inhale a smokeball (a "medication") if the consumers contracted influenza while using the smokeball after a requisite two week period.[337] In the

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lawsuits, any defense would be moot, so discussion of the defense presupposes that suits could be filed. *See also* Haskins, *supra* note 4.

329. *Cipollone*, 593 F. Supp. at 1148; *Palmer*, 633 F. Supp. at 1173, 1179-80.

330. *See* PROSSER & KEETON, *supra* note 73, at § 98; J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-3 (2d ed. 1980); Sullivan, *Innovation in the Law of Warranty: The Burden of Reform*, 32 HASTINGS L.J. 341 (1980); Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 253 S.E.2d 344 (1979).

331. *See* PROSSER & KEETON, *supra* note 73, at § 97, and cases cited therein.

332. *See, e.g.*, Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 253 S.E.2d 344 (1979). *See also* PROSSER & KEETON, *supra* note 73, at § 97.

333. *E.g.*, Green v. American Tobacco Co., 409 F.2d 1166 (5th Cir. 1969) (en banc), *cert. denied*, 397 U.S. 911 (1970); Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964).

334. *See supra* note 84 and cases listed therein.

335. PROSSER & KEETON, *supra* note 73, at § 95A.

336. Seixas v. Woods, 2 Caines 48 (N.Y. Sup. Ct. 1804).

337. Carlill v. Carbolic Smoke Ball Co., 1 Q.B. 256 (Ct. App. 1893). The "reward" for con-

United States, a public representation was held to be a warranty when the manufacturer described a car windshield as "shatterproof," but the windshield shattered upon impact with a stone, causing glass to destroy plaintiff's eye.[338]

In the landmark case of *Henningsen v. Bloomfield Motors, Inc.*,[339] a consumer's ability to recover from a remote manufacturer despite the lack of privity of contract was established. Since then, Prosser has described the parade of cases which follow *Henningsen* as a "deluge . . . [making] quite clear that the 'citadel of privity' has fallen."[340]

The question whether tobacco firms can be held liable for express warranties to consumers then reduces to whether they have expressed anything that constitutes a warranty. As developed below, this question should be answered affirmatively.

In the mid-1900s, tobacco firms ran numerous ads loudly proclaiming the safety of their products. For example, Camel ads stated: "How Mild can a cigarette be? NOTED THROAT SPECIALISTS REPORT . . . Not one single case of throat irritation due to smoking. . . ."[341] Other ads by Camel stated basically the same thing and added: "Yes, MY DOCTOR'S REPORT JUST PROVED WHAT MY OWN THROAT TOLD ME . . . THEY'RE SO MILD!"[342] And Lucky Strike struck back with: ". . .Perfect mildness? You bet. Scientific tests, confirmed by three independent consulting laboratories. . . ."[343] Promoting Parliament's filters, the manufacturer claimed: "It gives you . . . protection. . . ."[344] Not to be outdone, Chesterfield declared in an advertisement containing a testimonial from a smoker of 25 years: "CHESTERFIELD FIRST TO GIVE YOU SCIENTIFIC FACTS IN SUPPORT OF SMOKING . . . . For six months a group of men and women smoked only Chesterfield—10 to 40 a day—their normal amount. 45% of the group have smoked Chesterfields from one to thirty years for an average of ten years each. . . . [M]edical specialist stated . . . '. . .the ears, nose, throat and accessory organs of all participating subjects examined by me were not adversely affected in the six-months period by smoking the cigarettes provided.' "[345] Chesterfield modestly proclaimed in another ad: ". . .the best cigarette for you to smoke."[346]

Although spending about two billion dollars each year promoting tobacco products,[347] cigarette companies no longer[348] run such blatant state-

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tracting influenza hardly fits the classic pattern of rewards, where one is paid something for the accomplishment of a desired result. In fact, that "reward" seems more like an early breach of warranty case, reaching the result that would follow a breach of warranty in a contract containing a liquidated damage clause. However, the court did not explain its result as one of "warranty" law.

338. Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932).

339. 32 N.J. 358, 161 A.2d 69 (1960).

340. PROSSER & KEETON, *supra* note 73, at § 97.

341. *See, e.g.*, TIME, at back cover (Jan. 15, 1951).

342. TIME, at back cover (Jan. 30, 1950).

343. TIME, at 27 (Jan. 1, 1951).

344. N.Y. TIMES, at 36 (Feb. 21, 1951).

345. LIFE, at back cover (Jan. 26, 1953).

346. TIME, at back cover (Feb. 20, 1950).

347. Board of Trustees Reports, *Media Advertising for Tobacco Products*, 255 J.A.M.A. 1033 (Feb. 28, 1986).

348. For one thing, the companies realize such blatant ads might be deemed to create express

ments. Does that relieve them of responsibility for statements made years ago? To answer this question, several considerations are significant. For one thing, smoking is addictive. It seems patently unfair to induce one to smoke, or to smoke more, and then to retract express promises after the person has already acted in reliance, detrimentally, and perhaps irretrievably.[349] Similarly, one should not be able to promise 500 dollars to another to swim the English Channel and then revoke the offer after partial performance when the tired swimmer is a few labored strokes from shore. To prohibit such unconscionable results, the Restatement makes an offer for a unilateral contract irrevocable after an offeree begins performance.[350]

Although the lyrics have been deleted, the music plays on. Current ads continue leaving the unmistakable impression that smoking is desirable and even associated with healthy activities. Young attractive people are depicted smoking or juxtaposed with cigarette messages while engaged in vigorous activities. Thus, cigarette ads in magazines show[351] mountain climbing,[352] skiing,[353] tobogganing,[354] golfing,[355] hiking,[356] exercising,[357] boating,[358] and playing racquet sports.[359] Because athletics are not all that interest people, another typical ad insists: "PLAYERS GO PLACES."[360] Given the expense of running full-page color ads on the covers of magazines, it should not take Sherlock Holmes nor a court with the wisdom of Solomon to fathom the obvious health message in an ad that brags: "U.S. GOV'T LATEST REPORT . . . A whole *carton* of Carlton has less tar than a single *pack* of [other listed brands]."[361] If an advertisement utilizes a foreign word that means the same thing as "safe" in English, no doubt courts would recognize that a warranty extends to any reader who so understood the language em-

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warranties. For another, the FTC has enjoined such misleading advertisements. For example, a tobacco company was ordered to cease advertising that the "NOSE, THROAT, and Accessory Organs [are] not Adversely Affected by Smoking Chesterfields." *Matter of Liggett*, 55 F.T.C. at 378.

349. The problem is complicated because smokers may have lost their voluntary choice to the addiction, not to mention the daily promotions that provide temptations similar to tendering a drink to an alcoholic, and because it may be too late to quit even if they could choose to do so. Quitting after the onset of cancer may be as helpful as deciding you want to live after pulling the trigger of a gun placed in your mouth.

350. RESTATEMENT (SECOND) OF CONTRACTS § 45 (1981).

351. *See* 1981 FTC REPORT, *supra* note 16, at 2-8 through 2-10 and App. A.

352. SCI. DIG., at inside cover (Dec. 1985) (Winston).

353. PLAYBOY, at 4 (Mar. 1986); BETTER HOMES AND GARDENS, at 26 (Jan. 1986) (Vantage).

354. PLAYBOY, at 30 (Mar. 1986) (Newport). Actually the activity shown does not involve the use of a long thin sled, but involves a young couple thoroughly enjoying themselves on a tire tube that is sliding backwards down a snowy slope. The ad proclaims: "Alive with pleasure!" It goes on to say: "*low-tar* menthols." The information regarding tar has to be designed to mean that the cigarette is safe or safer than other cigarettes. No other reasonable purpose exists for including such a message.

355. GOLF DIG., at inside front cover (Sept. 1984) (Vantage).

356. GOLF DIG., at 26 (Oct. 1984) (Camel Lights).

357. COUNTRY LIVING, at back cover (Feb. 1984) (Vantage). This ad actually shows a young woman taking a break from either dancing, aerobics, or some other vigorous exercise. She is dressed in ballet leotards or an exercise outfit, and her tousled hair, towel, and cigarette clearly convey that she is enjoying a break.

358. COUNTRY LIVING, at back cover (June 1984) (Merit).

359. WOMAN'S DAY, at 126 (Sept. 3, 1985) (Kent).

360. COUNTRY LIVING, at back cover (May 1984). The ad includes a number of young men and women enjoying themselves socially.

361. TIME, at back cover (Dec. 6, 1982).

ployed. Seemingly, the same thing is true of pictures and references to low tar that are understood as the equivalent of "safe." The modern world clearly accepts the importance and impact of pictures. Frequently, traffic lights inform pedestrians to walk or not walk by blinking a hand or a human figure rather than words. Public restrooms often depict human figures wearing pants or dresses rather than spelling "men" or "women" on the entrance. In *Hubbard-Hall Chemical Company v. Silverman*,[362] the court imposed liability, despite the detailed warning label, because the label did not contain a skull and crossbones or some similar symbol to convey its deadly message.

The ads cited, and others as well, clearly communicate the impression that smoking is safe and that it may be done for a long time, even throughout one's life.[363] A Camel ad[364] used to show a young girl and woman in a doctor's office, with the girl declaring: "I'm going to grow a (sic)[365] hundred years old!" The ad goes on to say: ". . . and possibly she may—for the amazing strides of medical science have added years to life expectancy . . . . More Doctors smoke Camels *than any other cigarette*!" Is there any doubt that Camel's ad means smoking is not harmful, that it will not decrease one's life expectancy,[366] that it may be enjoyed throughout a long, healthy life, and that doctors endorse smoking? In another ad, Camel shows a doctor taking a call in the middle of the night, saying: " 'I'll Be Right Over' . . .24 hours a day your doctor is 'on duty' . . . guarding health . . . protecting and prolonging life. . . ."[367] Incidentally, those commercial announcements adorned medical journals.

Unquestionably, earlier tobacco advertisements were regarded as promising too much and improperly promoting a toxic product.[368] In *Banzhaf v. F.C.C.*,[369] the court ruled that anti-smoking groups were entitled to free television time to state arguments against smoking because misleading messages were being aired by televised commercials. In *In the Matter of Liggett & Myers Tobacco Company*,[370] certain Chesterfield ads were halted because they deceptively claimed their cigarettes produced no adverse effects upon the nose, throat, or accessory organs. In 1971, Congress banned radio and television advertising altogether.[371]

Cautious, sophisticated advertisements no longer use words to make the above preposterous claims. It is submitted, however, that the camera and an

362. 340 F.2d 402 (1st Cir. 1965).

363. Board of Trustees Reports, *Media Advertising for Tobacco Products, supra* note 347, at 1033; Banzhaf v. F.C.C., 405 F.2d 1082 (D.C. Cir. 1968).

364. Blum, *supra* note 18, at 1347, 1350.

365. One is tempted to write "sick" alongside every tobacco ad.

366. In fact, smoking does decrease life expectancy on average about 6 to 8.3 years, depending upon how heavily one smokes. AM. CANCER SOC'Y, *supra* note 18, at 12.

367. What the ad fails to note is that the doctor's call may well be to treat a smoker for smoking-related ailments.

368. *See* 1981 FTC REPORT, *supra* note 16, at 1. In 1964, the FTC declared the cigarette manufacturers guilty of "unfair or deceptive act or practice." *Id.* at 4-5. In 1953, the AMA barred tobacco advertising from its publications. *Id.*

369. 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

370. 55 F.T.C. 354 (1958).

371. Cigarette Labeling And Advertising Act, *supra* note 108.

artist's pallet are mechanisms just as effective as the alphabet for conveying the impression that smoking is healthy and socially desirable.[372] Since it is neither healthy nor socially desirable,[373] advertisements inducing people to smoke should constitute express warranties giving a cause of action for ensuing damages.[374]

Undoubtedly, tobacco companies will argue that such ads are merely the salesman's opinion[375] or puffing; in that case, warranties are not made, and consumers would acquire no remedy based upon such statements.[376]

Resolving the issue whether such ads are warranties or mere puffery is not easy. White and Summers go so far as to state that anyone who claims to be able to differentiate between the two "may be a fool or a liar."[377] On the other hand, others who have written about the task of solving the riddle point to various factors which seem to identify warranties. For example, specificity is important[378] (and comparative words such as "safer" are more likely to be regarded as specific than words like "big"[379]), products that are to be ingested, or that have a potential for harm, deserve greater scrutiny[380] (thus being more likely to be deemed warranties), and the modern trend is moving away from "puffing" in much the same way that the doctrine of *caveat emptor* has eroded.[381]

Clearly, courts will have considerable discretion in determining whether modern advertisements constitute warranties or mere puffery. Resolution of the question might produce a split of authority. But, until this issue is answered, it seems a question that should be litigated.[382]

Quite possibly, current advertisements should be categorized at least two ways. Many ads involve young people engaged in sports that convey all kinds of images, including health, glamour, sex, and fun. Another type of message is advertised sometimes along with those ads and sometimes sepa-

372. *See* 1981 FTC REPORT, *supra* note 16, at 3-9, to the effect that pictures pack more punch than words.

373. The medical evidence against smoking is staggering. Regarding the social problem, consider the fact that many employees will find it increasingly difficult to smoke and obtain jobs or to continue progressing in their careers. *See* Weis, *supra* note 273, at 6.

374. Discussion of implied warranties is beyond the scope of this Article. For now, consider whether a product should be deemed unmerchantable or unfit for its purpose when it has no safe use. In Holowka v. New York Farm Bureau Coop. Ass'n, a farmer sprayed malathion on his crops, thereby inadvertently providing toxic feed for his cattle. The court reasoned that the product was not fit for its purpose even though it did its intended job and could be used safely. 2 UCC Rep. Serv. (Callaghan) 445 (1963). Garner finds curious the fact the plaintiff did not pursue the breach of warranty claim in *Pritchard*, when the court signified that a cause of action existed for that breach. Garner, *supra* note 4, at 1427-28.

375. U.C.C. § 2-313(2) (1985).

376. *Id.*

377. J. WHITE & R. SUMMERS, *supra* note 331, § 9-3, at 329. Pridgen & Preston, *supra* note 71, at 642-46 argue that opinion or puffery claims actually represent a remnant of *caveat emptor*.

378. J. WHITE & R. SUMMERS, *supra* note 330, § 9-3, at 329.

379. Grady and Feinman, *Advertising and the FTC: How Much Can You 'Puff' Until You're Legally Out of Breath?* 36 ADMIN. L. REV. 399, 411 (1984).

380. *Id.*

381. THE LAW OF ADVERTISING § 10.06, at 10-28.

382. *See* 1981 FTC REPORT, *supra* note 16, at 2-8. The court in *Cipollone* observed that: "Efforts to convince the public that the risks do not exist or that they are minimal or unsupported by medical or scientific data may in and of themselves give rise to a cause of action; indeed they may even constitute a violation of the very statute which defendants brandish as a shield." *Cipollone*, 593 F. Supp. at 1148.

rately—the tar and nicotine content. It is submitted that the second type is even more clearly an express warranty, and a warranty of more than the mere level of tar and nicotine in cigarettes. Since even the industry regards low tar and nicotine as representing less taste,[383] the proud announcement of such content[384] can mean only one thing, that the cigarettes are safe, safer, or safest (depending upon the boast).[385] Because no cigarette is safe, lulling the public into buying poison by obfuscating the danger should provide a remedy to misled consumers. Some ads "imply that smoking a particular brand solves the health problem or at least minimizes the risks,"[386] or that special filters minimize the risks.[387]

Additionally, such ads may be misleading even if the message should be taken to address only the precise, narrow question of tar and nicotine content. Considerable evidence exists that humans do not smoke like machines[388] and, therefore, that the content is misleading;[389] in other words, humans will not necessarily ingest merely the levels promised in deceptive ads. Even if it could be shown that lower tar and nicotine levels are safer than other cigarettes, and the evidence is far from conclusive, data indicate that some smokers may actually get more tar and nicotine from lower content cigarettes due to the fact that smokers tend to compensate for the low content in several ways. For example, covering the holes in the filters with one's lips or fingers affects the intake,[390] and lower tar and nicotine might cause a craving that results in smoking more cigarettes to fix one's addiction or might make "it easier for some people to *start* smoking or to rationalize not quitting."[391]

These messages, unlike the ineffective health warnings, work; thus, "some consumers incorrectly believe that while smoking may be hazardous

383. *See* 1981 FTC REPORT, *supra* note 16, at 1-54, where the FTC report discusses the use of additives to "replace the flavor lost by reducing the 'tar' levels." *See also* an ad in the February, 1980 issue of Popular Mechanics which promises, ". . .The taste high tar smokers want in a low tar." 1981 FTC REPORT, *supra* note 16, App. A. Consider the September 9, 1977 advertisement in People magazine, saying, ". . .Now has the most satisfying taste in any cigarette so low in tar." *Id.* Or Pall Mall's Outdoor Life (October, 1979) ad, "The most flavor you can get in a low tar cigarette." *Id.*

384. *See, e.g.*, TIME, at back cover (Dec. 6, 1982), where Carlton brags that a whole carton of its cigarettes contains less tar than a single pack of other listed brands.

385. "Over one-third of the smokers polled falsely believe that it has been proven that by smoking low 'tar' cigarettes, smokers do not significantly increase their health risks over nonsmokers." 1981 FTC REPORT, *supra* note 16, at 11.

386. *Id.* at 2-12. Consider the True ad in the January, 1976 Cosmopolitan, where a young model, in a tennis outfit, is standing next to a tennis racket, saying, "Considering all I'd heard, I decided to either quit or smoke True. I smoke True." It goes on to say, "The low tar, low nicotine cigarette. *Think about it.*" (emphasis added). *Id.* at App. A. It is suggested that the advertiser's advice (to think about it!) be followed. The ad clearly gives the impression that this cigarette is safe. With a name like "True," how can one discredit the ad? For the proposition that a name is important in creating liability, consider Maize v. Atlantic Refining Co., 352 Pa. 51, 41 A.2d 850 (1945), where the name "Safety-Kleen" lulled the consumer into a false sense of security.

387. 1981 FTC REPORT, *supra* note 16, at App. A.

388. *Id.* at 1-55. In fact, The Tobacco Institute has not only written that people do not smoke like the machines which measure tar, but they have even utilized the difference as an argument against some smoking studies. *See* THE TOBACCO INSTITUTE, SMOKING AND HEALTH, *supra* note 214, at 16.

389. *See* 1981 FTC REPORT, *supra* note 16, at 1-57; 1979 SURGEON GENERAL'S REPORT, *supra* note 4, (preface) at xiv.

390. 1981 FTC REPORT, *supra* note 16, at 1-55.

391. *Id.* at 1-56.

to others, it is not hazardous to themselves because of the particular type of cigarette they smoke."[392] Many "still falsely believe that there is a substantial controversy about the basic fact that smoking is in any way hazardous to health."[393] Many also believe smoking is not dangerous if they smoke low tar and low nicotine cigarettes.[394]

Cigarette companies also maintain they do not try to lure young people to smoke, but simply run advertisements in order to cause smokers to switch brands. Such claims are misleading. Even if they were not trying to induce young people to smoke, they certainly are trying to induce adults to smoke, and that alone seems sufficient to impose liability for deceptive ads. As for their claim that ads do not address the young, several considerations are glaring. For one thing, numerous ads include young, attractive models rather than older ones and even say things that appeal to young people.[395] For another, it is easier to judge one by conduct than by protestations. Consider, for example, what tobacco companies are doing in foreign countries; cigarettes are sold to people of all ages at street corners.[396] When health warnings are not required, for example with exported cigarettes or with chewing tobacco, they are not present.[397]

Even ads that allegedly advise teenagers not to smoke are questionable. For instance, several things are notable about ads such as one run by R.J. Reynolds Tobacco Company.[398] To begin with, the name of the cigarette company is more conspicuous than the message.[399] The ad consists entirely of words, no pictures. The ad purports to advise against smoking because smoking "has always been an adult custom," an incredibly effective use of reverse psychology.[400] The ad says nothing about the health hazards of smoking, the costs, nor anything else negative about smoking. It seems ironic that tobacco companies that discredit the hazards of smoking are against selling to young people; if smoking is harmless, why should young people be precluded from smoking? If harmful, why should tobacco companies lure adults? It is submitted that the reason for advising young people away from smoking has much more to do with public relations and pending litigation or future lawsuits than it has to do with a sincere conviction that young people should not smoke.

Interestingly, another R.J. Reynolds advertisement raises more questions than it purports to answer.[401] For example, in Family Circle maga-

392. *Id.* at 3-8.

393. *Id.* at 3-14.

394. *Id.* at 3-42.

395. *Id.* at 2-11. For example, the report states, ". . .Some Winston ads imply that smoking is an activity that is begun before one 'grows up.' "

396. Davis, *Promotion of Cigarettes in Developing Countries*, 255 J.A.M.A. 993 (Feb. 28, 1986).

397. Even after passage of the Cigarette Labeling Act in 1965, cigarette manufacturers continued to run ads without warnings through 1971, in accordance with the law.

398. Chi. Tribune, Oct. 13, 1985, (USA Weekend, Advertising Supplement), at 22.

399. *Id.*

400. *See* 1981 FTC REPORT, *supra* note 16, at 5-15. Indeed, the same advertisement in Young Miss magazine openly admits, ". . .we know . . . this kind of advice to young people can sometimes backfire." The "bravery" mustered in risking such a backlash, resulting in new consumers and increased sales for the advertiser, is suspect.

401. FAMILY CIRCLE, at 68 (Apr. 15, 1986).

zine, the tobacco company declares in bold print, "We don't advertise to children." That ad goes on to inform a reader that, "we're running ads aimed specifically at young people advising them that we think smoking is strictly for adults;" it is curious that the company would do that considering, immediately thereafter, the ad points out: ". . .research shows that among all the factors that can influence a young person to start smoking advertising is insignificant. Kids just don't pay attention to cigarette ads. . . ."[402] The ad continues with, ". . .getting smokers to switch [brands] is virtually the *only* way a cigarette brand can meaningfully increase its business." (emphasis added). Frankly, it is a shock to this writer that a company could not also increase its business by, among *other* ways: 1) inducing more consumption; 2) allaying fears, so smokers do not cut down on consumption or quit smoking; or 3) inducing new people (adults who the industry openly wants to smoke, or young people) to start smoking. The ad concludes with the suggestion that the reader might share "*this* ad" with the reader's children.[403] Since the ad is admittedly an advertisement by a tobacco company, one might wonder why it does not include the Surgeon General's health warning. Considering the effectiveness of ads that promote smoking, and the assertion that young people pay no attention to cigarette ads, the ones directing youths away from smoking appear inept or insincere.

When Congress banned advertisements from television, it recognized what the courts should openly acknowledge: a picture is as effective as words and print in motivating people's reliance.[404] The courts should certainly acknowledge that thousands of pictures are worth as much as a few unspoken words. In *Rinkmasters v. City of Utica*,[405] a manufacturer sold equipment to the city to resurface ice for ice skating. The machine was advertised in a brochure that included pictures. When the machine arrived, it conformed to the written description of the machine but not to the pictures. The court held that express warranties were breached due to the nonconformity, and that the warranties made by the pictures superceded the written description. This result involved merely commercial losses. Other cases have similarly held that pictures are important in determining the extent of the express warranties made by sellers.[406] Recently, it has been argued that pictures might inadvertently create express warranties.[407]

CONCLUSION—EVEN GOLIATH FELL

Tobacco products have enjoyed a long, profitable history in the United

402. *Id.*

403. *Id.*

404. Incidentally, it should be noted that, under the UCC, reliance is not as necessary for a determination of warranty liability as it once was. *See, e.g.*, J. WHITE & R. SUMMERS, *supra* note 330, at § 9-3.

The 1981 FTC REPORT, *supra* note 16, at 3-9, points out that "[p]ictures are better remembered than words."

405. 75 Misc. 2d 941, 348 N.Y.S.2d 940 (1973).

406. *See* cases cited in Davis, *supra* note 397.

407. Grady, *Inadvertent Creation of Express Warranties: Caveats for Pictorial Product Representations*, 15 U.C.C. L.J. 268 (1983).

States. Additionally, tobacco firms have enjoyed immunity from liability to consumers.

At least two significant changes have manifested themselves over the years. For one thing, medical evidence of the dire consequences of smoking has convinced most unbiased persons who have studied the question that smoking is hazardous. Indeed, the tobacco industry's own witnesses would not deny that fact when cross-examined in court on the right to continue false advertisements. For another, consumer law has moved unmistakably away from *caveat emptor* in every area except tobacco cases.

Explanations exist for the lofty position enjoyed by the tobacco industry. The industry is a multi-billion dollar oligopoly that wields political influence on an unequaled scale. Leveling liability on the industry would be at best difficult in that atmosphere; at worst, it might produce economic results that would deal a staggering blow to many persons associated with distributing tobacco products. Many politicians, judges, juries, lawyers, and others are smokers who have a mind-set in favor of smoking or who, quite naturally, wish to deny a conclusion that admits the fallacy of their ways. Many people are against the idea that one should be able to recover monetary damages due to what is perceived as "self-inflicted" injuries. Cases brought in the 1950s and 1960s failed for a variety of reasons ranging from economic attrition to the legal conclusion that the hazards were not foreseeable in the early 1900s when those plaintiffs began smoking.

However, the unnecessary death of approximately 350,000 Americans yearly is rather difficult to ignore. The medical evidence is both frightening and overwhelming. Policies which underlie products liability and warranty law, and which justifiably result in liability for other products, apply with equal force to this area. In fact, these policies should apply with greater force, considering that tobacco products are designed for human consumption and constitute the single greatest cause of serious illness and premature death in this country.

The evidence is also overwhelming that tobacco products are defective in numerous ways ranging from unnecessary fire hazards to defective health warnings that leave people in the dark on issues that threaten their lives.

Despite the fact that many people have a general impression that smoking is not healthy, a substantial number do not appreciate even "well-known" hazards, let alone lesser known ones. A substantial portion of consumers do not understand the extent of the harm, nor the likelihood that smoking will cripple or kill them. Warnings imposed by Congress are of recent vintage and grossly inadequate. Until late 1985, they have been largely unobserved and too general to cause sufficient impact. It is probably too early to tell how well the new rotating warnings are being observed, but since they continue to be in the same, rectangular, small, unchanging format as before, they are unlikely to improve matters significantly. The warnings, among other problems, continue to hide the fact that cigarettes are addictive and likely to result in illness and death of smokers and nonsmokers. Indeed, despite voluminous evidence of the harm done by tobacco products, the industry conducts an aggressive, appealing ad campaign which lures victims into its web.

Even nonsmokers are endangered. Deaths and injuries result from fire, radiation, and air pollution caused by tobacco products. The tobacco industry is a Goliath sweeping a poison tipped sword in a callous, unchecked motion; regardless of prior hurdles, the time has come for the courts to pick up a pebble.

The tobacco industry asserts that people should be responsible for their choices; the industry should be judged by that standard as well. Imposition of liability might, indeed, produce costs that will necessitate price increases in amounts that might discourage smoking or even break the industry's back. But those results are warranted, long overdue, and should not shock the missing conscience of an industry addicted to killing off its best customers.