

THE PRODUCT LIABILITY OF THE TOBACCO INDUSTRY: HAS *CIPOLLONE V. LIGGETT GROUP* FINALLY PIERCED THE CIGARETTE MANUFACTURERS' AURA OF INVINCIBILITY?

In 1979, the Surgeon General of the United States published conclusive, scientific evidence establishing cigarette smoking as the "largest preventable cause of death in America."¹ Smoking-induced illnesses cause approximately 350,000 deaths in America each year² and cost the American economy between thirty-nine and sixty-five billion dollars annually in health care costs and decreased productivity.³ Cigarette manufacturers, however, publicly dispute that cigarette smoking is dangerous,⁴ and have successfully avoided liability for the harm smoking causes.

¹ U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, SMOKING AND HEALTH, REPORT OF THE SURGEON GENERAL ii (*Secretary's Foreword*) (1979) [hereinafter 1979 SURGEON GENERAL'S REPORT]. The report states that: "In 1979, cigarette smoking is the single most important preventable environmental factor contributing to illness, disability, and death in the United States." *Preface* to 1979 SURGEON GENERAL'S REPORT at vii. The 1979 report was supported by over 30,000 articles on smoking and health. *Id.* at 1-5.

² Edell, *Cigarette Litigation: The Second Wave*, 22 TORT & INS. L.J. 93-94, (Fall 1986). Edell notes that:

cigarette smoking [is] considered to be the major cause of lung cancer in the United States; the major cause of coronary disease in the United States; the major cause of chronic obstructive pulmonary disease in the United States (90 percent); a cause of cancer of the oral cavity, pharynx, larynx, esophagus, urinary bladder, pancreas, kidney

Id. (citing U.S. DEP'T HEALTH, EDUCATION AND WELFARE, THE HEALTH CONSEQUENCES OF SMOKING, A REPORT OF THE SURGEON GENERAL, (1979); U.S. DEP'T HEALTH, EDUCATION, AND WELFARE, THE HEALTH CONSEQUENCES OF SMOKING: CANCER, A REPORT OF THE SURGEON GENERAL, (1982); U.S. DEP'T HEALTH, EDUCATION AND WELFARE, THE HEALTH CONSEQUENCES OF SMOKING: CANCER AND CHRONIC LUNG DISEASE IN THE WORKPLACE, A REPORT OF THE SURGEON GENERAL, (1985); U.S. DEP'T HEALTH, EDUCATION AND WELFARE, THE HEALTH CONSEQUENCES OF SMOKING: CARDIOVASCULAR DISEASE, A REPORT OF THE SURGEON GENERAL, (1983); U.S. DEP'T HEALTH, EDUCATION AND WELFARE, THE HEALTH CONSEQUENCES OF SMOKING: CHRONIC OBSTRUCTIVE LUNG DISEASE, A REPORT OF THE SURGEON GENERAL, (1984)); see also, K.M. McLeod, *The Great American Smokeout: Holding Cigarette Manufacturers Liable For Failing To Provide Adequate Warnings Of The Hazards of Smoking*, 27 B.C.L. REV. 1033, 1033 n.2 (1986); 1979 SURGEON GENERAL'S REPORT, *supra* note 1, at ii.

³ Schultz, *Perspectives on the Economic Magnitude of Cigarette Smoking*, 85 N.Y. STATE J. MED. 302, 302 (1985), see also Edell, *supra* note 2, at 94 n.26.

⁴ Ross, *Judicial and Legislative Control of the Tobacco Industry: Toward a Smoke-Free Society?*, 56 U. CIN. L. REV. 317, 333 (1987). The author notes that the tobacco industry still disputes the causal link between smoking and disease. *Id.* The chairman and chief executive officer

Despite growing scientific evidence⁵ on cigarette smoking's harmful effects, the American judicial system has refused to impose liability on the tobacco industry for the serious harm caused by the consumption of their products.⁶ A combination of favorable judicial

of R.J. Reynolds Tobacco Co. testified before a congressional subcommittee that the smoking and health controversy remains unresolved, and that the cigarette industry opposed the Comprehensive Smoking Education Act because the medical and scientific assumptions or findings underlying it were incorrect and unsubstantiated. *Id.* at 333 n.103 (citing Waxman, *The Comprehensive Smoking Education Act*, 85 N.Y. STATE J. MED. 363, 364 (1985)). See also, Janson, *Cigarette Maker Assessed Damages In Smoker's Death*, N.Y. Times, June 13, 1988, at B4, col. 4. Janson quotes a 1972 confidential memorandum by a vice-president of the Tobacco Institute (an organization created in 1958 by the tobacco industry to centralize their research, public relations, and lobbying activities). The memo outlined the "brilliantly conceived and executed" 20-year strategy of countering assertions that smoking causes cancer by "creating doubt about the health charge without actually denying it." Janson, *supra* at B4, col. 4.

⁵ U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE 33 (1964) [hereinafter 1964 SURGEON GENERAL'S REPORT]. The 1964 report was supported by approximately 6,000 scientific studies on the health effects of smoking. *Id.* at 14. The report concluded that smoking caused lung cancer in men and chronic bronchitis in both men and women, but it failed to establish smoking as a cause of coronary heart disease or lung cancer in women. *Id.* at 31-32. The 1979 SURGEON GENERAL'S REPORT, however, relying on over 30,000 studies on the health effects of smoking, established cigarette smoking as the single "most important preventable factor" causing illness and death in the United States. 1979 SURGEON GENERAL'S REPORT, *supra* note 1, at 5, vii. This report concluded that smoking was a major cause of lung and other cancers in both men and women, and a risk factor for cardiovascular disease. *Id.* at 1-16, 34-63. In 1983, the Surgeon General proclaimed that cigarette smoking was the major cause of coronary heart disease in America. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, REPORT OF THE SURGEON GENERAL, THE HEALTH CONSEQUENCES OF SMOKING: CARDIOVASCULAR DISEASE 127 (1983), [hereinafter 1983 SURGEON GENERAL'S REPORT]; see also Kepko, *Products Liability — Can It Kick the Smoking Habit*, 19 AKRON L. REV. 269, 269-70 (1985).

⁶ Tobacco suppliers have been held liable when their product has contained foreign objects. See, e.g., *Liggett & Myers Tobacco Co. v. DeLape*, 109 F.2d 598, 600, 602 (9th Cir. 1940) (affirmed judgment for plaintiff allowing recovery from cigarette manufacturer for injuries sustained when a cigarette exploded while the plaintiff was smoking it); *Pillars v. R.J. Reynolds Tobacco Co.*, 117 Miss. 490, 497, 498, 500, 78 So. 365, 365-66 (1918) (tobacco company liable for injuries sustained from the presence of a human toe in a package of chewing tobacco); *Foley v. Liggett & Myers Tobacco Co.*, 136 Misc. 468, 469, 475-76, 241 N.Y.S. 233, 235, 241-42 (App. Term 1930), *aff'd mem.*, 232 A. D. 833, 249 N.Y.S. 924 (1931) (manufacturer held liable for injuries sustained by the plaintiff due to the presence of fragments of a dead mouse in a package of smoking tobacco); *Corum v. R.J. Reynolds Tobacco Co.*, 205 N.C. 213, 215, 217, 171 S.E. 78, 80, 81 (1933) (tobacco company held liable for injury caused by the presence of a fishhook in package of chewing tobacco); *Dow Drug Co. v. Nieman*, 57 Ohio App. 190, 191, 202, 13 N.E.2d 130, 131, 135 (1936) (drug store held liable for injury caused when cigar it sold to plaintiff exploded while he was smoking it).

No tobacco company, however, prior to the *Cipollone* verdict, has ever been found liable or been required to pay damages for any injury caused by the consumption of the harmful, but indigenous, components of tobacco smoke. Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423, 1425 (1980); McElvaine, *Liability of Cigarette*

rulings, extreme inequalities in litigants' legal and financial resources,⁷ and societal attitudes toward smoking and smokers' "freedom of choice"⁸ have all contributed to this de facto immunity. This judicially created immunity insulates cigarette manufacturers from tort claims, contrary to the policy objectives of product liability law,⁹ and allows the tobacco industry to prosper¹⁰ by marketing an extremely dangerous product with impunity.¹¹

Two 1988 cases, however, gave the impression that American society may finally be prepared to hold the cigarette industry accountable. In *Cipollone v. Liggett Group*¹² the United States District

Manufacturers For Smoking Induced Illnesses and Deaths, 18 RUTGERS L.J. 165, 165-66 (1986); McLeod, *Great American Smokeout*, *supra* note 2 at 1033; *see also*, Janson, *supra* note 4, at A1, col. 6; ("making his suit [Mr. Cipollone's] the first of more than 300 suits since 1954 in which a tobacco company had lost even a single claim or paid a penny in damages").

⁷ Edell, *supra* note 2, at 91-92. Edell notes the disparities in the litigants' resources:

Although not usually articulated in the reported decisions, it is clear that the many appeals and retrials placed extraordinary financial burdens on plaintiffs' counsel, resulting in many voluntary dismissals. The only decision that actually discusses the impact of the manner in which the cases had been defended is the unpublished decision of *Thayer v. Liggett & Myers*. In that case, the judge observed that "the facts themselves mock the mandatory jury instruction that individuals and corporate institutions are always equal before the court." In fact, he was convinced "that the magnitude of the impact of the disparity in resources between . . . [the] parties through a sophisticated and calculated exploitation of the situation by the defendant, approaches a denial of due process which would compel the granting of a new trial. The question, unfortunately, is now moot because plaintiff cannot afford further proceedings."

Id. *See generally* *Trying the Tobacco Case: A Symposium of Interviews with Melvin Belli, J.D. Lee, and Paul Monjione*, 10 TRIAL DIP. J. 9 (Summer 1987) [hereinafter *Symposium, Trying the Tobacco Case*].

⁸ *See generally* Gidmark, *The Tobacco Juries — An In-Depth Study*, 10 TRIAL DIP. J. 18 (Summer 1987); Janson, *supra* note 4, at A1, col. 6.

⁹ W.P. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 692-93 (5th ed. 1984) [hereinafter PROSSER]. The underlying theory of product liability law is that the manufacturer is in a better position to bear the cost of any injuries inflicted by its products because it can insure against such risks and pass this additional cost onto consumers by charging a higher price for the product. *Id.*

¹⁰ Eichenwald, *Analysts See No Significant Setback for Tobacco Industry in Wake of Ruling*, N.Y. Times, June 13, 1988, at B4, col. 1. Eichenwald noted that:

Last year, 50 million smokers spent about \$33.3 billion on cigarettes in the United States, more than ever before. Industry earnings hit a record of \$3.45 billion in 1985, the last year for which industry figures were available. Profit margins were higher than ever, reaching 13.8 percent, up from 9.2 percent a decade before.

Id. at col.6.

¹¹ *Cipollone v. Liggett Group, Inc.*, 649 F. Supp. 664, 675 (D.N.J. 1986) ("In essence, without any express authority from Congress, a single industry, for the first time in our country's history, may speak what is untrue, may conceal what is true, and may avoid liability for doing so merely by affixing certain mandated warnings to its products and advertising.").

¹² 593 F. Supp. 1146 (D.N.J. 1984), *later proceeding*, 106 F.R.D. 573 (D.N.J. 1985),

Court for the District of New Jersey upheld a \$400,000 jury verdict for a plaintiff whose wife contracted lung cancer from cigarette smoking.¹³ This verdict marked the first time in the brief history of tobacco product litigation that a jury imposed liability on a cigarette manufacturer for injuries caused by the consumption of an unadulterated tobacco product. Additionally, the Minnesota State Court of Appeals in *Forster v. R.J. Reynolds Tobacco Co.* held that the Federal Cigarette Labeling and Advertising Act¹⁴ does not preempt "failure-to-warn" tort claims against cigarette manufacturers.¹⁵ This holding marked a significant breakthrough in cigarette industry accountability because the cornerstone of the industry's tort immunity has been the defense of implied preemption.¹⁶ These developments, together with the increasing scientific knowledge concerning the addictiveness of tobacco products, could end the era of de facto immunity and expose the tobacco industry to a staggering amount of litigation and liability.¹⁷ These apparent breakthroughs, however, may be shortlived and largely illusory.

This note analyzes the current trends in tobacco product liability litigation, evaluates the prospects of future litigation, and considers the legitimacy of the preemption defense. Section I examines the development of product liability law and its application to cigarette manufacturers.¹⁸ This section discusses the rationales and holdings of both the "first wave" and the "second wave" of

mandamus granted, 785 F.2d 1108 (3d Cir. 1986), *rev'd in part and remanded*, 789 F.2d 181 (3d Cir. 1986), *motion granted*, 644 F. Supp. 283 (D.N.J. 1986), *motion denied*, 802 F.2d 658 (3d Cir. 1986), *cert. denied*, 108 S. Ct. 487, (1987), *mandamus denied*, 822 F.2d 335 (3d Cir. 1987), *motion denied*, 668 F. Supp. 408 (D.N.J. 1987), *motions granted in part and denied in part*, No. 83-2864 slip op. 9936 (D.N.J. 1987), *reconsideration denied*, No. 83-2864 slip op. LEXIS 12659 (1987), *motions granted in part and denied in part*, 683 F. Supp. 1487 (D.N.J. 1988), *motions denied*, 693 F. Supp. 208 (D.N.J. 1988).

¹³ *Cipollone v. Liggett Group, Inc.*, 693 F. Supp. 208, 210, 218-19 (D.N.J. 1988).

¹⁴ Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended by Pub. L. No. 91-222, 84 Stat. 87 (1970) at 15 U.S.C. §§ 1331-1340 (1982)). Congress amended certain provisions of the Act by enacting the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) [hereinafter "the 1969 Act"], and again by enacting the Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200 (1984) [hereinafter "the 1984 Act"].

¹⁵ See *Forster v. R.J. Reynolds Tobacco Co.*, 423 N.W.2d 691, 693, 701 (Minn. Ct. App. 1988).

¹⁶ See *Cipollone*, 649 F. Supp. at 675. The *Cipollone* court noted the irony of the preemption defense: "[The Labeling Act] . . . which the tobacco industry sought so hard to defeat now serves to substantially immunize it from liability . . ." *Id.* See generally Ewell, *Preemption of Recovery in Cigarette Litigation: Can Manufacturers Be Sued For Failure To Warn Even Though They Have Complied With Federal Warning Requirement?*, 20 LOY. L.A.L. REV. 867 (1987).

¹⁷ Ewell, *supra* note 16, at 867-68.

¹⁸ See *infra* notes 22-395 and accompanying text.

tobacco litigation to explore the evolution of the tobacco industry's de facto immunity.¹⁹ Moreover, this section analyzes the *Cipollone* and *Forster* decisions and the possible effects these two 1988 decisions might have on the underpinnings of the cigarette industry's de facto tort immunity.²⁰ Section II examines the legitimacy of the preemption defense in cigarette litigation, and hypothesizes what effect a reversal of the preemption finding might have on both the tobacco industry and the American public. Section II also analyzes how America's changing attitude toward smoking and the increasing evidence on tobacco addiction may affect future tobacco product litigation. This note concludes that holding the tobacco industry liable for the harm their products cause would be an equitable way to distribute the cost of such harm consistent with the objectives of product liability law, and would directly contribute to the realization of other societal goals.²¹

I. AN HISTORICAL ANALYSIS OF PRODUCT LIABILITY LAW AND ITS APPLICATION TO CIGARETTE LITIGATION

A. *The Development of Product Liability Law in Modern Society*

"Product liability" is the term used to identify the body of law that seeks to hold manufacturers and sellers financially responsible for their products' safety. The demise of the privity requirement²² has allowed courts to expand the scope of product liability using a hybrid of contract and tort law.²³ Generally, as a matter of state

¹⁹ Edell, *supra* note 2, at 90. Edell cites 1954 as the beginning of the "first wave" of cigarette litigation. *Id.* at 90 n.1. The complaint in *Cooper v. R.J. Reynolds Tobacco Co.*, 256 F.2d 464 (1st Cir. 1958), was filed on June 7, 1954. This "first wave" of cigarette litigation ended in 1972 when the defendant's motion for summary judgment was granted in *Albright v. R.J. Reynolds Tobacco Co.*, 350 F. Supp. 341 (W.D. Pa. 1972). See Edell, *supra* note 2, at 90 n.2; Garner, *supra* note 6, at 1426. All of the "first wave" plaintiffs were unsuccessful in their attempts to recover for their smoking-induced illnesses. Edell, *supra* note 2, at 90.

The "second wave" of cigarette litigation is the term used to describe the lawsuits brought by smoker-plaintiffs during the 1980's. McElvaine, *supra* note 6, at 169. The first such lawsuit to go to a jury was the unreported case *Galbraith v. R.J. Reynolds Tobacco Co.* See, *Gidmark*, *supra* note 8, at 18. The case resulted in a jury verdict for the defendant.

²⁰ See *infra* notes 250-305 and accompanying text.

²¹ See *infra* notes 397-469 and accompanying text.

²² The privity requirement was established in *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (Exch. 1842). Prosser, *supra* note 9, at 681. *Winterbottom* held that a seller had no liability, in contract or in tort, to anyone other than his or her immediate buyer.

²³ Prosser, *The Assault Upon The Citadel*, 69 YALE L.J. 1099, 1099-1100 (1960). The author notes that product liability is "a freak hybrid born of the illicit intercourse of tort and contract." *Id.* at 1126. See also J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 325

law,²⁴ courts utilize both tort and contract theories of recovery to impose liability on manufacturers and sellers for marketing "unreasonably dangerous" products that injure the consuming public.²⁵

Contractually, recovery for product-related injuries may be sought under a breach of warranty theory. In the vast majority of states, Article 2 of the Uniform Commercial Code (UCC) governs most aspects of commercial sales transactions, including the law of sales warranties.²⁶ The UCC recognizes three distinct types of sales warranties: an express warranty;²⁷ an implied warranty of merchantability;²⁸ and an implied warranty of fitness for a particular purpose.²⁹

According to the UCC, a seller creates an express warranty if the seller makes affirmations or promises concerning product quality, and these statements form a "basis of the bargain" between the seller and purchaser.³⁰ The UCC does not require proof that the buyer actually relied on the seller's statements when purchasing the product.³¹ Rather, a seller's affirmation or promise will become the

(West 1980) [hereinafter WHITE] (the authors recognize that strict tort liability is often indistinguishable from liability for breach of an implied warranty of merchantability).

²⁴ Product liability law is primarily a matter of state law. This Note does not examine every jurisdiction's application of product liability concepts. Rather, it is intended as a general overview of product liability law in cigarette litigation.

²⁵ See *Cipollone v. Liggett Group, Inc.*, 693 F. Supp. 208, 210-11 (D.N.J. 1988) (defendant cigarette manufacturer liable to deceased smoker's husband for breach of express warranty); *Kotler v. American Tobacco Co.*, 685 F. Supp. 15, 19-20 (D. Mass. 1988) (plaintiff's claim for breach of implied warranty of merchantability is viable against cigarette manufacturer); *Gianitsis v. Am. Brands, Inc.*, 685 F. Supp. 853, 859 (D.N.H. 1988) (plaintiff's failure-to-warn claim is viable as pertains to cigarette manufacturer's pre-1966 conduct); *Dewey v. Brown & Williamson Tobacco Corp.*, 523 A.2d 712, 716-17 (N.J. Super. L. 1986), *aff'd as modified*, 542 A.2d 919, 925-26 (N.J. Super. 1988) (plaintiff's design defect claim against cigarette manufacturer is not preempted).

²⁶ By 1979 the U.C.C. "had become the law in all states but Louisiana, and law in the District of Columbia and the Virgin Islands." WHITE, *supra* note 23, at 1. All cites in this Note are to the Uniform Commercial Code, however, the code adopted by an individual state may vary.

²⁷ U.C.C. § 2-313 (1988).

²⁸ *Id.* § 2-314 (1988).

²⁹ *Id.* § 2-315 (1988).

³⁰ *Id.* § 2-313(1)(a) (1988).

³¹ *Id.* § 2-313, official comment 3 (1988) notes in pertinent part:

In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. (emphasis added).

Id. See also, *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479, 483-84 (3d Cir. 1965) (plaintiff's actual reliance on express warranty is irrelevant in an action for breach); *Cipollone v. Liggett Group, Inc.*, 693 F. Supp. 208, 213-14 (D.N.J. 1988) (citing U.C.C. comment 3,

basis of the bargain if such a statement is designed to induce product purchases.³² The courts, recognizing the intent and effect of mass media advertising, have held that an advertisement creates an express warranty to the general public if the advertisement makes claims regarding product quality in an effort to promote sales.³³

Implied warranties, by contrast, are created as a matter of law and thus are independent of a seller's statements concerning product quality.³⁴ The UCC's implied warranty of merchantability requires that sellers offering goods for sale to the public on a regular basis must warrant that their goods are "fit for the ordinary purposes for which such goods are used."³⁵ The courts have construed this provision to mean that products offered for sale must perform according to reasonable consumer expectations³⁶ when a consumer uses the product as intended, or in a manner reasonably foreseeable to the seller.³⁷ Additionally, the UCC provides that a seller impliedly warrants a product is fit for a particular purpose when a buyer communicates a particular need to the seller, and relies on the seller's superior skill and judgment in providing a product to satisfy the specified need.³⁸

Unless a seller takes the necessary action to disclaim³⁹ its express or implied warranties, a court will impose liability on a seller for breach if the seller's product fails to perform as warranted, and such failure is the proximate cause of an injury.⁴⁰ Breach of war-

court concluded that proof of plaintiff's actual reliance is not necessary to maintain a breach of express warranty claim). But see *Cipollone*, 693 F. Supp. at 214 (court recognizes that other courts and commentators have held that the buyer must prove actual reliance in order to maintain a breach of warranty action). See generally WHITE, *supra* note 23, at 332-39 for a general discussion concerning the confusion as to whether actual reliance is necessary to create an express warranty.

³² *Pritchard*, 350 F.2d at 483; *Cipollone*, 693 F. Supp. at 214; see also, Prosser, *infra* note 37, at 837.

³³ *Pritchard*, 350 F.2d at 483-84; *Cipollone*, 693 F. Supp. at 214.

³⁴ See BLACK'S LAW DICTIONARY 1423 (5th ed. 1979).

³⁵ U.C.C. § 2-314(1)(c) (1987).

³⁶ The consumer expectation test is the same under both strict liability and breach of an implied warranty of merchantability. See *Kotler v. American Tobacco Co.*, 685 F. Supp. 15, 19 (D. Mass. 1988).

³⁷ *Kotler*, 685 F. Supp. at 19; *Larsen v. General Motors Corp.*, 391 F.2d 495, 501-03 (8th Cir. 1968). See also, Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 825-26 (1966).

³⁸ U.C.C. § 2-315 (1987).

³⁹ U.C.C. § 2-316 (1987). This section sets forth the necessary actions a seller must take to disclaim any sales warranty. To disclaim an implied warranty of merchantability, the seller's disclaimer must mention merchantability and, in the case of a writing, it must be conspicuous. *Id.* § 2-316(2) (1987). An implied warranty may be excluded under § 2-316(3).

⁴⁰ U.C.C. § 2-314 (1987) official comment 13 (1988).

ranty occurs when a product either fails to satisfy reasonable consumer expectations, or fails to perform as promised. Breach of an express warranty and breach of an implied warranty of fitness for a particular purpose operate on a theory quite different from strict liability;⁴¹ that is, breach occurs regardless of seller fault or negligence whenever a product fails to perform as promised.⁴² Breach of an implied warranty of merchantability, however, occurs only if a seller markets a product in a condition or manner that renders the product more dangerous than an ordinary consumer would reasonably expect.⁴³ Thus, the plaintiff establishing a *prima facie* case for breach of warranty, whether express or implied, must show the creation of a warranty, breach of the warranty due to product non-performance or defect, and that the product non-performance or defect was the proximate cause of the plaintiff's injury.

Prior to 1963, the warranty theories of recovery dominated the area of product liability.⁴⁴ There were problems with this approach, however, because warranties were subject to the limitations of contract law and the Uniform Sales Act.⁴⁵ The most notable limitation in sustaining a breach of warranty action was the privity requirement.⁴⁶ Only an aggrieved buyer in "privity of contract" with the offending seller could bring a warranty claim.⁴⁷ The limitations of contract law spurred the development of strict liability in tort as an alternative method for holding manufacturers and remote sellers accountable to the consuming public for product-related injuries.⁴⁸

The tort theory of strict liability holds that a defendant must pay damages to an injured plaintiff even though the defendant neither intentionally nor negligently caused the plaintiff's injury.⁴⁹ Under English common law, the courts employed a strict liability theory to hold owners of domesticated farm animals responsible for

⁴¹ WHITE, *supra* note 23, at 326.

⁴² J. HENDERSON, JR. & A. TWERSKI, PRODUCTS LIABILITY PROBLEMS AND PROCESS 82, 84 [hereinafter HENDERSON]. See generally WHITE, *supra* note 23, at 339-43.

⁴³ *Kotler v. American Tobacco Co.*, 685 F. Supp. 15, 19 (D. Mass. 1988) (the court noted that under Massachusetts law reasonable consumer expectations determine whether goods are merchantable).

⁴⁴ Prosser, *supra* note 37, at 801. (Note that Prosser states the year as 1962; however, the year is 1963, the date of the *Greenman* decision. The cause of error appears to be a misprinted decision date for *Greenman* in the California Reporter).

⁴⁵ Prosser, *supra* note 37, at 801; Prosser, *supra* note 23, at 1127-34.

⁴⁶ See, Prosser, *supra* note 23, at 1099-1100; PROSSER, *supra* note 9, at 681-84.

⁴⁷ PROSSER, *supra* note 9, at 681, 684; see Prosser, *supra* note 37, at 793-94.

⁴⁸ See generally Prosser, *supra* note 23; Prosser, *supra* note 37.

⁴⁹ PROSSER, *supra* note 9, at 534.

any damage their animals caused when trespassing on another's land.⁵⁰ The English courts also expanded this theory of liability to impose financial accountability on parties engaging in "abnormally dangerous" activities.⁵¹

Although the American courts adopted the common law theory of strict liability for some dangerous activities,⁵² they refused to apply this tort concept in most product liability cases.⁵³ American courts preferred utilizing the negligence doctrine of *res ipsa loquitur*⁵⁴ in product liability claims where lack of privity barred a plaintiff's warranty action.⁵⁵ In addition to permitting negligence claims against remote sellers, the courts also promulgated a privity exception in the food products area.⁵⁶

Beginning in 1913,⁵⁷ state courts began fashioning an additional exception to the privity requirement to allow consumers to recover against remote sellers of tainted food products.⁵⁸ Although the courts labeled such actions "warranty" claims, the courts actually held purveyors of food and drink strictly liable for the wholesomeness of their products.⁵⁹ Gradually, courts began expanding strict liability, without privity, to include sellers of any products intended for intimate bodily use,⁶⁰ including cigarettes.⁶¹

⁵⁰ *Id.* at 538-41.

⁵¹ *Id.* at 545; see also *Rylands v. Fletcher*, L.R. 1 Ex. 269 (Exch. 1866), *aff'd*, L.R. 3 H.L. 339 (1868); Wade, *On the Nature Of Strict Tort Liability For Products*, 44 Miss. L.J. 825, 826-27 (1973).

⁵² See, e.g. *Yukon Equipment, Inc. v. Fireman's Fund Ins. Co.*, 585 P.2d 1206, 1208, 1211, (Alaska 1978) (court imposed strict liability on company storing dynamite); *Langan v. Valicopters, Inc.*, 88 Wash. 2d 855, 859, 865, 567 P.2d 218, 220, 223, (1977) (court imposed strict liability on company for crop dusting with pesticides).

⁵³ See generally Prosser, *supra* note 23f, at 1103; Prosser, *supra* note 37v, at 793.

⁵⁴ Under [the] doctrine of *res ipsa loquitur* the happening of an injury permits an inference of negligence where plaintiff produces substantial evidence that injury was caused by an agency or instrumentality under exclusive control and management of defendant, and that the occurrence was such that in the ordinary course of things would not happen if reasonable care had been used.

BLACK'S LAW DICTIONARY 1173 (5th ed. 1979). See generally PROSSER, *supra* note 9, at 242-62.

⁵⁵ See Prosser, *supra* note 23, at 1100.

⁵⁶ *Id.* at 1103.

⁵⁷ *Id.*, at 1106; Wade, *supra* note 51, at 825 n.3. See also *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633, 636 (1913) (first case to extend strict liability for tainted food products beyond privity of contract).

⁵⁸ Prosser, *supra* note 23, at 1106.

⁵⁹ See generally *id.* at 1106-10.

⁶⁰ *Id.* at 1111-12; see also, *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19, 25 (5th Cir. 1963).

⁶¹ *Lartigue*, 317 F.2d at 34; *Ross v. Phillip Morris & Co.*, 328 F.2d 3, 7 (8th Cir. 1964).

Finally, in the 1963 landmark case *Greenman v. Yuba Power Products, Inc.* the Supreme Court of California imposed strict liability on the manufacturer of a defective power tool.⁶² In *Greenman* a defective power saw caused a wood chip to fly up out of the saw and strike the plaintiff on the forehead, seriously injuring him. The court held that strict liability in tort governs a manufacturer's responsibility for defective products. The court further held that in order to find a manufacturer strictly liable a plaintiff must prove that an unknown product defect rendered the product unsafe for its intended use and was the proximate cause of his or her injury.⁶³ Other jurisdictions immediately accepted the *Greenman* court's holding that strict liability in tort determines a manufacturer's or seller's responsibility for product safety.⁶⁴

The conversion of product liability from a theory of recovery sounding in contract to one sounding in tort was completed in the mid-to-late 1960s.⁶⁵ In 1965, the American Law Institute published section 402A of the Second Restatement of Torts (Second Restatement), detailing a seller's strict liability in tort for product-related injuries.⁶⁶ The authors of the Second Restatement wanted to make certain that strict product liability did not transform sellers into absolute insurers of product safety.⁶⁷ Therefore, the Second Restatement limited a seller's strict product liability to instances where the injury-causing product was sold "in a defective condition unreasonably dangerous to the user or consumer or to his property."⁶⁸

⁶² 59 Cal. 2d 57, 63-64, 377 P.2d 897, 901-02, 27 Cal. Rptr. 647, 701 (1963).

⁶³ *Id.* at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

⁶⁴ Prosser, *supra* note 37, at 804 (listing cases).

⁶⁵ PROSSER, *supra* note 9, at 581-82, 694.

⁶⁶ Section 402A reads in pertinent part:

§ 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 user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(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 contractual relation with the seller.

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

⁶⁷ See Wade, *supra* note 51, at 828, 830-31.

⁶⁸ RESTATEMENT (SECOND) OF TORTS § 402A (1965); see also PROSSER, *supra* note 9, at 698.

The Second Restatement defines "defective condition" as a product condition "not contemplated by the ultimate consumer, which [renders the product] unreasonably dangerous to him."⁶⁹ Thus, to recover under strict liability, a plaintiff must prove the product is unsafe because something is wrong with it.⁷⁰

Section 402A soon swept the country and strict product liability became the dominant theory of recovery. Courts, however, are divided on the proper test for determining whether a product is unreasonably dangerous. The majority of jurisdictions employ the "consumer expectation" test.⁷¹ These courts interpreted *Greenman* and the Second Restatement⁷² as establishing the proposition that a product is unreasonably dangerous only if an unknown defect⁷³ makes the product more dangerous than a reasonable consumer would expect.⁷⁴ Therefore, a product is not unreasonably danger-

⁶⁹ RESTATEMENT (SECOND) OF TORTS § 402A comment g (1965).

⁷⁰ Wade, *supra* note 51, at 830.

⁷¹ *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 131, 104 Cal. Rptr. 433, 440, 501 P.2d 1153, 1160 (1972) (noting that a majority of jurisdictions adopted the consumer expectation test of § 402A). See generally PROSSER, *supra* note 9, at 698-99 for a discussion of the consumer expectation test.

⁷² RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965) is printed below in full because of its particular relevance to cigarette litigation (the reader will often be referred back to this section). Comment i defines "unreasonably dangerous" as follows:

i. *Unreasonably dangerous.* The rule stated in this Section applies only where the defective constitution of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by "unreasonably dangerous" in this Section. The article sold must be 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. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. 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. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.

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

⁷³ RESTATEMENT (SECOND) OF TORTS § 402 comment n (1965) notes: "If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery." *Id.*

⁷⁴ Wade, *supra* note 51, at 829; see *Cronin*, 8 Cal. 3d at 131, 104 Cal. Rptr. at 1160-61, 501 P.2d at 440-41.

ous if a consumer, knowing the product's true characteristics, would nonetheless still use the product.

The minority position employs what may be called the "reasonable manufacturer" test.⁷⁵ This test first assumes that a seller knows the true condition of its product and the risks associated with its use.⁷⁶ After imputing knowledge of the product's true condition and attendant risks, the test becomes whether a reasonable manufacturer (or seller) would place this product in the stream of commerce.⁷⁷

Jurisdictions employing the reasonable manufacturer/seller test must necessarily perform a product risk/utility analysis.⁷⁸ This analysis is similar to the analysis for determining whether an activity is abnormally dangerous.⁷⁹ The risk/utility analysis employs seven factors to determine whether a product's risks outweigh its social utility.⁸⁰ If, in its present condition, a product's risks outweigh its social utility, it is unreasonably dangerous because a reasonable manufacturer or seller would not market this product.⁸¹ If, however, a product's social utility outweighs its inherent risks, the product is

⁷⁵ PROSSER, *supra* note 9, at 701-02 (refers to this test as the "hindsight negligence" test).

⁷⁶ *Id.*; see also *Phillips v. Kimwood Machine Co.*, 269 Or. 485, 492, 525 P.2d 1033, 1036 (1974).

⁷⁷ PROSSER, *supra* note 9, at 701; see also *Phillips* at 492, 525 P.2d at 1036; *Cipollone v. Liggett Group, Inc.*, 649 F. Supp. 664, 669 (D.N.J. 1986) (citing *Feldman v. Lederle Laboratories*, 97 N.J. 429, 451, 479 A.2d 374 (1984)).

⁷⁸ See PROSSER, *supra* note 9, at 701; Wade, *supra* note 51, at 837-41. Professor Wade was the first to propose the risk/utility test as a more meaningful alternative to the consumer-expectation test. *Gianitsis v. Am. Brands, Inc.*, 685 F. Supp. 853, 857 (D.N.H. 1988).

⁷⁹ Wade, *supra* note 51, at 835-36, n.36-38.

⁸⁰ *Id.* at 837-38. Professor Wade lists the seven factors to be considered in a product's risk/utility analysis as follows:

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

Id.

⁸¹ *Id.* at 839-40.

deemed "unavoidably unsafe,"⁸² and the seller incurs no liability if the product causes injury.⁸³

In jurisdictions applying the risk/utility theory, a non-defective product may be found unreasonably dangerous if the product's inherent risks outweigh its social utility.⁸⁴ In the majority of courts, however, a plaintiff must prove that a product is both defective and unreasonably dangerous. The requisite product defect may come from any of three sources: a manufacturing flaw, a product design defect, or an inadequate warning.⁸⁵

A manufacturing flaw results when something goes wrong with the manufacturing process and causes an unintended product flaw.⁸⁶ Manufacturing flaws, therefore, exist when the manufacturing process creates a product that is appreciably different than intended, or in comparison to similar products. Design defects, by contrast, may exist even when the manufacturing process creates the intended product, and all products are of similar quality.⁸⁷ To determine whether a design is defective, a court must employ the risk/utility analysis.⁸⁸ If the design's utility outweighs the design's risks, the design is not defective. If, however, the opposite is true, a design defect exists.

Apart from these physical product defects, a manufacturer may also be held strictly liable for failing to warn of any inherent product dangers that are not patently obvious to the consumer. Courts generally apply the "foreseeability doctrine" to limit a manufacturer's strict liability for failure to warn.⁸⁹ That is, a manufacturer must

⁸² See RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965) (an unavoidably unsafe product is a product that is incapable of being made safe for its intended and ordinary use but whose benefits outweigh its inherent risks).

⁸³ See Wade, *supra* note 51, at 839-40; see also RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965).

⁸⁴ Wade, *supra* note 51, at 831-41; see also *O'Brien v. Muskin Corp.*, 94 N.J. 169, 184-85, 463 A.2d 298, 306 (1983); *Cipollone v. Liggett Group, Inc.*, 649 F. Supp. 664, 669-71 (D.N.J. 1986); *Gianitsis v. Am. Brands, Inc.*, 685 F. Supp. 853, 857 (D.N.H. 1988).

⁸⁵ PROSSER, *supra* note 9 at 695; see, *Cipollone*, 649 F. Supp. at 669; *Gianitsis*, 685 F. Supp. at 856; *Semowich v. R.J. Reynolds Tobacco Co.*, No. 86-CV-118, slip op. at 10 (N.D.N.Y. August 18, 1988).

⁸⁶ PROSSER, *supra* note 9 at 695; see also Wade, *supra* note 51, at 831; *Phillips v. Kimwood Machine Co.*, 269 Or. 485, 491, 525 P.2d 1033, 1035-36 (1974); *O'Brien v. Muskin Corp.*, 94 N.J. 169, 180-81, 463 A.2d 298, 304 (N.J. 1983).

⁸⁷ Wade, *supra* note 51, at 830; see *Phillips*, 269 Or. at 494, 525 P.2d at 1037; *O'Brien*, 94 N.J. at 181, 463 A.2d at 304.

⁸⁸ PROSSER, *supra* note 9; at 698-99; Wade, *supra* note 51, at 831-32; see *Phillips*, 269 Or. at 494, 525 P.2d at 1037; *O'Brien*, 94 N.J. at 181, 463 A.2d 304.

⁸⁹ PROSSER, *supra* note 9 at 697; see also RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965).

only warn of any reasonably foreseeable risks associated with its product's intended or foreseeable use.⁹⁰ Reasonably foreseeable risks, however, are generally predicated on expert knowledge of a product's inherent danger at the time of distribution.⁹¹ Thus, a manufacturer has a duty to warn potential users or consumers if available scientific knowledge or industry expertise indicate an inherent danger in the foreseeable use of its product, and this danger is not readily apparent to the potential user or consumer.

The product warning serves two purposes.⁹² It should alert any potential user of any attendant danger, and also it should convey enough information concerning a product's risks so that a potential user may make an informed decision whether to use the product. Thus, courts have held that a manufacturer's warning must be timely,⁹³ and designed in both form and substance to apprise a potential user of any danger.⁹⁴ Furthermore, a manufacturer may not significantly diminish the effectiveness of its warning through its advertising or promotional activity.⁹⁵

Once a plaintiff establishes that a product or its warning is defective, he or she must still prove the defect rendered the product unreasonably dangerous, and that the defect proximately caused his or her injury.⁹⁶ A court will apply either the consumer expectation test or the reasonable manufacturer test to determine whether the product defect was unreasonably dangerous.⁹⁷ To establish the requisite causation, the plaintiff must prove that the product defect "more likely than not" caused his or her injury.⁹⁸ Thus, a plaintiff establishes a *prima facie* case of strict product liability when he or she can show that an unreasonably dangerous product defect proximately caused his or her injury.

⁹⁰ RESTATEMENT (SECOND) OF TORTS § 402A comment h (1965).

⁹¹ McLeod, *supra* note 2, at 1041; *see, e.g.*, Halphen v. Johns-Manville Corp., 737 F.2d 462, 465-66 (5th Cir. 1984); Beshada v. Johns-Manville Corp., 90 N.J. 191, 204-09, 447 A.2d 539, 546-49 (1982).

⁹² McLeod, *supra* note 2, at 1040-53.

⁹³ *Id.* at 1042.

⁹⁴ *Id.* at 1043-47.

⁹⁵ *Id.* at 1046-47.

⁹⁶ PROSSER, *supra* note 9, at 712-13 (details plaintiff's burden of proof in product liability case).

⁹⁷ Some courts now allow a plaintiff to prove a defect under either test. *See, e.g.*, Barker v. Lull Engineering Co., 20 Cal. 3d 413, 426-29, 432, 143 Cal. Rptr. 225, 233-37, 573 P.2d 443, 452-55 (1978); Dewey v. Brown & Williamson Tobacco, 542 A.2d 919, 925 (N.J. Super. 1988).

⁹⁸ *See* PROSSER, *supra* note 9, at 712-13.

The defendant manufacturer, however, may defend against a strict product liability suit using an affirmative defense of contributory negligence, comparative fault, or assumption of the risk.⁹⁹ No matter which defense is used, the defendant must prove that the plaintiff either used the product improperly, or that the plaintiff knowingly and voluntarily assumed the risk of using the product.¹⁰⁰ To prove the former, the defendant must show that the plaintiff used the product in an unexpected and unforeseeable manner, and that the plaintiff's abnormal misuse increased the risk of injury.¹⁰¹ To prove the latter, the defendant must show that the plaintiff either discovered or knew of the product defect but, nevertheless, continued to use the product.¹⁰²

As early as 1918, courts utilized the *res ipsa loquitur* doctrine and the privity exception for food product manufacturers to hold the tobacco industry liable under negligence and breach of warranty theories, when tobacco products have contained foreign substances that injured consumers.¹⁰³ Liability has been imposed on a tobacco manufacturer in this type of situation because the presence of a foreign substance leads to the presumption of a manufacturing flaw. No court, however, had ever found a tobacco company liable for an injury caused by the inherent, but harmful, substances contained in non-defective tobacco products. The first and second wave smoker-plaintiffs sought to change this by utilizing the developing theories of product liability to impose liability on cigarette manufacturers for causing their smoking-induced illnesses.

B. *The First Wave of Cigarette Litigation*

As far back as the 1930s, medical researchers suspected a link between cigarette smoking and cancer.¹⁰⁴ By 1954 the American Cancer Society felt there was sufficient evidence to issue a public resolution announcing a causative link between smoking and lung cancer.¹⁰⁵ As the evidence concerning smoking's harmful effects grew and became public, smokers who had developed lung cancer

⁹⁹ See PROSSER, *supra* note 9, at 710-12; Prosser, *supra* note 37, at 824-28, 838-40.

¹⁰⁰ See PROSSER, *supra* note 9, at 710-12; Prosser, *supra* note 37, at 824-28 and 838-40.

¹⁰¹ See PROSSER, *supra* note 9, at 711.

¹⁰² See *id.* at 712; see also *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479, 484 (3d Cir. 1965) ("Assumption of risk in its primary and strict sense involves voluntary exposure to an obvious or known danger.").

¹⁰³ See *supra* note 6 and accompanying text.

¹⁰⁴ 1979 SURGEON GENERAL'S REPORT, *supra* note 1, at 1-6.

¹⁰⁵ McElvaine, *supra* note 6, at 168 n.20 (citing N.Y. Times, Oct. 23, 1954, at 17, col. 1).

began suing cigarette manufacturers for marketing the cigarettes that the smokers believed were responsible for causing their illnesses.¹⁰⁶

Consistent with prevailing legal practice, plaintiffs brought these product liability suits under negligence and breach of warranty theories.¹⁰⁷ Although plaintiffs successfully circumvented the privity requirement in bringing these suits,¹⁰⁸ juries and courts proved unsympathetic to their plight. Despite evidence suggesting the tobacco industry failed to test cigarettes' safety adequately,¹⁰⁹ or warn of smoking's dangers,¹¹⁰ juries consistently found cigarette manufacturers' conduct non-culpable.¹¹¹

¹⁰⁶ See Wegman, *Cigarettes and Health: A Legal Analysis*, 51 CORNELL L. REV. 678, 680-84 (1966) (detailing the health controversy surrounding smoking during the 1950s and 1960s).

¹⁰⁷ See, e.g., *Ross v. Phillip Morris & Co.*, 328 F.2d 3, 5 (8th Cir. 1964) (plaintiff reached jury on negligence and breach of implied warranty claims); *Lartigue v. R.J. Reynolds Tobacco Co.* 317 F.2d 19, 22 (5th Cir. 1963) (plaintiff reached jury on negligence and breach of implied warranty claims); *Green v. Am. Tobacco Co.*, 304 F.2d 70, 71 (5th Cir. 1962) (plaintiff reached jury on negligence and breach of implied warranty claims).

¹⁰⁸ See, e.g., *Lartigue*, 317 F.2d at 35 (no privity requirement under Louisiana law in an action against a cigarette manufacturer for breach of implied warranty); *Ross*, 328 F.2d at 7 (no privity requirement under Missouri law in an action against a cigarette manufacturer for breach of implied warranty).

¹⁰⁹ *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 300 (3d Cir. 1961). In overruling the trial court's directed verdict for the defendant on a negligence claim the Third Circuit noted that:

there was evidence that in 1952 defendant conducted tests admittedly to determine the effects of smoking Chesterfields on the nose, throat and accessory organs. Apparently, this was the only test undertaken by defendant to determine the harmful effects on human beings from smoking its products. . . . As a result of this test, it was concluded that smoking Chesterfields had no harmful effect[s]. . . . There was evidence in the record that these tests were inconclusive and inadequate as the basis for such a conclusion. . . . Furthermore, between 1921 and 1953, defendant made no tests to determine the carcinogenic content of Chesterfields, or the relationship between lung cancer and smoking.

Id.

¹¹⁰ *Id.* at 299-300. In overruling the trial court's directed verdict for the defendant on plaintiff's negligent failure-to-warn claim, the Third Circuit noted that the plaintiff produced several expert witnesses to support his contention that scientific knowledge of the causative link between smoking and cancer existed as early as the mid 1930s. *Id.*

During the first wave, a cause of action existed only for a "negligent" failure to warn. See, e.g., *Pritchard*, 295 F.2d at 299 (under Pennsylvania law "one who supplies a product to another and knows or should know that the foreseeable use is dangerous to human life unless certain precautions are taken . . . is under a duty to warn the user of such consequences").

Likewise, the Fifth Circuit noted in *Lartigue* that under Louisiana law a manufacturer may be found negligent for failing to warn the public of "some inherent danger or defective condition of his product." *Lartigue*, 317 F.2d at 40. The plaintiff, however, must establish that the manufacturer actually knew or reasonably should have known of the existing danger.

¹¹¹ *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479, 482 (3d Cir. 1965) (jury found the defendant was not negligent); *Ross v. Phillip Morris & Co.*, 328 F.2d 3, 5 (8th Cir.

Yet plaintiffs' inability to prove cigarette manufacturer culpability did not affect the viability of their claims based on breach of implied warranty.¹¹² Breach of implied warranty claims are based on strict liability.¹¹³ Therefore, to prevail, the plaintiff must only impugn the product's merchantability, not the manufacturer's or seller's conduct.¹¹⁴ Thus, plaintiffs reasoned that the only prerequisite for recovery under a breach of warranty theory was to establish causation.¹¹⁵

This plaintiffs' theory, however, went unrecognized as the recurring theme in the first wave of cigarette litigation was marked by a judicial unwillingness to make the tobacco industry absolute insurers of tobacco products.¹¹⁶ Courts observed that food product manufacturers were strictly liable for consumer injuries only when their products were spoiled or contained a deleterious foreign object

1964) (general jury verdict for defendant on negligence and breach of implied warranty claim); *Lartigue*, 317 F.2d at 23 (general jury verdict for the defendant on negligence and breach of implied warranty claim); *Green v. Am. Tobacco Co.*, 304 F.2d 70, 72 (5th Cir. 1962) (jury found the defendant was not negligent; plaintiff did not appeal negligence finding).

¹¹² *Lartigue*, 317 F.2d at 24 (under Louisiana law a manufacturer of products intended for human consumption is strictly liable, regardless of fault, to consumers for breach of warranty); *Ross*, 328 F.2d at 8 (Missouri law imposes strict liability on cigarette manufacturers for breach of implied warranty regardless of privity or negligence); see also *Pritchard*, 295 F.2d at 296 (under Pennsylvania law cigarette manufacturer impliedly warrants that cigarettes are "reasonably fit and generally intended for smoking without causing physical injury"); *Wade*, *supra* note 51, at 825.

¹¹³ See *Lartigue*, 317 F.2d at 24; *Ross*, 328 F.2d at 8; *Wade*, *supra* note 51, at 825.

¹¹⁴ See *Lartigue*, 317 F.2d at 24; *Ross*, 328 F.2d at 8; *Wade*, *supra* note 51, at 825.

¹¹⁵ *Green v. Am. Tobacco Co.*, 304 F.2d 70, 72 (5th Cir. 1962). Plaintiff's argument received support in Judge Cameron's dissent in *Green* when the judge noted:

Under Florida's law, the implied warranty [of merchantability] was an unconditional guarantee to Green that the use to which the cigarettes would be put, as understood by all, would not do him harm by reason of any deleterious substance or ingredient contained in them.

Id. at 81 (Cameron, J., dissenting); see also *Green v. Am. Tobacco Co.*, 391 F.2d 97, 107 (5th Cir. 1968). The Fifth Circuit held that under Florida law the plaintiff-smoker "was entitled to rely on the implied assurance that . . . cigarettes were wholesome and fit for [smoking] . . . [and] the merchant [was] absolutely liable for [his] injuries [because the plaintiff had previously proven causation]. *Id.* This holding was overruled, however, by the Fifth Circuit sitting *en banc*. *Green v. Am. Tobacco Co.*, 409 F.2d 1166, 1166 (5th Cir. 1969).

The Third Circuit in *Pritchard* held that a cigarette manufacturer impliedly warrants that cigarettes are "reasonably fit and generally intended for smoking without causing physical injury." 295 F.2d at 296. This appears to establish the proposition "that cigarettes would be deemed unmerchantable if the smoker suffered physical injury as a result of smoking." *Garner*, *supra* note 6, at 1427.

¹¹⁶ See also *Hudson v. R.J. Reynolds Tobacco Co.*, 427 F.2d 541, 541-52 (5th Cir. 1970) (per curiam); *Green v. Am. Tobacco Co.*, 391 F.2d 97, 111-13 (5th Cir. 1968) (Simpson, J., dissenting), *rev'd per curiam*, 409 F.2d 1166 (5th Cir. 1969) (en banc), *cert. denied*, 397 U.S. 911 (1970); *Ross v. Phillip Morris & Co., Ltd.*, 328 F.2d 3, 10-14 (8th Cir. 1964); *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19, 38-40 (5th Cir. 1963).

or substance.¹¹⁷ The courts, therefore, developed similar rationales for limiting a cigarette manufacturer's strict liability for smoking-related injuries.

In *Green v. American Tobacco Co.*, the first wave's longest and most famous case,¹¹⁸ the United States Court of Appeals for the Fifth Circuit fashioned two different rationales for limiting a cigarette manufacturer's strict liability. First, the circuit court interpreted Florida law as limiting the scope of a manufacturer's implied warranty to reasonably foreseeable product risks.¹¹⁹ Second, after the Supreme Court of Florida corrected the circuit court's earlier interpretation of Florida law,¹²⁰ the Fifth Circuit held that a cigarette manufacturer is liable for breach of implied warranty only if a plaintiff establishes that cigarettes pose a health risk to a substantial number of smokers.¹²¹

The *Green* case began in 1957 when Edwin Green, Sr., brought suit against a cigarette manufacturer to recover for lung cancer he allegedly contracted from smoking the defendant's cigarettes.¹²² Mr. Green began smoking at age sixteen, and continued smoking between one and three packs of cigarettes per day for over thirty years. In 1956, doctors diagnosed Mr. Green as having inoperable lung cancer, which resulted in his death two years later at the age of forty-nine.¹²³ At the completion of trial the United States District Court for the Southern District of Florida ruled that a manufacturer's implied warranty does not cover unforeseeable product dangers.¹²⁴ The jury returned a verdict for the defendant.¹²⁵

¹¹⁷ *Lartigue*, 317 F.2d at 30; *Ross*, 328 F.2d at 9-10; *Green*, 391 F.2d at 108-09 (Simpson, J., dissenting).

¹¹⁸ See, McElvaine, *supra* note 6, at 169; Garner, *supra* note 6, at 1423. The *Green* case took over twelve years to litigate and involved two jury trials and six appeals. *Green v. Am. Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962), *question certified on rehearing*, 154 So. 2d 169 (Fla. 1963), *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).

¹¹⁹ *Green*, 304 F.2d at 77.

¹²⁰ *Green*, 154 So. 2d at 170-71, 173 (Fla. 1963) (Supreme Court of Florida held that the foreseeability doctrine does not limit a manufacturer's implied warranty).

¹²¹ *Green*, 391 F.2d at 101, *rev'd per curiam*, 409 F.2d 1166, 1166 (5th Cir. 1969) (en banc).

¹²² *Green*, 304 F.2d at 71.

¹²³ *Id.* at 77 (Cameron, J., dissenting).

¹²⁴ *Id.* at 72-73.

¹²⁵ *Id.* at 71. The jury answered special interrogatory number (4) which read in pertinent part:

(4) Could the defendant on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight have known that users of Lucky Strike cigarettes, such as the decedent would be endangered by the inhalation of the

Although the jury found that smoking caused Mr. Green's lung cancer, it also found that a cigarette manufacturer could not have foreseen that smoking would cause harm. Therefore, according to the jury, the manufacturer was not liable for Mr. Green's unforeseen lung cancer.¹²⁶ The plaintiff appealed the district court's judgment entered pursuant to the jury's verdict, contending that the jury's finding on causation entitled him to judgment as a matter of law.¹²⁷

The Fifth Circuit disagreed, however, and upheld the jury verdict. The court reasoned that a manufacturer's superior skill and knowledge concerning product fitness creates its implied warranty of merchantability because a buyer necessarily relies on this skill and knowledge in purchasing a product. Such buyer reliance is unjustified, the Fifth Circuit reasoned, if no reasonable application of human skill or foresight would reveal a hidden product defect to the seller.¹²⁸ Thus, the Fifth Circuit held, the scope of a manufacturer's implied warranty is limited to foreseeable product risks under Florida law.

Nonetheless, the Fifth Circuit asked the Supreme Court of Florida whether its interpretation of Florida law was correct, and granted plaintiff's petition for a rehearing.¹²⁹ The Florida Supreme Court answered that the foreseeability doctrine does not limit a manufacturer's implied warranty under Florida law.¹³⁰ Although the Florida court refused to hold cigarettes unmerchantable as a matter of law,¹³¹ it did rule that a manufacturer's implied warranty of product "wholesomeness"¹³² is based on the product's actual safety.¹³³

mainstream smoke from Lucky Strike cigarettes, of contracting cancer of the lung?

Yes

No X

Id. at 72.

The jury returned a general verdict for the defendant, and the trial court entered judgment for the defendant pursuant to the verdict. *Id.* at 71-72.

¹²⁶ *Id.* at 71-72.

¹²⁷ *Id.* at 72.

¹²⁸ *See id.* at 77.

¹²⁹ *Green*, 304 F.2d 70, (5th Cir. 1962), *question certified on rehearing*, 154 So. 2d 169 (Fla. 1963), *rev'd and remanded*, 325 F.2d 673 (5th Cir. 1963); *see also* *Green v. Am. Tobacco Co.*, 391 F.2d 97, 99 (5th Cir. 1968).

¹³⁰ *Green*, 154 So. 2d at 172.

¹³¹ *Id.* at 170.

¹³² The courts use the term "wholesomeness" to connote product purity; i.e. that a product is not spoiled and does not contain harmful, foreign substances. *See Green*, 325 F.2d at 676; *Green*, 304 F.2d at 82.

¹³³ *Green*, 154 So. 2d at 173.

On rehearing, the Fifth Circuit reversed its earlier holding, but refused to impose liability on the defendant-manufacturer as a matter of law.¹³⁴ According to the Fifth Circuit, the plaintiff must still prove the defendant's cigarettes were not "reasonably fit and wholesome" for smoking in order to recover. A warranty of wholesomeness did not guarantee the goods were incapable of causing injury, the Fifth Circuit reasoned.¹³⁵ Although the dissent argued that a finding of causation means that the defendant necessarily breached an implied warranty based on actual product safety,¹³⁶ the Fifth Circuit remanded the case to the district court for a new trial on the sole issue of whether the defendant's cigarettes were "reasonably fit and wholesome" for human consumption.¹³⁷

At the completion of the second trial, the district court instructed the jury that a breach of implied warranty "occurs only if the defendant's cigarettes endanger 'any important number of smokers.'"¹³⁸ The second jury also returned a verdict for the defendant. Once again the plaintiff appealed, and reiterated his claim that the previous finding of causation entitled him to a directed verdict.¹³⁹

This time the Fifth Circuit agreed. By a 2-1 majority, a three-judge panel from the Fifth Circuit decided to set aside the second jury verdict, and to hold the cigarette manufacturer absolutely liable as a matter of law.¹⁴⁰ The majority opinion, borrowing the previous dissent's rationale, reasoned that the actual safety of the product to the individual consumer is determinative of a manufacturer's liability once causation is established.¹⁴¹ The previous dissent noted that a tobacco company *impliedly warrants* that smoking cigarettes

¹³⁴ *Green*, 325 F.2d at 677, 679.

¹³⁵ *Id.*

¹³⁶ *Id.* at 681 (Cameron, J., dissenting). Judge Cameron reasoned that:

The contract here was between the Tobacco Company and Green. The warranty embodied by the law in every sale the Company made to him was that the cigarettes purchased by him would do him no harm.

... The finding of the jury has settled the fact that the cigarettes sold to Green were not reasonably fit and wholesome for use by him. No other question is ... involved under the law of Florida with which alone we are dealing.

Id. at 680-81.

¹³⁷ *Green*, 391 F.2d at 101.

¹³⁸ *Id.*

¹³⁹ *Green* 391 F.2d at 101. The finding of causation was binding on the second jury and the issue could not be re-litigated.

¹⁴⁰ *Id.* at 106.

¹⁴¹ *Id.* at 105-06.

will not harm a smoker; therefore, if smoking causes injury, the tobacco company is liable for such injury.¹⁴²

The dissenting judge in the second panel, however, argued that the imposition of absolute liability on cigarette manufacturers was contrary to product liability law.¹⁴³ A manufacturer is strictly liable but not *absolutely* liable, the dissent reasoned, for the safety of its products.¹⁴⁴ The dissent noted that strict liability requires that the product causing harm also be unreasonably dangerous.¹⁴⁵ Furthermore, the dissent argued that a product is unreasonably dangerous only if it contains a defect that renders it unsafe for consumer use, or if the product is inherently dangerous absent a defect. Thus, according to the dissent, a cigarette manufacturer is liable only if its cigarettes contain a harmful, foreign substance not present in well-made cigarettes, or if cigarettes, as a whole, are found to present a danger to a substantial portion of the public. Because the plaintiff did not claim that the defendant's cigarettes were defective,¹⁴⁶ the dissent reasoned that, whether cigarettes were reasonably "wholesome and fit" was not a question of their actual safety, but a question of fact for the jury.¹⁴⁷

The rationale of this dissent prevailed.¹⁴⁸ Sixteen months later, by an 8-3 majority, the Fifth Circuit rehearing *Green en banc* in 1969 overruled the previous panel's decision citing the dissent's rationale. Thus, the second trial court's judgment for the defendant was affirmed, and when the United States Supreme Court denied certiorari in 1970 the *Green* case finally came to an end.¹⁴⁹

The Fifth Circuit's first limitation on a cigarette manufacturer's liability was not discarded, however. In *Lartigue v. R.J. Reynolds Tobacco Co.*¹⁵⁰ and *Ross v. Phillip Morris & Co.*¹⁵¹ the Fifth and Eighth

¹⁴² *Green*, 391 F.2d at 106; see also *Green*, 325 F.2d at 681 (Cameron, J., dissenting).

¹⁴³ *Green*, 391 F.2d at 108-13 (Simpson, J., dissenting).

¹⁴⁴ *Id.* at 108-09 (Simpson, J., dissenting).

¹⁴⁵ *Id.* at 110 (Simpson, J., dissenting).

¹⁴⁶ *Green*, 325 F.2d at 676.

¹⁴⁷ *Green*, 391 F.2d at 113 (Simpson, J., dissenting).

¹⁴⁸ *Green*, 409 F.2d at 1166.

¹⁴⁹ *Green v. Am. Tobacco Co.*, 397 U.S. 911 (1970).

¹⁵⁰ 317 F.2d 19 (5th Cir. 1963). *Lartigue* was affirmed by the Fifth Circuit in 1970. *Hudson v. R.J. Reynolds Tobacco Co.*, 427 F.2d 541, 541 (5th Cir. 1970). In 1984, however, the Fifth Circuit repudiated *Lartigue* and held that, under Louisiana law, a manufacturer's knowledge regarding the dangerous qualities of its products is irrelevant in determining liability. *Halphen v. Johns-Manville Sales Corp.*, 737 F.2d 462, 466 (5th Cir. 1984), *panel opinion recalled per curiam*, 752 F.2d 125 (5th Cir. 1985), *question certified to Louisiana Supreme Court per curiam*, 755 F.2d 393 (5th Cir. 1985) (*en banc*), *question certified on rehearing*, 484 So. 2d 110 (La. 1986), *aff'd*, 788 F.2d 275 (5th Cir. 1986).

¹⁵¹ 328 F.2d 3 (8th Cir. 1964).

Circuits, respectively, upheld jury verdicts in favor of cigarette manufacturers. These courts held that a manufacturer is not an insurer against the unknowable.¹⁵² Both cases involved smokers' suits against tobacco companies to recover for lung cancer. The circuit courts recognized that a cigarette manufacturer impliedly warrants the wholesomeness of cigarettes, but concluded that the manufacturer is not an absolute insurer of this product.¹⁵³ The courts noted that the scope of a manufacturer's reasonable knowledge limits its warranty, and that, therefore, the manufacturer's implied warranty does not cover risks that are unknowable. Thus, according to the Fifth and Eighth Circuits, a cigarette manufacturer's implied warranty of wholesomeness does not guarantee that cigarettes do not contain carcinogenic substances unless the manufacturer had reason to know that such substances were present.¹⁵⁴

The first wave of cigarette litigation was not completely void of plaintiff-smoker victories. Yet these victories never resulted in an ill smoker obtaining recovery from a tobacco company. In *Pritchard v. Liggett & Myers Tobacco Co.*¹⁵⁵ smokers received their most favorable judicial rulings.¹⁵⁶ The *Pritchard* case was a suit brought in 1954 by Otto Pritchard against a cigarette manufacturer seeking recovery for his lung cancer allegedly contracted as a result of cigarette smoking.¹⁵⁷ Pritchard began smoking when he was fifteen years old, and smoked at least a carton of cigarettes per week for over thirty years.¹⁵⁸ In 1953, the plaintiff was diagnosed as having lung cancer, and doctors removed his right lung.¹⁵⁹

In 1954, Otto Pritchard brought suit against the manufacturer of his brand of cigarettes in the United States District Court for the Western District of Pennsylvania for marketing the product that caused his lung cancer.¹⁶⁰ The district court dismissed Pritchard's breach of warranty claim and directed a verdict for the defendant on Pritchard's negligence claim.¹⁶¹ The United States Court of Ap-

¹⁵² *Ross*, 328 F.2d at 12; *Lartigue*, 317 F.2d at 39.

¹⁵³ *Ross*, 328 F.2d at 13-14; *Lartigue*, 317 F.2d at 39.

¹⁵⁴ *Ross*, 328 F.2d at 13-14; *Lartigue*, 317 F.2d at 39.

¹⁵⁵ 134 F. Supp. 829 (W.D. Pa. 1955), *rev'd and remanded*, 295 F.2d 292 (3d Cir. 1961), *rev'd and remanded*, 350 F.2d 475 (3d Cir. 1965) *opinion amended per curiam*, 370 F.2d 95 (3d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967).

¹⁵⁶ *Garner*, *supra* note 6, at 1427; *McElvaine*, *supra* note 6, at 170.

¹⁵⁷ *Pritchard*, 295 F.2d at 294.

¹⁵⁸ *Pritchard*, 350 F.2d at 482.

¹⁵⁹ *Pritchard*, 295 F.2d at 294.

¹⁶⁰ *Pritchard*, 134 F. Supp. at 830.

¹⁶¹ *Pritchard*, 295 F.2d at 292-93.

peals for the Third Circuit reversed the trial court's judgment on both counts and remanded the case for a new trial.

In reversing the trial court's dismissal of the warranty claim, the Third Circuit noted that a seller's warranty of merchantability is a warranty "that the goods are reasonably fit for the general purposes for which they are sold."¹⁶² Commentators have hypothesized that Pritchard would have recovered under a breach of implied warranty theory had he chosen to pursue it.¹⁶³ Instead, however, the plaintiff on remand brought his case under negligence and breach of express warranty theories.¹⁶⁴ The *Pritchard* jury returned a verdict for the defendant.¹⁶⁵ Although the jury found that smoking caused the plaintiff's lung cancer, it also found that the defendant had not been negligent and that the plaintiff had not relied on the defendant's express warranties. Additionally, the jury found that the plaintiff had assumed the risk of smoking cigarettes.

The plaintiff appealed once again, and this time the Third Circuit reversed the jury verdict and remanded the case for a new trial solely on the breach of express warranty claim.¹⁶⁶ The Third Circuit held that assumption of the risk is not a defense to a breach of warranty claim unless the defendant proves that the plaintiff reasonably should have known that cigarette smoking was dangerous.¹⁶⁷ The circuit court also held that the plaintiff's actual reliance is irrelevant in an express warranty claim under Pennsylvania law when the warranties are directed to the general public. Under Pennsylvania law, the court noted, an express warranty exists if a manufacturer makes affirmations regarding product quality to the public in order to induce purchases. Despite the court's dicta indicating "overwhelming evidence" in support of his claim,¹⁶⁸ the plaintiff voluntarily discontinued his suit.¹⁶⁹

In summary, the courts' failure to hold the tobacco industry "absolutely" liable for the harm caused by tobacco products dominated the "first wave" of tobacco litigation.¹⁷⁰ The courts steadfastly

¹⁶² *Id.* at 296.

¹⁶³ Garner, *supra* note 6, at 1427-28; McElvaine, *supra* note 6, at 170. Note that Pritchard established causation at trial. *Pritchard*, 350 F.2d at 482.

¹⁶⁴ Garner, *supra* note 6, at 1427; McElvaine, *supra* note 6, at 170. See generally, *Pritchard*, 350 F.2d at 482.

¹⁶⁵ *Pritchard*, 350 F.2d at 482.

¹⁶⁶ *Id.* at 487.

¹⁶⁷ *Id.* at 485.

¹⁶⁸ *Id.* at 486.

¹⁶⁹ Garner, *supra* note 6, at 1426, 1427 n.26.

¹⁷⁰ To summarize, there were ten reported cases during the "first wave" of tobacco

refused to impose strict liability on cigarette manufacturers absent a showing of culpability or the discovery of a foreign substance in the tobacco. The juries, for their part, failed to find the tobacco industry culpable, and refused to return verdicts for the plaintiff-smokers based on the evidence presented. Lastly, the courts absolutely refused to hold that cigarettes were unreasonably dangerous (i.e., unmerchantable) as a matter of law.

C. *The Second Wave of Tobacco Litigation*

The "second wave" of tobacco litigation is the term used to identify the new wave of lawsuits that smokers and their families have brought against the tobacco industry during the 1980s.¹⁷¹ The second wave of suits appeared as increasing scientific evidence was published that overwhelmingly established cigarette smoking as a major cause of illness and death in the United States. This conclusive scientific evidence meant that cigarette manufacturers could no longer dispute that cigarettes endangered a "substantial segment" of the American public. Thus, the first wave's two judicial limitations on a cigarette manufacturer's strict product liability were no longer valid.¹⁷²

litigation. Garner, *supra* note 6, at 1426. In addition to the five cases discussed in the text the remaining cases and their disposition were as follows: *Padovani v. Bruchausen*, 293 F.2d 546 (2d Cir. 1961); *Fine v. Phillip Morris, Inc.*, 239 F. Supp. 361 (S.D.N.Y. 1964); *Mitchell v. Am. Tobacco Co.*, 183 F. Supp. 406 (M.D. Pa. 1960). These cases were all voluntarily discontinued by the plaintiffs. See Garner, *supra* note 6, at 1426, n.26. *Cooper v. R.J. Reynolds Tobacco Co.*, 256 F.2d 464, 465 (1st Cir. 1958) (per curiam) (summary judgment affirmed because the plaintiff was unable to produce evidence of any of the advertisements which she claimed that the decedent relied on); *Albright v. R.J. Reynolds Tobacco Co.*, 350 F. Supp. 341, 343, 352-53 (W.D. Pa. 1972) (case dismissed because court held that the plaintiff had received a previous settlement as compensation for the injuries claimed in this suit).

¹⁷¹ Currently, there are more than 100 lawsuits pending involving tobacco product liability. Janson, *supra* note 6, at A1, col. 6.

¹⁷² The increased scientific knowledge on the health risks of smoking clearly shows that cigarette smoking poses a serious health threat to a substantial segment of the public. See *supra* notes 1-4 and accompanying text. The findings in these cases clearly invalidate the previous judicial limitations on the scope of a cigarette manufacturer's liability: *Hudson v. R.J. Reynolds Tobacco Co.*, 427 F.2d 541 (5th Cir. 1970) (scope of manufacturer's liability is determined by its reasonable knowledge and the foreseeability of the harm caused by its product); *Ross v. Phillip Morris & Co.*, 328 F.2d 3, 13-14 (8th Cir. 1964); *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19, 39 (5th Cir. 1963); *Green v. Am. Tobacco Co.*, 409 F.2d 1166 (5th Cir. 1969) (cigarette manufacturer is liable for breach of implied warranty only if it can be shown that smoking poses a threat to a substantial segment of the population).

1. Significant Events Preceding or Affecting the Second Wave Cigarette Litigation

Although plaintiff-smokers hoped to use this increased scientific knowledge to build on the limited success of the first wave of cigarette litigation, several developments combined to cast doubt on the viability of their continued efforts to obtain recovery from illness. First, in 1965, Congress enacted the Federal Cigarette Labeling and Advertising Act.¹⁷³ The federal act, which took effect on January 1, 1966, was a congressional response to the Surgeon General's 1964 report on cigarette smoking's serious health hazards.¹⁷⁴ The federal act mandated that cigarette manufacturers must place a specific warning on each cigarette package to alert the smoker to the health risks associated with cigarette smoking.¹⁷⁵ The declared congressional purpose for this federal enactment was to *adequately* inform the public of cigarette smoking's adverse health risks.¹⁷⁶ Second, also in 1965, the American Law Institute published section 402A of the Second Restatement of Torts outlining the parameters of a manufacturer's strict tort liability for product-related injuries. The Second Restatement expressly exempted a cigarette manufacturer from liability for smoking-related injuries that were caused by smoking unadulterated, i.e., wholesome, tobacco.¹⁷⁷ Additionally, the Second Restatement dictated that a product is unreasonably dangerous only if it is more dangerous than a reasonable consumer would expect. Third, the enormous publicity surrounding the 1964 Surgeon General's report, and other subsequent studies on smoking's adverse health effects, rendered cigarette smoking's harmful

¹⁷³ See *supra* note 14 and accompanying text; see also *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1149 (D.N.J. 1984).

¹⁷⁴ Ewell, *supra* note 16, at 878. The federal act was a congressional compromise to avoid a complete prohibition on the manufacture and sale of cigarettes. See *Cipollone*, 593 F. Supp. at 1147.

¹⁷⁵ See Ewell, *supra* note 16, at 879, n.83. Ewell notes that the 1965 Act provided that:

It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: "Caution: Cigarette Smoking May be Hazardous to Your Health." Such statement shall be located in a conspicuous place on every cigarette package and shall appear in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the package.

Id. (citing Pub. L. No. 89-92, § 4, 79 Stat. 283).

¹⁷⁶ 15 U.S.C. § 1331(1) (1982).

¹⁷⁷ RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965). See *supra* note 72 for the text of comment i.

characteristics common knowledge.¹⁷⁸ This combination of factors made it doubtful that a plaintiff could show that he or she was unaware of cigarette smoking's attendant health risks, or that cigarettes were more dangerous than a consumer would reasonably expect.

Nevertheless, the viability of cigarette litigation remained uncertain because other, equally pertinent, developments supported the imposition of strict tort liability on cigarette manufacturers for the harm attributable to cigarette smoking. First, and most importantly, increased scientific evidence indicated that cigarette smoking is addictive.¹⁷⁹ Second, a number of courts held, in product areas other than cigarettes, that a manufacturer's compliance with federal warning requirements does not automatically immunize the manufacturer from liability for failure to warn.¹⁸⁰ Third, courts had

¹⁷⁸ See Garner, *supra* note 6, at 1428-29; see also, *Roysdon v. R.J. Reynolds Tobacco Co.*, 623 F. Supp. 1189, 1191-92 (E.D. Tenn. 1985).

¹⁷⁹ See Garner, *supra* note 6, at 1430-34. Although Garner recognizes that the Surgeon General's 1979 report listed cigarette smoking as a "habituation" rather than a "dependency," i.e., an addiction, because smoking's withdrawal symptoms are not comparable to those produced by addictive substances, he also noted that numerous health organizations recognized tobacco as an addictive substance and some equated it with addictive drugs. *Id.* at 1432. Garner cited to the following reports and studies to support his tobacco addiction argument: COMMITTEE ON NOMENCLATURE AND STATISTICS OF THE AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 93-99 (3d ed. 1980); ROYAL COLLEGE OF PHYSICIANS REPORT 98, 107 (1977); U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, NATIONAL INST. OF DRUG ABUSE, *RESEARCH ON SMOKING BEHAVIOR* 214 (1977); WORLD HEALTH ORG., *YOUTH AND DRUGS*, REPORT NO. 516, 9 (1973); Dolin, *Smoking: Still a Burning Issue*, 18 AM. PHARMACY, issue 10, at 31 (1978); *Id.* at 1432, n.70.

Moreover, the increasing evidence on tobacco addiction has led to change this classification of cigarette smoking as an habituation. Edell, *supra* note 2, at 103. The Surgeon General now classifies cigarette smoking as physiologically addictive, as do the National Institute of Drug Abuse and the American Psychiatric Association. *Id.* Additionally, medical research has determined that nicotine, which is present in tobacco and cigarette smoke, is an addictive drug that causes the smoker's inability to quit smoking despite his or her awareness of its health risks. Pollin, *The Role of the Addictive Process as a Key Step in Causation of All Tobacco-Related Diseases*, 252 J. A.M.A. 2874, 2874 (1984). Dr. Pollin, who is the Director of the National Institute for Drug Abuse, describes cigarettes as a "powerfully addictive drug," more addictive than heroin or alcohol. Also, in 1979 the National Institute on Drug Abuse concluded that "cigarette smoking behavior should be considered a form of addiction, and tobacco in the form of cigarettes, an addicting substance." NATIONAL INSTITUTE ON DRUG ABUSE OF THE U.S. PUBLIC HEALTH SERVICE, *FINAL REPORT: TECHNICAL REVIEW ON SMOKING AS AN ADDICTION* 6 (1979). Such scientific findings have led a presidential panel to recommend that tobacco be classified as a drug and regulated by the Food and Drug Administration. AP, *Panel: Tobacco should be a drug regulated by the FDA*, Boston Globe, Feb. 9, 1989, at G1, col. 3.

¹⁸⁰ See *Palmer v. Liggett Group, Inc.*, 633 F. Supp. 1171, 1178 (D. Mass. 1986) (citing *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1539-43 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062 (1985); *MacDonald v. Ortho Pharmaceutical Corp.*, 394 Mass. 131, 140, 475 N.E.2d

begun to apply a risk/utility theory in product liability litigation, and had held manufacturers strictly liable for non-defective, injury-causing products when a product's inherent risks outweighed its social utility.¹⁸¹ In order to understand fully the interrelationship of these factors and their potential impact on cigarette litigation, it is necessary to examine each factor in depth.

The tobacco addiction argument was first proposed in 1980 by Professor Donald Garner¹⁸² as a way for smoker-plaintiffs, in cigarette litigation, to overcome the affirmative "assumption of the risk" defense.¹⁸³ As the United States Court of Appeals for the Third Circuit noted in *Pritchard v. Liggett & Myers Tobacco Co.*, the contributory negligence defense is not available in a product liability case.¹⁸⁴ The *Pritchard* court did hold, however, that a defendant manufacturer may utilize assumption of the risk in defending a product liability action.¹⁸⁵ The *Pritchard* court noted that a plaintiff who voluntarily exposes himself or herself to a known danger assumes the attendant risk, and thus may not recover for any injuries resulting from such exposure. The Second Restatement added the additional requirement of unreasonableness. According to the Second Restatement, courts should deny a consumer recovery for product-related injuries only if his or her continued use of a defective product was both voluntary and unreasonable.¹⁸⁶ Thus, Garner argued, tobacco addiction makes an assumption-of-the-risk defense impotent and establishes a *prima facie* product liability case for

65, 70 (1985); *Burch v. Amsterdam Corp.*, 366 A.2d 1079, 1086 (D.C. 1976); *Blasing v. P.R.L. Hardenbergh Co.*, 303 Minn. 41, 49, 226 N.W.2d 110, 115 (1975); *Stevens v. Parke, Davis & Co.*, 9 Cal. 3d 51, 56, 65, 507 P.2d 653, 661, 107 Cal. Rptr. 45, 53 (1973); *Maize v. Atlantic Refining Co.*, 352 Pa. 51, 56, 41 A.2d 850, 853 (1945)).

¹⁸¹ See *Halphen v. Johns-Manville*, 484 So. 2d 110, 113-14 (La. 1986). The *Halphen* court noted that a product may be judged unreasonably dangerous *per se* "solely on the basis of [its] intrinsic characteristics . . . irrespective of the manufacturer's intent, knowledge or conduct." *Id.* at 113. The *Halphen* court noted that a product is unreasonably dangerous *per se* if the product's inherent risks, whether foreseeable or not, outweighed its social utility. Such a product, the *Halphen* court noted, gives rise to the purest form of strict product liability.

¹⁸² McLeod, *supra* note 2, at 1071 n.310.

¹⁸³ See generally Garner, *supra* note 6.

¹⁸⁴ 350 F.2d 479, 485 (3d Cir. 1965); see also *Hughes v. Magic Chef, Inc.*, 288 N.W.2d 542, 544 (Iowa 1980).

¹⁸⁵ *Pritchard*, 350 F.2d at 485.

¹⁸⁶ RESTATEMENT (SECOND) OF TORTS § 402A comment n. (1965) states in pertinent part: "[i]f the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery. *Id.* (emphasis in original). See also, *Hughes v. Magic Chef, Inc.*, 288 N.W.2d 542, 545 (Iowa 1980).

failure to warn.¹⁸⁷ This result should occur, Garner argued, because failure to warn adequately of the danger of tobacco addiction exposes a smoker to the danger and renders his or her continued cigarette smoking both reasonable and involuntary.¹⁸⁸ Thus, failure to warn of addiction exposes a plaintiff-smoker to possible tobacco addiction and the serious health risks associated with continued and/or excessive smoking.

The tobacco addiction argument finds support, as Professor Garner noted, in the 1974 case of *Crocker v. Winthrop Laboratories, Division of Sterling Drug, Inc.*¹⁸⁹ In *Crocker*, Glenn Crocker became addicted to a new painkiller, "talwin," that had been previously thought to be non-addictive.¹⁹⁰ Mr. Crocker's talwin addiction eventually led him to obtain an injection of a narcotic, which, in turn, caused his death. In *Crocker* the Supreme Court of Texas held the manufacturer of talwin liable for Mr. Crocker's injuries resulting from his drug addiction and for his wrongful death, despite the fact that the court found talwin to be a "good and useful" drug with no adverse side effects for the great majority of users.¹⁹¹ Although the *Crocker* court imposed liability on the drug manufacturer because it found that the manufacturer had misrepresented talwin's addictiveness,¹⁹² the *Crocker* court noted, in dicta, that liability might also have been imposed because the drug manufacturer failed to

¹⁸⁷ Garner, *supra* note 6, at 1437-49.

¹⁸⁸ *Id.* at 1448-49. Garner hypothesizes that plaintiffs beginning to smoke cannot be found to be unreasonable because the danger of tobacco addiction is neither known or appreciated. *Id.* at 1449. A smoker's continued smoking cannot be found to be voluntary because of his or her addiction.

¹⁸⁹ 514 S.W.2d 429 (Tex. 1974).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 432. The Texas Court of Civil Appeals had reversed the trial court's judgment for the plaintiff because it determined that Crocker's addiction was an "abreaction." *Id.* at 431. The court defined abreaction as "an unusual reaction resulting from a person's susceptibility to the product in question; that is, such person's reaction is different in the presence of the drug in question from that in the usual person." *Id.* "An abreaction is one which could not have been reasonably foreseen in an appreciable class or number of potential users prior to the time Glenn E. Crocker became addicted or dependent on Talwin." *Id.*

¹⁹² *Id.* at 433. The *Crocker* court noted that, although the plaintiff had sought recovery for failure to warn of talwin's possible addictiveness, it was not upholding the trial court's judgment on this ground, because it was not prepared to hold the manufacturer of a beneficial drug liable for an inadequate warning based on these facts. Instead, the *Crocker* court imposed liability on the manufacturer because the court found that Winthrop Laboratories misrepresented that talwin was non-addictive. This finding allowed the *Crocker* court to impose liability on Winthrop Laboratories regardless of the state of medical knowledge and/or the rare susceptibility of the user.

warn adequately of talwin's possible addictive side-effect.¹⁹³ The *Crocker* court recognized that a manufacturer may expose itself to liability for failure to warn of a product's addictiveness even if its failure endangered only a few users.¹⁹⁴

Related to Garner's tobacco addiction argument is the fact that a number of American courts have held that a manufacturer's compliance with federal warning requirements does not automatically immunize the manufacturer from failure-to-warn claims.¹⁹⁵ In the 1984 case *Ferebee v. Chevron Chemical Co.* the United States Court of Appeals for the District of Columbia Circuit held that a herbicide manufacturer may be found liable for failing to warn adequately of a chemical herbicide's inherent danger, even though the manufacturer had affixed an EPA-approved warning label on its product that complied with federal statutory labeling requirements.¹⁹⁶ Federal warning requirements were traditionally regarded as establishing minimum levels of safe conduct, the *Ferebee* court noted.¹⁹⁷ The *Ferebee* court then recognized that mere compliance with federal labeling requirements did not preclude a jury finding that these labeling requirements were inadequate, and imposing liability on the responsible manufacturer for failure to warn. Thus, it follows, as commentators have surmised, that smoker-plaintiffs may challenge the adequacy of the congressionally mandated warnings on cigarette packages.¹⁹⁸

Such a judicial conclusion in the area of cigarette litigation would buoy an injured smoker-plaintiff's chances of recovering against a cigarette manufacturer for three reasons. First, the required warnings on cigarette packages and advertisements have never warned of the danger of tobacco addiction or death. In fact,

¹⁹³ *Id.* at 431-33.

¹⁹⁴ *Id.* at 432.

¹⁹⁵ See *supra* note 180 and accompanying text.

¹⁹⁶ 736 F.2d 1529, 1532, 1543 (D.C. Cir. 1984). In *Ferebee*, a United States Department of Agriculture employee's estate and surviving children brought a failure to warn claim against the manufacturer of a herbicide known as paraquat. *Id.* at 1531-32. The plaintiffs' complaint alleged that the decedent's long-term skin exposure to paraquat caused him to contract pulmonary fibrosis and die. The plaintiffs sought recovery against paraquat's manufacturer, Chevron, for failing to adequately warn that long-term skin exposure to paraquat could cause serious lung disease. After two trials, a jury returned a \$60,000 verdict in plaintiffs' favor.

¹⁹⁷ *Id.* at 1543.

¹⁹⁸ Garner, *supra* note 6, at 1453-54; Ewell, *supra* note 16, at 902-19; McLeod, *supra* note 2, at 1045-47.

the tobacco industry's powerful lobby has successfully opposed the inclusion of any warning requirement that mentions addiction or death.¹⁹⁹ Second, the congressionally mandated warnings have been vague and general.²⁰⁰ Congress, itself, has felt it necessary to revise its statutory warning requirement three times since 1966. Third, despite a congressional ban on television and radio cigarette advertising since 1971,²⁰¹ cigarettes remain the most heavily advertised product in America. It is estimated that, in 1986 alone, cigarette manufacturers will spend \$2.3 billion on promoting cigarette sales.²⁰²

According to the prevailing body of law regarding a manufacturer's potential liability for failure to warn, these three factors, either individually or in combination, might provide a smoker-plaintiff with a legal basis for recovery for his or her smoking-induced illnesses. As discussed previously, failure to warn of potential tobacco addiction may provide a basis of recovery for injured smokers. Additionally, smokers could challenge the adequacy of a cigarette manufacturer's congressionally mandated warnings as being too vague or general to apprise them adequately of cigarette smoking's inherent dangers. Lastly, a smoker-plaintiff might also contend that the cigarette manufacturer's overpromotion rendered its warnings ineffectual.²⁰³

A manufacturer has a duty to warn potential consumers or users whenever an inherent product risk would affect a reasonable

¹⁹⁹ Goldsmith, *Tobacco-Addiction-Death Link Shown But Labels Don't Tell It*, 255 J. A.M.A. 997, 997 (1986).

²⁰⁰ Commentators have speculated that the congressionally mandated warnings on cigarettes would not satisfy the adequate warning criteria as it has developed in other areas of product liability law. See Brody, *Recovery Against Tobacco Companies*, 21 Trial 48, 49-50 (Nov. 1985); McLeod, *supra* note 2, at 1064-67.

²⁰¹ 15 U.S.C. § 1335 (1982).

²⁰² *Advertising of Tobacco Products: Hearings Before the Subcommittee on Health and Environment of the House Committee on Energy and Commerce*, Serial No. 99-167, 99th Cong., 2d Sess. (1986) [hereinafter *Tobacco Advertising Hearings*], opening statement of Hon. Henry A. Waxman, Chairman, at subcommittee meeting on Friday, July 18, 1986. Mr. Waxman noted that in 1986 the cigarette industry will spend an estimated \$2.3 billion on advertising and promoting cigarette sales. *Id.* at 2.

²⁰³ See *Salmon v. Parke, Davis & Co.*, 520 F.2d 1359, 1362 (4th Cir. 1975) (overpromotion of a drug may erode its warning's effectiveness); *Stevens v. Parke, Davis & Co.*, 9 Cal. 3d 51, 66-67, 507 P.2d 653, 662-63, 107 Cal. Rptr. 45, 54-55 (1973) (drug manufacturer held liable for wrongful death because its promotion activities rendered the warning on its antibiotic ineffective); *Tinnerholm v. Parke, Davis & Co.*, 285 F. Supp. 432, 451 (S.D.N.Y. 1968) (drug manufacturer held liable because its advertising techniques led doctors to prescribe dangerous drugs).

consumer's decision whether to purchase or use the product in question.²⁰⁴ The attendant manufacturer's warning must be clear and understandable.²⁰⁵ Thus, the United States Court of Appeals for the First Circuit sustained a jury verdict imposing liability on an insecticide manufacturer in the 1965 case of *Hubbard-Hall Chemical Co. v. Silverman* for failing to use the traditional skull-and-crossbones symbol to indicate that its insecticide was poisonous.²⁰⁶ In *Hubbard-Hall* two Puerto Rican farm workers were killed after using the defendant manufacturer's insecticide, Parathion.²⁰⁷ One of the farm workers could read some English while the other could not read any. The First Circuit upheld the jury verdict, and imposed liability on the manufacturer for failure-to-warn despite the presence of an extensive, federally-approved warning on the insecticide container.²⁰⁸ The First Circuit reasoned that the manufacturer should have foreseen that farm laborers with limited reading abilities would use its insecticide and, therefore, should have added a skull and crossbones, or other comparable symbol, to its warning.²⁰⁹

In addition to being clear and understandable, a warning must also be prominent,²¹⁰ and sufficient in substance to adequately convey to the user or consumer the nature and extent of a product's inherent risks.²¹¹ The adequacy of a warning in a products liability

²⁰⁴ *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1089, (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974).

²⁰⁵ See e.g., *Hubbard-Hall Chem. Co. v. Silverman*, 340 F.2d 402, 405 (1st Cir. 1965); *Hayes v. Kay Chem. Co.*, 135 Ill. App. 3d 932, 935, 482 N.E.2d 611, 613 (1985); *Campos v. Firestone Tire & Rubber Co.*, 98 N.J. 198, 208, 485 A.2d 305, 305, 310 (1984).

²⁰⁶ *Hubbard-Hall*, 340 F.2d 402, 405 (1st Cir. 1965); see also *Campos*, 98 N.J. at 208, 485 A.2d at 310 (court determined that a jury may find a manufacturer liable for failing to use international or symbolic warning signals to indicate product danger).

²⁰⁷ *Hubbard-Hall*, 340 F.2d at 403-04.

²⁰⁸ *Id.* at 403, 405.

²⁰⁹ *Id.* at 405.

²¹⁰ See *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 82, 85 (4th Cir. 1962) (warning in small print on the back of furniture polish container was inadequate); *Maize v. Atlantic Refining Co.*, 352 Pa. 51, 55-56, 41 A.2d 850, 852 (1945) (instructions in small print on proper use of solvent were inadequate); see also *Michael v. Warner/Chilcott*, 91 N.M. 651, 655, 579 P.2d 183, 187 (N.M. Ct. App. 1978). The *Michael* court noted that the "physical aspects of the warning — conspicuousness, prominence, relative size of print, etc. — must be adequate to alert the reasonably prudent person." *Id.* (citing *First Nat. Bank, Albuquerque v. Nor-Am Agr. Prod., Inc.*, 88 N.M. 74, 83-84, 537 P.2d 682, 691 (N.M. Ct. App. 1975)).

²¹¹ See *Watson v. Uniden Corp. of Am.*, 775 F.2d 1514, 1516 (11th Cir. 1985); *MacDonald v. Ortho Pharmaceutical Corp.*, 394 Mass. 131, 140-41, 475 N.E.2d 65, 71 (1985); *Seley v. G.D. Searle Co.*, 67 Ohio St. 192, 198, 423 N.E.2d 831, 837 (1981); *Michael*, 91 N.M. at 655, 579 P.2d at 187.

case generally presents a question of fact for the jury.²¹² The jury standard for determining a warning's adequacy is based on whether the warning in question would "reasonably" communicate to an alert, reasonably prudent person the extent and/or seriousness of the potential danger inherent in the product's intended or foreseeable use.²¹³ Thus, to be judged legally adequate, a warning must fully and effectively communicate a product's inherent risks in a manner that would alert a reasonably prudent user to the existence, scope, and gravity of a product's inherent danger.²¹⁴

Manufacturers of non-prescription drugs have been held to a legal duty to warn consumers of *all specific* known product risks.²¹⁵ In the 1978 case of *Michael v. Warner/Chilcott* the New Mexico Court of Appeals held that the manufacturer of a non-prescription sinus medicine may be found liable because the warning accompanying its sinus medicine was ineffective and vague.²¹⁶ The plaintiff in *Michael* had taken four of the defendant manufacturer's sinus tablets per day for approximately three years when he was diagnosed as suffering from kidney failure. The drug manufacturer's warning had stated that "this medication *may* damage the kidneys when used in large amounts or for a long period of time."²¹⁷ The *Michael* court determined that this warning was inadequate because it did not indicate that the medication is a dangerous drug that *will* damage the kidneys.²¹⁸ Furthermore, the *Michael* court found that the term "large amounts" contained in the warning was vague and indefinite. In this same regard, the Superior Court of New Jersey, Appellate Division, held in the 1979 case of *Torsiello v. Whitehall Laboratories* that the manufacturer of Anacin may be found liable for failure to warn.²¹⁹ The plaintiff in *Torsiello* suffered gastrointestinal bleeding as a result of his taking eight Anacin tablets per day for a fourteen-month period. In overruling the trial court's involuntary dismissal of the case, the superior court held that an aspirin manufacturer

²¹² *Watson*, 775 F.2d at 1516.

²¹³ See *Ellis v. Int'l Playtex, Inc.*, 745 F.2d 292, 306 (4th Cir. 1984); *MacDonald*, 394 Mass. at 140-41, 475 N.E.2d at 71; *Michael*, 91 N.M. at 655, 579 P.2d at 187; *Torsiello v. Whitehall Laboratories*, 165 N.J. Super. 311, 321, 398 A.2d 132, 137 (1979).

²¹⁴ *Torsiello*, 165 N.J. Super. at 324, 398 A.2d at 139 (citing *Michael v. Warner/Chilcott* 91 N.M. 651, 579 P.2d 183 (N.M. Ct. App. 1978)).

²¹⁵ *Michael*, 91 N.M. at 655, 579 P.2d at 185, 187.

²¹⁶ *Id.* at 652, 579 P.2d at 184.

²¹⁷ *Id.* at 655, 579 P.2d at 187.

²¹⁸ *Id.*

²¹⁹ 165 N.J. Super. 311, 318, 328, 398 A.2d 132, 135, 141 (1979).

had a duty to warn of aspirin's specific risks²²⁰ concerning gastrointestinal bleeding if the manufacturer knew, or reasonably should have known, that regular, prolonged use of aspirin would cause gastrointestinal bleeding in an appreciable percentage of users.²²¹ The *Torsiello* court noted, however, that, consistent with section 402A of the Second Restatement, the manufacturer had a duty to warn of specific product risks only if the consuming public was generally unaware of the product's inherent danger.²²² In this regard, the *Torsiello* court recognized that the jury could have reasonably found that an aspirin manufacturer's advertising and mass marketing strategies were designed to assure consumers that aspirin is harmless and inherently safe.²²³

Perhaps, though, the high water mark of a warning's required specificity was recognized in 1985 in *MacDonald v. Ortho Pharmaceutical Corp.*²²⁴ In *MacDonald*, a jury returned a verdict for the plaintiff, Carole D. MacDonald, a woman in her late twenties who suffered a stroke as a result of her taking prescription birth control pills.²²⁵ The Supreme Judicial Court of Massachusetts, overturning the trial court's judgment notwithstanding the verdict for the defendant, held that the jury might reasonably have concluded that the warning accompanying Ortho's birth control pills was inadequate.²²⁶ The

²²⁰ *Id.* at 321, 398 A.2d at 137. The *Torsiello* court noted that the specific product risk in question was gastrointestinal damage due to prolonged use. The manufacturer's warning on the Anacin package read as follows:

CAUTION — If pain persists for more than 10 days or redness is present, or in arthritic or rheumatic conditions affecting children under 12 years of age, consult a physician immediately.

Id. at 316, 398 A.2d at 134-35.

²²¹ *Id.* at 321, 398 A.2d at 137.

²²² *Torsiello*, 165 N.J. Super. at 321, 398 A.2d at 137.

²²³ *Torsiello*, 165 N.J. Super. at 322, 398 A.2d at 138; see also *Leichtamer v. Am. Motors Corp.*, 67 Ohio St. 2d 456, 459-60, 469, 424 N.E.2d 572-73, 578 (1981). In *Leichtamer* plaintiffs were injured or killed when they drove a Jeep model CJ-7 off the top of a hill ridge, traveling approximately 50 feet through the air before landing upside down at the bottom of a hill 23.5 feet below. In the plaintiffs' ensuing products liability suit against the jeep's manufacturer, the plaintiffs alleged that American Motors' multi-million dollar advertising campaign led them to believe that such off-road product use was safe and induced their behavior. In affirming the jury verdict for plaintiffs, the Supreme Court of Ohio held that a manufacturer's commercial advertising affects a consumer's reasonable product safety expectations, therefore, the manufacturer's marketing campaign is relevant evidence in determining what an ordinary consumer's reasonable expectations are regarding a product's safety and its intended use. *Id.* at 469, 424 N.E.2d at 578.

²²⁴ 394 Mass. 131, 475 N.E.2d 65, cert. denied, 474 U.S. 920 (1985).

²²⁵ *MacDonald*, 394 Mass. at 132, 134, 475 N.E.2d at 66-67. Ms. MacDonald had been using the birth control pills for approximately three years under the supervision of her gynecologist when her stroke occurred.

²²⁶ *Id.* at 141-42, 475 N.E.2d at 71-72.

MacDonald court concluded that, although Ortho had warned that its birth control pills could cause "abnormal blood clotting which can be fatal," and further warned of the incremental likelihood of hospitalization or death due to blood clotting in "vital organs, such as the brain," a jury could reasonably find that Ortho's failure to specifically warn of a "stroke"²²⁷ may have unduly minimized the warning's impact or lessened its effectiveness in the ordinary consumer.²²⁸ Thus, the *MacDonald* court determined that a jury could impose liability on a drug manufacturer for failure to warn even though the manufacturer had detailed and highlighted the risk of death inherent in its product's use.²²⁹

Additionally, drug manufacturers have been found liable when their marketing practices rendered their warnings ineffective. For example, in 1973 in *Stevens v. Parke, Davis & Co.* a prescription drug manufacturer was found liable for overpromoting a broad-spectrum antibiotic known as Chloromycetin.²³⁰ In *Stevens*, six prescribed dosages of Chloromycetin caused a thirty-eight year old mother of two to develop aplastic anemia which resulted in her death approximately one year later. The Supreme Court of California, in affirming the jury verdict,²³¹ that the manufacturer's advertisements and "give-aways" extolled the effectiveness of the drug without mentioning its dangers, and, most importantly, that the manufacturer's salespersons promoted Chloromycetin's use during personal visits with physicians without reminding them of the drug's possible adverse side-effects.²³² Thus, the *Stevens* court held that the jury was justified in finding that the manufacturer's promotion activities had overcome the effectiveness of its FDA-approved warnings.²³³ And in 1975 in the case of *Salmon v. Parke, Davis & Co.*, another overpromotion case involving Chloromycetin, the United State Court of Appeals for the Fourth Circuit noted that not only may overpromotion erode the effectiveness of an otherwise ade-

²²⁷ A stroke is an occlusion (blockage) of a cerebral artery by a blood clot.

²²⁸ *MacDonald*, 394 Mass. at 141, 475 N.E.2d at 71-72.

²²⁹ *Id.* at 141, 475 N.E.2d at 72. The *MacDonald* court noted that a jury may conclude that there are fates worse than death. *Id.*

²³⁰ 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973).

²³¹ *Id.* at 56, 73, 507 P.2d at 655, 667, 107 Cal. Rptr. at 47, 59.

²³² *Id.* at 67, 507 P.2d at 662, 107 Cal. Rptr. at 54. The *Stevens* court noted that the highly effective promotional activity utilizing personal salesperson visits with prescribing physicians was not employed to disseminate information on the drug's serious adverse side-effects, even though such warnings would have entailed no additional burden.

²³³ *Id.* at 66, 507 P.2d at 662, 107 Cal. Rptr. at 54.

quate warning, but, in addition, a jury may infer that a warning is inadequate if a manufacturer knows that its present warning is widely disregarded and fails to change it.²³⁴ Thus, given the various failure-to-warn product liability theories, and the plausible analogy of cigarettes to over-the-counter non-prescription drugs, smoker-plaintiffs finally appeared ready to mount a successful product liability suit against the cigarette industry.

Independent of the legal trends and precedents concerning a manufacturer's duty to warn, another development in product liability law also fueled smoker-plaintiffs' optimism regarding the viability of future cigarette litigation. In the area of product liability design-defect cases, plaintiffs were allowed to maintain a design-defect claim without proving that an alternative, safer design existed.²³⁵ To maintain such a design-defect claim a plaintiff had to establish that a product's inherent risks outweigh its social utility. Although this theory of product liability has not gained great acceptance,²³⁶ in jurisdictions that do apply it, a smoker-plaintiff would, conceivably, only need to prove that cigarette smoking's risks outweigh its utility. Furthermore, under such a standard, a cigarette manufacturer could not claim that its compliance with industry design standards immunized it from design-defect liability,²³⁷ nor

²³⁴ *Salmon v. Parke, Davis & Co.*, 520 F.2d 1359, 1362 (4th Cir. 1975). The majority of overpromotion cases involved a drug manufacturer's marketing activities involving the promotion of prescription drugs directly to the prescribing physician. As a general proposition, where prescription drugs are concerned, the drug manufacturer's duty to warn is limited to warning the prescribing physician of a drug's potential danger. *Torsiello v. Whitehall Laboratories*, 165 N.J. Super. 311, 323, 398 A.2d 132, 138 (1979). Thus, in the area of prescription drugs, a manufacturer generally has no duty to warn the ultimate drug user. The courts have made an exception, however, in the area of prescription birth control pills because, unlike prescription drug choice and use, the consumer is actively involved in the decision whether to use "the pill." See *MacDonald v. Ortho Pharmaceutical Corp.*, 394 Mass. 131, 136-37, 475 N.E.2d 65, 69 (1985).

²³⁵ *O'Brien v. Muskin Corp.*, 94 N.J. 169, 184-85, 463 A.2d 298, 306 (1983).

²³⁶ See, e.g., *Phillips v. Hardware Wholesalers, Inc.*, 762 F.2d 46 (6th Cir. 1985); *Raschke v. Carrier Corp.*, 146 Ariz. 9, 703 P.2d 556 (1985); *Troja v. Black & Decker Manufacturing Co.*, 62 Md. App. 101, 488 A.2d 516 (1985); *Owens v. Allis-Chalmers Corp.*, 414 Mich. 413, 326 N.W.2d 372 (1982); *Wilson v. Piper Aircraft Corp.*, 282 Or. 61, 577 P.2d 1322 (1978). This theory of product liability has been criticized. See, e.g., Twerski, *A Moderate and Restrained Federal Products Liability Bill: Targeting the Crisis Areas for Resolution*, 18 U. MICH. J.L. REF. 575, 586-89 (1985); Note, *Strict Products Liability and the Risk-Utility Test for Design Defect: An Economic Analysis*, 84 COLUM. L. REV. 2045 (1984).

²³⁷ *O'Brien*, 94 N.J. at 183-84, 463 A.2d at 305. The *O'Brien* court noted that state-of-the-art product design or compliance with prevailing industry custom is relevant to, but not dispositive of, risk/utility analysis. Compliance with either is not an absolute defense to a

could a cigarette manufacturer escape liability because a smoker-plaintiff was unable to prove that a safer cigarette design existed.

2. The Second Wave of Cigarette Litigation

The smoker-plaintiffs' anticipated success during the current "second wave" of cigarette litigation, however, has been largely unrealized. The first second-wave lawsuit to get to a jury was the 1985 unreported case of *Galbraith v. R.J. Reynolds Tobacco Co.*²³⁸ In *Galbraith*, the plaintiff, a sixty-nine-year-old smoker named John Galbraith, brought suit in 1982 against R.J. Reynolds alleging that decades of smoking the defendant's cigarettes had caused his lung cancer.²³⁹ The plaintiff's attorney in *Galbraith*, Mr. Melvin Belli,²⁴⁰ asserted that cigarettes were addicting and that R.J. Reynolds was liable for failing to warn smokers of this inherent product risk.²⁴¹ The *Galbraith* jury did not accept the plaintiff's tobacco addiction argument, and, after deliberating for one day, returned a 9-3 verdict for the defendant.²⁴²

The fatal flaw in the *Galbraith* case may have been the plaintiff's inability to establish causation.²⁴³ Mr. Galbraith's attending physician

product liability action; "[t]hat is, a product may embody the state-of-the-art and still fail to satisfy the risk-utility equation. *Id.*

²³⁸ See Kepko, *supra* note 5, at 290; Gidmark, *supra* note 8, at 18. The *Galbraith* case was the first tobacco products liability case to go to a jury in more than fifteen years.

²³⁹ See Gidmark, *supra* note 8, at 18. John Galbraith died later in 1982; his family continued his lawsuit. John Galbraith had smoked from two to three packs of cigarettes per day for most of his life. Kepko, *supra* note 5, at 290 n.219.

²⁴⁰ Melvin Belli is regarded as the "King of Torts." See, *Symposium, Trying the Tobacco Case*, *supra* note 7, at 9. Mr. Belli was co-counsel in the first wave cigarette litigation case of *Lartigue v. R.J. Reynolds Tobacco Co.*

²⁴¹ Kepko, *supra* note 5, at 290 (citing Bean, *R.J. Reynolds Held Not Liable in Man's Death*, *Wall St. J.*, Dec. 24, 1985, at 2, col. 2).

²⁴² See McElvaine, *supra* note 6, at 171; Kepko, *supra* note 5, at 290; Gidmark, *supra* note 8, at 18-19. Gidmark quotes a New York Times article reporting that several jurors rejected the tobacco addiction argument and felt that John Galbraith had made a free choice to continue smoking despite warnings from his doctor and others. *Id.* at 19. In the more tragic case of *Marsee v. U.S. Tobacco* a jury refused to impose liability on the manufacturer of Copenhagen snuff, a tobacco product. *Id.* at 18. In *Marsee*, a nineteen year old boy, Sean Marsee, died from tongue cancer allegedly contracted as a result of his seven year snuff habit. The Oklahoma jury in *Marsee* returned a 6-0 verdict for the defendant despite the obvious emotional appeal of the case, and the fact that smokeless tobacco did not bear any warning concerning its health risks. The *Marsee* jury was unconvinced that smokeless tobacco had caused young Sean Marsee's cancer or that tobacco usage had any significant harmful effects. *Id.* at 27-28. One *Marsee* juror even mistakenly believed that the Surgeon General had retracted his statement that smokeless tobacco causes cancer. *Id.* at 27.

²⁴³ See McElvaine, *supra* note 6, at 170-71; Kepko, *supra* note 5, at 290; Gidmark, *supra* note 8, at 19. The jury forewoman in *Galbraith*, Ms. Stacie Proft, stated that she believed that

testified that Mr. Galbraith did not die of lung cancer,²⁴⁴ and his death certificate, in fact, listed arteriosclerotic heart disease and pulmonary fibrosis as the causes of Mr. Galbraith's death.²⁴⁵ The plaintiff's age, medical history, and his counsel's failure to provide for an autopsy at the time of his death combined to significantly weaken his case.²⁴⁶ Despite its verdict, members of the jury indicated that they might have found for the plaintiff if the evidence had been stronger.²⁴⁷

Although smoker-plaintiffs received another setback in *Galbraith*, the jury's comments, and apparent attitude toward cigarette smoking, encouraged plaintiffs' attorneys to continue their cigarette litigation efforts.²⁴⁸ In fact, well-known tort lawyer J.D. Lee predicted that the first verdict against a tobacco company might come as early as 1987.²⁴⁹ Although Mr. Lee's prediction was wrong, he did not err by much. On June 13, 1988 a New Jersey jury returned the first verdict against a tobacco company in the history of cigarette litigation.²⁵⁰ Thus, *Cipollone v. Liggett Group, Inc.* became the first suit in cigarette litigation history in which a jury awarded a plaintiff

the majority was not convinced that Mr. Galbraith died of smoking-related causes or that he was addicted to cigarettes. Gidmark, *supra* note 8, at 19.

²⁴⁴ *Id.* at 18.

²⁴⁵ McElvaine, *supra* note 6, at 171-72.

²⁴⁶ See McElvaine, *supra* note 6, at 171-72; Gidmark, *supra* note 8, at 19. One minority juror stated that she believed that the majority "really felt that this was a difficult case because the man was so ill." Gidmark, *supra* note 8, at 19. The medical evidence in *Galbraith* was further complicated because the plaintiff had a long history of health problems unrelated to smoking. Kepko, *supra* note 5, at 290 n.222. Additionally, experts for the Tobacco Company testified that Mr. Galbraith actually died from heart failure, totally unrelated to his cigarette smoking. TOBACCO INDUSTRY LITIGATION REP., Mar. 27, 1986, at 514-15. The plaintiff had contended that he was dying from squamous carcinoma of the lung. Gidmark, *supra* note 8, at 18. Mr. Belli had specifically sought out a smoker who was afflicted with this type of lung cancer because it is more conclusively linked to cigarette smoking than are other types of cancer. See Symposium, *Trying the Tobacco Case*, *supra* note 7, at 11. The conflicting evidence concerning Mr. Galbraith's death combined with the failure of plaintiff's counsel to have an autopsy performed greatly weakened the *Galbraith* case. See McElvaine, *supra* note 6, at 172.

²⁴⁷ Gidmark, *supra* note 8, at 28. Gidmark indicates that in addition to the three minority jurors who found for the plaintiff perhaps four or five majority jurors might have voted for the plaintiff if the evidence had been stronger. In addition, Stacie Proft, the *Galbraith* jury forewoman, stated, "We want to stress that we don't like smoking, and we feel smoking is harmful, and the only reason we didn't side with the plaintiff was that the evidence wasn't there." McElvaine, *supra* note 6, at 172 n.38 (citing PROD. SAFETY & LIAB. REP. (BNA), Jan. 10, 1986, at 25, col. 2).

²⁴⁸ See generally Gidmark, *supra* note 8, at 28; Symposium, *Trying the Tobacco Case*, *supra* note 7, at 11, 13.

²⁴⁹ Symposium, *Trying the Tobacco Case*, *supra* note 7, at 13. J.D. Lee was the plaintiff's attorney in the cigarette litigation case of *Roysdon v. R.J. Reynolds Tobacco Co.*

²⁵⁰ See Janson, *supra* note 4, at A1, col. 6.

damages for an injury caused by the consumption of the harmful but inherent substances present in cigarette smoke.

The *Cipollone* case began on August 1, 1983 when the plaintiff, Rose Cipollone, filed a complaint in the United States District Court for the District of New Jersey²⁵¹ alleging that smoking the defendant's cigarettes had caused her to develop lung cancer.²⁵² Mrs. Cipollone began smoking in 1942 at the age of sixteen, and, despite her various attempts to quit, continued smoking from one pack to one-and-a-half packs of cigarettes daily until 1983 when her lung cancer was diagnosed as terminal.²⁵³ In October 1984, Mrs. Cipollone died from lung cancer. Her husband, Antonio, continued her product liability suit, both on his own behalf and as the executor of his wife's estate.²⁵⁴ Mrs. Cipollone's original complaint sought recovery from three cigarette manufacturers for causing her alleged smoking-induced illness.²⁵⁵ Her complaint sounded in strict liability, negligence, breach of warranty, and intentional tort.²⁵⁶

After approximately five years of litigation, during which time Mrs. Cipollone's original cause of action was severely limited, the jury awarded Antonio Cipollone \$400,000 for his loss of consortium, but refused to award any damages to Rose Cipollone's estate for her smoking-induced illness and death.²⁵⁷ Responding to specific interrogatories, the jury found that prior to 1966 the defendant breached express warranties regarding its product's safety, and that during this same period the defendant manufacturer had also failed to warn smokers adequately of cigarette smoking's inherent health

²⁵¹ *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 183 (3d Cir. 1986). The original plaintiffs in the case were Rose Cipollone, a smoker dying from lung cancer, and her husband Antonio Cipollone. They brought a product liability suit against the three cigarette manufacturers who made and marketed the various brands of cigarettes that Mrs. Cipollone had smoked during her lifetime. *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1149, n.1 (D.N.J. 1984).

²⁵² *Id.* at 1149. She alleged that her 41-year-long smoking habit proximately caused her lung cancer.

²⁵³ *Cipollone*, 683 F. Supp. at 1489-90.

²⁵⁴ *Id.* at 1490; see also *Cipollone*, 649 F. Supp. at 668 (D.N.J. 1986).

²⁵⁵ Mrs. Cipollone's complaint named three cigarette manufacturers (Phillip Morris, Lorillard, and Liggett) as defendants. See *Cipollone*, 593 F. Supp. at 1149. She smoked cigarettes manufactured by Liggett from 1942 until 1968, switched to brands manufactured by Phillip Morris from 1968 to 1974, and, in 1974, she began smoking True cigarettes manufactured by Lorillard based on the recommendation of her family doctor. *Cipollone*, 683 F. Supp. at 1489-90.

²⁵⁶ *Cipollone*, 593 F. Supp. at 1149.

²⁵⁷ *Cipollone v. Liggett Group, Inc.*, 693 F. Supp. 208, 210 (D.N.J. 1988).

risks.²⁵⁸ The jury also determined that each cause of action proximately caused Mrs. Cipollone's lung cancer and death.²⁵⁹ The jury further concluded, however, that Mrs. Cipollone suffered zero damages and was 80 percent at fault for causing her own illness and death.²⁶⁰ Lastly, the jury found that the defendant was not liable for fraud or civil conspiracy.²⁶¹ The *Cipollone* district court entered a judgment pursuant to the jury verdict, and affirmed this judgment in response to motions from both sides.²⁶²

3. The Preemption Defense

Despite the fact that *Cipollone v. Liggett Group, Inc.* became the first tobacco product liability case to impose liability on a cigarette manufacturer for causing a smoking-related illness, the case may well be recognized as a significant plaintiff defeat, rather than a breakthrough victory,²⁶³ for a variety of reasons.²⁶⁴ The most significant smoker-plaintiff setback in *Cipollone* was, undoubtedly, the cigarette industry's successful implementation of the preemption defense.²⁶⁵ Since its introduction to cigarette litigation in 1984 the preemption defense has become the cornerstone of the tobacco industry's defense against tobacco product liability claims.²⁶⁶

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.* at 210, 222-23.

²⁶³ See Eichenwald, *supra* note 10, at B4, cols. 1, 3-5; Janson, *supra* note 4, at A1, col. 6.

²⁶⁴ See generally Eichenwald, *supra* note 10, at B4, col. 1-6; Janson, *supra* note 4, at A1, col. 6, B4, cols. 1-5. A lawyer for Phillip Morris, one of the defendants in *Cipollone*, stated that "[t]he plaintiff bar is not likely to regard this verdict as encouraging because they got only 10 to 15 percent of their costs in prosecuting their suit. It's a breakthrough only in the sense that the industry had never lost a claim in a damage suit." Janson, *supra* note 4, at B4, col. 3.

²⁶⁵ Symposium, *Trying the Tobacco Case*, *supra* note 7, at 12. Plaintiff lawyer J.D. Lee noted that the Third Circuit ruling favoring the preemption defense was the most important development in recent cigarette litigation.

²⁶⁶ See Ewell, *supra* note 16, at 886. *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 187 (3d Cir. 1986). The district court noted that the "Supremacy Clause" of the United States Constitution, U.S. CONST., art. VI, cl. 2, dictates that a congressional act or treaty is the supreme law of the land, and therefore, the district court concluded that state law must yield to it. *Cipollone*, 593 F. Supp. at 1150. Thus, the district court concluded that the "Supremacy Clause" vests Congress with the power to either expressly or impliedly preempt state law in any given area.

For an in depth discussion and analysis of the preemption doctrine especially as it relates to cigarette litigation, see Ewell, *supra* note 16. But see Thornton, *The Liability of Cigarette*

The preemption defense was first raised by the defendant-cigarette manufacturers in *Cipollone* in response to Mrs. Cipollone's original complaint.²⁶⁷ The preemption defense, as asserted in *Cipollone*, maintained that the Federal Cigarette Labeling and Advertising Act (the federal act) preempted all of Mrs. Cipollone's tobacco product liability claims. On September 20, 1984, in response to the defendant's motion for a judgment on the pleadings and to Mrs. Cipollone's cross-motion to strike the affirmative preemption defense, District Judge H. Lee Sarokin of the United States District Court for the District of New Jersey issued the first published opinion on the preemptive effect of the federal act on state common-law tort claims.²⁶⁸ After an extensive analysis of the federal act and its legislative history, Judge Sarokin held that the federal act did not expressly or impliedly preempt the plaintiff's state tort claims,²⁶⁹ and, as such, granted the plaintiff's motion to strike the preemption defense. So began the preemption controversy.

In December 1985, District Judge Hull of the United States District Court for the Eastern District of Tennessee reached a contrary conclusion in *Roysdon v. R.J. Reynolds Tobacco Co.* In *Roysdon*, Judge Hull held that the federal act preempted a state common-law tort claim for failure to warn.²⁷⁰ Although Judge Hull agreed

Manufacturers for Lung Cancer: An Analysis of the Federal Cigarette Labeling and Advertising Act and Preemption of Strict Liability in Tort Against Cigarette Manufacturers, 76 Ky. L.J. 569 (1987-88).

In *Cipollone v. Liggett Group Inc.*, the Third Circuit succinctly defined implied preemption as follows:

Without . . . express language, a court may find intent to preempt in two general ways. . . . First, a court may determine that Congress intended "to occupy a field" in a given area "because '[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose'" Second, in those instances where Congress has not wholly superceded state regulation in a specific area, state law is preempted "to the extent that it actually conflicts with federal law" The [Supreme] Court has stated that such conflict arises when "compliance with both federal and state regulations is a physical impossibility," . . . or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Cipollone, 789 F.2d at 185.

²⁶⁷ *Cipollone*, 593 F. Supp. at 1149.

²⁶⁸ See Ewell, *supra* note 16, at 886; *Cipollone*, 593 F. Supp. at 1146.

²⁶⁹ *Cipollone*, 593 F. Supp. at 1171. The doctrine of preemption allows Congress to supersede state common law as well as state statutes and regulations. *Id.* at 1151.

²⁷⁰ 623 F. Supp. 1189, 1190-91 (E.D. Tenn. 1985).

that the federal act did not expressly preempt state tort claims, he determined that permitting a damage award based on a claim that the warning on a cigarette package was inadequate would directly conflict with the federal act's legislative intent.²⁷¹ According to Judge Hull, exposing a cigarette manufacturer to a possible damage award for failure to warn is an indirect method for requiring a more stringent warning label on a cigarette package, and, therefore, conflicts with the federal act's congressional purpose.²⁷²

In 1986, the United States Court of Appeals for the Third Circuit adopted Judge Hull's rationale when it reversed the district court's preemption holding in *Cipollone*.²⁷³ The Third Circuit agreed that Congress had not expressly preempted state tort claims when it enacted the federal act.²⁷⁴ The Third Circuit did hold in *Cipollone*, however, that the doctrine of implied preemption partially preempted the plaintiffs' product liability claims.²⁷⁵

The Third Circuit began its implied preemption analysis by attempting to ascertain whether Congress intended to preempt state tort claims under either of the two recognized principles of implied preemption.²⁷⁶ First, the court determined that, in enacting the federal act, Congress intended to "occupy the field" with respect to cigarette labeling and advertising regulations.²⁷⁷ Nevertheless, the Third Circuit noted that the federal interest in this field was not so pervasive that it preempted state tort claims challenging the adequacy of the federal act's prescribed warnings.²⁷⁸ Thus, the Third Circuit concluded that the scope of the field that Congress intended to occupy in enacting the federal act was limited and, as such, the federal act does not preempt state common-law tort claims.²⁷⁹

The second recognized implied preemption principle required that the Third Circuit examine the extent to which the Cipollones'

²⁷¹ *Id.* at 1191.

²⁷² *Id.*

²⁷³ *Cipollone*, 789 F.2d at 187.

²⁷⁴ *Id.* at 185.

²⁷⁵ *Id.* at 187.

²⁷⁶ *Id.* at 186.

²⁷⁷ *Id.* The Third Circuit agreed with the district court's determination that "Congress . . . intended to occupy a field" and "indicated this intent as clearly as it knew how." *Id.* (quoting *Cipollone*, 593 F. Supp. at 1164) (emphasis in original).

²⁷⁸ *Id.*

²⁷⁹ *Id.* The court could not "say that the scheme created by the Act is 'so pervasive' or the federal interest involved 'so dominant'" that the Act necessarily preempts the Cipollones' state tort claims. *Id.* Nor was the court convinced "that the object of the Act and the character of obligations imposed by it revealed] a purpose to exert *exclusive* control over every aspect of the relationship between cigarettes and health." *Id.* (emphasis added).

common-law tort claims actually conflicted with the federal act.²⁸⁰ State law actually conflicts with a federal statute, the court noted, when the state law operates to frustrate the federal law's purposes.²⁸¹ The Third Circuit then determined that the federal act's policy provision, section 1331,²⁸² read in conjunction with its preemption provision, section 1334,²⁸³ clearly revealed that Congress intended to strike a careful balance between the need to warn the public of the health hazards of smoking and the need to protect the national economy.²⁸⁴ According to the Third Circuit, exposing the tobacco industry to tort liability for complying with the federal act²⁸⁵ would upset the delicate balance Congress intended to create,

²⁸⁰ *Id.* at 187.

²⁸¹ *Id.* The Third Circuit had previously stated that state law "actually conflicts" with federal law when compliance with both state and federal law is physically impossible or when state law acts to frustrate the congressional purpose of a federal statute. Although the Third Circuit did not expressly consider the issue other courts have held that compliance with state tort law and the Labeling Act is not "physically impossible." *Cipollone*, 593 F. Supp. at 1167; *Palmer*, 633 F. Supp. at 1177.

²⁸² 15 U.S.C. § 1331 (1982) (the policy provision of the Federal Cigarette Labeling and Advertising Act). Section 1331 reads as follows:

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

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

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

Id.

²⁸³ 15 U.S.C. § 1334 (1982) (the preemption provision of the Federal Cigarette Labeling and Advertising Act). Section 1334 reads as follows:

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

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

Id.

²⁸⁴ *Cipollone*, 789 F.2d at 186. The Third Circuit in *Cipollone* felt the express language of the statute clearly stated Congress's intent; therefore, it was unnecessary to examine the Act's legislative history.

²⁸⁵ The original Act required the following warning on cigarette packages:

"Caution: Cigarette Smoking May Be Hazardous to Your Health." 15 U.S.C. § 1333 (1970).

This warning was amended by Congress in 1969 as follows: Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health. 15 U.S.C. § 1333 (1976).

and thus actually conflict with the federal act.²⁸⁶ Therefore, the Third Circuit held in *Cipollone* that the Federal Cigarette Labeling and Advertising Act impliedly preempts any state tort claim that challenges the adequacy of Congress' prescribed warnings on a cigarette package, or the tobacco industry's advertising and promotional activity.²⁸⁷

Subsequent to the Third Circuit's 1986 opinion in *Cipollone* several courts have refused to apply the preemption defense retroactively.²⁸⁸ The federal act became effective January 1, 1966; therefore, according to these courts only post-1965 claims that challenge the congressional warning requirements or the tobacco industry's promotional activity are preempted.²⁸⁹ A plaintiff may still bring pre-1966 claims against cigarette manufacturers, just as he or she may bring any product liability claims that do not challenge the federal act's prescribed warning or advertising requirements.²⁹⁰ The majority of American courts,²⁹¹ including every circuit court that

This required warning section was again amended by Congress in 1984 by prescribing the following four warnings:

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

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

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

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

Id. § 1333(a) (1984). These four warnings are to be rotated on a quarterly basis in alternating sequence. *Id.* § 1333(c).

²⁸⁶ *Cipollone*, 789 F.2d at 187.

²⁸⁷ *Id.* The Labeling and Advertising Act was amended by Congress in 1984 by adding a reference in the Act's policy provision, section 1331:

"(1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes" 15 U.S.C. § 1331(1) (Supp. II 1984).

²⁸⁸ *Gianitsis v. Am. Brands, Inc.*, 685 F. Supp. 853, 859 (D.N.H. 1988); *Kotler v. Am. Tobacco Co.*, 685 F. Supp. 15, 18 (D. Mass. 1988); *Semowich v. R.J. Reynolds Tobacco Co.*, 1988 U.S. Dist. LEXIS 9102 (N.D.N.Y. 1988); *Cipollone v. Liggett Group, Inc.*, 683 F. Supp. 1487, 1496-97 (D.N.J. 1988), *motions denied*, 693 F. Supp. 208, 210 (D.N.J. 1988); *Phillips v. R.J. Reynolds Indus., Inc.*, 769 S.W.2d 488 (Tenn. Ct. App. 1988).

²⁸⁹ See *supra* note 288 and accompanying text.

²⁹⁰ *Cipollone v. Liggett Group, Inc.*, 649 F. Supp. 664, 671 (D.N.J. 1986) (design defect claim and "unreasonably unsafe product" claim are independent of a failure-to-warn claim and, hence, are not preempted); *Kotler*, 685 F. Supp. at 19-20 (plaintiff's design defect claim is not preempted by Federal Labeling Act); *Dewey v. Brown & Williamson Tobacco*, 523 A.2d 712, 717 (N.J. Super. 1988), *aff'd as modified*, 542 A.2d 919 (N.J. Super. Ct. App. Div. 1988) (plaintiff's design defect claim based on a risk/utility analysis is not preempted by the Federal Labeling Act); *Semowich*, 1988 U.S. Dist. LEXIS 9102 at 2, 17 (design defect claim is not preempted).

²⁹¹ *Semowich*, 1988 U.S. Dist. LEXIS 9102 at 4-5. The court noted that "[W]hether the Act preempts state law claims . . . has been addressed by a number of courts . . . [T]he

has considered the issue,²⁹² have followed the third circuit's rationale and holding on preemption. Therefore, the preemption defense is now firmly established in cigarette litigation as an effective bar to most cigarette product liability claims.

The Minnesota State Court of Appeals, however, in the 1988 case of *Forster v. R.J. Reynolds Tobacco Co.* rejected the majority's preemption analysis.²⁹³ The *Forster* court held that the federal act does not preempt state tort claims.²⁹⁴ The court noted that in 1984 the United States Supreme Court refused to recognize the preemption of state tort claims against the nuclear power industry despite the federal government's comprehensive regulation of this industry.²⁹⁵ The *Forster* court reasoned that the same arguments then must surely be rejected when considering the federal act's preemptive effect on state tort claims.

The Minnesota Court of Appeals recognized in *Forster* that our system of federalism demands a strong presumption against preemption.²⁹⁶ Congress failed to expressly preempt state tort claims in the federal act's preemption provision, the *Forster* court noted, and its examination of the federal act's legislative history revealed nothing to suggest a congressional intent to preempt state tort claims.²⁹⁷ Additionally, the *Forster* court recognized that protecting the health and safety of its citizens was traditionally a state function, and that preempting state tort claims would leave a state's

Third Circuit held that the Act preempts state law claims . . . [and] [t]hree other circuit courts . . . as well as a host of federal district courts and state courts have reached the same result." *Id.* "In fact, only [*Forster v. R.J. Reynolds Tobacco Co.*] . . . is cited for a contrary result." *Id.*

²⁹² *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 234 (6th Cir. 1988); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 629 (1st Cir. 1987); *Stephen v. Am. Brands, Inc.*, 825 F.2d 312, 313 (11th Cir. 1987) (per curiam); *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 187 (3d Cir. 1986).

²⁹³ 423 N.W.2d 691 (Minn. Ct. App. 1988).

²⁹⁴ *Id.* at 700-01.

²⁹⁵ *Forster*, 423 N.W.2d at 697-98. The Minnesota Court of Appeals rejected the tobacco company's argument that cigarette manufacturers are "entitled to special treatment because their industry is subject to 'comprehensive' regulations." *Id.* at 697. The court noted that the United States Supreme Court "has recognized [that] federal regulation and state tort law can — and must — coexist." The court also rejected the cigarette manufacturer's contention that an award of damages under state tort law would frustrate the congressional purpose of protecting the national economy. *Id.* at 698. The court noted that "if the nuclear industry does not deserve protection 'at all costs' certainly neither does the tobacco industry."

²⁹⁶ *Forster*, 423 N.W.2d at 692. The court observed that: "[P]re-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reason — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" *Id.* at 695. (quoting *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981)).

²⁹⁷ *Id.* at 696, 699.

personal injury victims without a remedy.²⁹⁸ Thus, the *Forster* court held that only a clear and actual conflict between state tort claims and the federal act is sufficient to support a finding of implied preemption.²⁹⁹ When the health and safety of citizens is at stake, the *Forster* court reasoned, a potential conflict between state tort claims and the federal act's stated congressional purpose is "too speculative" to support an implied preemption finding.³⁰⁰

The *Forster* court, balancing state interests against the federal act's stated congressional purpose, determined that the potential regulatory effects of exposing the tobacco industry to tort liability were insufficient to frustrate the purposes of the federal act and, hence, insufficient to justify a finding of implied preemption.³⁰¹ Although the *Forster* court noted that the federal act expressly stated an intent to protect the national economy, the court concluded that Congress could not have intended to protect the tobacco industry "at all costs."³⁰² Thus, the *Forster* court held that the objectives of the federal act and the potential economic harm to the tobacco industry should not preclude the right of smokers to seek legal redress for their injuries.³⁰³

The Appellate Court decision in *Forster* was the only current judicial opinion on record that found that the federal act did not preempt state tort, failure-to-warn claims. The Appellate Court's findings and rationale in *Forster* were rejected, however, by the Minnesota Supreme Court in 1989.³⁰⁴ The Minnesota Supreme Court reasoned that failure-to-warn claims are necessarily based on a cigarette manufacturer's duty to give a warning that is different from the federal act's prescribed warnings, and thus such claims conflict with one of the federal act's announced purposes: to prohibit diverse, non-uniform warning requirements on cigarette pack-

²⁹⁸ *Id.* at 699-700.

²⁹⁹ *Id.* at 692, 700-01. The court stated that: "Where Congress has spoken on the subject of preemption and not explicitly preempted the fundamental right to bring a state tort action, we find it inappropriate and wholly unnecessary to strain to find implied preemption." *Id.* at 693.

³⁰⁰ *Id.* at 697 (quoting *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985)). The Supreme Court in *Hillsborough* noted "that state and local regulation related to matters of health and safety can normally coexist with federal regulations" and that "the regulation of health and safety matters is primarily, and historically, a matter of local concern." *Hillsborough*, 471 U.S. at 718, 719.

³⁰¹ *Forster*, 423 N.W.2d at 700-01.

³⁰² *Id.* at 696.

³⁰³ *Id.* at 700-01.

³⁰⁴ *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655, 57 U.S.L.W. 2604, 2604 (Minn. 1989).

ages.³⁰⁵ The Minnesota Supreme Court's decision in *Forster* is significant because it means that the American judicial system has now unanimously accepted the preemption defense in failure-to-warn litigation against cigarette manufacturers. This acceptance has, in turn, allowed cigarette manufacturers to limit severely or bar product liability suits that smokers and their families have brought during the 1980s.

4. The Preemption Defense's Effect on Current Cigarette Litigation

As the Minnesota Appellate court cautioned in *Forster*, cigarette manufacturers have used the preemption defense to limit or bar product liability suits.³⁰⁶ In *Cipollone v. Liggett Group, Inc.* the Third Circuit's directive allowing the preemption defense forced the *Cipollone* district court to cut back the plaintiff's cause of action.³⁰⁷ As previously noted, the plaintiff in *Cipollone* was a smoker seeking recovery from a cigarette manufacturer under theories of strict liability, negligence, breach of warranty, and intentional tort.³⁰⁸ The *Cipollone* district court, implementing the preemption defense as directed, held that the plaintiff's failure-to-warn and breach of express warranty claims were preempted.³⁰⁹ Yet, the *Cipollone* court subsequently allowed these claims to the extent that they pertained to the cigarette manufacturer's pre-1966 conduct.³¹⁰ The district court further determined that intentionally misleading the public, whether by misrepresentation or concealment of facts, constituted "promotional" activity; hence, fraud claims were preempted from 1966 onwards.³¹¹ Nonetheless, the district court excepted from

³⁰⁵ *Id.*

³⁰⁶ *See id.* at 701.

³⁰⁷ *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 187-88 (3d Cir. 1986). The circuit court refused to identify which claims were preempted by the Labeling Act. Rather, it merely denied plaintiff's motion to strike the preemption defense and remanded the case back to the district court for further proceedings consistent with its opinion concerning the preemptive effect of the Act.

³⁰⁸ *Cipollone v. Liggett Group, Inc.* 593 F. Supp. 1146, 1149 (D.N.J. 1984).

³⁰⁹ *Cipollone*, 649 F. Supp. at 668, 675.

³¹⁰ *Id.* at 668. The Cigarette Labeling and Advertisement Act took effect on January 1, 1966. 15 U.S.C. § 1331.

³¹¹ *Cipollone*, 649 F. Supp. at 673-74. Generally, fraud or intentional misrepresentation consists of the following elements:

- 1) a material misrepresentation of a presently existing or past fact;
- 2) knowledge of the falsity by the person making the misrepresentation;
- 3) intent that the misrepresentation be relied upon;
- 4) justifiable reliance on the misrepresentation;
- 5) resultant damage [to the plaintiff, proximately caused by such reliance].

preemption any fraud claim charging that the defendants prevented, or conspired to prevent, third persons from releasing information to the public on the health risks of smoking.³¹² Lastly, the *Cipollone* court held that the federal act does not preempt any strict liability or negligence claim that is independent of the defendant's failure to warn.³¹³

The necessary product "defect" for a viable strict liability claim may come from any of three sources, the district court in *Cipollone* reasoned; a manufacturing flaw, a design defect, or an inadequate warning.³¹⁴ The *Cipollone* court noted that each of these defects creates an independent product liability claim, and only failure-to-warn claims are preempted. In addition, the *Cipollone* court recognized, a product is "defective," even absent a manufacturing or design defect, if the product's inherent risks outweigh its social utility.³¹⁵ The *Cipollone* court noted that, although the product's warning label is a factor in a product's risk/utility analysis, the warning is not dispositive on the issue.³¹⁶ Therefore, the *Cipollone* court concluded, the federal act does not preempt a "non-defective" product liability claim³¹⁷ based on a pure product risk/utility analysis.³¹⁸

Cipollone, 683 F. Supp. at 1499; see also W. PROSSER, HANDBOOK OF THE LAW OF TORTS 685-86 (4th Ed. 1971) [hereinafter PROSSER, LAW OF TORTS].

A defendant's intentional failure to disclose significant facts may also constitute fraud or misrepresentation if this failure-to-disclose meets the same criteria established for imposing liability based on an affirmative misrepresentation. *Cipollone*, 683 F. Supp. at 1499; see also RESTATEMENT (SECOND) OF TORTS § 550.

The district court determined that the plaintiffs' fraud or misrepresentation claims sought to make defendant liable for intentionally misleading the public and/or depriving it of the information necessary to make informed choices about the hazards of smoking. *Cipollone*, 649 F. Supp. at 673. The court further reasoned that, because "the Court of Appeals meant to exempt defendants from liability for what they did say, it follows that they cannot be held liable for what they did not say." *Id.* The district court, compelled by the Third Circuit's holding, allowed that a cigarette manufacturer has no civil liability for either misstating or concealing the truth. *Id.* at 673-74.

³¹² *Id.* at 674.

³¹³ *Id.* at 669-72.

³¹⁴ *Cipollone*, 649 F. Supp. at 669; see also, *Gianitsis*, 685 F. Supp. at 856; *Dewey v. Brown & Williamson Tobacco*, 523 A.2d 712, 717 (N.J. Super. 1988), *aff'd as modified*, 542 A.2d 919 (N.J. Super. Ct. App. Div. 1988).

³¹⁵ *Cipollone*, 649 F. Supp. at 669-72.

³¹⁶ *Id.* at 670-71.

³¹⁷ An inherently dangerous product is a product whose associated risks outweigh its social utility even absent a defect. *Gianitsis v. Am. Brands, Inc.*, 685 F. Supp. 853, 857 (D.N.H. 1988); *Dewey v. R.J. Reynolds Tobacco Co.*, 523 A.2d 712, 717 (N.J. Super. 1986); *Cipollone v. Liggett Group, Inc.*, 649 F. Supp. 664, 669-71 (D.N.J. 1986).

³¹⁸ *Cipollone*, 649 F. Supp. at 671; see also *Gianitsis*, 685 F. Supp. at 857; *Dewey*, 523 A.2d at 717.

The *Cipollone* court eventually concluded, however, that, although New Jersey common law recognized that a plaintiff may show that a product is unreasonably dangerous without proving a product defect or a safer alternative design, such a cause of action was now barred under present New Jersey law.³¹⁹ In this regard, the *Cipollone* court held that the New Jersey legislature's recent enactment of section 3(a)(2) of the New Jersey Products Liability Act of 1987³²⁰ barred "pure" risk/utility claims as a matter of law.³²¹ The *Cipollone* court further held that section 3(a)(2) applied to any pending product liability actions, and, as such, precluded the *Cipollones* from asserting that cigarettes are an unreasonably dangerous product based on a risk/utility analysis.³²² The *Cipollone* court did allow, however, that its holding only barred a cause of action that was based on a cigarette's unsafe but known characteristics.³²³ Thus, the *Cipollone* court did not preclude a cause of action that claimed cigarettes were more dangerous than a reasonable consumer expects because foreign, adulterating substances were present in the defendant's cigarettes, or because a safer alternative cigarette design was available.³²⁴

Although the *Cipollone* court allowed the plaintiffs to proceed on their alternative design claim, it did not allow this issue to reach

³¹⁹ *Cipollone v. Liggett Group, Inc.*, slip op. No. 83-2864, 1987 U.S. Dist. LEXIS 9936, 6 (D.N.J. October 27, 1987); see also, *Gianitsis*, 685 F. Supp. at 859 (risk/utility analysis is not recognized in New Hampshire); *Roysdon v. R.J. Reynolds Tobacco Co.*, 623 F. Supp. 1189, 1192 (D.C. Tenn. 1985), *aff'd*, 849 F.2d 230 (6th Cir. 1988) (cigarettes are not unreasonably dangerous under Tennessee law).

³²⁰ Act of July 22, 1987, ch. 197, 1987 N.J. Sess. Law Serv. (No. 6) 188-93. Section 3(a)(2) of the act reads, in pertinent part:

In any product liability action against a manufacturer or seller for harm allegedly caused by a product that was designed in a defective manner, the manufacturer or seller shall not be liable if . . . the characteristics of the product are known to the ordinary consumer or user, and the harm was caused by an unsafe aspect of the product that is an inherent characteristic of the product and that would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the class of persons for whom the product is intended.

Id.

The *Cipollone* court acknowledged that the parties agreed that section 3(a)(2) incorporated Restatement (Second) § 402A comment i into New Jersey law and, as such, would bar the plaintiff's risk/utility claim if the section was applicable to pending litigation. *Cipollone v. Liggett Group, Inc.*, No. 83-2864, 1987 U.S. Dist. LEXIS 9936, 2 (D.N.J. 1987), *aff'd*, 1987 U.S. Dist. LEXIS 12659, 10-11 (D.N.J. 1987).

³²¹ *Cipollone*, 1987 U.S. Dist. LEXIS 9936 at 2, 6.

³²² *Id.*

³²³ *Cipollone*, 1987 U.S. Dist. LEXIS 12659 at 9-10.

³²⁴ *Id.*

the jury.³²⁵ Instead, the district court directed a verdict for the defendants on the Cipollone's design-defect claim because it held that the plaintiffs failed to establish causation.³²⁶ The *Cipollone* court determined that to sustain a design-defect claim the plaintiff must prove that an alternative design more likely than not would have prevented the plaintiff's injury. In this regard, the Cipollones presented expert testimony that a palladium cigarette could have been marketed as early as 1971, and that such a cigarette design would have reduced Mrs. Cipollone's risk of developing lung cancer by between eight and seventeen percent.³²⁷ Therefore, the Cipollones argued, the cigarette manufacturer's failure to market the safer palladium cigarette reduced Mrs. Cipollone's probability of avoiding lung cancer, and thus increased her risk of injury.³²⁸ The district court noted, however, that, although the defendant's failure to market an allegedly safer cigarette *may* have increased Mrs. Cipollone's risk of injury, this so-called "lost chance" causation standard³²⁹ did not extend to product liability claims.³³⁰ Therefore, the court concluded that the Cipollones must present evidence from which a jury could reasonably find that a palladium cigarette would realistically, or more likely than not, have prevented Mrs. Cipollone's lung cancer.³³¹ The *Cipollone* court held that an eight-to-seventeen percent chance of avoiding lung cancer did not satisfy the plaintiff's "more likely than not" burden of proof on proximate causation.

The *Cipollone* court further delineated the jury issues by holding that the Cipollone's strict liability claims subsumed their negligence claims.³³² The court determined that to maintain both negligence and strict liability claims the Cipollones must show that the defendant's failure to use "reasonable care" harmed them in a manner separate and apart from their strict liability claims. There-

³²⁵ *Cipollone v. Liggett Group, Inc.*, 683 F. Supp. 1487, 1495 (D.N.J. 1988).

³²⁶ *Id.*

³²⁷ *Id.* at 1493.

³²⁸ *Id.* The plaintiff argued that, under the "lost chance" doctrine, he must present evidence that the defendants' conduct increased Mrs. Cipollone's risk of contracting lung cancer and that this increased risk was a "substantial" factor in producing her injury and death.

³²⁹ The "lost chance" doctrine is a theory of recovery that allows a plaintiff to recover for injury suffered because the defendant's failure to act reduced the plaintiff's probability of avoiding the injury actually sustained. See *Cipollone*, 683 F. Supp. at 1494.

³³⁰ *Id.* In New Jersey the "lost chance" doctrine had only been applied in medical malpractice actions. *Id.*

³³¹ *Id.* at 1495.

³³² *Id.* at 1499.

fore, the *Cipollone* court also directed a verdict for the defendants on the Cipollone's negligence claims because the plaintiffs had failed to show that the defendant's action or inaction resulted in a more dangerous product than one lacking a sufficient warning or a safer design.³³³

Thus, the district court in *Cipollone* allowed the jury to consider the Cipollones' failure-to-warn, breach of express warranty, and fraud claims only to the extent that such claims challenged the cigarette manufacturer's pre-1966 conduct.³³⁴ The district court also allowed, without imposing any time period constraints, the Cipollones' fraud claim that asserted that the tobacco industry prevented, or conspired to prevent, third parties from releasing information that smoking is dangerous.³³⁵ This conspiracy claim, in particular, may have troubled the tobacco industry because a finding of civil conspiracy would have exposed each defendant, and perhaps the entire cigarette industry, to joint and several liability for the damages caused by the acts and products of their co-conspirators.³³⁶

The jury subsequently found that the defendants were not liable for fraud or conspiracy, but were liable for failure to warn and breach of express warranty.³³⁷ The jury, however, apparently not accepting a tobacco addiction argument, also found that Mrs. Cipollone was eighty percent culpable in causing her own injury and death.³³⁸ The *Cipollone* court, however, upheld the jury's \$400,000 verdict in favor of Mr. Cipollone for his loss of consortium based on the defendant's breach of express warranty.³³⁹ In denying Liggett's motion for a judgment notwithstanding the verdict, the district court emphasized that the plaintiff's express warranty claim sounded in contract, not tort.³⁴⁰ Thus, the *Cipollone* court held that the jury's finding on Mrs. Cipollone's contributory fault barred plaintiffs' recovery on their tort claim, but not on their contract claim.³⁴¹

³³³ *Id.*

³³⁴ *Id.* at 1496-97, 1500.

³³⁵ *Id.* at 1500.

³³⁶ *Id.*; see also Eichenwald, *supra* note 10, at B4, col. 2.

³³⁷ See *supra* notes 257-62 and accompanying text.

³³⁸ See *supra* note 260 and accompanying text.

³³⁹ *Cipollone v. Liggett Group, Inc.*, 693 F. Supp. 208, 210, 222-23 (D.N.J. 1988).

³⁴⁰ *Id.* at 210.

³⁴¹ *Id.* at 215-17. The *Cipollone* court denied the defendant's argument that the plaintiff's contributory fault barred her recovery for its breach of express warranty on both procedural and substantive grounds. *Id.*

In denying the defendant's j.n.o.v. motion, however, the *Cipollone* court rejected two of the defendant's most potent arguments on strictly procedural grounds, without considering the arguments' legal merits.³⁴² First, the defendant argued that under New Jersey's interpretation of the UCC a personal injury action cannot be maintained by a buyer who is not in privity with the defendant-manufacturer.³⁴³ Therefore, the defendant argued, the Cipollones' express warranty claim must fail because Mrs. Cipollone did not purchase her cigarettes directly from Liggett. Although the *Cipollone* court conceded that New Jersey's version of the UCC controlled the warranty claim, it held that the defendant had not properly raised the privity defense.³⁴⁴ Second, the defendant argued that the jury's finding on Mrs. Cipollone's contributory fault barred any recovery of consequential damages. The *Cipollone* court recognized that New Jersey's UCC bars the recovery of consequential damages if the buyer's own fault or negligence contributes to the buyer's injury. The district court concluded, however, that the defendant had not properly raised this issue at trial, and thus refused to consider the argument.³⁴⁵

The *Cipollone* court also refused the plaintiffs' motion for a partial new trial limited strictly to the issue of damages.³⁴⁶ Although the district court agreed that the record clearly did not support the jury's award of zero damages to Mrs. Cipollone, it denied the plaintiffs' motion for a new trial solely to determine the proper damage award for Mrs. Cipollone's lifetime injuries.³⁴⁷ A buyer cannot collect consequential damages, the district court noted, if the buyer used the injury-causing product with knowledge of its warranty-breaching defect.³⁴⁸ Therefore, the *Cipollone* court determined that

³⁴² *Id.* at 212, 217-18. The *Cipollone* court denied the defendant's statute of limitation, notice, "affirmation of fact," reliance, and proximate cause arguments on the merits or because the jury findings were consistent with the evidence. *Id.* at 211-17. The only two defendant arguments that the *Cipollone* court rejected strictly on procedural grounds, without considering the legal merits, were the defendant's privity and consequential damages arguments. *Id.* at 211-18.

³⁴³ *Id.* at 212.

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 217-18.

³⁴⁶ *Id.* at 221.

³⁴⁷ *Id.* at 219, 221. The *Cipollone* court noted that the parties had stipulated in the trial that Mrs. Cipollone had incurred \$124,500 in reasonable medical expenses. Additionally, the district court recognized that plaintiff had incontrovertibly proved that Mrs. Cipollone had suffered for many months prior to her death. The jury's award of zero damages to Mrs. Cipollone clearly cannot be reconciled with these proofs.

³⁴⁸ *Id.* at 200.

any trial concerning the proper amount of Mrs. Cipollone's consequential damages must necessarily involve the issue of Mrs. Cipollone's knowledge regarding the warranty-breaching defect in Liggett's cigarettes. In sum, the *Cipollone* court denied both parties' motions and entered judgment pursuant to the jury's verdict.³⁴⁹

In another significant 1988 product liability case involving a cigarette manufacturer, the United States Court of Appeals for the Sixth Circuit held in *Roysdon v. R.J. Reynolds Tobacco Co.* that a smoker-plaintiff's failure-to-warn claims were barred under Tennessee law.³⁵⁰ The plaintiff in *Roysdon*, Floyd Roysdon, began smoking Camel cigarettes in 1946, switched to Winston cigarettes in the 1960s, and continues to smoke.³⁵¹ Mr. Roysdon alleged that his cigarette smoking proximately caused him to develop severe peripheral vascular disease, which resulted in the 1983 amputation of his left leg below the knee.³⁵² In his complaint Mr. Roysdon stated two causes of action: that the defendant's cigarettes are defective and unreasonably dangerous and that the warnings on cigarette packages and advertisements were inadequate to apprise smokers fully of cigarette smoking's serious health risks. Before trial, the United States District Court for the Eastern District of Tennessee held that the Federal Cigarette Labeling and Advertising Act preempted the plaintiff's failure-to-warn claim and dismissed it. At the completion of trial, the *Roysdon* district court directed a verdict for the defendant on the plaintiff's other product liability claim because the trial court found that Roysdon had failed to establish a jury question as to whether the defendant's cigarettes were unreasonably dangerous.

The Sixth Circuit affirmed both of the *Roysdon* trial court's findings.³⁵³ The Sixth Circuit agreed that the federal act impliedly preempts state tort claims for failure to warn.³⁵⁴ Moreover, the circuit court concluded that because Roysdon's product liability claims were limited to harm allegedly caused within the ten year period immediately preceding commencement of his suit (1974-1984), his failure-to-warn claims were completely barred.³⁵⁵ The

³⁴⁹ *Id.* at 222-23.

³⁵⁰ 623 F. Supp. 1189 (E.D. Tenn. 1985), *aff'd*, 849 F.2d 230, 232 (6th Cir. 1988).

³⁵¹ *Id.* at 232. The Sixth Circuit, itself noted in *Roysdon* that Mr. Roysdon had been unable to stop smoking because of his tobacco addiction, despite his illness.

³⁵² *Roysdon*, 623 F. Supp. at 1190.

³⁵³ *Roysdon*, 849 F.2d at 236.

³⁵⁴ *Id.* at 235.

³⁵⁵ *Id.* at 232.

Sixth Circuit also held in *Roysdon* that the defendant's cigarettes were neither defective nor unreasonably dangerous. According to Tennessee law, the circuit court noted, a manufacturer may be found liable if its product is either defective or unreasonably dangerous.³⁵⁶ The Court of Appeals then defined a product defect as a product condition that renders the product unsafe for normal or foreseeable use and consumption. The Sixth Circuit noted that *Roysdon* had not made any allegations or offered any proof that the defendant's cigarettes were improperly manufactured or contained dangerous impurities. Thus, the Sixth Circuit held the defendant's cigarettes were not defective because there was no evidence that they posed greater health risks than those risks generally associated with cigarette smoking.³⁵⁷ The *Roysdon* court also held that cigarettes are not unreasonably dangerous as a matter of law, because they are not more dangerous than an ordinary consumer would reasonably expect.

A similar rationale was employed by the United States District Court for the District of Massachusetts in the 1988 case of *Kotler v. American Tobacco Co.* to limit a plaintiff's breach of implied warranty claim.³⁵⁸ In *Kotler* the plaintiff, a widow, brought a product liability action against a cigarette manufacturer alleging that smoking the defendant's cigarettes proximately caused her deceased husband's lung cancer and death. The plaintiff's complaint charged that the defendants were liable for negligence, breach of warranty, negligent misrepresentation, and fraud.³⁵⁹ The defendant manufacturers filed a motion to dismiss for failure to state a claim, asserting that the federal act preempted all the plaintiff's claims. The *Kotler* court, in allowing the defendants' motion in part and denying it in part, held that the plaintiff's failure to warn, misrepresentation, and fraud claims were only preempted as they pertained to the cigarette manufacturers' post-1965 conduct.³⁶⁰ The *Kotler* court also held that the plaintiff's breach of an implied warranty of merchantability claim was not preempted, nor could it be dismissed because there was an issue of material fact.³⁶¹

According to the *Kotler* court a breach of implied warranty claim, under Massachusetts law, is centered around reasonable con-

³⁵⁶ *Id.* at 235.

³⁵⁷ *Id.* at 236.

³⁵⁸ 685 F. Supp. 15 (D. Mass. 1988).

³⁵⁹ *Id.* at 16.

³⁶⁰ *Id.* at 17-18.

³⁶¹ *Id.* at 19-20.

sumer expectations.³⁶² That is, the district court stated, merchantable goods must be fit for the ordinary purpose for which such goods are used, and product fitness, in turn, is determined by reasonable consumer expectations concerning product quality and safety. The court held that reasonable consumer expectations concerning a cigarette's safety is a material issue of fact because the plaintiff sufficiently pleaded that the defendants' cigarettes were inadequately tested and designed, and that they contained toxic and carcinogenic ingredients.³⁶³ The district court noted that other courts have held that cigarettes may be found unmerchantable if the tobacco contains pesticide residues, or if they contain excess nicotine or additives that may affect their safety. Therefore, the *Kotler* court denied the defendants' motion to dismiss.

Thus, the state and federal courts' refusal to hold cigarettes inherently dangerous and their unanimous acceptance of the preemption defense has strengthened the tobacco industry's de facto tort immunity. The courts do not permit smokers or their survivors to challenge the tobacco industry's marketing activities or the adequacy of their warning labels from 1966 to the present. Moreover, the courts, to date, have completely barred plaintiffs, as a matter of law, from arguing that non-defective cigarettes are "unreasonably dangerous" based on a risk/utility analysis.

These rulings do not bar product liability or negligence suits against a cigarette manufacturer, but they do combine to make such suits virtually unwinnable. A product liability claim requires that a plaintiff-consumer allege the presence of a product "defect" that makes use or consumption of the product "unreasonably dangerous" to the consumer, and proximately causes his or her injury.³⁶⁴ A product "defect" may result from a manufacturing or design flaw, or it may occur due to an inadequate warning.³⁶⁵ Also, a product may be "unreasonably dangerous" without a defect if its risks outweigh its social utility.³⁶⁶ The courts, however, have limited both the application and availability of the risk/utility analysis.³⁶⁷ They have also severely limited any plaintiff claims based on a failure-to-warn

³⁶² *Id.* at 19.

³⁶³ *Id.* at 20.

³⁶⁴ See *supra* notes 96-97 and accompanying text for a discussion of plaintiff's prima facie strict liability claim.

³⁶⁵ See *supra* note 314 and accompanying text.

³⁶⁶ See *supra* note 316 and accompanying text. See also notes 78-84 and accompanying text for a discussion of the risk/utility analysis.

³⁶⁷ See *supra* note 319-24 and accompanying text.

defect. Smokers thus may bring a product liability suit against a cigarette manufacturer only if they allege a manufacturing or design flaw in the cigarette, or claim that the manufacturer failed to adequately warn of cigarette smoking's health risks before 1966.³⁶⁸

Smokers who cannot prove the presence of a foreign substance in their cigarettes are, therefore, limited to pursuing a product liability suit under either a design-defect claim or a pre-1966 failure-to-warn claim. Although smokers might be successful on a pre-1966 failure-to-warn claim a jury might well conclude that the lengthy period of continued smoking after 1965 is an intervening event sufficient to break the requisite chain of causation.³⁶⁹ Also, if a jury is led to believe that the cigarette warnings have been adequate since 1966, it is more likely to attribute a greater percentage of culpability to the smoker for causing his or her own injury. Thus, a smoker's chances to recover under a pre-1966 failure to warn claim are greatly diminished, unless the smoker can impress the jury with a tobacco addiction argument.³⁷⁰

A smoker may also bring a design defect claim, without any time constraint, because the sufficiency of a product's warning is an alternative, non-essential aspect of the requisite risk/utility inquiry.³⁷¹ Also, a warning is not dispositive on whether the product, as designed, functions as safely as a reasonable consumer expects.³⁷² In jurisdictions that apply the consumer expectation test, a cigarette is defectively designed only if the design makes a cigarette more dangerous than an ordinary consumer would reasonably expect.³⁷³ Some consumer expectation jurisdictions reason that, because an ordinary consumer knows that cigarettes present a serious health risk, they cannot be considered unreasonably dangerous beyond a reasonable consumer's expectations unless they contain a manufacturing flaw.³⁷⁴ Other such jurisdictions hold that whether a cigarette

³⁶⁸ See *supra* notes 306-63 and accompanying text.

³⁶⁹ *Cipollone v. Liggett Group, Inc.*, 693 F. Supp. 208, 210 (D.N.J. 1988) (jury found cigarette manufacturer strictly liable for failing to warn of cigarette's health hazards prior to 1966; yet, the jury also found smoker 80% culpable for causing her own smoking induced illness, thus she was barred from tort recovery under New Jersey law).

³⁷⁰ See *supra* notes 182-203 and accompanying text for a discussion of the tobacco addiction argument.

³⁷¹ *Cipollone v. Liggett Group, Inc.*, 649 F. Supp. 664, 671 (D.N.J. 1986).

³⁷² *Kotler v. Am. Tobacco Co.*, 685 F. Supp. 15, 19-20 (D. Mass. 1988); *Dewey v. Brown & Williamson Tobacco*, 542 A.2d 919, 925-26 (N.J. Super. Ct. App. Div. 1988). See *supra* notes 71-74 and accompanying text for a discussion of the consumer expectation test.

³⁷³ *Kotler*, 685 F. Supp. at 19-20; *Dewey*, 542 A.2d at 925-26.

³⁷⁴ *Roysdon v. R.J. Reynolds Tobacco Co.*, 623 F. Supp. 1189, 1191-92, (E.D. Tenn. 1985), *aff'd*, 849 F.2d 230 (6th Cir. 1988).

is defective is a jury question because cigarettes vary in design and tobacco varies in composition.³⁷⁵

Jurisdictions purporting to use the reasonable manufacturer test apply a different rationale but reach basically the same result.³⁷⁶ Because cigarettes are not unreasonably dangerous as a matter of law, the plaintiff cannot challenge whether cigarettes are defective because of tobacco's inherent characteristics.³⁷⁷ Thus, a plaintiff must prove that the defendants were capable of designing safer cigarettes.³⁷⁸ The risk/utility inquiry imputes knowledge to the manufacturer of its product's defect as well as knowledge of other possible design alternatives, then it determines whether the manufacturer, with this imputed knowledge, acted reasonably in marketing its product as designed.³⁷⁹ The plaintiff in a jurisdiction applying the reasonable manufacturer test must, therefore, prove that another cost effective design is available in order to prevail on his or her claim.³⁸⁰

Additionally, a plaintiff seeking to recover on a design defect claim must also prove that the defective design proximately caused his or her injury.³⁸¹ To establish causation, a plaintiff must show that an alternative design would more likely than not have prevented injury. This means that to establish causation a plaintiff must show that an alternative cigarette design would have reduced the risk of contracting a smoking-induced illness by at least fifty-one percent. If, however, a jurisdiction applies the "lost chance" doctrine to product liability suits, then a plaintiff may prevail on causation if he establishes that a manufacturer's failure to adopt a safer alternative design increased the risk of injury.³⁸² Thus, absent a manufacturing flaw, a smoker's defective design claim has little, if any, chance for success.

Smokers may also pursue suits against cigarette manufacturers under theories of negligence, breach of warranty, and fraud, but the probability for success on any of these theories is equal to or

³⁷⁵ *Kotler*, 685 F. Supp. at 19-20; *Dewey*, 542 A.2d at 925-26.

³⁷⁶ See *supra* notes 75-83 and accompanying text for a discussion of the reasonable manufacturer test.

³⁷⁷ See *supra* note 319-24 and accompanying text.

³⁷⁸ *Cipollone v. Liggett Group, Inc.*, 683 F. Supp. 1487, 1495 (D.N.J. 1988); *Dewey*, 542 A.2d at 925-26; *Cipollone v. Liggett Group, Inc.*, 649 F. Supp. 664, 669 (D.N.J. 1986).

³⁷⁹ *Cipollone*, 649 F. Supp. at 669.

³⁸⁰ See *supra* notes 235-37, 319-24, 378 and accompanying text.

³⁸¹ *Cipollone*, 683 F. Supp. at 1495.

³⁸² *Id.* at 1494.

less than that of a suit based on strict liability. Preemption bars the smoker from challenging the tobacco industry's warning labels, or its post-1965 marketing, advertising, and other promotional activities. Because the courts allow the preemption defense, plaintiffs cannot challenge the cigarette manufacturer's post-1965 advertising or promotion activity; thus, a plaintiff may not bring a claim for breach of express warranty or fraud based on the industry's post-1965 conduct.³⁸³ Claims based on pre-1966 conduct encounter the same difficulties as failure-to-warn claims.³⁸⁴ Additionally, breach of express warranty claims are even more difficult to maintain successfully because of the various contractual defenses a cigarette manufacturer may raise.³⁸⁵ The *Cipollone* court created a narrow exception to the preemption defense for fraud claims based on a theory that the tobacco industry prevented or conspired to prevent third persons from releasing information to the public on the health risks of smoking.³⁸⁶ Despite the *Cipollone* court's recognition that there was sufficient evidence to bring the question before the jury,³⁸⁷ the *Cipollone* jury denied the plaintiffs' relief in their only attempt to pursue this theory.³⁸⁸

Although negligence suits remain viable, a plaintiff's strict liability claims may subsume such claims unless the plaintiff can show that the cigarette manufacturer's negligent behavior created a defective product that is more dangerous than one with a safer design or an adequate warning.³⁸⁹ If a court forces the plaintiff to choose between these two theories, he or she will most likely choose to pursue a strict liability claim. This outcome is likely because either

³⁸³ See *supra* notes 309-10 and accompanying text.

³⁸⁴ See *supra* notes 369-70 and accompanying text.

³⁸⁵ See generally *Cipollone*, 693 F. Supp. at 211-18 (an overview of the various contractual defenses available to cigarette manufacturers in defending a contractual breach of warranty claim). Although the plaintiff in *Cipollone* was successful on a breach of express warranty claim, the defendant was prevented from raising two contract defenses that may have effectively barred such warranty claims on strictly procedural grounds. See *supra* notes 342-49 and accompanying text. See *supra* notes 26-48 and accompanying text for a discussion of contract methods of recovery for product liability.

³⁸⁶ See *supra* note 312 and accompanying text.

³⁸⁷ *Cipollone*, 683 F. Supp. at 1500; see Janson, *supra* note 6, at B4, col. 4. Janson notes that the Cipollones introduced into evidence a 1972 confidential memorandum from Fredrick R. Panzer, vice president of the Tobacco Institute, that outlined the cigarette industry's "brilliantly conceived and executed" 20-year strategy of countering assertions that smoking produces cancer by "creating doubt about the health charge without actually denying it." *Id.*

³⁸⁸ *Cipollone*, 693 F. Supp. at 210.

³⁸⁹ See *supra* notes 332-33 and accompanying text.

cause of action requires proof of the same requisite elements and both are subject to the preemption defense, but a negligence suit requires that the plaintiff also prove the defendant's culpability.³⁹⁰

Another option still open to plaintiffs, though few choose to pursue it, is a cause of action based on a breach of implied warranty.³⁹¹ Breach of implied warranty claims are not really viable because reasonable consumer expectations regarding the safety of cigarettes determine the scope of their implied warranty.³⁹² Therefore, although the warning label on cigarettes cannot disclaim a warranty of merchantability,³⁹³ the warning label's presence as well as general public awareness of smoking's health risks lead to the conclusion that cigarettes are not more dangerous than the reasonable consumer expects. Thus, as the Massachusetts District Court recognized in *Kotler v. American Tobacco Co.*, the plaintiff must still prove the existence of a design defect or a foreign substance not present in well-made cigarettes for a breach of implied warranty claim to succeed.³⁹⁴

In summary, unless a smoker can prove that his or her cigarettes contained a substance (i.e., pesticides, excess nicotine, etc.), or a design defect not present in well-made cigarettes, the smoker has virtually no chance of prevailing over a cigarette manufacturer under any product liability theory. Thus, to maintain a viable product liability suit, the plaintiff must show that the substance that caused his or her injury is not inherent in good tobacco, or, alternatively, that a safer, cost-effective design probably would have prevented his or her illness. Furthermore, the courts have stated that any product liability claim challenging the tobacco industry's warning labels, or the industry's advertising and marketing activity, is preempted. A smoker may challenge the industry's pre-1966 conduct; the smoker must also convince the jury, however, that he or she did not unreasonably assume the risk by continuing to smoke after the warnings appeared. Thus, the tobacco industry enjoys greater tort immunity than it did during the "first wave" of cigarette litigation. Cigarette manufacturers no longer fear adverse jury ver-

³⁹⁰ See *supra* notes 49-56 and 112-15, and accompanying text for a discussion of the difference between negligence and strict liability claims.

³⁹¹ See *Kotler v. Am. Tobacco Co.*, 685 F. Supp. 15, 19 (D. Mass. 1988).

³⁹² See *supra* notes 34-38 and accompanying text.

³⁹³ U.C.C. § 2-316 (1987). To disclaim a warranty of merchantability in writing, the disclaimer must mention "merchantability." *Id.*

³⁹⁴ *Kotler*, 685 F. Supp. at 19-20.

dicts because the courts preempt or bar most product liability claims as a matter of law. As the years progress and smokers age and die, the number of potential plaintiffs who began smoking before 1966 dwindles and will eventually reach zero.³⁹⁵ At that time, the cigarette industry will achieve absolute tort immunity, excepting the isolated instance where a smoker is injured by a foreign object in his cigarette.

II. THE FUTURE OF CIGARETTE LITIGATION

A. *The Legitimacy of Preemption*

The preemption of failure-to-warn claims is the most vital issue in cigarette litigation because the preemption defense effectively bars the only truly viable theory of recovery for smokers who have been maimed or killed due to the cigarette industry's unscrupulous marketing practices.³⁹⁶ This judicial immunization from potential

³⁹⁵ See, e.g., *Semowich v. R.J. Reynolds Tobacco Co.*, No. 86-CV-118 1988 U.S. Dist. LEXIS 9102 (N.D.N.Y. 1988). In *Semowich* the United States District Court for the Northern District of New York dismissed a plaintiff's failure to warn and breach of warranty claims against three cigarette manufacturers. *Id.* at 17. In *Semowich* the plaintiff brought the suit to recover for his deceased wife's lung cancer and death. *Id.* at 1. His wife, however, did not begin smoking until 1970, therefore her failure to warn and express warranty claims related to post-1965 cigarette manufacturer conduct and were preempted. *Id.* at 1, 17.

³⁹⁶ See *supra* notes 4, 247 and accompanying text. Moreover, the Federal Trade Commission has charged that R.J. Reynolds illegally misrepresented and understated the health risks of cigarette smoking by misrepresenting the purpose and results of a major government study in its advertisements that ran from March to June 1985 in leading newspapers and magazines. McElvaine, *supra* note 6, at 182, n.119 (citing N.Y. Times, June 17, 1986 at A1, col. 2, Tobacco Industry Litigation Reporter, June 26, 1986 at 1000, 1047). During congressional subcommittee hearings Charles Sharp, president of Charles Sharp and Associates, a management consulting firm specializing in locating creative and management executives for top advertising firms, concluded:

The [cigarette industry's] current advertising and promotion practices are aimed at expanding the market for their products, specifically through the targeting of those populations among which there is the greatest potential for growth: youth, women and minorities. The vast expenditures of the [cigarette] industry on their marketing efforts are carefully researched and crafted to ensure that their messages about smoking — that is sexy, confidence inspiring, success oriented, and fashionable — will appeal to and be most effective with those audiences whose *own* needs and aspirations in life most readily conform with the fulfillment exuding from the models used in these image advertisements. Cleverly, subtly, and unfairly, current tobacco advertising and promotion practices exploit the dreams and desires of the most susceptible of us, our young people, for the purpose of hooking them on an expensive and deadly habit. As any self-respecting advertising executive will admit, the art of selling a product is not dependent on the actual need for a product, but on a perceived need for

liability fails to provide any incentive for the tobacco industry to design or market their dangerous products in a more conscientious and responsible manner.³⁹⁷ The reason that immunization fails to

a product. The tobacco industry has proved masterful at creating the misperception among our nation's youth.

Tobacco Advertising Hearings, *supra* note 202 at 165 (Statement of Charles Sharp). Additionally, Dr. Alan Blum, M.D., founder and chairman of "Doctors Ought to Care," related a conversation with a former advertising agency employee who admitted the advertising agencies were trying to influence 14-year old kids, because 14 was perceived to be the entry age for smoking. *Id.* at 276 (statement of Dr. Alan Blum). In this regard, it is believed that 85 to 90% of all new smokers begin smoking during their teenage years, and, of those that start over 60% are addicted before they leave the ninth grade. *Id.* at 46 (statement of Charles A. Lemaistre, M.D., president of the American Cancer Society). And only 15% of the teenagers who smoke even a single cigarette avoid becoming regular dependent smokers. Garner, *supra* note 6, at 1434.

Moreover, cigarette advertising diverts a consumer's, or potential consumer's, attention from the health consequences of smoking and seeks to assuage fear or anxieties concerning smoking's health risks. Cigarette advertising attempts to counteract any health warning by subtly using outdoor settings and vigorous, youthful, healthy people in cigarette advertisements. The cigarette industry also attempts to alleviate a smoker's health anxieties by promoting that their cigarettes are filtered and low in tar. See *Tobacco Advertising Hearings*, *supra* note 202 at 130-36 (testimony of Edward T. Popper, DBA, associate professor, College of Business Administration, Northeastern University); McLeod, *supra* note 2, at 1067. "Further[more], there is a growing body of evidence that cigarette advertising revenues have a chilling effect upon the willingness of recipients to speak about the dangers of smoking." *Tobacco Advertising Hearings*, *supra* note 202, (opening statement of Hon. Henry A. Waxman, (chairman), presiding). The influence of the cigarette industry's advertising dollars has created substantial economic leverage in the print media, such that the tobacco industry has pressured the print media, including national weekly magazines, to self-censor their coverage concerning cigarette smoking's serious adverse health risks. Warner, *Special Report, Cigarette Advertising and Media Coverage of Smoking and Health*, 312 N.E. JRN'L. MED. 384, 384, 388 (Feb. 7, 1985).

See generally *Tobacco Advertising Hearings*, *supra* note 202 at 486-580 (testimony of John F. Banzhaf III, professor of law, The National Law Center, George Washington University, and Executive Director of Action on Smoking and Health); *Federal Trade Commission, Staff Report on the Cigarette Advertising Investigation*, ch. 2, at 2, 8, ch. 5, at 31.

³⁹⁷ See *Cipollone v. Liggett Group, Inc.*, 649 F. Supp. 664, 675 (D.N.J. 1986). Judge Sarokin eloquently summed up the state of cigarette litigation when the Third Circuit directed him to allow the preemption defense:

In essence, no claim may be pursued which is predicated upon either the failure to warn the consuming public of known dangers regarding the risk of smoking, or upon the dissemination of information about smoking through advertising and promotion, even if calculated to deceive and mislead and to encourage existing smokers to continue and non-smokers to begin. It is ironic that the legislation which the tobacco industry sought so hard to defeat now serves to substantially immunize it from liability; and that deceiving the consuming public and concealing the truth from it is deemed to be an activity which Congress impliedly intended to protect in enacting this legislation. In essence, without any express authority from Congress, a single industry, for the first time in our country's history, may speak what is untrue, may conceal what is true, and may avoid liability for doing so merely by affixing certain mandated warnings to its products and advertising.

provide any incentive is because it allows the cigarette industry to avoid liability merely by placing an inconspicuous and often innocuous warning on a cigarette package while publicly contesting the validity of these warnings, and knowingly devising marketing strategies that are specifically intended to negate such warnings. Therefore, the preemption defense must be eliminated in cigarette litigation, or the tobacco industry will be allowed to market recklessly a dangerous, addicting product that injures and kills hundreds of thousands of Americans each year.

American courts considering the issue of preemption have unanimously held that the Federal Cigarette and Labeling Act does not *expressly* preempt state tort claims. The majority of these courts also ruled that the federal act did not indicate a congressional intent to "occupy the field" of smoking and health so completely that it superseded state tort law. Thus, a court may find state tort claims preempted only to the extent that they "actually conflict" with federal law.

The courts favoring preemption have held that state tort claims challenging the cigarette industry's promotion and advertising practices, or the adequacy of its warning labels, are preempted, because the "potential" regulatory effect of such claims conflicts with the federal act's purpose.³⁹⁸ Without examining the act's legislative history, these courts have determined that the act's policy provision, read in conjunction with its preemption provision, reveal a clear congressional intent to create a careful balance between protecting the national economy and warning the public. This balance is achieved, according to these courts, by mandating specific warnings on cigarette labels and advertisements while barring state regulation in these areas.

The courts favoring preemption have held that both state legislative regulation and common-law damage awards must be preempted to maintain the federal act's careful balance. Exposing the cigarette industry to potential damage awards, these courts feel, would, in effect, allow each jury to determine the cigarette industry's warning and advertising standards. Thus, these courts have concluded that cigarette manufacturers would be forced to comply with a dizzying array of warning and advertising requirements in an effort to avoid tort liability. To allow such a scenario would, according to these courts, upset the delicate balance created by Congress,

³⁹⁸ See *supra* notes 280-88, 285-86 and accompanying text.

expose the cigarette industry to non-uniform warning and advertising requirements, and allow the states to do indirectly what they are prohibited from doing directly.

Although superficially persuasive, this argument has several shortcomings. A court should avoid finding preemption if the conflict between state and federal law is merely potential.³⁹⁹ Also, our federalist system demands that federal law should not supersede a state's police powers absent a clear congressional intent to do so.⁴⁰⁰ A third shortcoming is the fact that Congress included a preemption provision in the federal act that failed to expressly preempt state tort claims.⁴⁰¹ Finally, a judicial preemption finding in this area usurps the legislative function and effectively removes a critical issue from the political process.

According to the Supreme Court, a federal law impliedly preempts state law only if Congress has "occupied a field" so completely that it displaces state law in this area, or if a state law *actually* conflicts with the federal law.⁴⁰² The courts that have considered the issue agree that Congress has not "occupied the area of cigarettes and health so completely that state tort claims must necessarily be preempted."⁴⁰³ Thus, a court can find implied preemption only if the federal act actually conflicts with failure-to-warn claims. An *actual* conflict exists between state and federal law only if compliance with both the state and federal law is a physical impossibility, or if a state law operates to frustrate a federal act's purpose.⁴⁰⁴

Any conflict between the federal act and state tort law for failure to warn is strictly *potential*, not actual, for two reasons. First, the regulatory effect is purely potential because a cigarette manufacturer may win a failure-to-warn suit. Therefore, there is only a *potential* exposure to tort damages. In fact, if the warnings are adequate, as the tobacco industry claims, the *potential* exposure is zero. This argument finds support in the *Galbraith* case. In *Galbraith*,

³⁹⁹ *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 188 (3d Cir. 1986) (citing *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982)); *Forster v. R.J. Reynolds Tobacco Co.*, 423 N.W.2d 691, 697 (Minn. Ct. App. 1988) (citing *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ware*, 414 U.S. 117, 127 (1973)).

⁴⁰⁰ *Forster*, 423 N.W.2d at 695.

⁴⁰¹ See *supra* notes 282 and 298 and accompanying text.

⁴⁰² See *supra* note 266 and accompanying text. See also *Fidelity Fed'l Sav. & Loan Association v. Delta Cuesta*, 458 U.S. 141, 153 (1982); *Pacific Gas & Elec. Co. v. Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1982).

⁴⁰³ See *supra* note 268 and accompanying text.

⁴⁰⁴ *Cipollone*, 789 F.2d at 185 (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

the plaintiffs reached the jury on a failure-to-warn claim that challenged the congressional warnings, and the jury found for the defendant.

Additionally, an award of tort damages is not an injunction.⁴⁰⁵ A finding of liability for failure to warn does not, in itself, require that the defendant change the inadequate warning, or dictate what the new warning should be. Although a damage award may motivate cigarette manufacturers to change their warnings or advertisements, it does not mandate change.⁴⁰⁶ Thus, any industry changes will be self-motivated, not state-imposed.

Moreover, our federalist system demands a strong presumption against preemption.⁴⁰⁷ Protecting the health and safety of citizens is primarily and historically a state function,⁴⁰⁸ and allowing the preemption of smokers' tort claims will leave a state's personal injury victims without a legal remedy.⁴⁰⁹ Although these factors are not dispositive on the preemption issue, the combination of them strongly supports the *Forster* court's conclusion that the mere threat of conflict between state and federal law is too speculative to support a preemption finding in the area of health and safety, absent a clear congressional intent to do so.⁴¹⁰

More importantly, Congress included a preemption provision in the federal act that did *not* expressly preempt state tort claims. Perhaps most indicative of the congressional intent not to preempt state tort claims is the fact that in 1969 Congress amended the federal act's preemption provision to include advertising but failed to expressly preempt failure-to-warn claims.⁴¹¹ Moreover, in 1984, after the district court in *Cipollone* had ruled against preemption,⁴¹²

⁴⁰⁵ *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1156 (D.N.J. 1984) (citing D. Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423, 1454 (1980)).

⁴⁰⁶ *Id.*

⁴⁰⁷ See *supra* note 296 and accompanying text.

⁴⁰⁸ *Forster*, 423 N.W.2d at 696.

⁴⁰⁹ *Id.* at 699-700.

⁴¹⁰ See *supra* note 300 and accompanying text.

⁴¹¹ Pub. L. No. 91-222, § 6, 84 Stat. 89 (1970). Congress amended the second paragraph of the federal act's preemption to read "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of the Act." *Id.* § 5(b), 84 Stat. 88. The 1969 Act defined "State" to include "any political division of any state." *Id.* § 3(3), 84 Stat. 88.

⁴¹² *Cipollone*, 593 F. Supp. at 1170-71. The *Cipollone* district court's opinion on the nonapplicability of preemption in cigarette litigation was the only judicial opinion on the federal act's preemption status until December, 1985 when Judge Hull issued his opinion in favor of preemption in *Roydon v. R.J. Reynolds Tobacco Co.*

Congress yet again amended the federal act but failed to express any intention to preempt failure-to-warn claims.⁴¹³ Surely, Congress must be imputed with knowledge that its warnings were being challenged and that the *Cipollone* court had failed to preempt such challenges.⁴¹⁴ Congress knew how to prevent this "mischief" if it so desired. Its failure to expressly preempt failure-to-warn claims should give a court pause before attempting to divine such a congressional intent.

The Third Circuit's attempt to divine such a congressional intent in *Cipollone* merely by reading the federal act's policy provision in connection with its preemption provision is a judicial usurpation of legislative power and is clearly erroneous. By finding preemption when Congress failed to clearly express such an intention, these courts have effectively removed a controversial decision from the political process; for our elected representatives in Congress would have had to enact a controversial amendment to the federal act if they wished to deny a personal injury victim his or her right to legal redress.⁴¹⁵ Now, however, because of the various circuit court opinions on preemption, Congress must enact a savings clause to preserve a citizen's right to legal redress when Congress never expressly denied this right in the first place.⁴¹⁶ Moreover, courts should not strain to find federal preemption of state law

⁴¹³ Pub. L. No. 98-474, 98 Stat. 2200 (1984) (codified at various sections of Title 15). Congress enacted more specific and stringent cigarette labeling requirements to be prominently displayed on cigarette packages on a rotational basis. *Id.* § 4, 98 Stat. 2201-03. Congress' 1984 Act left intact the 1969 Act's policy and preemption provisions.

⁴¹⁴ See *Cipollone*, 593 F. Supp. at 1161-62; *Palmer v. Liggett Group, Inc.*, 633 F. Supp. 1171, 1176 (D. Mass. 1986).

⁴¹⁵ See *Forster v. R.J. Reynolds Tobacco Co.*, 423 N.W.2d 691, 700-01 (Minn. Ct. App. 1988). The *Forster* court noted that state tort remedies should not be withdrawn from citizens without an express statement from Congress or a clear and unequivocal finding of implied preemption. *Id.*; see also *Palmer*, 633 F. Supp. at 1180 (the decision to effectively immunize the tobacco industry from tort claims must come from Congress not the courts); *Cipollone*, 593 F. Supp. at 1148 (before a court rejects fundamental common law principle "it should demand a much more definitive statement from Congress").

⁴¹⁶ Recently Congress enacted The Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252, 100 Stat. 30. In the Smokeless Tobacco Act, Congress included a "savings clause" that read as follows: "Nothing in this Act shall relieve any person from liability at common law or under State statutory law to any other person." *Id.* § 7(c), 100 Stat. 34 (1986).

The Smokeless Tobacco Act and the Cigarette Labeling Act are nearly identical. Ewell, *supra* note 20, at 884. As the *Palmer* district court noted, Congress' inclusion of a savings clause in the 1986 Smokeless Tobacco Act, occurring as it did during the *Cipollone* and *Roydon* preemption controversy, reinforces the idea that Congress does not believe that allowing failure-to-warn suits will frustrate its objective of uniform warnings. *Palmer*, 633 F. Supp. at 1179.

unless a congressional intent to preempt such law is clearly present. Yet, the Third Circuit concluded that the federal act preempted failure-to-warn claims without examining the act's legislative history or resorting to other statutory construction techniques, despite the fact that it held that the federal act did not *expressly* preempt state tort claims.

Congress failed or chose not to preempt state tort claims in the clear language of their preemption provision.⁴¹⁷ This provision should be given meaning from its plain language, not from reading it in conjunction with the act's policy provision.⁴¹⁸ If, however, a court believes the federal act's language is not explicit, then it must employ other statutory construction techniques to ascertain the federal act's intent.⁴¹⁹ In this regard, it is important to note that Congress enacted the federal statute in 1965 in response to the 1964 Surgeon General's report on the serious health risks associated with smoking.⁴²⁰ The federal act was a congressional compromise designed to prevent the prohibition of cigarettes by warning the public of the health risks without over-burdening the tobacco industry with diverse marketing regulations.⁴²¹ The mischief to be remedied, however, was the elimination of various state and local laws regulating the sale of cigarettes, not the elimination of state tort claims.⁴²² Failure-to-warn claims against cigarette manufacturers had been prevalent since the late 1950s. If Congress wished to preclude such claims, then it should have expressly done so. The congressional intent not to disturb the viability of these claims is further evidenced by the reassurances given by the federal act's supporters during congressional debate. As the *Cipollone* district court noted, the only court to examine fully the act's legislative history, the federal act's supporters clearly stated that the federal act would not adversely affect the rights of injured parties to seek legal redress against cigarette manufacturers.⁴²³

Congress expressly mandated that state law could not require cigarette manufacturers to include any additional warnings.⁴²⁴ The

⁴¹⁷ *Id.*, 633 F. Supp. at 1174; 15 U.S.C. 1334.

⁴¹⁸ *Forster*, 423 N.W.2d at 699.

⁴¹⁹ *Id.*

⁴²⁰ Ewell, *supra* note 20, at 878; *Palmer*, 633 F. Supp. at 1173.

⁴²¹ *Forster*, 423 N.W.2d at 699; *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1189, 1191 (D.N.J. 1984).

⁴²² *Forster*, 423 N.W.2d at 699.

⁴²³ *Id.*; see *Cipollone*, 593 F. Supp. at 1162-63.

⁴²⁴ 15 U.S.C. § 1334.

federal act, however, did not state that cigarette manufacturers were forbidden from including additional warnings that were strictly self-motivated and self-imposed.⁴²⁵ Exposing the tobacco industry to tort liability is, at best, a *potential* conflict between federal and state law. Furthermore, damage awards do not impose additional warning or advertising requirements as a matter of law; such awards merely motivate self-imposed requirements. Thus, courts allowing state tort claims still allow a cigarette manufacturer to comply with the federal act without frustrating the federal act's congressional purpose; hence, a finding of preemption is unwarranted.

In fact, allowing failure-to-warn claims is consistent with the federal act's declared congressional policy and prior judicial precedent. The federal act's declared dual policy was to inform the public about cigarette smoking's health hazards and to prevent the cigarette industry from exposure to diverse, state-imposed warning and advertising requirements.⁴²⁶ Allowing failure-to-warn claims would not conflict with either congressional purpose, and would, in effect, promote what surely must have been Congress' major concern in enacting the federal act: to inform the consuming public adequately of cigarette smoking's serious health risks.

Allowing failure-to-warn claims would not expose cigarette manufacturers to diverse warning and advertising requirements because such requirements would be strictly self-motivated and self-imposed. A cigarette manufacturer would be free to adopt any additional warnings that it considered necessary, in addition to Congress' prescribed warnings, and *uniformly* include such warnings on its tobacco products. It is safe to assume that a cigarette manufacturer, acting in its own self-interest, would voluntarily adopt the most stringent warning in an effort to avoid liability for failure to warn adequately. A stringent warning label, and conscientious marketing practices, would protect a cigarette manufacturer from potential product liability while better informing smokers and potential smokers of cigarette smoking's grave health risks. Thus, allowing failure-to-warn claims against cigarette manufacturers would ensure that the public is adequately informed about cigarette smoking's

⁴²⁵ *Cipollone*, 593 F. Supp. at 1170-71; *Palmer v. Liggett Group, Inc.*, 633 F. Supp. 1171, 1177 (D. Mass. 1986).

⁴²⁶ See *Palmer*, 633 F. Supp. at 1178. But see *Cipollone*, 593 F. Supp. at 1166. The *Cipollone* district court recognized the federal act's two purposes as, first, to preserve the economic vitality of the tobacco industry and the individual's freedom to choose to smoke, and, second, to implement this goal by mandating uniform labeling and advertising requirements.

serious health risks, without exposing cigarette manufacturers to diverse state regulations or warning requirements.

Additionally, allowing failure-to-warn claims in cigarette litigation is consistent with prior judicial precedent. Many courts have held that a manufacturer's compliance with federal labeling/warning requirements or safety standards does not preempt a plaintiff's product liability claim.⁴²⁷ These courts recognized that such federal requirements are only the minimum safety standards with which a manufacturer must comply, not maximum standards that the manufacturer may not exceed.⁴²⁸ Therefore, despite the fact that Congress, in this instance, has prescribed the warnings' exact language,⁴²⁹ a jury should be allowed to decide if the congressionally

⁴²⁷ See *supra* note 180 and accompanying text. See also *Silkewood v. Kerr-McGee Corp.*, 464 U.S. 238, 256-58 (1984) (compliance with Price-Anderson Act, which comprehensively regulates the nuclear power industry, did not preempt state tort claims or punitive damage awards); *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1539, 1542-43 (D.C. Cir. 1984) (compliance with Federal Insecticide, Fungicide, and Rodenticide Act and EPA regulations does not preempt failure to warn claims); *Dawson v. Chrysler Corp.*, 630 F.2d 950, 958 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) (compliance with National Traffic and Motor Vehicle Safety Act does not relieve car manufacturer of liability for defective design); *MacDonald v. Ortho Pharmaceutical Corp.*, 394 Mass. 131, 140, 475 N.E.2d 65, 70 (1985); *Stevens v. Parke, Davis & Co.*, 9 Cal.3d 51, 65, 507 P.2d 653, 661, 107 Cal. Rptr. 45, 53 (1973) (compliance with FDA warning requirement does not immunize a drug manufacturer from failure to warn claims); *Maize v. Atlantic Refining Co.*, 352 Pa. 51, 56, 41 A.2d 850, 853 (1945) (label approved by Surgeon General is not adequate as a matter of law). See generally RESTATEMENT (SECOND) OF TORTS § 288c (1965) (generally compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable person would take additional precautions).

⁴²⁸ See *United States v. Bass*, 404 U.S. 336, 349 (1971); see also *supra* note 197 and accompanying text.

⁴²⁹ See *supra* note 285 and accompanying text. The First Circuit in *Palmer* felt that the congressional mandate of the cigarette warning's exact language and the fact that the federal act applied only to cigarettes and prohibited any state regulation in the area of cigarette warnings combined to distinguish the *Palmer* case from *Ferebee*. See *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 628-29 n.13 (1st Cir. 1987). Additionally, the Third Circuit in *Cipollone* concluded that the cigarette warnings' exact language was necessary to maintain the careful balance between informing the public and protecting the economy that Congress had sought to create. See *supra* note 284 and accompanying text. What both these circuit courts failed to realize, however, was that a state tort verdict does not command a cigarette manufacturer to change its label — the verdict merely tells the manufacturer that if it chooses to continue to sell its cigarettes within the state it may have to compensate consumers that it injures. See *Ferebee*, 736 F.2d at 1541. Moreover, legal minimums are not intended to supplant moral maximums. It is conceivable that cigarette manufacturers that have been directed to do no less can safely assume that they need not do more. *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1170 (D.N.J. 1984). Alternatively, Congress may have determined exactly how much information the public should have in deciding whether to smoke and may have effectively prohibited the tobacco industry from freely adding any additional information on smoking's harmful effects. *Palmer*, 633 F. Supp. at 1178. If we agree with the circuit courts that preemption is warranted, then "we must conclude that Congress legislated to curtail the

mandated warnings adequately inform smokers of a cigarette's inherent health risks.⁴³⁰ The failure to allow a jury to decide the legal sufficiency of the warnings necessarily imputes that Congress intended to establish these exact warnings as the maximum disclosure required by law and to limit the information available to a potential smoker when he or she makes the decision to start or to continue smoking. Although Congress did express an intention in the federal act to protect the national economy, it is doubtful that it intended to sacrifice under-informed consumers for the good of the gross national product.

Thus, the preemption defense must be overruled in cigarette litigation so that the tobacco industry may have a financial incentive to market its products forthrightly. Truthful marketing practices would, in turn, allow a smoker to make an informed decision on whether to start or continue smoking, while imposing only a minimal burden on the industry.⁴³¹ Moreover, because of the tobacco industry's tremendous financial and political power,⁴³² state tort claims may be the only viable alternative for effectively regulating the industry's marketing of a dangerous and addicting product. The last section of this note analyzes the possible regulatory effects that failure-to-warn claims might have on the cigarette industry.

B. *The Possible Effects of Permitting Failure-to-Warn Claims*

Overruling the preemption defense would only affect the product liability of cigarette manufacturers for failure-to-warn, breach of express warranty, and fraud claims. The tobacco industry's exposure to tort liability under the remaining theories of product liability (i.e., negligence, defective design, breach of implied warranty, etc.) would remain unchanged. Yet, this result would be significant because it would allow consumers to assail the cigarette industry's marketing practices rather than their product.

potential flow of information lest the public learn too much about the hazards of smoking for the good of the economy. We are loathe to impute such a purpose to Congress absent a clear expression." *Banzhaf v. FCC*, 405 F.2d 1082, 1089 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

⁴³⁰ See *Palmer*, 633 F. Supp. at 1178. See also *supra* note 198 and accompanying text.

⁴³¹ Milio, *Health and Policy and the Emerging Tobacco Reality*, 21 Soc. Sci. MED. 603, 607 (1985) Milio estimates that the cost to the tobacco industry of complying with the rotational warning system is 0.0004 cents per pack of cigarettes.

⁴³² See *Garner*, *supra* note 6, at 1463; *Ross*, *supra* note 4, at 326, 329, 332; *Thornton*, *supra* note 266, at 572.

The current state of failure-to-warn product liability law would, in turn, provide smokers with the necessary precedents to challenge successfully the marketing strategy of the tobacco industry, and the adequacy of the congressionally prescribed warnings on cigarettes. For activity prior to 1966, smoker-plaintiffs' claims and evidence remain unchanged; despite the availability of scientific research on smoking-induced illness, the tobacco industry failed to provide a timely warning to smokers of the potential danger. After 1966, the plaintiffs would argue that the warnings Congress mandated were inadequate in both form and substance to apprise smokers fully of the risks associated with cigarette smoking. The victims may further argue that the advertising and promotional campaigns of the cigarette companies have been carefully designed to downplay their warnings and to deny the health risks of smoking in an attempt to confuse consumers and provide rationalizations for people to start smoking or to continue to do so despite the risk.⁴³³ Because other manufacturers, especially drug manufacturers, have been found liable for failure to provide comprehensive, detailed warnings, plaintiffs will have a good chance of recovering against the tobacco companies.⁴³⁴ This probability of success will increase as society's attitude toward smoking continues to change, and the evidence on smoking's health risks and addictive nature increases.

Because a product warning serves two purposes, a jury may impose liability on a manufacturer for failure-to-warn for a warning that fails to satisfy either purpose.⁴³⁵ A warning should alert any product user to any potential product danger so that the user may reduce his or her risk of injury when using the product.⁴³⁶ Also,

⁴³³ See *supra* note 430 and accompanying text. Although the tobacco industry claims that its advertising is defensive in nature and designed to promote brand loyalty and to encourage brand switching, and not to induce consumers to begin smoking, studies of the industry's advertising strategies by the Federal Trade Commission have indicated otherwise. Milio, *supra* note 431, at 610. See also, *Tobacco Advertising Hearings*, *supra* note 202, at 45-48 (testimony of Charles A. Lemaistre, M.D., president of the American Cancer Society). Dr. Lemaistre noted that only 10% of current smokers switch brands each year, while nearly 1.4 million smokers die or quit each year. *Id.* at 45. It is unreasonable to believe that the tobacco industry is not making every effort to replace those smokers that die or quit, in order to maintain its market. *Id.* See also *id.* at 128-30 (testimony of Edward T. Popper, DBA, associate professor, College of Business Administration, Northeastern University) (cigarette industry's argument that its advertising campaigns are designed to promote brand loyalty and encourage brand switching cannot survive economic analysis).

⁴³⁴ See *supra* notes 204-14 and accompanying text for a discussion of the warning requirements that have been imposed on insecticide and drug manufacturers.

⁴³⁵ See *supra* note 92 and accompanying text.

⁴³⁶ See *supra* note 93 and accompanying text.

the warning should convey enough detailed information concerning the scope and gravity of a product's inherent danger so that potential users may make an informed decision whether to use the product, and thus expose themselves to the attendant danger.⁴³⁷ As medical research has determined that there is no safe level of cigarette consumption,⁴³⁸ the first rationale fails to justify the provision of a warning in a cigarette smoking context. The fact that there is no safe level of cigarette consumption means that it is impossible for a cigarette manufacturer to provide a warning that will decrease a smoker's risk of injury if he or she chooses to smoke. The second rationale for requiring a warning, however, establishes a cigarette manufacturer's duty to warn. Thus, a cigarette manufacturer has a duty to provide a comprehensive warning that details *all* the health risks associated with smoking. This warning should prominently display all the information an ordinary consumer would reasonably require concerning the potential and severity of smoking-induced illness so that the consumer may make an adequately informed decision whether to begin smoking, or if he or she has begun, whether to continue.⁴³⁹

The issue in cigarette litigation is not, as the cigarette industry maintains, freedom of choice,⁴⁴⁰ but, rather, whether a smoker's personal decision to smoke is an adequately informed one. In this regard, the government should not have to provide or disseminate the information on cigarette smoking's health risks.⁴⁴¹ Moreover, the duty to warn is non-delegable; thus, the tobacco industry should not be allowed to attribute the warnings to the Surgeon General.⁴⁴²

⁴³⁷ See *supra* notes 94, 212-14 and accompanying text.

⁴³⁸ TOBACCO ADVERTISING HEARINGS, *supra* note 202, at 91 (testimony of Dr. R. Davis, Member, Board of Trustees of the AMERICAN MEDICAL ASSOCIATION); see also 1979 SURGEON GENERAL'S REPORT, *supra* note 1, preface at XII.

⁴³⁹ See *supra* notes 210-14 and accompanying text for a discussion of "inherently dangerous" products. See also *Borel*, 493 F.2d at 1089. The *Borel* court noted that when dealing with "unavoidably unsafe" products (the category cigarettes must now fall in by analogy):

the rule is that the user or consumer is entitled to make his own choice as to whether the product's utility or benefits justify exposing himself to the risk of harm. Thus, a true choice situation arises, and a duty to warn attaches, whenever a reasonable man would want to be informed of the risk in order to decide whether to expose himself to it.

Id.; see also *MacDonald v. Ortho Pharmaceutical Corp.*, 394 Mass. 131, 138-39, 475 N.E.2d 65, 69-70 (1985); *Reyes v. Wyeth Laboratories*, 498 F.2d 1264, 1276-78 (5th Cir. 1974); *Davis v. Wyeth Laboratories*, 399 F.2d 121, 129-31 (9th Cir. 1968).

⁴⁴⁰ See *Eichenwald*, *supra* note 10, at B4, col. 4.

⁴⁴¹ See *supra* notes 180, 195-96, and accompanying text; see also *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1090 (5th Cir. 1973).

⁴⁴² See *supra* note 285 and accompanying text. The current rotational warnings and the

or to dispute these warnings or cigarette smoking's health risks publicly through their advertising and promotional campaigns.⁴⁴³ Neither should the cigarette industry's advertisements or promotional campaigns be allowed to downplay, subtly or otherwise, the seriousness of cigarette smoking's health risks or to impair the warnings' effectiveness.⁴⁴⁴

The potential exposure to tort liability, including punitive damages, for failure to warn adequately would provide the necessary incentive for the tobacco industry to market its products more responsibly, without the need for continuous regulatory legislation. The tobacco industry would be forced to self-regulate its marketing practices because a jury could reasonably find that the congressionally prescribed warnings on cigarette packages are insufficient in both form and substance to inform a smoker adequately of cigarette smoking's inherent health risks. The earlier warnings on cigarette packages and advertisements merely stated: "Caution: Cigarette Smoking May Be Hazardous to Your Health." This warning was strengthened in 1970 to: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." These warnings are general and vague, and lack the necessary specificity and force to convey cigarette smoking's attendant risks adequately so that the ordinary smoker could make an informed choice on whether he or she should smoke.⁴⁴⁵ Even the more detailed rotational warnings that took effect in October 1985 might reasonably be considered too vague and general to inform smokers adequately of their potential for contracting smoking-induced illnesses, or to evoke the requisite sense of urgency that such serious health risks demand.⁴⁴⁶

1970 warning on cigarette packages and advertisements are attributable to the Surgeon General.

⁴⁴³ See *supra* note 4 and accompanying text. See also Gidmark, *supra* note 8, at 21. Gidmark notes that it was R.J. Reynolds' position during the *Galbraith* trial that cigarettes have never been scientifically proven to be harmful. This has been the industry's consistent legal position. *Id.*

⁴⁴⁴ See *supra* notes 202-03, 230-34, 433 and accompanying text.

⁴⁴⁵ See *supra* notes 203-29, 439 and accompanying text.

⁴⁴⁶ See *supra* note 285 for the exact wording of the four rotational warnings now required on cigarette packages and advertisements.

See also McLeod, *supra* note 2, at 1065. McLeod notes that even Congress' most stringent warning fails to inform a smoker or potential smoker adequately that:

smoking nearly doubles one's risk of heart disease, that smokers are between ten and twenty-five times more susceptible to lung cancer than are non-smokers, and that between seventy and eighty percent of all emphysema and chronic bronchitis deaths are attributable to smoking . . . [nor do the current warnings]

Moreover, the cigarette warning labels have never mentioned the danger of tobacco addiction or death, although both these factors are critical in making an informed decision whether to smoke. The medical evidence linking cigarette smoking with death has been available since the 1930s,⁴⁴⁷ and the fact that tobacco is addictive has been suspected for quite some time.⁴⁴⁸ Despite this evidence, the tobacco industry has successfully lobbied Congress to make certain that neither addiction nor death is mentioned on cigarette packages or advertisements.⁴⁴⁹

The threat of civil liability, however, might accomplish what Congress has failed to do. Faced with a staggering amount of potential liability,⁴⁵⁰ the cigarette industry will have to give up the charade of the so-called smoking-health controversy and admit the

inform an individual that his or her risk of premature death from cigarette-induced illness increases up to forty-five percent if he or she smokes.

Id.

McLeod also notes that the current warning, "WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight," does not evoke the same urgency as realizing that smoking increases by up to 35% the risks of spontaneous abortion, fetal death, or neonatal death. *Id.*

In this regard the Federal Trade Commission has noted that:

*Over 50% of adult Americans do not know that cigarette smoking is addictive.

*Approximately 40% of high school seniors do not believe there is a great health risk in smoking.

*Almost 50% of all women do not know that smoking during pregnancy increases the risk of stillbirth and miscarriage.

*Almost 60% of the public does not know that smoking causes most cases of emphysema and bronchitis.

*Over 30% of the public does not know that smoking causes heart disease; and over 50% do not know that smoking causes many cases of heart disease.

*Approximately 20% of the public does not know that smoking causes lung cancer; over 40% do not know that smoking causes up to 90% of the lung cancer cases.

*A lower percentage of heavy smokers (76%) are aware that smoking is hazardous to your health as compared to the general American public (90%).

FEDERAL TRADE COMMISSION, STAFF REPORT ON THE CIGARETTE ADVERTISING INVESTIGATION (1981).

⁴⁴⁷ 1979 SURGEON GENERAL'S REPORT, *supra* note 1, at 1-6.

⁴⁴⁸ See *supra* note 179 and accompanying text. King James I suspected that tobacco was addicting as early as 1604. See E.F. BORGATTA, R.R. EVANS, *SMOKING, HEALTH AND BEHAVIOR* 4 (Aldine Publishing Co. 1970); McElvaine, *supra* note 6, at 168 n.13; see also Garner, *supra* note 6, at 1444-45. Garner notes that the 1964 Surgeon General's Report lists thirty-six reports dealing with nicotine addiction, of which the earliest report was published in 1895; see also Seley v. G.D. Searle, 67 Ohio St. 2d 192, 198, 423 N.E.2d 831, 837 (1981) (the existence of a product risk does not have to be definitely established before a manufacturer incurs a duty to warn of such a risk).

⁴⁴⁹ See *supra* note 446 and accompanying text.

⁴⁵⁰ See Forster v. R.J. Reynolds Tobacco Co., 423 N.W.2d 691, 701 (Minn. Ct. App. 1988); Palmer v. Liggett Group, Inc., 633 F. Supp. 1171, 1180 (D. Mass. 1986); See also McElvaine, *supra* note 6, at 165-66, n.2-3; Garner, *supra* note 6, at 1463 n.261.

causal link between smoking and ill health. Additionally, to avoid liability the cigarette industry would be forced to voluntarily adopt more stringent warning labels detailing cigarette smoking's various health risks. Such warnings would have to exhibit sufficient urgency to compel the attention of smokers, or potential smokers, and affect their decision to smoke.⁴⁵¹ These results should occur because, as the *MacDonald* court pointed out, it is a well-established legal principle that a warning is inadequate if it is "reluctant in tone" or fails to make the extent and severity of a product's risks reasonably comprehensible to the ordinary consumer.⁴⁵²

Furthermore, because it is reasonably foreseeable that illiterate or non-English speaking consumers will smoke, the cigarette industry may have to adopt appropriate symbols to warn of the danger.⁴⁵³ Thus, it may be necessary for the tobacco industry to include a prominent skull-and-crossbones symbol to adequately warn of cigarette smoking's inherent danger.⁴⁵⁴ Moreover, the cigarette industry would be forced to police itself because it is another well-established legal rule that a jury may infer that a warning is inadequate if a manufacturer knows that its warning is widely disregarded and fails to change it. Thus, exposing the cigarette industry to civil liability for failure to warn may cause the industry to increase and monitor the effectiveness of its warning labels.

In this same manner, the threat of potential civil liability should effectively regulate the cigarette industry's advertising and promotional practices without requiring additional congressional intervention.⁴⁵⁵ This self-imposed regulation would occur because a jury could also impose liability on the cigarette industry if it finds that the industry's advertising and promotional practices effectively watered-down the impact of its warnings.⁴⁵⁶ Furthermore, a jury could find that the cigarette industry's adamant refusal to accept and publicize the causal link between smoking and serious illness,⁴⁵⁷

⁴⁵¹ See *supra* notes 204-29, 446 and accompanying text.

⁴⁵² *MacDonald v. Ortho Pharmaceutical Corp.*, 394 Mass. 131, 141, 475 N.E.2d 65, 71-72 (1985); *Seley*, 67 Ohio St. 2d at 198, 423 N.E.2d at 837. The *Seley* court noted that "a reasonable warning not only conveys a fair indication of the nature of the danger involved, but also warns with the degree of intensity demanded by the nature of the risk." *Seley*, 67 Ohio St. 2d at 198, 423 N.E.2d at 837.

⁴⁵³ See *supra* notes 205-09 and accompanying text.

⁴⁵⁴ See *supra* note 209 and accompanying text.

⁴⁵⁵ See generally *Tobacco Advertising Hearings*, *supra* note 202, at 1-7. The House Subcommittee was studying proposals to completely ban cigarette advertising or, alternatively, to make such advertising costs non-deductible for federal tax purposes.

⁴⁵⁶ See *supra* notes 202-03, 230-34, 433 and accompanying text.

⁴⁵⁷ See *supra* note 449 and accompanying text.

combined with its advertising techniques to assuage a smoker's health anxieties,⁴⁵⁸ may effectively render cigarettes more dangerous than an ordinary consumer reasonably expects.⁴⁵⁹

Such a jury finding would also serve to negate an assumption-of-the-risk defense,⁴⁶⁰ because a smoker's continued smoking is not unreasonable if the smoker was not adequately informed of the inherent danger, or if the manufacturer's promotional activity misled consumers, or otherwise caused consumers to underestimate the risks they were taking. Alternatively, the ability to establish tobacco addiction conclusively would present a cause of action that would render the assumption-of-the-risk defense ineffective.⁴⁶¹ This claim would be viable because a smoker could show that the tobacco industry has never warned the smoker of tobacco addiction, and that this failure to warn has caused the smoker's subsequent addiction which, in turn, has rendered the smoker's continued smoking involuntary.⁴⁶² Thus, allowing failure-to-warn claims against the cigarette industry would present smokers with several possible alternatives for holding the tobacco industry accountable for its questionable marketing practices.

Additionally, the policy reasons for strict product liability support an imposition of such liability on the cigarette industry, regardless of its warnings.⁴⁶³ Economically it is more rational and equitable for the tobacco industry to bear directly the costs that tobacco products inflict on society. The policy underlying strict product liability is to force a manufacturer to bear the cost of product-related injuries when it markets dangerous products, and/or products of questionable social value. This policy contains two beneficial effects: it rids the market place of unsafe products (without legislating them out of existence), and it apportions the cost among a product's consumers without forcing society to subsidize the use of dangerous products.⁴⁶⁴ In this regard, between a manu-

⁴⁵⁸ See *supra* note 433 and accompanying text.

⁴⁵⁹ See *supra* notes 230-34 and accompanying text.

⁴⁶⁰ See *supra* notes 183-86 and accompanying text for a discussion of the assumption-of-the risk defense.

⁴⁶¹ See *supra* notes 182-94 and accompanying text for a discussion of the tobacco addiction argument.

⁴⁶² See *supra* notes 460-61 and accompanying text.

⁴⁶³ See *supra* note 9 and accompanying text; see also, Henderson, *Coping With the Time Dimension in Products Liability*, 69 CALIF. L. REV. 919, 931-39 (1981). Henderson notes that products liability has four major policy objectives: encouraging investment in product safety, discouraging consumption of dangerous products, reducing transaction costs, and promoting loss-risk spreading. *Id.* at 931-32.

⁴⁶⁴ *Id.* at 933. Henderson notes that strict liability discourages the use of dangerous

facturer and a consumer, the manufacturer is in the better position to evaluate its product's risks, and to insure against them. The insurance cost may be then internalized and passed on to the consumer in the form of higher product prices. Therefore, allowing the tobacco industry to prosper economically while forcing society to pay for the damage its products cause does not make economic sense. It provides no incentive whatsoever for the tobacco industry to market a safer product.

Imposing damage awards on the tobacco companies would force the industry to internalize these costs, and pass them on to smokers through a price increase on cigarettes. This would put the cost of the injuries on the proper parties — smokers — and possibly lead to a decrease in consumption as the price began to rise. More importantly, it could cause the price of cigarettes to rise to a level that would be prohibitive to young people. This price-hike, in turn, might reduce the number of new smokers.⁴⁶⁵ Alternatively, it might force young people to put off the decision to smoke until they are more mature, and more able to make such an important decision.⁴⁶⁶ Imposing such strict liability on the tobacco industry may ruin the industry.⁴⁶⁷ Yet, it would serve to distribute the costs equitably and allow market forces to function properly.

Such an imposition of strict liability, however, would make the cigarette industry "absolute insurers" of tobacco products.⁴⁶⁸ That is, the tobacco industry would be forced to pay damages whenever a tobacco product caused an injury, regardless of fault. For this reason the courts have been loathe to impose such liability on the

products by increasing their cost, which places them at a disadvantage with other products in the market place. One of the rationales for such a policy is that consumers tend to underassess product risks and are thus reminded of these risks by the high price. *Id.*

⁴⁶⁵ See Ross, *supra* note 4, at 337. Ross notes that price increases on tobacco products affect the consumer's demand for these products. *Id.* The price effect on demand is a function of the age of the consumer, the consumer's income, and the elasticity of the consumer's demand. *Id.* The group of smoker's most responsive to a price increase are the younger smokers. *Id.* He further estimates that a sixteen percent increase in the price of cigarettes would cause 3.5 million smokers either to quit or not to start smoking. *Id.* (citing Warner, *Smoking and Health Implications of a Change in the Federal Cigarette Excise Tax*, 255 J.A.M.A. 1028, 1029-31 (1986)). Currently the cost of cigarettes is approximately \$1.50/pack. If the imposition of strict liability caused the price to rise to \$4.50-6.00 this would be a 200-300% increase in price. The reduction in consumption should, therefore, be substantial. This is especially true considering that the tobacco industry has targeted predominantly lower income groups, such as youth, women and minorities for the expansion of their market.

⁴⁶⁶ See *supra* notes 433, 465 and accompanying text.

⁴⁶⁷ See *supra* note 450 and accompanying text.

⁴⁶⁸ See *supra* notes 140-54, 170 and accompanying text for discussions of absolute liability.

tobacco industry.⁴⁶⁹ Allowing failure-to-warn claims, however, would not impose liability without fault. Failure-to-warn claims impugn the integrity of a manufacturer's marketing process, not the integrity of its product. Thus, allowing failure-to-warn claims would not impugn a cigarette's inherent safety, but it would hold the tobacco industry accountable for marketing its products in a responsible manner.

III. Conclusion

The judicial finding of preemption in cigarette litigation has led to de facto tort immunity for the cigarette industry. Such a judicial finding, without a clearly expressed congressional intent to preempt state tort law, is an unwarranted judicial overreaching. Moreover, a preemption finding frustrates the congressional policy that the public is to be informed adequately of cigarette smoking's health risks. Congress, in allowing the cigarette industry to continue marketing an extremely dangerous product, could not possibly have intended that this marketing be done irresponsibly, and the courts are wrong to impute such an intent. If Congress allows cigarette manufacturers to market such a dangerous product without imposing absolute liability on the manufacturer for product-related injuries, then surely it expects that these manufacturers will market their products in a responsible fashion. Failure-to-warn claims are the only adequate civil remedy to ensure that the cigarette industry markets its products in a reasonably responsible manner. Thus, courts must overrule the the preemption defense, and allow plaintiffs to challenge the integrity of the tobacco industry's marketing processes.

PETER F. RILEY

⁴⁶⁹ See *supra* notes 367, 468 and accompanying text.