

THE GREAT AMERICAN SMOKEOUT: HOLDING CIGARETTE MANUFACTURERS LIABLE FOR FAILING TO PROVIDE ADEQUATE WARNINGS OF THE HAZARDS OF SMOKING

More than 350,000 Americans die annually from cigarette-induced illness.¹ Smoking is the principal cause of many serious diseases, including lung and other cancers, heart disease, chronic bronchitis, and emphysema.² Yet despite the overwhelming evidence establishing smoking as the "largest preventable cause of death in America,"³ cigarette manufacturers never have been held liable for the illness, disability, and death which result from smoking.⁴

The de facto immunity long enjoyed by the cigarette manufacturers, however, now may be in jeopardy. There are numerous product liability actions currently pending throughout the United States seeking to hold cigarette manufacturers liable for the

¹ Margolick, *Antismoking Climate Inspires Suits by the Dying*, N.Y. Times, Mar. 15, 1985, at B1, col. 2. In 1984, Surgeon General C. Everett Koop reported that cigarette smoking was the largest preventable cause of death in the U.S. *Id.*

² *Cancer*: Cigarette smoking has been established as a major cause of cancer of the lung, larynx, oral cavity, esophagus, and bladder and is significantly associated with cancer of the kidney and pancreas. U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, SMOKING AND HEALTH, REPORT OF THE SURGEON GENERAL, ch. 5, at 31, 36, 42, 44, 49, 53 (1979) [hereinafter 1979 SURGEON GENERAL'S REPORT]. Moreover, cigarette smokers have total cancer rates between two and four times greater than non smokers. U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, OFFICE ON SMOKING AND HEALTH, THE HEALTH CONSEQUENCES OF SMOKING: CANCER — A REPORT OF THE SURGEON GENERAL at v (1982) [hereinafter 1982 SURGEON GENERAL'S REPORT].

Chronic Obstructive Lung Disease (Emphysema and Chronic Bronchitis): The Surgeon General reported in 1984 that "the contribution of cigarette smoking to chronic obstructive lung disease morbidity and mortality far outweighs all other factors." OFFICE OF SMOKING AND HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING: CHRONIC OBSTRUCTIVE LUNG DISEASE, at i (1984). Between 70% and 80% of all emphysema and chronic bronchitis deaths each year are smoking related. Holbrook, *Tobacco Smoking* in HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 940 (K. Isselbacher 9th ed. 1980).

Heart Disease: Smoking doubles the risk of suffering from coronary heart disease. 1979 SURGEON GENERAL'S REPORT, *supra*, ch. 4 at 34-35. Moreover, an estimated 30% of all fatal heart attacks are attributable to cigarette smoking. OFFICE OF SMOKING AND HEALTH, U.S. DEP'T. OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING: CARDIOVASCULAR DISEASE — A REPORT OF THE SURGEON GENERAL, at iii-iv (1983).

³ 1979 SURGEON GENERAL'S REPORT, *supra* note 2, at ii (Secretary's Forward).

⁴ Plaintiffs filed several cases throughout the 1960s but the cigarette manufacturers were universally successful. See, e.g., *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962), *question certified on rehearing*, 154 So. 2d 169 (Fla.), *rev'd and remanded*, 325 F.2d 673 (5th Cir. 1963), *rev'd and remanded on rehearing*, 391 F.2d 97 (5th Cir. 1968), *aff'd on rehearing en banc*, 409 F.2d 1166 (5th Cir. 1969), *cert. denied*, 397 U.S. 911 (1970); *Ross v. Philip Morris & Co.*, 328 F.2d 3 (8th Cir. 1964); *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961), *aff'd on rehearing*, 350 F.2d 479 (3d Cir. 1965), *cert. denied*, 382 U.S. 987 (1966), *modified*, 370 F.2d 95 (3d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967); *Lartique v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963). See *infra* notes 22-54 and accompanying text for a discussion of unsuccessful suits against cigarette manufacturers.

harmful effects of smoking.⁵ Evolution in the field of product liability law,⁶ extensive scientific evidence linking cigarette smoking to disease,⁷ and increased public sentiment against smoking⁸ suggest that plaintiffs in these current lawsuits may recover damages from the cigarette manufacturers for the injuries and death caused by smoking.

Under today's product liability standards, courts have held manufacturers of even the most essential products on the market, including automobiles,⁹ food items,¹⁰ and prescription drugs,¹¹ strictly liable for the injuries caused by their products. Courts apply strict liability when the manufacturer's product is unsafe due to improper design,¹² flaws in the manufacturing process,¹³ or inadequate warnings.¹⁴ Courts premise strict liability solely upon the defective nature of the product and may hold a manufacturer strictly liable for the harm caused by its product even in the absence of any negligent or culpable

⁵ At the time of publication over 100 cases are pending throughout the country. Information regarding these cases can be obtained from the Tobacco Products Liability Project (TPLP) c/o Professor Richard Daynard, Northeastern University School of Law. TPLP serves as a clearinghouse, referral, and consulting service for anyone interested in suing a tobacco company.

⁶ See generally Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U. L. REV. 796, 797-811 (1983) (illustrating development of product liability doctrine).

⁷ The 1979 Surgeon General's Report, which was based on more than 30,000 articles and scientific studies relating cigarettes to disease, concluded that the scientific evidence on the adverse health effects of smoking is overwhelming. 1979 SURGEON GENERAL'S REPORT, *supra* note 2, Preface at vii (1979). The report stated that "cigarette smoking is the most important preventable environmental factor contributing to illness, disability and death in the United States." *Id.* See also *supra* note 2 for studies linking smoking to health problems.

⁸ For example, antismoking regulations which ban smoking in public places have become increasingly prevalent in the United States. See N.Y. Times, Feb. 1, 1986, at B1, col. 6.

⁹ See, e.g., *Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976); *Carey v. General Motors Corp.*, 377 Mass. 736, 387 N.E.2d 583 (1979).

¹⁰ See, e.g., *Coffer v. Standard Brands Inc.*, 30 N.C. App. 134, 226 S.E.2d 534 (1976) (peanuts); *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944) (soda).

¹¹ See, e.g., *Reyes v. Wyeth Laboratories*, 498 F.2d 1264 (5th Cir.) (polio vaccine), *cert. denied*, 419 U.S. 1096 (1974); *McEwen v. Ortho Pharmaceutical Corp.*, 270 Or. 375, 528 P.2d 522 (1974) (oral contraceptive); *Michael v. Warner/Chilcott*, 91 N.M. 651, 579 P.2d 183 (N.M. Ct. App. 1976) (sinus medication).

¹² See generally P. Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 539 (1969); W. KEETON, D. OWEN & J. MONTGOMERY, *CASES AND MATERIALS IN PRODUCTS LIABILITY AND SAFETY* 364-99 (1980) [hereinafter *PRODUCT LIABILITY AND SAFETY*]; 2 L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 16A[4][f][iv] (1985) [hereinafter *FRUMER & FRIEDMAN*].

¹³ See generally Weinstein, Twerski, Piehler & Donaher, *Product Liability: An Interaction of Law and Technology*, 12 DUQ. L. REV. 425, 430-33 (1974); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 841 (1973); Schwartz, *Foreword: Understanding Products Liability*, 67 CALIF. L. REV. 435, 460-61 (1979); *PRODUCT LIABILITY AND SAFETY*, *supra* note 12, at 269-93; W. PROSSER & W. KEETON, *PROSSER AND KEETON ON TORTS* § 99, at 695-97 [hereinafter *PROSSER & KEETON*].

¹⁴ See generally 2 FRUMER & FRIEDMAN, *supra* note 12, § 16A[f][iv]; *PRODUCT LIABILITY AND SAFETY*, *supra* note 12, at 294-325; Sales, *The Duty to Warn and Instruct for Safe Use In Strict Tort Liability*, 13 ST. MARY'S L.J. 521 (1982); Twerski, Weinstein, Donaher & Piehler, *The Use and Abuse of Warnings in Product Liability — Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495 (1976); Wade, *supra* note 13, at 831, 842; W. Keeton, *Product Liability: Inadequacy of Information*, 48 TEX. L. REV. 398 (1970); Dillard & Hart, *Product Liability: Directions for Use and the Duty to Warn*, 41 VA. L. REV. 145 (1955).

conduct.¹⁵ Although it is a relatively recent advancement in the field of product liability law,¹⁶ strict liability has been adopted by virtually every jurisdiction in one form or another.¹⁷

In the context of the current surge of cigarette suits, plaintiffs argue that courts should hold manufacturers strictly liable for failing to warn adequately of the dangers of smoking.¹⁸ Generally, to prevail on a failure to warn claim in a strict liability context, plaintiffs must prove that the manufacturer sold its product in a "defective condition unreasonably dangerous to the user or consumer."¹⁹ *The Restatement (Second) of Torts*,

¹⁵ RESTATEMENT (SECOND) OF TORTS § 402A comment a (1965). The American Law Institute's RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides the standard for recovery under strict liability:

§ 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 any contractual relation with the seller.

Id. See, e.g., Laaperi v. Sears, Roebuck & Co., 787 F.2d 726, 729 (1st Cir. 1986); Hayes v. Ariens, 391 Mass. 407, 410, 462 N.E.2d 273, 277 (1984).

¹⁶ Justice Traynor of the California Supreme Court first advanced the rule of strict liability in 1944 in *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 462-68, 150 P.2d 436, 440-44 (1944) (Traynor, J., concurring). Justice Traynor asserted that "a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings." *Id.* at 461, 150 P.2d at 440 (citations omitted). The California Supreme Court in *Greenman v. Yuba Power Products* first adopted the theory of strict liability. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). The RESTATEMENT (SECOND) OF TORTS § 402A codified the rule of strict liability in 1965.

¹⁷ See I R. HURSH & H. BAILEY, *AMERICAN LAW OF PRODUCTS LIABILITY* § 4.41 (2d ed. 1974 & Supp. 1985) [hereinafter HURSH & BAILEY] for a review of the status of strict liability in every American jurisdiction. A handful of states, including Massachusetts, Florida, Delaware, and Georgia have extended their warranty law to approximate § 402A strict liability. *Id.*

¹⁸ Smokers also may base their case on negligence and breach of warranty theories, although strict liability is the most advantageous theory available to plaintiffs. Cigarette plaintiffs pursuing recovery on a negligence theory must prove that the manufacturers knew or should have known smoking was likely to cause harm but failed to warn of those dangers. These plaintiffs also must show that the manufacturer's lack of due care in warning was the actual and legal cause of their injuries. See Rossi, *The Cigarette — Cancer Problem: Plaintiff's Choice of Theories Explored*, 34 S. CAL. L. REV. 399, 402-03 (1961). In contrast, courts impose strict liability for injuries caused by a defective product without regard to the manufacturer's fault. When adjudicating a strict liability claim, courts focus on the defective nature of the product itself rather than the manufacturer's knowledge and conduct. See RESTATEMENT (SECOND) OF TORTS § 402A, comment a. Plaintiffs pleading a claim based on breach of warranty must show privity, reliance, and timely notice. I HURSH & BAILEY, *supra* note 17, § 3.1-3.3 at 426-34. A strict liability action, however, relieves plaintiffs of these requirements. 2 HURSH & BAILEY, *supra* note 17, § 4.8 at 657-59.

¹⁹ RESTATEMENT (SECOND) OF TORTS § 402A (1965).

section 402A, provides that a product is unreasonably dangerous without a warning when its dangers would not otherwise be generally known or recognized.²⁰ Thus, plaintiffs making a claim under strict liability must prove that cigarettes require adequate warnings because the ordinary consumer does not fully appreciate the dangers of smoking, and further, that any warnings provided by the cigarette manufacturers were insufficient to satisfy the manufacturers' duty to warn.²¹ Cigarette plaintiffs also are required to prove that the manufacturers' failure to warn adequately of the dangers of smoking caused their injuries.²² Finally, even if a plaintiff successfully proves that cigarettes require warnings, that the warnings provided on the cigarette package were inadequate, and that the lack of adequate warnings actually and legally caused their injury, a court nevertheless may deny a plaintiff full recovery if it finds that he or she assumed the risks of smoking or negligently contributed to his or her own injury.²³

Courts should hold cigarette manufacturers liable because they have failed to provide adequate warnings of the dangers of smoking. In addition, the manufacturers' overpromotion and deceptive advertising of cigarettes has completely eviscerated any value that the warnings they have provided may have had. Section I will discuss briefly the first generation of cigarette suits in which plaintiffs were universally unsuccessful in recovering against tobacco manufacturers.²⁴ This section will place particular emphasis on the defenses raised and problems of proof encountered in these early cases. Section II will consider generally the manufacturer's duty to warn adequately of its product's dangers.²⁵ Section II also will review the affirmative defenses available to a manufacturer in a product liability action, focusing primarily on changes in these defenses over the past two decades.²⁶ Section III will examine the increased scientific evidence of the harmful effects of cigarette smoking and the legislative responses to these medical developments.²⁷ Finally, Section IV will assess the viability of a claim for damages against the cigarette manufacturers due to their failure to warn adequately of the dangers of cigarette smoking.²⁸ Based on a consideration of the merits of such a claim, this note will conclude that courts should hold cigarette manufacturers, as producers of the most harmful product on the market today, to the same product liability standards that other manufacturers must satisfy. Having failed to meet those standards, courts should hold cigarette manufacturers liable for the harms caused by their failure to warn of the hazards of smoking.

²⁰ *Id.*, § 402A, comment i (a product is unreasonably dangerous if its hazards are beyond those which would be contemplated by the ordinary consumer who purchases it). The *Restatement (Second) of Torts* also states that "[i]n order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warnings, on the container as to its use." *Id.* § 402A, comment j. See, e.g., *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1088 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974).

²¹ See RESTATEMENT (SECOND) OF TORTS § 402A comment j. See also *id.* comment k ("product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous") (emphasis in original).

²² See *infra* notes 116-29.

²³ See *infra* notes 130-58.

²⁴ See *infra* notes 32-58 and accompanying text.

²⁵ See *infra* notes 59-115 and accompanying text.

²⁶ See *infra* notes 130-58 and accompanying text.

²⁷ See *infra* notes 159-90 and accompanying text.

²⁸ See *infra* notes 191-321 and accompanying text.

I. FIRST GENERATION CIGARETTE SUITS: THE TOBACCO INDUSTRY EMERGES WITH DE FACTO IMMUNITY

Damage claims against the cigarette manufacturers are not unprecedented. Between the late 1950's and early 1970's, plaintiffs seeking recovery for cigarette-induced cancer filed numerous unsuccessful suits against various cigarette manufacturers.²⁹ Plaintiffs in these suits generally proceeded under an implied warranty theory. Under this theory, a manufacturer warrants that its goods are of merchantable quality when it sells them.³⁰ To be merchantable, a manufacturer's goods must be reasonably fit for the ordinary purpose for which such goods are used.³¹ Cigarette plaintiffs typically alleged that cigarettes were not reasonably fit to smoke.³² Courts were reluctant, however, to allow recovery under these circumstances because liability would have required a finding that cigarettes are unsafe products that should be removed from the market.³³ Manufacturers avoided liability in this first generation of cigarette suits on several grounds. In some cases, courts did not hold cigarette manufacturers liable because there was no evidence that the manufacturers could have foreseen the dangers of smoking. At least one court denied recovery based upon a finding that cigarettes were reasonably fit for use and consumption by the general public.³⁴ Finally, plaintiffs did not prevail in these early claims against cigarette manufacturers because of the practical problems of proof and expense in litigation of these suits.

Foreseeability of harm represented a major stumbling block to plaintiffs in the first generation of cigarette suits.³⁵ As an element of their cause of action under an implied warranty theory, cigarette plaintiffs generally were required to prove that the manufacturer could foresee the deleterious effects of smoking.³⁶ Thus, applying negligence notions of reasonableness to plaintiffs' claims, courts refused to hold the cigarette manufacturer liable for hazards which were unknowable.³⁷ To permit recovery, these courts reasoned, would in effect make the cigarette manufacturer an "absolute insurer" of its product.³⁸ For example, in 1963, in *Lartique v. R.J. Reynolds Tobacco Co.*, the United States

²⁹ See *supra* note 4. Several commentators have discussed these cases. See, e.g., Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423, 1425-28 (1980) [hereinafter Garner, *Cigarette Dependency*]; Garner, *Cigarettes and Welfare Reform*, 26 EMORY L.J. 269, 297-300 (1977) [hereinafter Garner, *Welfare Reform*]; Wegman, *Cigarettes and Health: A Legal Analysis*, 51 CORNELL L. REV. 678, 697-703 (1966).

³⁰ PROSSER & KEETON, *supra* note 13, § 95, at 681; see U.C.C. § 2-314.

³¹ PROSSER & KEETON, *supra* note 13, § 95, at 681.

³² See, e.g., *Ross v. Philip Morris & Co.*, 328 F.2d 3, 5 (8th Cir. 1964); *Lartique v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19, 22 (5th Cir. 1963); *Green v. American Tobacco Co.*, 304 F.2d 70, 71 (5th Cir. 1962).

³³ Cf. *Ross*, 328 F.2d at 10 (Eighth Circuit refused to hold defendant "absolutely liable as an insurer if smoking its cigarettes caused or contributed to cause plaintiff's cancer").

³⁴ See *Green v. American Tobacco Co.*, 391 F.2d 97, 101-02 (5th Cir. 1968).

³⁵ See *Hudson v. R.J. Reynolds Tobacco Co.*, 427 F.2d 541 (5th Cir. 1970); *Ross v. Philip Morris & Co.*, 328 F.2d 3 (8th Cir. 1964); *Lartique v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963).

³⁶ See *Hudson v. R.J. Reynolds Tobacco Co.*, 427 F.2d 541. In *Hudson*, the Fifth Circuit granted summary judgment for the cigarette manufacturer because plaintiff failed to allege, as required by Louisiana law, that the manufacturer could have reasonably foreseen the risk of cigarette induced lung cancer. *Id.* at 541-42.

³⁷ See *Lartique*, 317 F.2d at 39-40.

³⁸ See *Ross*, 328 F.2d at 12.

Court of Appeals for the Fifth Circuit held that the cigarette manufacturer could be liable "only for a defective condition . . . the harmful consequences of which, based on the state of human knowledge, are foreseeable."³⁹ The jury returned a verdict for the defendant because it could not conclude that Mr. Lartique's cancer, attributable to fifty-five years of smoking, was reasonably foreseeable to the cigarette manufacturer.⁴⁰ Similarly in *Ross v. Philip Morris & Co.*, the Eighth Circuit refused to impose liability upon the cigarette manufacturer because the manufacturer could not have anticipated the cancer causing propensities of cigarettes by the use of "any developed human skills or foresight."⁴¹ Despite recognition that Missouri had embraced the doctrine of strict liability,⁴² the federal appeals court in this 1964 case nevertheless focused on the cigarette manufacturer's reasonableness in marketing its product and the unknowability of the hazards of smoking.⁴³ Thus, in many of the early cigarette suits the requirement that plaintiffs allege and prove that the cigarette manufacturer could foresee the dangers of smoking precluded plaintiffs from recovering for their cigarette-induced illnesses.⁴⁴

Although plaintiffs in *Green v. American Tobacco Co.*⁴⁵ successfully surmounted the foreseeability hurdle at the state court level,⁴⁶ the Fifth Circuit Court of Appeals denied recovery because plaintiffs failed to demonstrate that cigarettes posed a danger to the general public.⁴⁷ To establish a breach of the implied warranty, Florida law required the plaintiff to prove that cigarettes endangered an appreciable number of smokers.⁴⁸ De-

³⁹ 317 F.2d 19, 39 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963).

⁴⁰ *Id.* at 39-40. The judge instructed the jury

If you find that at the time Mr. Lartique's cancer started, the cigarettes manufactured by the defendants were usable as such, and that the state of medical knowledge was then such that the defendants could not have anticipated in the exercise of reasonable care that their products would cause cancer, then your verdict on the issue of implied warranty, would be in favor of the defendants.

Id. at 23 (emphasis in original).

⁴¹ 328 F.2d 3, 12-14 (8th Cir. 1964).

⁴² *Id.* at 8.

⁴³ *Id.* at 10-12.

⁴⁴ Although courts premised some of those decisions on strict liability, they were reluctant to impute knowledge to the cigarette manufacturer. See *Lartique*, 317 F.2d at 39. *But see* *Halphen v. Johns-Manville Corp.*, 737 F.2d 462, 465-66 (5th Cir. 1984) (repudiating *Lartique*).

⁴⁵ 304 F.2d 70 (5th Cir. 1962), *question certified on rehearing*, 154 So. 2d 169 (Fla.), *rev'd and remanded*, 325 F.2d 673 (5th Cir. 1963), *rev'd and remanded on rehearing*, 391 F.2d 97 (5th Cir. 1968), *aff'd on rehearing en banc*, 409 F.2d 1166 (5th Cir. 1969), *cert. denied*, 397 U.S. 911 (1970).

⁴⁶ 154 So. 2d at 170-01. The Supreme Court of Florida, responding to a certified question from the Court of Appeals for the Fifth Circuit, ruled that a cigarette manufacturer's inability to foresee the dangers of smoking was wholly irrelevant to its liability on the theory of implied warranty.

⁴⁷ 391 F.2d at 101-02.

⁴⁸ *Id.* at 102. The United States District Court Judge for the Southern District of Florida instructed the jury that the question was one of common danger to the general public as distinguished from Mr. Green alone:

if these cigarettes did endanger any important number of cigarette smokers — any responsible number — any large segment of those smokers — then it would be a breach of the implied warranty for fitness, which is imposed upon the manufacturer who sells the cigarettes. If they did not, there would be no breach of warranty.

Id.

spite a jury finding that cigarette smoking caused Green's death,⁴⁹ the Fifth Circuit denied recovery because of a lack of evidence generally linking cigarettes to lung cancer.⁵⁰

Plaintiffs in the first generation of cigarette suits also faced practical problems of proof and traditional product liability defenses.⁵¹ In *Pritchard v. Liggett & Myers Tobacco Co.*,⁵² for example, the plaintiff encountered evidentiary problems early in his case⁵³ and later was barred from recovery based on a finding that he had assumed the risk of smoking.⁵⁴ In this 1961 case, plaintiff alleged that the defendant cigarette manufacturer negligently had failed to warn of the carcinogenic components of cigarette smoke and had breached the express warranty of safety it had made in advertisements.⁵⁵ The jury in *Pritchard* decided that cigarettes caused Pritchard's cancer but denied recovery based on its conclusion that the plaintiff had assumed the risk of injury by smoking.⁵⁶ Despite a ruling by the Court of Appeals for the Third Circuit that the lower court had given the jury erroneous instructions on assumption of the risk,⁵⁷ plaintiff did not pursue a new trial. Voluntarily discontinuing the case, Pritchard's attorney described the problems of proof as "insurmountable."⁵⁸

In sum, plaintiffs in the first generation of cigarette suits were unsuccessful in their attempt to hold the cigarette manufacturers liable for the cancer-causing propensities of cigarettes for various reasons. Principally, plaintiffs were unable to prove, as most state law required, that the dangers of cigarette smoking were foreseeable. Plaintiffs' inability to prove that an appreciable number of smokers suffered from cigarette-induced disease, thereby establishing a breach of warranty claim, also precluded recovery in at least one case. Practically, the expense of litigation and the obstacles to proof in the first generation of suits rendered a successful action against the cigarette manufacturers a virtual impossibility.

⁴⁹ *Green*, 304 F.2d at 71-72 (jury answering written interrogatories found smoking Lucky Strike cigarettes a proximate cause of defendant's cancer).

⁵⁰ 391 F.2d at 99-102. An evidentiary ruling barring plaintiff from using favorable scientific data when cross examining the cigarette manufacturer's experts as to their opinion that there was no causal link between cigarette smoking and lung cancer significantly influenced this decision. See *id.* at 101-02.

⁵¹ Traditional product liability defenses include contributory negligence, assumption of the risk, product misuse, and obvious danger. See generally Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93, 95-106, 119-29 (1972); Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct*, UTAH L. REV. 267, 267-73 (1968).

⁵² 295 F.2d 292 (3d Cir. 1961), *aff'd on rehearing*, 350 F.2d 479 (3d Cir. 1965), *cert. denied*, 382 U.S. 987 (1966), *modified*, 370 F.2d 95 (3d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967).

⁵³ *Id.* at 300. The trial court refused to admit as evidence of defendant's knowledge of the harm, a bibliography of nearly 800 articles dealing with the harmful effects of tobacco. *Id.*

Adverse evidentiary rulings continue to pose a serious obstacle to plaintiffs' recovery in the second-round of suits. See *Galbraith v. R.J. Reynolds Tobacco Co.*, 14 PROD. SAFETY & LIAB. REP. (BNA) 25 (Dec. 23, 1985) (Surgeon General's Report inadmissible hearsay).

⁵⁴ *Pritchard*, 350 F.2d at 482.

⁵⁵ *Pritchard*, 295 F.2d 294, 296-97.

⁵⁶ *Pritchard*, 350 F.2d at 482. On appeal, however, the Third Circuit reversed and remanded, finding the trial court's instructions to the jury confused the defenses of contributory negligence and assumption of the risk. *Id.* at 485-86.

⁵⁷ *Id.*

⁵⁸ Garner, *Cigarette Dependency*, *supra* note 29, at 1427.

II. RECOVERY AGAINST MANUFACTURERS FOR FAILING TO PROVIDE ADEQUATE WARNINGS OF PRODUCT RISKS AND DANGERS

Changes in product liability law occurring over the past two decades have lessened significantly the problems of pleading and proving a case against a cigarette manufacturer.⁵⁹ Courts today generally are willing to adapt modern tort law to an ever-changing and complicated environment.⁶⁰ Increasingly, failure to warn has been used in product liability actions as a basis for liability when a product is inherently dangerous but could be remedied, at least in part, with an adequate warning.⁶¹ Today a court may find a properly manufactured and otherwise flawless product to be "defective" under a duty to warn theory if the manufacturer sells its product without warning adequately of the dangers associated with its intended and foreseeable use.⁶²

Adequate warnings serve two principal ends. First, an adequate warning enables the consumer to make an intelligent and well-informed decision whether to use a given product.⁶³ Second, warnings of dangers inherent to a product's use enable consumers to safeguard themselves against the product's hazardous condition and potential injury.⁶⁴ In addition, satisfaction of the duty to warn usually imposes a minimal burden upon the manufacturer. For example, manufacturers increasingly have employed package inserts

⁵⁹ Commentators universally agree that there has been a tremendous evolution in the field of products liability law over the past two decades. See, e.g., Schwartz, *supra* note 6, at 797-811 (illustrating development of products liability doctrine); Garner, *Cigarette Dependency*, *supra* note 29, at 1428 (highlighting courts' acceptance of consumer expectations as determinative of a product's defectiveness).

⁶⁰ See, e.g., *Ellis v. International Playtex Inc.*, 745 F.2d 292, 306 (4th Cir. 1984) (failure to warn of possibility of toxic shock); *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1050 (D.C. Cir. 1981) (adopting "exposure" theory for asbestos); *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 610-13, 607 P.2d 924, 936-38, 163 Cal. Rptr. 132, 144-46 (adopting market share liability for DES injuries), *cert. denied*, 449 U.S. 912 (1980). See generally Page, *Generic Product Risks: The Case Against Comment k and for Strict Tort Liability*, 58 N.Y.U. L. REV. 853, 853-57 (1983).

⁶¹ See, e.g., *Ellis*, 745 F.2d at 306; *Borel v. Fibreboard Paper Prods. Co.*, 493 F.2d 1076, 1087-90 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); *Ortho Pharmaceutical Corp. v. Chapman*, 388 N.E.2d 541, 545-48 (Ind. Ct. App. 1979). See generally Twerski, *supra* note 14, at 500-24 (identifying pervasive use of failure to warn theory); Noel, *Recent Trends in Manufacturers' Negligence as to Design, Instructions or Warnings*, 19 Sw. L.J. 43, 44 (1965).

⁶² 2 FRUMER & FRIEDMAN, *supra* note 12, § 16A[4][f][vi]. See, e.g., *Laaperi v. Sears, Roebuck & Co.*, 787 F.2d 726, 729 (1st Cir. 1986); *Hayes v. Ariens*, 391 Mass. 407, 410, 462 N.E.2d 273, 277 (1984); see also PROSSER & KEETON, *supra* note 13, § 99 at 697 (product can be defective in a way that makes it unreasonably dangerous by failing to warn adequately about a risk which naturally accompanies product's design).

⁶³ Courts and commentators emphasize that the consumer has a right to choose whether to subject himself or herself to identifiable product dangers. See *Davis v. Wyeth Laboratories, Inc.*, 399 F.2d 121, 129-30 (9th Cir. 1968) (recipient of polio vaccine entitled to make a "true choice judgment" whether to be inoculated with Sabin III vaccine). See generally McClellan, *Strict Liability for Drug Induced Injuries: An Excursion Through the Maze of Products Liability, Negligence And Absolute Liability*, 25 WAYNE L. REV. 1, 32 (1978).

⁶⁴ The principal function of a warning is educational. The manufacturer designs a warning to alert the user to the dangers and risks associated with product use and consumption so that he or she will treat the product with proper respect and avoid the dangerous condition. Twerski, *supra* note 14, at 506. See, e.g., *Torsiello v. Whitehall Laboratories*, 165 N.J. Super. 311, 325-26, 398 A.2d 132, 139-40 (1979) (manufacturer must apprise consumer of the side effects of aspirin); *Michael v. Warner/Chilcott*, 91 N.M. 651, 655, 579 P.2d 183, 187 (N.M. Ct. App. 1978) (manufacturer required to warn of the dangers of sinus medication).

to satisfy their duty to warn. Thus, courts today are willing to impose liability upon manufacturers for failure to warn because of the relative ease with which the manufacturer can remedy a product's defect by adequately warning of that product's dangers.⁶⁵

To recover under strict liability for failure to warn, a litigant must first establish that the manufacturer had a duty to warn. Generally a manufacturer has a duty to warn of dangers inherent in its product's use if those dangers are not patently obvious. The manufacturer has the further duty to ensure that its product's warnings are adequate. A plaintiff therefore may recover if he or she can establish that the manufacturer's warnings were inadequate to alert the consumer fully of the dangers attendant with its product's use. Moreover, plaintiff must establish that both the manufacturer's product and the manufacturer's failure to warn caused his or her injury. Finally, to recover under a duty to warn theory, plaintiffs must overcome the affirmative defenses alleged by the product's manufacturer.

A. Establishing the Duty to Warn

In the strict liability context, a manufacturer generally is under a duty to warn if the manufacturer knows or by the use of its special knowledge should know of a potential danger in its product's intended or foreseeable use.⁶⁶ Courts theoretically should impute present day knowledge to the manufacturer because a product's defective condition, rather than its manufacturer's culpable conduct, is the central issue in the case.⁶⁷ Thus, courts would impose strict liability upon a manufacturer for failure to warn of a product's risks if, given present day knowledge of the product's dangers, the manufacturer would have been negligent in failing to warn.⁶⁸

Nonetheless, most jurisdictions consider the manufacturer's ability to foresee its product's dangers a prerequisite to the imposition of strict liability for failure to warn. These courts evaluate whether a manufacturer acted reasonably, in light of knowledge available at the time the product was sold, in marketing the product without a warning.⁶⁹ Thus, courts in the majority of jurisdictions will hold a manufacturer strictly liable for failure to warn only if the manufacturer knows or through its expertise should know of dangers in its product's intended or foreseeable use and fails to warn adequately of those dangers.⁷⁰

⁶⁵ Twerski, *supra* note 14, at 513.

⁶⁶ See, e.g., *Reyes v. Wyeth Laboratories*, 498 F.2d 1264 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974); *McEwen v. Ortho Pharmaceutical Corp.*, 270 Or. 375, 528 P.2d 522 (1974); *Michael v. Warner/Chilcott*, 91 N.M. 651, 579 P.2d 183 (N.M. Ct. App. 1978).

⁶⁷ 2 FRUMER & FRIEDMAN, *supra* note 12, § 16A[4][f][vi]. See *Woodill v. Parke, Davis Co.* for a discussion of the courts' split on whether a court should impute knowledge to the product manufacturer in a strict liability failure to warn case, 79 Ill. 2d 26, 32-33, 402 N.E.2d 194, 197 (1980).

⁶⁸ 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).

⁶⁹ See, e.g., *Lindsay v. Ortho Pharmaceutical Corp.*, 637 F.2d 87, 91 (2d Cir. 1980); *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457, 465 (5th Cir. 1976); *Borel*, 493 F.2d at 1088 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). See also *Sales*, *supra* note 14, at 524-30.

⁷⁰ See, e.g., *Lindsay*, 637 F.2d at 91-92; *Mitchell v. Sky Climber, Inc.*, 396 Mass. 629, 631, 487 N.E.2d 1374, 1376 (1986); *Seley v. G.D. Searle & Co.*, 67 Ohio St. 2d 192, 198-99, 423 N.E.2d 831, 837 (1981); *McEwen v. Ortho Pharmaceutical Corp.*, 270 Or. 375, 385-407, 528 P.2d 522, 528-38 (1974).

Courts do, however, hold the manufacturer to the skill and knowledge of an expert in its field.⁷¹ Accordingly, the manufacturer must keep abreast and is presumed to have knowledge of scientific discoveries and advancements in its field of expertise.⁷² Thus, if sufficient scientific knowledge was available regarding a product's inherent dangers, a court may hold that the manufacturer had a duty to warn.

In addition, courts consider the likelihood of injury, the potential severity of harm, and the feasibility of providing effective warnings when assessing whether a manufacturer has a duty to warn.⁷³ Generally, a manufacturer has a duty to warn if its product's potential hazards are great, the possibility of consumers protecting themselves absent an adequate warning is small, and warning of those hazards does not impose an undue burden on the manufacturer.⁷⁴

A manufacturer can satisfy its duty to warn only if it is timely in alerting the consumer to dangers associated with its product's use or consumption. A manufacturer cannot rely on others, such as the government or other manufacturers, to "sound the hue and cry" concerning a danger in its product.⁷⁵ Further, a manufacturer cannot wait for what it considers to be sufficient proof of a causal relationship between dangers inherent in its product and possible harm due to the product's use before supplying a warning appropriate to alert the consumer of potential risks.⁷⁶ The manufacturer's duty to warn in a timely manner is illustrated by *Borel v. Fibreboard Paper Products Co.*⁷⁷ In *Borel*, the Court of Appeals for the Fifth Circuit ruled that the manufacturer of insulation could be held liable for failing to warn its employees of the dangers of working with asbestos.⁷⁸ Affirming a jury's verdict, the court concluded that ample evidence establishing the dangers of inhaling asbestos existed as early as the 1930's.⁷⁹ Fibreboard's failure to warn its employees of the possibility of contracting asbestosis was a breach of the manufacturer's duty to warn.

A manufacturer generally has no duty to warn against obvious or patent dangers.⁸⁰ The purpose of a warning is to communicate sufficient information of a product's hazards to afford consumers an opportunity to make an educated decision regarding

⁷¹ See, e.g., *Tucson Indus., Inc. v. Schwartz*, 108 Ariz. 464, 468, 501 P.2d 936, 940 (1972); *Borel*, 493 F.2d at 1089-90; *Mahr v. G.D. Searle & Co.*, 72 Ill. App. 3d 540, 564, 390 N.E.2d 1214, 1231 (1979).

⁷² See, e.g., *Borel*, 493 F.2d at 1089; *Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132, 140-41 (3d Cir. 1973).

⁷³ *Sales*, *supra* note 14, at 525-28.

⁷⁴ See, e.g., *Fiorentino v. Staley Mfg. Co.*, 11 Mass. App. Ct. 428, 434, 416 N.E.2d 998, 1003 (1981). See also *Sales*, *supra* note 14, at 525-28.

⁷⁵ *Borel*, 493 F.2d at 1090.

⁷⁶ See *McCue v. Norwich Pharmacal Co.*, 453 F.2d 1033, 1035 (1st Cir. 1972); *Hamilton v. Hardy*, 549 P.2d 1099, 1108 (Colo. Ct. App. 1976). Cf. *Stevens v. Parke, Davis & Co.*, 9 Cal. 3d 51, 65, 507 P.2d 653, 661, 107 Cal. Rptr. 45, 53 (1973).

⁷⁷ 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

⁷⁸ *Id.* at 1089-93.

⁷⁹ *Id.* at 1092-93.

⁸⁰ See, e.g., *Jamieson v. Woodward & Lothrop*, 101 U.S. App. D.C. 32, 37-38, 247 F.2d 23, 28-29 (recovery denied where elastic exerciser slipped off purchaser's foot and injured eye), *cert. denied*, 355 U.S. 855 (1957); *Zidek v. General Motors*, 66 Ill. App. 3d 982, 985, 384 N.E.2d 509, 512 (1978) (no duty to warn tires will skid on wet pavement when driver suddenly stops). See also RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965) ("a seller is not required to warn with respect to products . . . when the danger, or potentiality of danger, is generally known and recognized").

their use of the product, as well as the ability to protect themselves from its dangers.⁸¹ If a product's dangers are obvious, there is no need to warn.⁸²

Acceptance of the principles of strict liability over the past two decades, however, has significantly curtailed the willingness of many courts to allow obviousness of a danger to operate as a bar to recovery in a product liability action.⁸³ Obviousness of a product's danger, courts have held, does not relieve the manufacturer of its duty to design a product which is safe for its intended use.⁸⁴ Indeed, most courts will recognize the "patent danger rule" only when convinced that a formal warning would not have been in any way useful.⁸⁵ Finally, a warning will not absolve the manufacturer of liability if its product is unavoidably unsafe and of doubtful value.⁸⁶

Thus, the majority of jurisdictions regard a manufacturer's ability to foresee its product's dangers as a prerequisite to the imposition of liability for failure to warn. Therefore, a manufacturer has a duty to warn if it knows, or by the use of its expertise should know, of a danger in its product's intended or foreseeable use. Generally, a manufacturer can satisfy its duty to warn only if it is timely in alerting the consumer to dangers associated with its product's use or consumption. Finally, although a manufacturer has no duty to warn of obvious dangers, obviousness does not relieve a manufacturer of potential liability if a formal warning would be useful.

B. Establishing the Inadequacy of Existing Warnings

Courts have not limited recovery for failure to warn to instances in which the manufacturer failed to provide any warning at all. Liability based on a manufacturer's failure to warn frequently arises when a manufacturer provides a warning but that warning is inadequate, in either form or substance. Additionally, mere compliance with statutory requirements does not preclude liability based on the inadequacy of a product's warning. Furthermore, a manufacturer's overpromotion and deceptive advertising practices may render a facially adequate warning inadequate. Generally, an inadequate warning is valueless and equal to no warning at all.⁸⁷

⁸¹ See *supra* notes 63-64 and accompanying text.

⁸² W. PROSSER, *HANDBOOK OF LAW OF TORTS* § 96, at 649 (4th ed. 1971) (the manufacturer of a knife does not have to warn consumers that the product will cut).

⁸³ Schwartz, *supra* note 6, at 806-10.

⁸⁴ See, e.g., *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 382-86, 348 N.E.2d 571, 575-77, 384 N.Y.S.2d 115, 119-21 (1976) (questioning *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950), the leading case standing for the principle that there is no recovery for patent dangers). See also *Palmer v. Massey-Ferguson Inc.*, 3 Wash. App. 508, 517, 476 P.2d 713, 719 (1970) ("the manufacturer of the obviously defective product ought not to escape because the product was obviously a bad one. The law . . . ought to discourage misdesign rather than encouraging it in its obvious form.").

⁸⁵ See, e.g., *Shuput v. Heublein, Inc.*, 511 F.2d 1104, 1106 (10th Cir. 1975) (champagne cork); *Borel*, 493 F.2d at 1093 (asbestos dust). See also *Garner, Cigarette Dependency*, *supra* note 29, at 1441-42.

⁸⁶ See, e.g., *Strum, Ruger & Co. Inc. v. Day*, 594 P.2d 38, 44 (Alaska 1979) (revolver), *cert. denied*, 454 U.S. 894 (1981). Cf. *Stromsodt v. Parke-Davis and Co.*, 257 F. Supp. 991 (D.N.D. 1966) (combination of DPT and polio vaccines resulted in side-effects which could have been avoided had drugs been separately administered); *Tinnerholm v. Parke, Davis & Co.*, 411 F.2d 48 (2d Cir. 1969) (same).

⁸⁷ See *Fidelity Trust Co. v. Wisconsin Iron & Wire Works*, 145 Wis. 385, 392, 129 N.W. 615, 618 (1911); *Dillard & Hart*, *supra* note 14, at 160.

A warning adequate in form is clear and understandable.⁸⁸ The warning also must be prominent.⁸⁹ Some courts impose the further requirement that the manufacturer use the best possible means available to inform and warn consumers of its product's dangers.⁹⁰

In addition to the requirement of proper form, the substance of a warning also must be adequate. An adequate warning is strenuous enough to bring home the nature and extent of the danger of the product involved.⁹¹ The New Mexico Court of Appeals, in *Michael v. Warner/Chilcott*, elaborated upon this concept when it observed that an adequate warning means notice, placed on the label of a potentially dangerous product, that is "reasonably readable, that appries a consumer exercising reasonable care under the circumstances of the existence and seriousness of the danger sufficient to enable the consumer to protect himself against it"⁹² The court in *Michael* pointed out that the warning on defendant's sinus medication stated that the drug *may* damage kidneys, when in fact, the manufacturer knew that the drug *will* cause kidney damage if used in large doses.⁹³ Therefore the *Michael* court held that the sufficiency of the medication's warning presented a question of fact for the jury and affirmed a denial of defendant's motion for summary judgment.⁹⁴

A warning is adequate in substance if it is comprehensive regarding both the nature and severity of the risks associated with a product and is calculated to apprise the consumer of the full extent of the dangers attendant with the product's use.⁹⁵ Illustrative

⁸⁸ See, e.g., *Hubbard-Hall Chem. Co. v. Silverman*, 340 F.2d 402, 405 (1st Cir. 1965) (warning required skull and crossbones when persons of limited reading ability would use product).

⁸⁹ See, e.g., *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 82, 85 (4th Cir. 1962) (warning in small print on back of label that furniture polish "may be harmful if swallowed, especially by children," inadequate); *Maize v. Atlantic Refining Co.*, 352 Pa. 51, 55-56, 41 A.2d 850, 852 (1945) (instructions in small print that cleaning solvent was to be used in a well ventilated place were inadequate, especially when the manufacturer placed the product's name, Safety-Kleen, in large letters on all sides of the product).

⁹⁰ See, e.g., *Yarrow v. Sterling Drug, Inc.*, 263 F. Supp. 159, 162-63 (D.S.D. 1967) (although company had advised physicians of risk of eye complications by means of a series of product cards, a letter, and the Physicians' Desk Reference Book, warnings were inadequate because the company did not use its persons employed to promote and explain its drugs to keep the physicians advised of its product's side effects); *Incollingo v. Ewing*, 444 Pa. 263, 288-89, 282 A.2d 206, 220 (1971) (same).

⁹¹ See, e.g., *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 306-07 (4th Cir. 1984); *Hubbard-Hall Chemical Corp. v. Silverman*, 340 F.2d 402, 404 (1st Cir. 1965); *Seley*, 67 Ohio St. 2d at 198, 423 N.E.2d at 837.

⁹² 91 N.M. 651, 655, 579 P.2d 183, 187 (N.M. Ct. App. 1978) (warning that medication *may* damage the kidneys did not apprise the consumer that drug *will* cause damage in large doses). See also *Torsiello v. Whitehall Laboratories*, 165 N.J. Super. 311, 316, 326-27, 398 A.2d 132, 134-35, 140 (1979) (jury question whether a warning on aspirin — "If pain persists for more than ten days . . . consult a physician immediately" — adequately warned of the potential for bleeding ulcers in the long term, high dosage user).

⁹³ *Michael*, 91 N.M. at 655, 579 P.2d at 187.

⁹⁴ *Id.*

⁹⁵ See, e.g., *Ellis*, 745 F.2d at 306-07 (tampon necessitated warning of toxic shock syndrome); *Tucson Indus., Inc. v. Schwartz*, 108 Ariz. 464, 468-69, 501 P.2d 936, 940 (1972) (warning on contact cement not sufficient to warn that product gave off fumes which might cause blindness to people in adjoining rooms without proper ventilation); *Haberly v. Reardon Co.*, 319 S.W.2d 859, 867 (Mo. 1958) (warning that paint is irritating to skin is not a warning against the injury to sight if paint comes into contact with eye). See also *Spruill v. Boyle-Midway Inc.*, 308 F.2d 79, 85 (4th Cir.

of this stringent requirement is *MacDonald v. Ortho Pharmaceuticals Corp.*⁹⁶ In *MacDonald*, plaintiff, after suffering a stroke, brought a failure to warn action against the manufacturer of birth control pills. The Supreme Judicial Court of Massachusetts ruled that although the defendant manufacturer warned that use of the pills could cause abnormal clotting and possible death, the jury nonetheless could have found the warning was inadequate because it failed to mention "stroke" specifically.⁹⁷ Similarly, the warning on the aerosol deodorant in *Reid v. Eckerd Drugs, Inc.* was potentially inadequate for failing to warn of the deodorant's flammability after it had been applied.⁹⁸ Plaintiff in *Reid* was severely burned when, upon striking a match to light a cigarette, the deodorant he had applied to his body ignited. The North Carolina Court of Appeals held that the manufacturer's warning never to spray deodorant toward a flame was not sufficient as a matter of law to give plaintiff adequate notice of the product's dangers.⁹⁹ Thus, in order to be adequate, the substance of a warning must fully communicate the product's dangers, indicating both the scope and gravity of potential harm.

A manufacturer is not automatically immune from liability for failure to warn when the manufacturer satisfies government warning standards.¹⁰⁰ Absent specific legislative intent to occupy the field, statutory warning requirements do not change the common-law duty to warn.¹⁰¹ Thus, even if a manufacturer adopts a warning verbatim from federal or state regulations, the warning generally does not, as a matter of law, constitute an adequate warning.¹⁰² For example, courts have not hesitated to find manufacturers of FDA-regulated prescription drugs and vaccines liable for failing to provide adequate warnings.¹⁰³ In *Bristol Myers Co. v. Gonzales*, the Supreme Court of Texas held the defendant pharmaceutical manufacturer strictly liable for failure to warn of hearing loss

1962) (warning on furniture polish insufficient to warn of the product's poisonous propensities if ingested); *Rumsey v. Freeway Manor Minimax*, 423 S.W.2d 387, 393 (Tex. Civ. App. 1968) (warning on roach poison inadequate because it did not alert the consumer that there was no antidote once the body had absorbed the poison).

⁹⁶ 394 Mass. 131, 475 N.E.2d 65 (1985).

⁹⁷ *Id.* at 141, 475 N.E.2d at 71-72. See also *Krug v. Sterling Drug, Inc.*, 416 S.W.2d 143, 147-48 (Mo. 1967) (jury could find warning of visual disturbances inadequate when loss of sight was a potential side effect).

⁹⁸ 40 N.C. App. 476, 253 S.E.2d 344, 349-50 (1979).

⁹⁹ *Reid*, 253 S.E.2d at 349-50. Similarly, a manufacturer must warn fully of a drug's side effects. See, e.g., *Crocker v. Winthrop Laboratories*, 514 S.W.2d 429, 432-33 (Tex. 1974) (judicial recognition of manufacturer's duty to warn of addiction).

¹⁰⁰ See, e.g., *Stevens v. Parke, Davis & Co.*, 9 Cal. 3d 51, 65-66, 507 P.2d 653, 661-62, 107 Cal. Rptr. 45, 53-54 (1973); *Michael*, 91 N.M. at 654, 579 P.2d at 186; *Rumsey*, 423 S.W.2d at 394. Whether the warnings which appear on the cigarette package as mandated by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-40, are sufficient to satisfy the cigarette manufacturer's duty to warn is unclear. See *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (1986) (the Act preempts civil suit). But see *Palmer v. Liggett Group, Inc.*, 633 F. Supp. 1171 (1986) (Act does not preempt suit). See *infra* notes 235-43.

¹⁰¹ See, e.g., *Mahr v. G.D. Searle & Co.*, 72 Ill. App. 3d 540, 561, 390 N.E.2d 1214, 1229 (1979); *Michael*, 91 N.M. at 654, 579 P.2d at 186.

¹⁰² *Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652, 658 (1st Cir. 1981); *Michael*, 91 N.M. at 654, 579 P.2d at 186. See also *Maize v. Atlantic Refining Co.*, 352 Pa. 51, 56, 41 A.2d 850, 853 (1945) (liability despite satisfaction of Surgeon General's warnings).

¹⁰³ See, e.g., *Reyes*, 498 F.2d 1264 (5th Cir.) (polio vaccine), *cert. denied*, 419 U.S. 1096 (1974); *McEwen*, 270 Or. 375, 528 P.2d 522 (1974) (oral contraceptive); *Michael*, 91 N.M. at 651, 579 P.2d at 183 (sinus medication). See also *supra* note 11.

as a potential side effect of its product.¹⁰⁴ The court held that FDA approval of the product's package insert did not relieve the drug manufacturer of its obligation to communicate an adequate warning, which would include informing the consumer of the potential of hearing loss.¹⁰⁵

The *Gonzales* decision also illustrates the potential inefficiency of allowing statutory warning requirements to dictate the standards of tort liability. In *Gonzales*, evidence existed to demonstrate that the defendant, Bristol Myers, knew of the drug's side effects long before these risks became known to the FDA officials but failed to make timely warnings of those known dangers.¹⁰⁶ Permitting Bristol Myers's compliance with the FDA's warning requirements to satisfy the manufacturer's common-law duty to warn in *Gonzales* implicitly would have ratified the manufacturer's culpable failure to warn of known dangers. Thus, compliance with statutory warning requirements does not, as a matter of law, satisfy a manufacturer's duty to warn of known product dangers. Statutes establish minimally sufficient regulatory requirements, but the principles of product liability law ordinarily dictate what constitutes a legally adequate warning. Consequently, where the manufacturer knows or has reason to know of hazards in its product, that manufacturer has a duty to warn the consumer of those hazards.

Furthermore, a manufacturer's representations¹⁰⁷ and marketing strategies¹⁰⁸ may diminish the effectiveness of a product's warning so significantly as to render the warning inadequate. For example, in *Stevens v. Parke, Davis & Co.*, the mother of two young children died of pneumonia caused by the use of defendant's product, an antibiotic that the pharmaceutical manufacturer continued to promote heavily even after the medical profession had recognized its propensity to cause blood disorders.¹⁰⁹ The Supreme Court of California in *Stevens* affirmed a jury verdict finding that the defendant drug manufacturer had "watered down" its FDA-required warning through overpromotion of its product.¹¹⁰ Likewise, in *Tinnerholm v. Parke, Davis & Co.*,¹¹¹ the court found that the manufacturer of a dangerous drug employed a "technique of ambiguity and shrewd use of adjectives" to "gloss over facts"¹¹² that would have led doctors to prescribe other, more

¹⁰⁴ 561 S.W.2d 801 (Tex. 1978).

¹⁰⁵ *Id.* at 804.

¹⁰⁶ *Id.*

¹⁰⁷ See, e.g., *Maize v. Atlantic Refining Co.*, 352 Pa. 51, 41 A.2d 850 (1945) (product's name — Safety-Kleen — misled users as to the safety of the cleaning solvent's use); *Toole v. Richardson-Merrell Inc.*, 251 Cal. App. 2d 689, 708–10, 60 Cal. Rptr. 398, 412–413 (1967) (manufacturer's statements that the drug was non-toxic and remarkably free from side effects were misrepresentations that constituted failure to warn).

¹⁰⁸ See, e.g., *Tinnerholm v. Parke Davis & Co.*, 285 F. Supp. 432, 451 (S.D.N.Y. 1968) (drug manufacturer liable because its shrewd advertising techniques led doctors to prescribe dangerous drug); *Stevens v. Parke, Davis & Co.*, 9 Cal. 3d 51, 66–67, 507 P.2d 653, 662–63, 107 Cal. Rptr. 45, 54–55 (1973) (manufacturer liable for death because warning on its antibiotic was counteracted by overpromotion). See also *Koenig v. Muskin Corp. & W.T. Grant Co.*, (Pa. C., Nov. 8, 1982) (seductive ads showing people diving into four feet deep swimming pools negated obviousness of danger), as discussed in *Warsaw, Don't Let A Good Lawsuit Slip Away*, 72 A.B.A.J., Oct. 1, 1986, at 80–82.

¹⁰⁹ 9 Cal. 3d 51, 57–59, 507 P.2d 653, 655–56, 107 Cal. Rptr. 45, 47–48 (1973).

¹¹⁰ *Id.* at 66, 507 P.2d at 662, 107 Cal. Rptr. at 54 (defendant extensively advertised its product, encouraged its sales persons to diminish the seriousness of the antibiotics' side-effects, and distributed several promotional "give-aways," none of which contained warnings).

¹¹¹ 285 F. Supp. 432 (S.D.N.Y. 1968), *aff'd*, 411 F.2d 48 (2d Cir. 1969).

¹¹² *Id.* at 451.

stable vaccines.¹¹³ In *Tinnerholm*, plaintiff suffered a violent reaction to a childhood vaccine, the alternative to which was relatively free of side-effects.¹¹⁴ The district court in New York found the pharmaceutical manufacturer liable for the damages which its product caused because the manufacturer's promotion had "watered down" and rendered inadequate the substance of the product's warning.¹¹⁵

Thus, a manufacturer may avoid liability for failing to warn of its product's dangers only if it supplies a warning that is adequate both in form and substance. Generally, a warning must be clear and understandable, as well as comprehensive, regarding both the nature and severity of a product's risks, to satisfy the manufacturer's duty to warn adequately. A manufacturer may not avoid liability, however, simply by complying with statutory warning requirements. Furthermore, a manufacturer's representations about its product and marketing strategies may diminish the product's warning so as to render it inadequate.

C. Establishing Causation

In order to recover on a claim of failure to warn, plaintiff also must establish the element of causation.¹¹⁶ Plaintiff must prove that defendant's product was both the actual¹¹⁷ and legal cause of his or her injuries.¹¹⁸ Absent a determination that plaintiff's injuries were attributable to a defect in the manufacturer's product, the plaintiff cannot recover.¹¹⁹

Proof of causation very often represents a major obstacle to recovery in product liability suits.¹²⁰ At a minimum, plaintiffs must present sufficient evidence of how the

¹¹³ *Id.* at 436-37, 451.

¹¹⁴ *Id.* at 451.

¹¹⁵ *Id.*

¹¹⁶ 1 HURSH & BAILEY, *supra* note 17, § 1.29.

¹¹⁷ See Klemme, *The Enterprise Liability Theory of Tort*, 47 U. COLO. L. REV. 153, 163 (1976). Professor Klemme stated:

the rule has been: no matter how tortious the defendant's conduct may have been and no matter how long or how strongly a given loss has been considered compensable, unless the plaintiff is able to persuade the fact finder . . . that the defendant's activity was at least one of the infinite "but for" causes of his losses, the plaintiff cannot recover.

Id. (footnotes omitted and emphasis in original). See also Owen, *The Highly Blameworthy Manufacturer: Implications on Rules of Liability and Defense in Product Liability Actions*, 10 IND. L. REV. 769, 777-84 (1977).

¹¹⁸ Proximate cause issues generally arise when the nexus between the manufacturer's breach of duty to market safe products and the plaintiff's injuries appears remote or tenuous, usually due to the intervention of some force other than plaintiff or defendant. PRODUCT LIABILITY AND SAFETY, *supra* note 12, at 623. See, e.g., *Little v. PPG Indus., Inc.*, 19 Wash. App. 812, 579 P.2d 940 (1978) (jury question whether employer's failure to warn of dangers of using a chemical without proper ventilation after receiving several complaints from employees was a superseding cause, negating the chemical company's liability). When a court finds an intervening factor to be so substantial that it supersedes defendant's conduct, the intervening cause becomes the proximate cause of the injury. PROSSER & KEETON, *supra* note 13, § 44 at 311-14.

¹¹⁹ See, e.g., *Owens v. Bourns, Inc.*, 766 F.2d 145 (4th Cir. 1985) (insufficient evidence to establish that infant's blindness was caused by defendant's ventilation equipment); *Gibbs v. Procter & Gamble Mfg. Corp.*, 51 Ill. App. 2d 469, 477-79, 201 N.E.2d 473, 477-78 (1964) (insufficient evidence to establish that detergent caused dermatitis).

¹²⁰ See e.g., *Owens*, 766 F.2d at 150-51 (insufficient evidence to establish that defendant's ventilation equipment caused infant's blindness); *In Re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 773-99 (1984) (due to lack of conclusive epidemiological studies actual causation virtually impossible to establish).

injury occurred to support inferences that a defect existed in the product and that the defect was a substantial factor in producing their harm.¹²¹ Plaintiffs also must sufficiently negate alternative causes of their injuries to satisfy their burden of proof.¹²² Furthermore, if the manufacturer can show that the injurious event would have occurred regardless of the defective nature of its product, the manufacturer has severed the causal link.¹²³

To establish causation in suits premised upon inadequate warnings and misrepresentation, plaintiffs also must prove that they relied on the manufacturer's allegedly inadequate warnings and/or misleading statements.¹²⁴ Plaintiffs are aided in proving that an inadequate warning caused their injuries by the presumption that had the manufacturer adequately warned of its product's hazards, plaintiff would have read the warning and heeded it by safeguarding himself or herself from that product's hazards or by using the product more cautiously.¹²⁵ Once a court determines that the manufacturer has breached its duty to warn, the plaintiff usually automatically has satisfied the element of causation.¹²⁶ The manufacturer may rebut this presumption by presenting evidence that the plaintiff would not have acted differently had it provided an adequate warning.¹²⁷ Depending on the particular facts, a manufacturer can rebut the presumption by producing evidence that the user was blind, illiterate, intoxicated, or otherwise incapacitated at the time of use.¹²⁸ In similar fashion, some courts hold that the plaintiff who has not read the product's warning has broken the causal link; these courts will not permit recovery for injuries based on a claim for failure to warn.¹²⁹

Many product liability cases boil down to a battle of the experts, essentially requiring the jury to resolve conflicting testimony. 1A FRUMER AND FRIEDMAN, *supra* note 12, § 12.02[1]. See, e.g., *Thirsk v. Ethicon Inc.*, 687 P.2d 1315 (Colo. App. 1983) (experts testified that surgical bone wax caused infection); *Brown v. Sterling Abrasives Div. of Cleveland Quarries Co.*, 5 Ill. App. 2d 1, 124 N.E.2d 607 (1955) (metallurgists testified that faulty construction of the wheel, rather than the manner it was mounted, caused wheel to break).

¹²¹ Owen, *supra* note 117, at 779. See e.g., *Carey v. General Motors Corp.*, 377 Mass. 736, 739-41, 387 N.E.2d 583, 585-86 (1979); *Gibbs v. Procter & Gamble Mfg. Corp.*, 51 Ill. App. 2d 469, 477-78, 201 N.E.2d 473, 478 (1964). See also *Kerns v. Engelke*, 54 Ill. App. 3d 323, 333, 369 N.E.2d 1284, 1292 (1977) (plaintiffs must prove that defendant's product was a material element in bringing about the injurious event), *rev'd in part on other grounds*, 76 Ill. 2d 154, 390 N.E.2d 859 (1979).

¹²² See, e.g., *Schwartz v. Macgrose Lumber & Trim Co.*, 29 A.D.2d 781, 287 N.Y.S.2d 706, 707-08 (1968), *aff'd*, 24 N.Y.2d 856, 301 N.Y.S.2d 91 (1969). Cf. *Scanlon v. General Motors Corp.*, 65 N.J. 582, 592, 326 A.2d 673, 678 (1974) (plaintiff must negate other causes where her proof is based on circumstantial evidence). But see *Foley v. Pittsburgh-Des Moines Co.*, 363 Pa. 1, 25, 68 A.2d 517, 528-29 (1949) ("the law does not require the elimination of every possible cause of the accident other than that on which plaintiff relies, but only such causes, if any, as fairly arise from evidence.") (emphasis in original).

¹²³ This is termed the "but for" test. See Owen, *supra* note 117, at 778-79.

¹²⁴ *Id.* at 781-82. See also *Reid v. Eckerd Drugs Inc.*, 40 N.C. App. 476, 486, 253 S.E.2d 344, 351 (1979).

¹²⁵ *Jacobs v. Technical Chem. Co.*, 480 S.W.2d 602, 606 (Tex. 1972). See, e.g., *Reyes v. Wyeth Laboratories*, 498 F.2d 1264, 1281-82 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974); *Hamilton v. Hardy*, 37 Colo. App. 375, 386, 549 P.2d 1099, 1109 (1976); *Ortho Pharm. Corp. v. Chapman*, 388 N.E.2d 541, 553-58 (Ind. Ct. App. 1979); *Nissen Trampoline Co. v. Terre Harte First Nat'l Bank*, 332 N.E.2d 820, 826-27 (Ind. Ct. App. 1975), *rev'd on procedural grounds*, 358 N.E.2d 924 (Ind. 1976); see also RESTATEMENT (SECOND) OF TORTS § 402A comment j ("where warning is given, the seller may reasonably assume it will be read and heeded").

¹²⁶ See Garner, *Cigarette Dependency*, *supra* note 29, at 1447-48.

¹²⁷ *Technical Chem. Co.*, 480 S.W.2d at 606.

¹²⁸ *Id.*

¹²⁹ See, e.g., *Bean v. Ross Mfg. Co.*, 344 S.W.2d 18, 30 (Mo. 1961). In some jurisdictions, however,

In sum, courts will require plaintiffs in an action based on strict liability failure to warn to prove that defendant's product caused their harm. Plaintiffs first must establish that the product's defective nature caused their injury. Plaintiffs also must demonstrate that the lack of an adequate warning was a substantial factor in their use or consumption of the product. In most jurisdictions, plaintiffs are aided by a presumption that had a proper warning been provided, it would have been read and heeded. Nevertheless, proof of causation very often represents a major obstacle to recovery in product liability suits.

D. Potential Defenses to Product Liability Actions

Even if a plaintiff successfully proves that a product is in a "defective condition unreasonably dangerous"¹³⁰ and that the product was the actual and legal cause of his or her injuries, a court may nonetheless deny full recovery. There are several defenses available to a manufacturer who has been sued for failure to warn.¹³¹ The most advantageous of these defenses come under the assumption of the risk and comparative negligence doctrines.

1. Assumption of the Risk

A plaintiff who knows a product is in a dangerous condition and proceeds to use the product in disregard of this known danger has "assumed the risk" and may not recover for his or her resulting injuries.¹³² The traditional form of assumption of the risk relieves a manufacturer of liability for the harm its product caused when the plaintiff actually knew¹³³ and appreciated the risk of injury posed by the product¹³⁴ but never-

plaintiffs may recover even if they have not read the product's warning. These courts have ruled that had the warning been adequate, that is, conspicuous and comprehensive enough to alert the user to potential dangers, the plaintiff would have read and heeded the warning. *See, e.g.,* McEwen v. Ortho Pharmaceutical Corp., 270 Or. 375, 407-10, 528 P.2d 522, 538-39 (1974); Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 86-87 (4th Cir. 1962).

¹³⁰ RESTATEMENT (SECOND) OF TORTS § 402A.

¹³¹ These defenses include assumption of the risk, contributory negligence, product misuse, obvious dangers and the state of the art defense. The state of the art and obvious danger defenses are very often discussed, as in this note, in terms of a manufacturer's duty. *See supra* notes 67-69, 80-85, and accompanying text.

¹³² 2 HURSH & BAILEY, *supra* note 17, § 9.23. *See, e.g.,* Moran v. Raymond Corp., 484 F.2d 1008, 1014-16 (7th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974); Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 426, 261 N.E.2d 305, 309-10 (1970); Heil Co. v. Grant, 534 S.W.2d 916, 920-23 (Tex. Civ. App. 1976).

¹³³ *See* Heil Co. v. Grant, 534 S.W.2d 916, 920-23 (Tex. Civ. App. 1976) (courts measure the injured person's subjective knowledge of a dangerous condition). *See also* Rudisale v. Hawk Aviation, Inc., 92 N.M. 575, 577-78, 592 P.2d 175, 177-78 (1979) (fact that pilot did not make customary preflight check was not assumption of risk that plane did not have oil in the engine). The warning of the danger does not have to come from the supplier of the product; rather, "one who voluntarily chooses to use a chattel with a complete realization, *regardless of how it was acquired*, of the risks to which he thus exposes himself voluntarily assumes such risks." 1 HURSH & BAILEY, *supra* note 17, § 2.107 (emphasis added).

¹³⁴ *See, e.g.,* Hogue v. A.B. Chance Co., 592 P.2d 973, 975 (Okla. 1978) (plaintiff did not assume the risk of being electrocuted where he erroneously believed that aerial basket was insulated); Haugen v. Minnesota Mining & Mfg. Co., 15 Wash. App. 379, 550 P.2d 71, 74 (1976) (plaintiff who did not wear safety goggles because he presumed his glasses would protect his eyes from dust

theless voluntarily proceeded to encounter the risk of harm.¹³⁵ The *Restatement (Second) of Torts* imposes an additional burden on the manufacturer, by requiring that plaintiff's conduct — knowingly exposing himself or herself to a given risk — also be unreasonable.¹³⁶ Although some courts and commentators continue to advocate the traditional assumption of the risk defense in product liability actions,¹³⁷ many jurisdictions have adopted the *Restatement* approach.¹³⁸

Under the *Restatement* approach, courts will deny recovery only when continued use of a product known to be defective is both voluntary and unreasonable.¹³⁹ In *Johnson v. Clark Equipment Co.*, for example, the Oregon Supreme Court recognized that a court must evaluate plaintiff's claim in light of the circumstances surrounding plaintiff's decision to encounter a given risk, including the conditions which motivated that decision and the pressures which operated on the plaintiff, as well as the probability and gravity of potential harm.¹⁴⁰ In *Johnson*, plaintiff's arms were crushed in a forklift accident when, because of hectic working conditions and a lack of assistance, he attempted to fix his cargo from within the cab rather than dismount.¹⁴¹ Similarly, the Colorado Court of Appeals in *Culp v. Rexnord & Booth-Rouse Equipment Co.*, affirmed a judgment for plaintiff holding that a general awareness of the dangers of working with heavy machinery was insufficient as a defense to liability.¹⁴² Plaintiff in *Culp* was injured when he fell into an

and wood particles did not assume the risk that the grinding disk would explode and cause injury to his eyes). In *Haugen*, the appeals court approved the trial court's jury instruction, which stated:

[i]t is not enough to bar recovery . . . that the plaintiff knew that there was a general danger connected with the use of the product, but rather it must be shown that plaintiff actually knew, appreciated, and voluntarily and unreasonably exposed himself to the specific defect and danger which caused his injuries.

Id. at 74.

¹³⁵ See, e.g., *Hogue*, 592 P.2d at 975 (Okla. 1978); PROSSER & KEETON, *supra* note 13, § 68 at 490-92. See also 2 HARPER AND JAMES, TORTS 1165-67 (1956) (identifying several categories of cases in which courts have refused to allow the assumption of the risk defense to operate because of lack of voluntariness).

¹³⁶ RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965) provides: "[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 2 FRUMER & FRIEDMAN, *supra* note 12, § 16A[5][f]; Sales, *Assumption of the Risk and Misuse in Strict Tort Liability — Prelude to Comparative Fault*, 11 TEX. TECH. L. REV. 729, 743-44 (1980).

¹³⁷ See *Hagens v. Oliver Mach. Co.*, 576 F.2d 97, 103 (5th Cir. 1978) ("In Texas, so long as plaintiff encountered the danger *voluntarily*, it matters not that under the same or similar circumstances, an ordinarily prudent person would have incurred the risk which plaintiff's conduct involved.") (emphasis added); Note, *Assumption of Risk and Strict Products Liability*, 95 HARV. L. REV. 872, 873-75 (1982).

¹³⁸ See, e.g., *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 684 (W. Va. 1979) (citing decisions in which the courts have incorporated an unreasonableness requirement).

¹³⁹ *Borel*, 493 F.2d at 1097, 1106-08 (sufficient evidence for jury to find that asbestos worker did not "voluntarily and unreasonably" proceed to "encounter a known danger"). See also *Johnson v. Clark Equip. Co.*, 274 Or. 403, 409-13, 547 P.2d 132, 138-40 (1976) (jury question whether plaintiff's operation of forklift from outside carriage was unreasonable given hectic working conditions); *Devaney v. Sarno*, 125 N.J. Super. 414, 418, 311 A.2d 208, 210 (1973) (jury question whether plaintiff acted unreasonably in driving a car with a defective seat belt), *aff'd*, 65 N.J. 235, 323 A.2d 449 (1974).

¹⁴⁰ 274 Or. 403, 412-13, 547 P.2d 132, 140 (1976).

¹⁴¹ *Id.* at 405-06, 415, 547 P.2d at 135-36, 141.

¹⁴² 38 Colo. App. 1, 2, 553 P.2d 844, 845 (1976).

industrial cement mixer that was defective due to lack of adequate safeguards. Although plaintiff admitted that he was aware of the dangers of working with heavy machinery and that injury was likely if his body got caught in the machinery, the court found this general knowledge insufficient to warrant a finding of assumption of the risk.¹⁴³ To establish assumption of the risk, the court stated, defendant must show that plaintiff had actual knowledge of the *specific danger* posed by the defective product and unreasonably proceeded to encounter that danger.¹⁴⁴

Some scholars have argued that the defense of assumption of the risk is theoretically inapplicable to suits based on failure to warn.¹⁴⁵ To allow this defense, they assert, is to indulge in "circular reasoning."¹⁴⁶ These commentators note that the duty to warn arises only if plaintiff does not already know of the danger. Thus, they conclude, plaintiffs logically cannot be said to have assumed a risk of which they are unaware.¹⁴⁷ Conversely, these scholars argue, if the plaintiff has knowledge of a product's danger from an independent source, the manufacturer's failure to warn could not be the proximate cause of his or her injury.¹⁴⁸ Accordingly, in *Wright v. Carter Products, Inc.*, the United States Court of Appeals for the Second Circuit recognized that the assumption of the risk defense is illogical in the failure to warn context.¹⁴⁹ In *Wright*, the plaintiff contracted a severe case of dermatitis because she continued to use defendant's antiperspirant that contained an ingredient to which she was allergic.¹⁵⁰ The Second Circuit found that in light of plaintiff's long and satisfactory experience with the product and defendant's advertisements that its product was harmless, plaintiff could not have assumed a risk which she did not know existed.¹⁵¹

Thus, to avail itself of the assumption of the risk defense, a manufacturer must at least demonstrate that plaintiff "knowingly and voluntarily proceeded to encounter a known danger." In those jurisdictions that follow the *Restatement* approach, the manufacturer also must prove that plaintiff's assumption of the risk was unreasonable. Finally, at least one court has held that the assumption of the risk defense is inapplicable to suits based on a strict liability claim.

2. Comparative Negligence

Although theoretically plaintiffs' negligence is not an appropriate inquiry in a strict liability action,¹⁵² a growing number of courts use comparative fault principles to apportion

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See Dillard & Hart, *supra* note 14, at 163; R. Keeton, *Assumption of Risk is Product Liability Cases*, 22 LA. L. REV. 122, 145 (1961).

¹⁴⁶ Dillard & Hart, *supra* note 14, at 163.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ 244 F.2d 53, 60-61 (2d Cir. 1957). See also *McClanahan v. California-Spray Chem. Corp.*, 194 Va. 842, 864, 75 S.E.2d 712, 725 (1953).

¹⁵⁰ *Wright*, 244 F.2d at 55-56.

¹⁵¹ *Id.* at 60-61.

¹⁵² Whether courts should apply comparative negligence principles to actions based on strict liability is one of the most controversial issues in the area of products liability. See generally Razook, *Merging Comparative Negligence, and Strict Products Liability: The Case for Judicial Innovation*, 20 AM. BUS. L.J. 511 (1983); Plant, *Comparative Negligence and Strict Tort Liability*, 40 LA. L. REV. 403, 404-10 (1980); Robinson, *Square Pegs (Products Liability) in Round Holes (Comparative Negligence)*, 52 CAL. ST. B.J. 16, 17-20 (1977).

tion damages between parties on the basis of their respective faults for plaintiff's injuries.¹⁵³ For example, in *Daly v. General Motors Corp.*,¹⁵⁴ the decedent sustained fatal injuries in what otherwise would have been a minor accident. The Supreme Court of California considered decedent's negligence in driving while intoxicated and failure to use a seat belt or lock the car door and General Motor's defective design of the doorlatch on decedent's vehicle concurrent causes of plaintiff's husband's death.¹⁵⁵ The court therefore concluded that the lower court should have considered decedent's lack of care and apportioned fault between the parties.

Courts in some jurisdictions also have applied comparative fault principles to eliminate assumption of the risk as a separate defense.¹⁵⁶ The Supreme Court of Florida in *Blackburn v. Dorta*, for example, viewed unreasonable assumption of the risk as a form of contributory negligence.¹⁵⁷ As in the typical comparative negligence case, the trial court would instruct the jury to determine, on a percentage basis, the degree to which defendant's product and plaintiff's unreasonable assumption of the risk contributed to plaintiff's injury.¹⁵⁸ The court would then apply the state's comparative negligence rule to apportion liability between the parties. Acceptance of comparative negligence in the product liability setting therefore permits a finding of manufacturer liability for failure to warn while diminishing the damage award to account for plaintiff's personal responsibility.

In sum, to recover against a manufacturer based on a failure to warn claim, a plaintiff first must establish that the manufacturer had a duty to warn of the dangers inherent in its product's use. Next, the plaintiff must establish either that the manufacturer completely failed to warn of those dangers or that the warnings which the manufacturer did provide were inadequate to apprise the consumer fully of the product's hazards. To recover under the failure to warn approach, plaintiff must also prove both that the manufacturer's product caused the injury which he or she suffered and that the manufacturer's failure to warn caused him or her to use the dangerous product. Finally, plaintiff must surmount the affirmative defenses asserted by the manufacturer, such as assumption of the risk and comparative negligence, to recover completely for his or her injuries.

General acceptance of the principles of strict liability and, specifically, recognition of a cause of action based on a manufacturer's failure to warn, significantly lessens the obstacles facing plaintiffs seeking to recover for injuries caused by a product whose hazards were not adequately warned against. Plaintiffs also will benefit from the relax-

¹⁵³ Although some courts have held comparative negligence to be inapplicable to actions based on strict liability, see, e.g., *Lewis v. Timco, Inc.*, 697 F.2d 1252, 1255-56 (5th Cir. 1983); *Melia v. Ford Motor Co.*, 534 F.2d 795, 802 (8th Cir. 1976), most courts have applied comparative negligence principles to strict liability actions. See, e.g., *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 890 (Alaska 1979); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 734-43, 575 P.2d 1162, 1167-73, 144 Cal. Rptr. 380, 385-91 (1978). See also SCHWARTZ, *COMPARATIVE NEGLIGENCE*, § 12.2 at 196-200 (2d ed. 1986) (survey of which courts have applied, either legislatively or judicially, comparative negligence and comparative fault principles to strict liability actions).

¹⁵⁴ 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

¹⁵⁵ *Id.* at 730-31, 575 P.2d at 1164-65, 144 Cal. Rptr. at 382-83.

¹⁵⁶ At least 20 states, either by statute or judicial decision, have merged assumption of the risk with the concept of contributory negligence and thus have applied comparative principles to diminish plaintiffs' recovery. See SCHWARTZ, *supra* note 156, § 9.4 at 167-173.

¹⁵⁷ 348 So. 2d 287, 292-93 (Fla. 1977).

¹⁵⁸ *Id.* at 291.

ation of affirmative defenses available to the manufacturer in a strict liability action. Consequently, the tremendous evolution in the field of product liability law greatly improves a litigant's prospects for recovery against a manufacturer for failing to provide adequate warnings of its product's risks.

III. SCIENTIFIC EVIDENCE OF AND LEGISLATIVE RESPONSES TO THE HARMFUL EFFECTS OF CIGARETTE SMOKING

In a 1979 report, the United States Surgeon General stated that "cigarette smoking . . . is the chief, single avoidable cause of death in our society and the most important public health issue of our time."¹⁵⁹ Joseph Califano, former Secretary of Health, Education and Welfare, characterized smoking as "Public Health Enemy Number One,"¹⁶⁰ observing that "*smoking is the largest preventable cause of death in America.*"¹⁶¹ Smoking is an established cause of several types of cancer, heart disease, chronic bronchitis, and emphysema.¹⁶² Consequently, in addition to the evolution of strict liability in the context of failure to warn, the ever-increasing wealth of scientific evidence relating cigarette smoking to disease and health complications should aid cigarette plaintiffs.

The medical profession acknowledged cigarette smoking as dangerous in the very early years of Anglo-American history.¹⁶³ During the first part of the twentieth century, the medical profession began to recognize smoking as a cause of lung cancer¹⁶⁴ and a broad spectrum of other diseases.¹⁶⁵ Finally, in 1964, the Surgeon General concluded that cigarette smoking was "a health hazard of sufficient importance in the United States to warrant appropriate remedial action."¹⁶⁶

¹⁵⁹ 1979 SURGEON GENERAL'S REPORT, *supra* note 2, at ii (Secretary's Forward) (emphasis in original).

¹⁶⁰ *Id.*, ch. 2 at 9.

¹⁶¹ *Id.* at ii (Secretary's Forward) (emphasis in original).

¹⁶² See *supra* note 2 for a discussion of medical research establishing smoking as a principal cause of these illnesses. Today, at least 340,000 excess deaths per year are attributable to cigarette smoking. 130 CONG. REC. S11847 (daily ed. Sept. 26, 1984). Cigarette smoking debilitates another ten million persons. *Id.* The phenomenal number of unnecessary deaths constitutes "more than all automobile fatalities per year, more than a hundred times all recorded deaths caused by the acquired immunodeficiency syndrome, and more than all American fatalities in World War I, World War II, and Vietnam put together." 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).

¹⁶³ Garner, *Welfare Reform*, *supra* note 29, at 280 (1977) (King James I urged Englishmen to quit smoking, for it was "[a] custome lothsome to the eye, hateful to the nose, harmful to the braine, dangerous to the lungs.") (quoting JAMES I, A COUNTERBLASTE TO TOBACCO (London 1604), reprinted by THREATRUM ORBIS TERRAERUM LTD. (Amsterdam) and DA CAPO PRESS (New York) (1969)).

¹⁶⁴ *Id.* at 281 n.62. See also Doll & Hill, *Lung Cancer and Other Causes of Death in Relation to Smoking*, 2 BRIT. MED. J. 1071-81 (1956).

¹⁶⁵ See Pollin, *Tobacco Addiction and Tobacco Mortality: Implications For Death Certification*, 252 J. A.M.A. 2849, 2851-52 (1984). See also Pearl, *Tobacco Smoking and Longevity*, 87 SCIENCE 216, 216-17 (1938); Dorn, *Tobacco Consumption and Mortality from Cancer and Other Diseases*, 74 PUB. HEALTH REP. 581 (1959).

¹⁶⁶ 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 SERVICES 33 (1964) [hereinafter 1964 SURGEON GENERAL'S REPORT]. The Surgeon General's committee established conclusively that cigarette smoking was "causally related to lung cancer in men" and also that smoking was "the most important of the causes of chronic bronchitis in the United States, and increases the risks of dying from chronic bronchitis and emphysema." *Id.* at 31.

The Surgeon General's words led to a tremendous surge of tobacco regulatory proposals by the states,¹⁶⁷ Congress,¹⁶⁸ and the Federal Trade Commission (FTC).¹⁶⁹ Fearful of diverse, non-uniform and confusing regulation, the cigarette industry successfully lobbied Congress¹⁷⁰ for the adoption of the Federal Cigarette Labeling and Advertising Act,¹⁷¹ which required that the following legend appear on the cigarette package: "Caution: Cigarettes May Be Hazardous To Your Health."¹⁷² In 1970, Congress amended the labeling act, requiring the cigarette package's admonishment to read: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health."¹⁷³ This warning remained unchanged for the next fifteen years. In October 1984, after much debate and external pressure, Congress passed the Comprehensive Smoking Education Act.¹⁷⁴ This act required that four rotational warnings appear on the cigarette package beginning in October, 1985.¹⁷⁵ These recently enacted

¹⁶⁷ See 111 CONG. REC. 13,901 (1965) (statement of Sen. Moss).

¹⁶⁸ H.R. REP. NO. 449, 89th Cong., 1st Sess. 3-4, reprinted in 1965 U.S. CODE CONG. & AD. NEWS 2350, 2351.

¹⁶⁹ The FTC's proposed rule would have required manufacturers to place the following warnings on each package of cigarettes:

a. CAUTION — CIGARETTE SMOKING IS A HEALTH HAZARD: The Surgeon General's Advisory Committee on Smoking and Health has found that cigarette smoking contributes substantially to mortality from certain specific diseases and to overall death rate; or

b. CAUTION: Cigarette Smoking is Dangerous to Health. It May Cause Death From Cancer and Other Diseases.

29 Fed. Reg. 530, 530-31 (1964). See historical discussion in *Federal Trade Commission, Staff Report on the Cigarette Advertising Investigation*, ch.4 at 2-6 (May 1981) [hereinafter 1981 FTC STAFF REPORT].

¹⁷⁰ See *Cigarette Labeling and Advertising: Hearings on S. 559 and S. 547 Before the Senate Committee on Commerce*, 89th Cong., 1st Sess. 244-47 (1965) (statement of Bowman Gray, Chairman of the Board for R.J. Reynolds and spokesperson for all cigarette manufacturers).

¹⁷¹ Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-40).

¹⁷² Pub. L. No. 89-92, § 4, 79 Stat. 282, 283 (1965) (prior to 1970 and 1984 amendments) (codified at 15 U.S.C. § 1333 (1965 & Supp. V 1965-1969)). The Act also included a preemption provision that no state law require a cautionary statement with respect to smoking and health, other than the specified legislation, on any cigarette package. Pub. L. No. 89-92, § 5, 79 Stat. 282, 283 (1965) (codified at 15 U.S.C. § 1334 (1964 & Supp. V 1965-70)) (emphasis added).

¹⁷³ Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 2, 84 Stat. 88 (1970) (codified at 15 U.S.C. § 1333 (1970)). The Act also barred radio and television advertising. Pub. L. No. 91-222, § 2, 84 Stat. 89 (1970) (codified at 15 U.S.C. § 1335 (1970)).

¹⁷⁴ Congress amended the Federal Cigarette Labeling and Advertising Act in 1984 by the Comprehensive Smoking Education Act, Pub. L. No. 98-74, 98 Stat. 2200 (1984) (codified at 15 U.S.C. §§ 1331-41 (1982 & Supp. II 1984)) (Act effective October 12, 1985). The warnings mandated by this Act, although more specific, should have little effect on the cigarette suits currently pending. Most plaintiffs in these suits began smoking approximately 20 years prior to imposition of the warnings and consequently, may avail themselves of the addiction defense to respond to cigarette manufacturer's assertions of its assumption of risk, contributory, and comparative negligence. See Garner, *Cigarette Dependency*, *supra* note 29, 1431-53, for a thorough discussion of the addiction defense.

¹⁷⁵ The Act requires the following rotational 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..

warnings vary in specificity and intensity. One legend warns of the risks of contracting lung cancer, heart disease, chronic bronchitis, and emphysema.¹⁷⁶ Another warning focuses on the hazards of pre-natal smoking.¹⁷⁷ The remaining two legends inform the consumer that cigarette smoke contains carbon monoxide and that quitting smoking decreases the risks of cigarette-induced illness.¹⁷⁸

Since the Surgeon General's first report on Smoking and Health in 1964, a significant amount of evidence has been amassed illustrating the existence, extent, and severity of tobacco-related disease and addiction. The 1979 Surgeon General's report concluded that "the scientific evidence on the health hazards of cigarette smoking is overwhelming."¹⁷⁹ Although the adverse health effects of smoking vary considerably in their nature and severity among individuals,¹⁸⁰ evidence nonetheless demonstrates that cigarette smokers suffer from higher rates of death,¹⁸¹ illness,¹⁸² and complicated pregnancies¹⁸³ than do non-smokers. Further, the medical profession has concluded that cigarette smoking is addictive.¹⁸⁴ Indeed, the former director of the National Institute of Drug

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

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

15 U.S.C. § 1333.

¹⁷⁶ *Id.* § 1333(a).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* The effect which these warnings will have upon cigarette litigation is unclear. Defendants have asserted, and some courts have agreed, that the Federal Cigarette Labeling and Advertising Act preempts state common law tort suit. See *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 187 (3d Cir. 1986); *Roysdon v. R.J. Reynolds Tobacco Co.*, 623 F. Supp. 1189, 1191 (E.D. Tenn. 1985). But see *Palmer v. Liggett Group, Inc.*, 633 F. Supp. 1171, 1179 (D. Mass. 1986). See also *infra* notes 235-42 and accompanying text for a brief discussion of the cases which have addressed the preemption issue.

¹⁷⁹ 1979 SURGEON GENERAL'S REPORT, *supra* note 2, at vii (Preface). A 1981 FTC report stated, "[t]he 1979 Report, based on over 30,000 articles on smoking and health, confirms, strengthens and extends the conclusions of the 1964 Surgeon General's Report . . ." 1981 FTC STAFF REPORT, *supra* note 169, ch 1 at 5.

¹⁸⁰ 1979 SURGEON GENERAL'S REPORT, *supra* note 2, at viii (Preface). The report states the health effects of smoking depend "on the duration and frequency of smoking, on the presence or absence of concurrent illness or other environmental exposures, and on the individual's age and sex." *Id.*

¹⁸¹ *Id.* ch.2, at 42-44. The 1979 Surgeon General's Report concluded that "[c]igarette smoking is the single most important environmental factor contributing to premature mortality in the United States." *Id.* ch.2, at 9. On average, a thirty-year-old heavy smoker (two or more packs a day) decreases his or her life expectancy by more than eight years. *Id.* ch.2, at 43. Even light smokers (1 to 9 cigarettes a day) are 20% to 45% more likely to die at a younger age than are comparable nonsmokers. *Id.*, ch.2, at 15-17.

¹⁸² See *supra* note 2 for a discussion of research conclusively linking cigarette smoking to cancer, chronic obstructive lung disease, and coronary heart disease.

¹⁸³ A 1980 Surgeon General's Report stated, "[c]igarette smoking is a major threat to the outcome of pregnancy and the well being of the new born baby." 1980 SURGEON GENERAL'S REPORT ON SMOKING AND WOMEN, at v (Preface). Maternal smoking increases the risks of still born births or neonatal deaths (e.g., sudden infant death syndrome) at least 20 percent for light smokers (less than a pack a day) and 35 percent for heavy smokers. Meyer, Jonas & Tonascia, *Perinatal Events Associated With Maternal Smoking During Pregnancy*, 103 AM. J. OF EPIDEMIOLOGY 464-76 (1976).

¹⁸⁴ In 1979 the National Institute on Drug Abuse (NIDA) concluded that "cigarette smoking behavior should be considered a form of addiction, and tobacco in the form of cigarettes, an

Abuse, Dr. William Pollin, called tobacco a "powerfully addictive drug," citing evidence indicating that tobacco is six times more addictive than alcohol.¹⁸⁵

Although cigarette manufacturers no longer claim that smoking has affirmative health effects, they vehemently have refused to acknowledge that cigarette smoking has any detrimental health consequences.¹⁸⁶ Cigarette manufacturers make constant reference to the smoking "controversy"¹⁸⁷ and purport to have evidence contrary to the conclusion that cigarettes cause cancer.¹⁸⁸ The tobacco industry contends that epidemiological evidence can never be relied upon to demonstrate that smoking increases one's likelihood of developing disease.¹⁸⁹ Yet highly regarded medical authority, including the Surgeon General, World Health Organization, American Medical Association, American Heart Association, American Cancer Society, American Lung Association, and members of the insurance industry, all recognize smoking as dangerous.¹⁹⁰

Tremendous advances in scientific research have established a causal connection between smoking and various health risks. Cigarette smoking is the major cause of numerous cancers and is responsible for between seventy and eighty percent of all emphysema and chronic bronchitis and thirty percent of all heart attacks. These developments, as well as the tobacco industry's consistent denial of the substantial evidence linking cigarettes to disease, will play a crucial role in the establishment of a plaintiff's claim that the cigarette manufacturers failed to make adequate warnings of the hazards of smoking.

IV. CIGARETTE MANUFACTURERS SHOULD BE HELD LIABLE FOR FAILING TO WARN ADEQUATELY OF THE DANGERS OF SMOKING

Courts should hold the tobacco industry, as manufacturers of the most harmful product on the market today,¹⁹¹ to the same strict liability standards as any other industry in the United States.¹⁹² There is a tremendous wealth of scientific evidence conclusively

addicting substance." NATIONAL INSTITUTE ON DRUG ABUSE OF THE U.S. PUBLIC HEALTH SERVICE, FINAL REPORT: TECHNICAL REVIEW ON CIGARETTE SMOKING AS AN ADDICTION, at 6 (1979). The medical profession has created a specific category for diseases and deaths caused by tobacco dependence. Pollin, *supra* note 165, at 2849 (citing WORLD HEALTH ORGANIZATION, INTERNATIONAL CLASSIFICATION OF DISEASES (9th rev. ed. 1978) and AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980) (DSM III)). The 1979 Surgeon General's Report also recognized nicotine as addictive. 1979 SURGEON GENERAL'S REPORT, *supra* note 2, ch. 16.

¹⁸⁵ Pollin, *supra* note 162, at 2874. Tobacco addiction is characterized by psychoactive effects, habitual use leading to dependence, compulsive abuse, physiological, and psychological distress upon discontinuance and a tendency to recidivism. Pollin, *supra* note 165, at 2850.

¹⁸⁶ See P. TAYLOR, THE SMOKE RING: TOBACCO, MONEY, AND MULTINATIONAL POLITICS 11-14 (1984); 1981 FTC REPORT, *supra* note 169, ch. 1 at 158-65; N.Y. Times, Jan. 30, 1984, at A11 (advertisement).

¹⁸⁷ N.Y. Times, Jan. 30, 1984, at A11 (advertisement).

¹⁸⁸ *Id.*

¹⁸⁹ 1981 FTC REPORT, *supra* note 169, ch. 1 at 58-65.

¹⁹⁰ N.Y. Times, Jan. 19, 1987, at A1, col. 1.

¹⁹¹ According to the U.S. Surgeon General, smoking kills at least 350,000 Americans each year. See *supra* notes 1-2.

¹⁹² Manufacturers of virtually every other consumer product have been liable for the harm their products have caused. See *supra* notes 9-11, for cases holding liable manufacturers of automobiles, foods, and drugs.

relating cigarette smoking to cancer, heart disease, chronic bronchitis, and emphysema,¹⁹³ yet warnings to the consumer regarding these risks are virtually nonexistent. The current state of product liability law, together with the substantial body of evidence linking cigarettes to several serious illnesses, mandates cigarette manufacturer liability for failure to warn adequately of the dangers of smoking.

Plaintiffs pleaded the first generation of cigarette suits in the 1960s on theories of strict liability and implied warranty, claiming that cigarettes were unreasonably dangerous or not merchantable.¹⁹⁴ Not surprisingly, courts refused to hold cigarette manufacturers liable under these theories, for to do so would have required a finding that cigarettes were in a defective condition and thereby not reasonably fit to smoke.¹⁹⁵ Liability premised on these claims would have had an extremely detrimental impact on the entire tobacco industry. If plaintiffs had been successful under these theories, the only alternatives available to the cigarette manufacturer would have been either to make cigarettes safe to smoke or to withdraw them from the market — neither a very practicable alternative.

Courts today, however, may be willing to hold cigarette manufacturers liable for failing to warn consumers adequately of the health risks of cigarette smoking.¹⁹⁶ Under a failure to warn approach, manufacturers can avoid future liability by ensuring that cigarette warnings are adequate to satisfy current product liability standards, that is, by providing warnings that are sufficiently conspicuous, comprehensive, specific, and intense to communicate the hazardous nature of smoking.¹⁹⁷ In fact, a package insert similar to those commonly accompanying drugs may be sufficient to warn consumers fully and adequately of the dangers of cigarette smoking. Additionally, the fear that the tobacco industry cannot withstand the imposition of liability is unfounded. The holdings of the largest cigarette manufacturers are so vast and diversified¹⁹⁸ that they could settle damage claims by reorganizing their operations while continuing to produce and sell their product. Finally, adequate warnings will preserve the individual's right to personal autonomy in making an informed decision whether to begin or continue smoking.¹⁹⁹

Liability based on the cigarette manufacturers' failure to provide adequate warnings of the deadly propensities and addictive nature of smoking now has a strong foundation grounded in well-established legal principles. Under present strict liability standards

¹⁹³ See *supra* note 2.

¹⁹⁴ See *supra* notes 32–58 and accompanying text.

¹⁹⁵ See *Green v. American Tobacco Co.*, 391 F.2d at 102; *Ross v. Philip Morris & Co.*, 328 F.2d at 12.

Plaintiffs continue to be plagued by courts' unwillingness to find cigarettes unreasonably dangerous. See, e.g., *Roysdon v. R.J. Reynolds Tobacco Co.*, 623 F. Supp. 1189, 1191–92 (E.D. Tenn. 1985).

¹⁹⁶ Because the cost of giving an adequate warning is minimal and relatively easy — often, a package insert is sufficient — most courts are willing to impose liability for failure to warn. See *Sales, supra* note 14, at 539–43. See, e.g., *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 306–07 (4th Cir. 1984) (tampons necessitate warning of toxic shock); *Moran v. Faberge, Inc.*, 273 Md. 538, 332 A.2d 11 (1975) (perfume requires a warning of flammability). Further, the law has recognized a right to full disclosure of a product's dangers even if the product is unavoidably unsafe. See *Davis v. Wyeth Laboratories, Inc.*, 399 F.2d 121, 129–30 (9th Cir. 1968).

¹⁹⁷ See *supra* notes 88–99 and accompanying text.

¹⁹⁸ For example, in June, 1985, R.J. Reynolds bought Nabisco Brands, Inc. and became "the nation's largest consumer products concern." *N.Y. Times*, June 16, 1985, § 3 at F6.

¹⁹⁹ See *supra* note 63.

courts should find that the cigarette manufacturers had and continue to have a duty to make timely warnings of the hazards of smoking. The cigarette manufacturers failed to fulfill this duty by waiting until 1965 for Congress to mandate a warning before providing any information regarding the known dangers of cigarette smoking.²⁰⁰ Under generally accepted product liability standards, courts also should recognize the inadequacy of the federal warnings that have appeared on the cigarette package since 1965. These warnings have not been sufficiently comprehensive or intense to satisfy the manufacturer's duty to apprise the consumer fully of the dangers of smoking.²⁰¹ Moreover, the manufacturer's own marketing activities have diminished the impact of these warnings so severely as to render them completely useless.²⁰²

Once courts find that the cigarette manufacturers have a duty to warn and that any warnings provided by the manufacturers have been wholly inadequate, plaintiffs still must prove that cigarettes caused their harm and that the manufacturers' failure to warn caused them to commence or continue smoking.²⁰³ Although causation may be difficult for cigarette plaintiffs to establish, this obstacle is by no means insurmountable. There is a tremendous wealth of scientific evidence which conclusively establishes that cigarette smoking causes cancer, heart disease, chronic bronchitis, and emphysema, as well as several other illnesses. Moreover, in virtually every jurisdiction plaintiffs will be aided by the presumption that had an adequate warning been provided, it would have been read and heeded.²⁰⁴

Plaintiffs also must overcome the affirmative defenses advanced by the manufacturers to recover for their cigarette-induced ailments.²⁰⁵ Although the assumption of the risk defense is theoretically available to the cigarette manufacturer, it should fail because the manufacturers *never* warned against the addictive nature of smoking.²⁰⁶ Furthermore, in light of the manufacturers' extensive advertising of cigarettes and their consistent denial of the hazards of smoking, courts probably will not find a plaintiff's decision to smoke unreasonable, as required by those jurisdictions that have adopted the *Restatement Second* definition of assumption of the risk.²⁰⁷ Courts' increased acceptance of comparative fault principles, however, may lead to a reduction in a plaintiff's ultimate recovery if a jury determines that the plaintiff should be held accountable for some portion of his or her smoking-related illness.²⁰⁸

Finally, as a matter of policy, the tobacco industry should bear the cost of illness and death caused by cigarettes.²⁰⁹ Courts, therefore, should hold the cigarette manufacturer to the same product liability standards as the manufacturer of any other consumer product.

A. Courts Should Hold Cigarette Manufacturers to a Duty To Warn

Courts will hold a manufacturer strictly liable for failure to warn if the manufacturer knew or should have known of a product's dangers in its intended or foreseeable use

²⁰⁰ See *infra* notes 210-38 and accompanying text.

²⁰¹ See *infra* notes 249-69 and accompanying text.

²⁰² See *infra* notes 273-88 and accompanying text.

²⁰³ See *infra* notes 289-97 and accompanying text.

²⁰⁴ See *infra* notes 296-97 and accompanying text.

²⁰⁵ See *infra* notes 298-316 and accompanying text.

²⁰⁶ See *infra* notes 310-14 and accompanying text.

²⁰⁷ See *infra* notes 298-303 and accompanying text.

²⁰⁸ See *infra* notes 315-16 and accompanying text.

²⁰⁹ See *infra* notes 317-23 and accompanying text.

and failed to warn adequately of those dangers.²¹⁰ Cigarette manufacturers offer three major arguments against courts imposing upon them a duty to warn. The manufacturers argue that they could not foresee the dangers of smoking, that the evidence establishing the hazards of smoking is not conclusive, and, paradoxically, that the dangers of smoking are obvious. These arguments are both factually and legally without merit. Evidence regarding the dangers of cigarette smoking began to accumulate at the turn of the century.²¹¹ Furthermore, manufacturers cannot wait for conclusive evidence regarding a product's hazards before incurring a duty to warn;²¹² therefore, the cigarette manufacturer had a duty to warn when the potential hazards of smoking became apparent. Finally, although manufacturers have no duty to warn against obvious dangers,²¹³ the health hazards of smoking have been far from obvious to the general public.

A sufficient wealth of studies were performed and published between the early 1900's and the 1960's to put the tobacco industry on notice of the dangers inherent to cigarette smoking.²¹⁴ By 1938 a substantial bibliography on the health hazards of smoking had accumulated.²¹⁵ By 1964, the Surgeon General had established conclusively the causal link between cigarette smoking and lung cancer.²¹⁶ Because the law imposes upon a manufacturer the knowledge of an expert in its field,²¹⁷ courts should presume that the cigarette manufacturer was fully aware of the medical developments linking cigarette smoking to debilitating disease and death.²¹⁸ Thus, it is clear that before 1965 the cigarette manufacturers had a duty to make timely warnings of the dangers associated with their product. Yet it was not until 1965 that the cigarette manufacturers issued any type of warning against the hazards of smoking.²¹⁹

Furthermore, in most jurisdictions a manufacturer may not wait for conclusive proof of a causal relationship before incurring a duty to alert the public to its product's risks.²²⁰ Rather, the manufacturer must warn its product's user of potential risks of harm.²²¹ Thus the cigarette manufacturers' classic defense that scientific evidence establishing smoking as a cause of cancer is not *conclusive*²²² is without merit. Like the insulation

²¹⁰ See *Lindsay v. Ortho Pharmaceutical Corp.*, 637 F.2d 87, 91 (2d Cir. 1980); *Mitchell v. Sky Climber, Inc.*, 396 Mass. 629, 631, 487 N.E.2d 1374, 1376 (1986); *Seley v. G.D. Searle & Co.*, 67 Ohio St. 2d 192, 198-99, 423 N.E.2d 831, 837 (1981); *McEwen v. Ortho Pharmaceutical Corp.*, 270 Or. 375, 385-407, 528 P.2d 522, 528-38 (1974).

²¹¹ See Pollin, *supra* note 165, at 2851-52.

²¹² *Borel*, 493 F.2d at 1090.

²¹³ See *supra* notes 80-82.

²¹⁴ In 1966, the plaintiff in *Pritchard* offered a bibliography of nearly 800 scientific studies on the hazards of smoking, but the court did not permit the studies into evidence. *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 300-01 (3d Cir. 1961). See Wegman, *supra* note 22, at 679-688 for an excellent historical perspective of the early cigarette suits.

²¹⁵ See Pearl, *supra* note 165, at 216-17.

²¹⁶ 1964 SURGEON GENERAL'S REPORT, *supra* note 166, at 31. The 1964 Surgeon General's Report also established that cigarette smoking was one of the most important causes of chronic bronchitis. *Id.*

²¹⁷ See *supra* notes 71-72.

²¹⁸ Cf. *Borel v. Fibreboard Prods. Corp.*, 493 F.2d 1076, 1089, 1093 (5th Cir. 1973) (asbestos manufacturer held to know of the hazards of asbestosis), *cert. denied*, 419 U.S. 869 (1974); *Mahr v. G.D. Searle & Co.*, 72 Ill. App. 3d 540, 564, 390 N.E.2d 1214, 1231 (1979) (oral contraceptive manufacturer presumed to have knowledge of the risks of blood clotting).

²¹⁹ See The Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, § 2(2), 79 Stat. 282 (1965) (codified at 15 U.S.C. § 1331).

²²⁰ See *supra* note 72.

²²¹ See *Borel*, 493 F.2d at 1090; *Hamilton v. Hardy*, 549 P.2d 1099, 1108 (Colo. App. 1976).

²²² See TAYLOR, *supra* note 191, at 12.

manufacturer in *Borel* who knew or should have known of the dangers associated with asbestos as early as the 1930's,²²³ the cigarette manufacturers breached their duty to make timely warning of the dangers of cigarette smoking. While many of the hazards of smoking were not established conclusively until the 1960's,²²⁴ the body of scientific knowledge that had accumulated throughout the early part of the twentieth century was sufficient to establish tangible health risks that required warning.²²⁵

Additionally, a manufacturer cannot rely on others to alert the consumer to dangers inherent in its product.²²⁶ Implicit in this rule is the understanding that once the cigarette manufacturers had a duty to warn of the grave health hazards of smoking, they could not wait for the federal government to enact legislation mandating a warning on cigarettes.²²⁷ Yet this appears to be precisely what the tobacco industry has done. Indeed, it took the Surgeon General's call to action,²²⁸ public clamor, and a Congressional mandate to compel cigarette manufacturers to "caution" of the possible hazards of smoking.²²⁹

Plaintiffs' burden in proving that the cigarette manufacturers breached their duty to make timely warnings of the hazards of smoking is lessened significantly in the minority of jurisdictions that are willing to impute knowledge of a product's dangers to its manufacturer.²³⁰ These jurisdictions focus solely upon the product's hazardous condition rather than upon any negligent conduct by its manufacturer.²³¹ *Halphen v. Johns-Manville Corp.*²³² illustrates the utility of this approach. In *Halphen*, a strict liability action, the Court of Appeals for the Fifth Circuit imputed to the manufacturer current knowledge about the cancer causing propensities of asbestos even though those dangers were

²²³ *Borel*, 493 F.2d at 1092-93.

²²⁴ The 1964 Surgeon General's Report publicized widely the harmful effects of smoking, particularly lung cancer. See *supra* note 166.

²²⁵ See 2 FRUMER & FRIEDMAN, *supra* note 12, § 16A[4][f][vi]. The seller is required to warn of a product's danger "if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger." RESTATEMENT (SECOND) OF TORTS § 402A comment j. See, e.g., *Ezagui v. Dow Chem. Corp.*, 598 F.2d 727, 733 (2d Cir. 1979) (manufacturer of dangerous children's vaccine had a duty to warn of the product's hazards); *Borel* 493 F.2d at 1092-93 (insulation manufacturer had duty to test and warn against foreseeable dangers of asbestos); *Hamilton* 549 P.2d at 1108-09 (manufacturer of birth control pill incurred duty to warn of potential side effects).

²²⁶ See *Borel* 493 F.2d at 1090.

²²⁷ See, e.g., *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801, 804 (Tex. 1978) (pharmaceutical manufacturer held liable for failure to warn despite satisfaction of the FDA's labeling requirements).

²²⁸ THE 1964 SURGEON GENERAL'S REPORT, *supra* note 166, at 33 (concluding that cigarette smoking was a "health hazard of sufficient importance in the United States to warrant appropriate remedial action.").

²²⁹ The 1965 Warning Act represents a political success to the tobacco industry, given the range and severity of regulations which the states and the FTC were proposing at the time. In response to the Surgeon General's report of 1964, most states and the FTC had begun drafting their own tobacco regulations and warnings. Fearful of varying and diverse warning requirements, the tobacco industry lobbied Congress for adoption of the relatively innocuous "Caution: Cigarette Smoking May Be Hazardous to Your Health." Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-40 (1964 & Supp. V 1965-1969)).

²³⁰ See *supra* notes 67-68 and accompanying text.

²³¹ See *Hayes v. Ariens*, 391 Mass. 407, 413, 462 N.E.2d 273, 277-78 (1984); *Ryder v. Kelly Springfield Tire Co.*, 91 Wash. 2d 111, 117-118, 587 P.2d 160, 163-64 (1978). See *supra* notes 67-68 and accompanying text for a discussion of imputation of a product's dangers to its manufacturer.

²³² 737 F.2d 462 (5th Cir. 1984).

unknowable at the time plaintiff was exposed.²³³ The Fifth Circuit accordingly held the defendant asbestos manufacturer strictly liable for causing plaintiff's fatal cancer.²³⁴

In a minority of jurisdictions, courts evaluating a cigarette plaintiff's complaint therefore would assume the current state of scientific knowledge regarding the health hazards of smoking and then consider whether an ordinary and prudent cigarette manufacturer would be acting reasonably in failing to warn of these dangers.²³⁵ Obviously, no reasonable manufacturer, given the overwhelming wealth of scientific evidence linking cigarettes to death and disease, could avoid liability while allowing the risks of cigarette induced illness to go unwarned. Thus, imputing knowledge of the hazards of cigarette smoking to the manufacturer significantly aids plaintiffs' case because courts would not require plaintiffs to prove the cigarette manufacturer had, or should have had, knowledge of the dangers of smoking at a given time. Rather, courts will presume that the cigarette manufacturer was fully apprised of the hazards of its product.

Finally, although there was a significant wealth of information available to the cigarette manufacturers to confirm the health hazards of smoking, these hazards were by no means sufficiently obvious to the ordinary consumer to obviate the cigarette manufacturer's duty to warn. Courts consider only the most blatant dangers "open and obvious" enough to negate the manufacturer's duty to warn.²³⁶ Therefore, it is highly unlikely that a court would declare the hazards of cigarette smoking obvious. Even today, despite the accumulation of scientific evidence identifying with particularity the health risks associated with smoking, the American public remains remarkably unaware of the specific dangers of cigarette smoking.²³⁷ Thus, while a general awareness of the dangers of smoking exists, the American public's unfamiliarity with the specific health risks of smoking reveals that the dangers of cigarette smoking are not and have not been sufficiently obvious to negate the need for adequate warnings.²³⁸

The cigarette manufacturer has a duty to warn of the foreseeable dangers of smoking. The cigarette manufacturer cannot wait for conclusive evidence regarding the risks of smoking before incurring a duty to warn. Nor may the manufacturer rely on others to alert the public of the hazards of its product. Rather, the cigarette manufacturer must inform the consumer in a timely manner of potential dangers in its product's use.

²³³ *Halphen*, 737 F.2d at 465-66. *Halphen* specifically repudiated *Lartique v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir. 1963).

²³⁴ *Id.*

²³⁵ See *supra* notes 67-68 and accompanying text.

²³⁶ See *Borel*, 493 F.2d at 1093; *Trujillo v. Uniroyal Corp.*, 608 F.2d 815, 819 (10th Cir. 1979). See generally *Sales*, *supra* note 14, at 575-77. See also *supra* notes 80-82.

²³⁷ A large percentage of the population does not know what diseases are smoking related. For example, over 30% of the public is still unaware of the relationship between smoking and heart disease, and nearly 50% of all women do not know that smoking during pregnancy increases the risks of stillbirth and miscarriage. 1981 FTC STAFF REPORT, *supra* note 169, ch. 3 at 27-30. Further, many Americans do not understand that cigarette smoking increases a person's susceptibility to a variety of serious health problems. Specifically, approximately 40% of the population does not know cigarette smoking causes "most" cases of lung cancer, and 30% of the population remains unaware that emphysema is smoking related. *Id.* ch. 3, at 19, 31. Additionally, a significant number underestimate the increased risk of dying from a smoking related illness. *Id.* ch. 3, at 12. Finally, the majority of the population does not consider smoking addictive. *Id.* ch. 3, at 40. In particular, 3 out of 5 teenagers believe smoking is "okay if they quit before it becomes a habit." *Id.*

²³⁸ Cf. *Borel*, 493 F.2d at 1093 (hazards of asbestos not sufficiently obvious to negate need for warning).

Thus, at a minimum, courts should hold cigarette manufacturers accountable to those persons who began to smoke prior to 1965, when the warnings first began to appear on the cigarette package, because the manufacturers failed to keep abreast of scientific evidence regarding the dangers of cigarettes and to warn of the hazards of smoking in a timely manner.

B. Courts Should Find that the Cigarette Manufacturers Provided Inadequate Warnings of the Hazards of Smoking

Courts should not allow the cigarette manufacturers' mere compliance with the warning requirements of the Federal Labeling Acts to immunize the tobacco industry from liability. Applying well-established product liability doctrine, courts should find that these Congressionally mandated warnings were and continue to be entirely inadequate because they have not been sufficiently comprehensive, specific, or intense to fully apprise the consumer of the hazards of smoking. Moreover, the cigarette manufacturers consistently have marketed and represented their product in such a fashion as to eviscerate the effect of these warnings. Thus, courts should hold the cigarette manufacturer liable for failure to provide adequate warnings of the dangers of smoking.

1. Compliance With the Cigarette Label Acts

One of the first, and most difficult, obstacles facing plaintiffs in the second generation of cigarette suits is the argument that the Federal Cigarette Labeling and Advertising Act (the Act) preempts suits based on the cigarette manufacturer's failure to warn of the dangers of smoking.²³⁹ Defendant cigarette manufacturers have asserted, sometimes successfully,²⁴⁰ that the Act preempts common-law tort actions. Although courts uniformly have agreed that Congress neither expressly preempted nor intended to occupy the entire field of cigarette labeling and advertising with respect to smoking and health, courts have not conclusively determined whether tort recovery contravenes the purposes of the Act.²⁴¹ The Third Circuit Court of Appeals, in *Cipollone v. Liggett*, found that imposition of civil liability upon the cigarette manufacturer would be in conflict with the Act's stated purposes — to provide for uniform labeling and safeguard the economic welfare of the tobacco industry.²⁴² Nevertheless, the District Court of Massa-

²³⁹ See 15 U.S.C. §§ 1331–1340. The Act contains a preemption provision which provides that: (a) No statement relating to smoking and health, other than the statement required by section 1333 . . . shall be required on any cigarette package.

(b) No requirement of 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 [Act].

15 U.S.C. § 1334 (1982).

²⁴⁰ See, e.g., *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 187 (3d Cir. 1986); *Roysdon v. R.J. Reynolds Tobacco Co.*, 623 F. Supp. 1189, 1191 (E.D. Tenn. 1985).

²⁴¹ Contrast *Cipollone* 789 F.2d at 187 and *Roysdon*, 623 F. Supp. at 1191 (imposition of common law liability upon cigarette manufacturers would be contrary to the purposes of the labeling acts) with *Palmer v. Liggett Group, Inc.*, 633 F. Supp. 1171, 1179 (D. Mass. 1986) (tort suits would not violate the purposes of the Act).

²⁴² 789 F.2d 181, 187 (3d Cir. 1986). The Act expressly stated the policy behind the warning to be:

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

chusetts, less than three weeks after the *Cipollone* decision, in *Palmer v. Liggett Group, Inc.*, disagreed with the Third Circuit and found that allowing product liability suits based on the cigarette manufacturer's failure to warn adequately of the dangers of smoking would not frustrate the Act's objectives.²⁴³ The district court's ruling in *Palmer* is currently on appeal to the United States Court of Appeals for the First Circuit. Should the First Circuit affirm *Palmer*, conflicting opinions in the First and Third Circuits eventually may lead to a ruling by the United States Supreme Court on the preemption question.²⁴⁴

Assuming that the Act does not preempt civil suit, courts should not consider compliance with the Act sufficient to satisfy the cigarette manufacturers' duty to provide adequate warnings of the dangers of cigarette smoking. The warnings which have appeared on the cigarette package, when evaluated on the basis of state common-law tort doctrine, have been wholly inadequate. Scientific knowledge of the hazards of cigarette smoking always has been far greater than that suggested by the federally required labels. Indeed, evidence conclusively establishing cigarette smoking as a primary cause of lung cancer was available prior to 1965.²⁴⁵ Nevertheless, Congress did not implement legislation requiring that cigarette manufacturers disclose the cancer causing propensities of cigarettes until 1985,²⁴⁶ more than two decades after the Surgeon General and the medical community had confirmed that causal relation.

The time lag between recognition of a product's risks and congressional action is precisely why courts are reluctant to find that a manufacturer has fulfilled its duty to warn by the mere satisfaction of government approved warnings.²⁴⁷ A manufacturer must continue to make timely warnings of its product's risks when it becomes aware of those risks.²⁴⁸ By allowing the cigarette labeling acts to define what constitutes an adequate cigarette warning, Congress and the courts have provided a disincentive for the cigarette manufacturers to test their product and make timely warnings of risks associated with cigarette smoking. Had courts held the cigarette manufacturers to the same standards as other manufacturers, it surely would not have taken twenty years for a warning to appear on cigarette packages that cigarettes cause lung cancer. Thus, courts should not consider compliance with the federal labeling acts sufficient to constitute an adequate warning of the dangers of smoking.

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

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

15 U.S.C. § 1331 (1982).

²⁴³ 633 F. Supp. 1171, 1176-79 (D. Mass. 1986).

²⁴⁴ A more detailed analysis of the preemption issue is beyond the scope of this note.

²⁴⁵ See, e.g., *Doll and Hill*, *supra* note 164, at 1071-81 (1956).

²⁴⁶ See *supra* notes 174-75 and accompanying text for the text of the warnings which began to appear on the cigarette package in October, 1985.

²⁴⁷ Cf. *Bristol Myers v. Gonzales*, 561 S.W.2d 801, 805 (1978) (pharmaceutical manufacturer held liable for failure to warn despite compliance with FDA warning requirements where evidence showed that manufacturer had knowledge of product dangers not identified by FDA warning).

²⁴⁸ See *Tinnerholm v. Parke, Davis & Co.*, 285 F. Supp. 432, 452 (S.D.N.Y. 1968). See also *supra* notes 75-79 and accompanying text.

2. The Inadequacy of the Cigarette Warnings

Measured against the principles of modern tort law, the cigarette manufacturers' warnings are woefully inadequate. The warnings required by the cigarette labeling acts of 1965, 1970, and 1984 have been neither strenuous enough²⁴⁹ to alert the consumer to the grave dangers of cigarette smoking nor sufficient to apprise the consumer of the full extent of the potential illness and death resulting from smoking.²⁵⁰ Moreover, these warnings have never approached the degree of comprehensiveness necessary to warn of the whole litany of dangers accompanying cigarette smoking.²⁵¹

The 1965 warning was not sufficiently intense to apprise the consumer of the health hazards reasonably known to the cigarette manufacturer. Congress required that the legend "Caution: Smoking May Be Hazardous to Your Health" appear on the cigarette package.²⁵² Yet by 1965, studies conclusively established cigarette smoking as a primary cause of lung cancer.²⁵³ The Supreme Court of New Mexico, in *Michael v. Warner/Chilcott*, found a similar warning, which provided that a sinus medication *may* cause kidney damage, inadequate because kidney damage was an established side-effect of the drug.²⁵⁴ Like the warning in *Michael*, the 1965 legend warned only that cigarette smoking *may* be hazardous to health,²⁵⁵ when in fact substantial evidence established that it *was* a health hazard. The 1967 Federal Trade Commission Staff, reporting on the effectiveness of cigarette labeling,²⁵⁶ quickly recognized the inadequacy of the 1965 warnings.²⁵⁷ Congress, three years later, also acknowledged the inadequacy of the warning and modified the labeling requirement to state that the Surgeon General had determined that smoking was dangerous.²⁵⁸

The warning which appeared on the cigarette package between 1970 and 1985,²⁵⁹ like the 1965 warning, also was insufficient to satisfy the cigarette manufacturer's duty

²⁴⁹ See, e.g., *Michael v. Warner/Chilcott*, 91 N.M. 651, 654, 579 P.2d 183, 186 (N.M. Ct. App. 1978) (warning on sinus medication stated product may cause hearing loss when such side effects were in fact known dangers when product was consumed in high dosages). See also *supra* notes 91-94 and accompanying text.

²⁵⁰ See, e.g., *Reid v. Eckerd Drugs, Inc.*, 40 N.C. App. 476, 253 S.E.2d 344, 349-50 (warning on antiperspirant insufficient to warn of the product's flammability). See also *supra* notes 95-99 and accompanying text for a discussion of adequacy of warning.

²⁵¹ *MacDonald v. Ortho Pharmaceutical Corp.*, 394 Mass. 131, 139-40, 475 N.E.2d 65, 70-71 (1980) (warning on contraceptive was not sufficiently comprehensive because it did not mention the possibility of stroke). See also Brody, *Recovery Against Tobacco Companies*, TRIAL 48, 49 (Nov. 1985). See *supra* notes 95-99 and accompanying text.

²⁵² 15 U.S.C. § 1333 (1964 & Supp. V. 1965-1969).

²⁵³ 1964 SURGEON GENERAL'S REPORT, *supra* note 166, at 37-38. The 1964 Surgeon General's Report concluded, among other things, that smoking is causally related to lung cancer in men and the leading cause of chronic bronchitis in the United States and further, that smokers have a higher death rate from coronary artery diseases than nonsmokers. *Id.*

²⁵⁴ 91 N.M. 651, 655, 579 P.2d 183, 187 (N.M. Ct. App. 1978).

²⁵⁵ See *supra* text at note 172 for the text of the 1965 warning.

²⁵⁶ The Federal Cigarette and Labeling Act of 1965 required the FTC to transmit a report annually to Congress concerning the effectiveness of cigarette labeling, current cigarette advertising practices, and the need for any additional legislation. 15 U.S.C. § 1334(d)(2) (1964 & Supp. V. 1965-1969).

²⁵⁷ *Federal Trade Commission, Report to Congress*, 28 (June 20, 1967).

²⁵⁸ The Public Health Cigarette Smoking Act of 1969 required the following warning: "Warning: The Surgeon General Has Determined That Cigarette Smoking is Dangerous to Your Health." 15 U.S.C. § 1333 (1982 & Supp. II 1984).

²⁵⁹ See *id.*

to provide adequate warnings of the hazards of smoking. The cigarette manufacturers continued to make no attempt to inform the consumer that smoking is causally related to lung cancer, a fact that the 1964 Surgeon General's Report conclusively established.²⁶⁰ In addition, the 1965 and 1970 warnings also were not sufficiently comprehensive or specific to convey the full scope and severity of the risks associated with smoking.²⁶¹ In *MacDonald v. Ortho Pharmaceutical Corp.*, the Supreme Judicial Court of Massachusetts affirmed a jury's finding that the warning on an oral contraceptive was inadequate because, although it warned of the potential of death due to abnormal clotting, it did not specifically mention the possibility of "stroke."²⁶² *MacDonald* affirmed the well-established rule that a warning is inadequate if it is "reluctant in tone" or fails to make the nature and severity of a product's risks reasonably comprehensible to the average consumer.²⁶³ Courts similarly should consider the vague Surgeon General's warning that "Cigarette Smoking Is Hazardous to Your Health" inadequate because it fails to satisfy the specificity and comprehensiveness requirements of an adequate warning. Indeed, the warning failed to alert the consumer that smoking is causally related to cancer, heart disease, chronic bronchitis, and emphysema and may complicate pregnancy.²⁶⁴ In 1964, however, the Surgeon General's committee on Smoking and Health concluded that all of these serious health hazards were caused by, or potentially related to, cigarette smoking.²⁶⁵

Even the most recent cigarette warnings, first appearing in October 1985,²⁶⁶ fail to warn of the grave dangers of cigarette smoking with sufficient force. The legend, which reads: "SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, and May Complicate Pregnancy,"²⁶⁷ hardly informs consumers 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.²⁶⁸ Furthermore, the 1985 package warnings do not 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.²⁶⁹ Such startling information clearly is not

²⁶⁰ 1964 SURGEON GENERAL'S REPORT, *see supra* note 166, at 31, 37.

²⁶¹ *See* cases cited in note 95 *supra*.

²⁶² 394 Mass. 131, 141, 475 N.E.2d 65, 71-72 (1985).

²⁶³ *See, e.g., Ellis v. International Playtex, Inc.*, 745 F.2d 292, 306-07 (4th Cir. 1984); *Sterling Drug, Inc., v. Yarrow*, 408 F.2d 978, 994 (8th Cir. 1969); *Seley v. G.D. Searle*, 67 Ohio St. 2d 192, 198, 423 N.E.2d 831, 837 (1981); *McEwen v. Ortho Pharmaceutical Co.*, 270 Or. 375, 388, 528 P.2d 522, 529 (1974).

²⁶⁴ *See supra* note 2.

²⁶⁵ 1964 SURGEON GENERAL REPORT, *supra* note 166, at 37-39.

²⁶⁶ 15 U.S.C. §§ 1331-1341 (1982 & Supp. II 1984). *See supra* note 175 for text of the current warnings.

²⁶⁷ 15 U.S.C. §§ 1333 (1982 & Supp. II 1984).

²⁶⁸ 1981 FTC STAFF REPORT, *supra* note 169, ch. 1 at 11-31. A similar argument can be made regarding the inadequacy of the current (1985) warning, which addresses the fetal health hazards due to maternal smoking. The medical data shows that a pregnant woman who smokes increases up to 35% the risks of spontaneous abortion, fetal, or neonatal death. *See Meyer, Jonas & Tonascia, Perinatal Events Associated with Maternal Smoking During Pregnancy*, 103 AM. J. OF EPIDEMIOLOGY, 464-76 (1976). Clearly, the Surgeon General's warning — "WARNING: Smoking By Pregnant May Result in Fetal Injury, Premature Birth and Low Birth Weight" — does not evoke the same sense of urgency.

²⁶⁹ 1979 SURGEON GENERAL'S REPORT *supra* note 2, ch.2, at 15-17.

a matter of common knowledge and the manufacturer therefore should warn of these potential fatal consequences.

Courts also may premise cigarette manufacturer liability for failure to provide adequate warnings of the dangers of smoking on the manufacturer's failure to employ the most effective means available to warn of its product's risks.²⁷⁰ Cigarette manufacturers have not used a package insert as a means of apprising the smoker of the scope and severity of the risks associated with cigarette smoking.²⁷¹ While the 1985 warnings have two significant attributes — specificity and rotation of message²⁷² — these advantages are probably insufficient to satisfy the cigarette manufacturer's duty to warn of the dangers of smoking by the best available means. The manufacturer's duty to warn probably requires the use of both a package insert, to attain the degree of specificity and intensity required, and the rotational warning scheme, to provide clarity and maintain novelty. Warning in this manner would not impose a tremendous burden on the cigarette manufacturer. Many other manufacturers employ both package inserts and warnings on their product's box or bottle as a cost-efficient manner of conveying to the consumer the potential risks inherent to their product's use.

Even if courts deem any of the congressionally mandated warnings sufficient to satisfy the duty to warn, the cigarette manufacturers' conduct in promoting their product have rendered these warnings inadequate. Cigarette manufacturers may be found liable for failure to warn because they have diminished the efficacy of the Surgeon General's warnings by representing their cigarettes to be safe, while underemphasizing the dangers of smoking by using shrewd marketing techniques and overpromoting their product through intense advertising.²⁷³ Although they have discontinued advertising that "nose, throat and accessory organs are not affected by smoking" and "a good cigarette can cause no ills,"²⁷⁴ cigarette manufacturers continue to mislead the public. First, the current warnings are attributable to the Surgeon General, not to the manufacturer itself. By attributing the warning to the Surgeon General, the cigarette manufacturers imply that they disagree with the content of the warning carried on the package or at least have confidence in the safety of their product. In addition, the cigarette manufacturers' continuous references to the "smoking controversy"²⁷⁵ eviscerate, or at least significantly mitigate the Surgeon General's warning. Finally, cigarette manufacturers consistently

²⁷⁰ See *Yarrow v. Sterling Drug Inc.*, 263 F. Supp. 159, 162-63 (D.S.D. 1967) (drug manufacturer did not employ its "detail men" to warn of product's possible side effects), *aff'd*, 408 F.2d 978 (8th Cir 1969); *Incollingo v. Ewing*, 444 Pa. 262, 288-89, 282 A.2d 206, 220 (1971) (same).

²⁷¹ Courts also may find that cigarette manufacturers have breached their duty to disseminate warnings of their product's dangers by the same means as they promote their product's use. In *Yarrow*, for example, the manufacturer of a dangerous drug was liable for not employing its detail men to keep physicians advised of the side effects associated with the use of a particular medication. *Yarrow*, 263 F. Supp. at 162-63. Courts could apply this same reasoning to hold the cigarette manufacturer liable for failing to use advertising as a vehicle to educate the public on the risks of smoking. Such a requirement would be similar to the fairness doctrine operating in public broadcasting. *Cf. Banzhaf v. F.C.C.*, 405 F.2d 1082 (D.C. Cir. 1968) (upheld F.C.C. ruling that required radio and television stations which carried cigarette advertisements to devote a significant amount of time to presenting the case against cigarette smoking), *cert. denied*, 396 U.S. 892 (1969).

²⁷² 1981 FTC STAFF REPORT, *supra* note 169, ch. 5, at 31.

²⁷³ See *supra* notes 107-15 and accompanying text.

²⁷⁴ Wegman, *supra* note 29, at 679-85.

²⁷⁵ See TAYLOR, *supra* note 186, at 12 n.36 (citing *The Smoking Controversy; A Perspective*, A Statement by the Tobacco Institute, December 1978).

deny the health hazards of smoking and challenge any medical studies as "biased" and "non-scientific."²⁷⁶ By denying the deleterious and fatal effects of smoking, the tobacco industry impliedly has represented that cigarette smoking is safe.²⁷⁷ The industry's position that there is no clear evidence linking cigarette smoking to disease not only constitutes total disregard for the substantial body of evidence concluding that smoking creates pervasive and severe health problems but also serves to negate the warning which appears on the package.²⁷⁸

Courts also may base liability for failure to warn upon the cigarette manufacturers' use of misleading marketing techniques which enable and indeed encourage consumers to ignore facts which would have discouraged them from smoking.²⁷⁹ By the use of thematic imagery associating smoking with "good health, youthful vigor, [and] social and professional success,"²⁸⁰ cigarette advertisements attempt to divert attention away from the health consequences of smoking.²⁸¹ Cigarette manufacturers also have attempted to allay anxieties about the hazards of smoking by modifying their product.²⁸² Advertisements promoting cigarettes which are filtered and low in tar, while cautiously avoiding any mention of the uncertain health benefits in smoking such cigarettes,²⁸³ may well be designed to convey the impression that smokers can safely smoke these cigarettes.²⁸⁴

Furthermore, courts should find that the tobacco industry, through its extensive advertising, has diminished or negated any warnings which have appeared on the cigarette package.²⁸⁵ Cigarettes are the most heavily advertised product in America, with the tobacco industry expending nearly 2.7 billion dollars in 1983 to promote its product.²⁸⁶ The 1981 FTC Staff Report foreshadowed liability for failure to warn based on the tobacco industry's overpromotion of cigarettes when it stated "[i]n contrast to the current warning, cigarette advertisements present information about smoking in a highly effective

²⁷⁶ See *id.* at 11-12.

²⁷⁷ *Cf.* *Toole v. Richardson-Merrell Inc.*, 251 Cal. App. 2d 689, 714, 60 Cal. Rptr. 398, 416 (1967) (manufacturer's statements that the drug was "non-toxic" and "remarkably free from side effects" constituted misrepresentations); *Maize v. Atlantic Refining Co.*, 352 Pa. 51, 55-56, 41 A.2d 850, 852 (1945) (product's name, Safety-Kleen, misled user as to the safety of the cleaning solvents use).

²⁷⁸ The tobacco industry's reference to the "smoking controversy" is analogous to the misleading effect of the product's name "Safety-Kleen" in *Maize*, 352 Pa. at 55-56, 41 A.2d at 852.

²⁷⁹ See *supra* notes 111-15 and accompanying text.

²⁸⁰ 1981 FTC STAFF REPORT, *supra* note 169, ch. 2, at 8.

²⁸¹ *Cf.* *Tinnerholm v. Parke, Davis & Co.*, 285 F. Supp 432, 451 (S.D.N.Y. 1968) (infant suffered "catastrophic" injuries as a result of a combination vaccine, which the manufacturer had heavily promoted despite its serious side-effects), *aff'd*, 411 F.2d 48 (2d Cir. 1969).

²⁸² *Wegman, supra* note 29, at 681.

²⁸³ In 1981, the Surgeon General questioned whether smoking low tar and nicotine cigarettes lessens the hazards of cigarette smoking and concluded that there is no safe level of cigarette consumption. OFFICE ON SMOKING AND HEALTH, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING, THE CHANGING CIGARETTE, A REPORT OF THE SURGEON GENERAL, at ii (Jan 12, 1981) [hereinafter 1981 SURGEON GENERAL'S REPORT].

²⁸⁴ *Wegman, supra* note 29, at 680-81.

²⁸⁵ *Cf.* *Stevens v. Parke, Davis & Co.*, 9 Cal. 3d 51, 65-66, 507 P.2d 653, 661-62, 107 Cal Rptr. 45, 53-54 (1973) (pharmaceutical manufacturer's extensive use of detail men and promotional "give-aways" without warnings of the drug's risks negated FDA warnings).

²⁸⁶ FEDERAL TRADE COMMISSION REPORT TO CONGRESS 45 (Table 6A) (June 1985) [hereinafter 1985 FTC REPORT]. This amount represented more than a 100% increase over 1973 expenditures of \$247.5 million. *Id.* at 47 (Table 7). This figure is particularly high when one considers that cigarette manufacturers do not advertise on TV or radio.

tive way It is possible that ads make it more difficult for the health warnings to be effective and may further increase the possibility of deception."²⁸⁷ Finally, through their placement of advertisements, the cigarette companies have used their economic leverage to pressure the media, including national weekly magazines, to self-censor and curtail coverage of the negative health consequences of smoking.²⁸⁸

In sum, the cigarette manufacturers have failed to provide timely and adequate warnings of the hazards of smoking. Although the Federal Cigarette Labeling Acts mandated a warning on the cigarette package, Congress did not intend these statutory warnings to preempt state tort suits. Indeed, the warnings mandated by the federal government have been woefully inadequate when measured by common law product liability standards. These warnings have not been sufficiently comprehensive, specific, or strenuous to apprise the consumer fully of the hazards of smoking. Finally, even if the statutory warnings theoretically are adequate, the manufacturers' deceptive marketing techniques and overpromotion of cigarettes have diminished the effectiveness of these warnings so severely as to render them inadequate.

*C. The Causation Requirement and the Assumption of the Risk Defense Should Not Present
Insurmountable Obstacles to Plaintiffs' Recovery*

Plaintiffs in the second generation of cigarette suits will encounter formidable, but certainly not insurmountable, obstacles to recovery. These potential obstacles include establishing causation and overcoming the assumption of the risk defense. In addition, comparative negligence may serve to lessen plaintiffs' awards. Evolution in the field of product liability law suggests that plaintiffs in the second generation of suits are likely to be successful in overcoming these obstacles and recovering, at least in part, against cigarette manufacturers.

1. Causation

Courts will hold cigarette manufacturers liable for failure to warn of the dangers of smoking only if plaintiffs can demonstrate that cigarette smoking caused their illness and that the defendant's failure to warn of the dangers of smoking caused them to commence or continue smoking.²⁸⁹ Proof that cigarette smoking caused plaintiff's injury probably will be the most difficult element to establish in the second generation of cigarette suits.²⁹⁰

Cigarette plaintiffs cannot prove causation simply by producing general evidence regarding the adverse health risks of cigarette smoking; rather, plaintiffs must prove

²⁸⁷ 1981 FTC STAFF REPORT, *supra* note 169, ch.2, at 2.

²⁸⁸ Warner, *Special Report, Cigarette Advertising and Media Coverage of Smoking and Health*, 312 N.E. JNL. MED., 384 (Feb. 7, 1985). Dr. Warner asserts that the journalism profession occasionally has allowed itself to be a part of the "conspiracy of silence" on smoking and health, influenced, albeit indirectly, by the power of the tobacco dollar. *Id.* at 388.

²⁸⁹ See *supra* note 116-19 and accompanying text.

²⁹⁰ The court denied recovery to the plaintiffs in *Galbraith v. R.J. Reynolds* because they were unable to prove that cigarette smoking caused his decedent's injuries. N.Y. Times, Dec. 24, 1985, at A8, col 1. The evidence at trial, however, showed that the decedent had suffered from numerous ailments. *Id.* Cigarette litigation is particularly difficult because plaintiffs have smoked different brands of cigarettes and, consequently, there might be multiple defendants. See Garner, *Cigarette Dependency*, *supra* note 29, at 1455-59.

that defendant's cigarettes caused their specific injury.²⁹¹ Proof of causation will vary with each particular claimant's occupation,²⁹² gender,²⁹³ family and personal health history,²⁹⁴ and other habits.²⁹⁵ Furthermore, a given plaintiff's success in the second generation of suits may depend on the illness from which he or she suffers. For example, causation may be easier to prove if plaintiff suffers from a disease, such as lung cancer, that generally is accepted as cigarette-induced.

Once plaintiffs prove that cigarette smoking caused their harm, they nevertheless must establish that the cigarette manufacturer's failure to warn caused them to commence or continue smoking. In the majority of jurisdictions, plaintiffs will be aided by the presumption that had a warning been provided, the plaintiff would have read and heeded it.²⁹⁶ Accordingly, most courts will presume that had the cigarette manufacturer adequately warned of the dangers of smoking, plaintiffs would have appreciated these risks and chosen not to smoke, or, notwithstanding addiction, quit smoking.²⁹⁷

2. Assumption of the Risk

Plaintiffs in the second generation of cigarette suits also must successfully defeat the manufacturer's allegation that plaintiffs assumed the risk of illness by smoking. Plaintiffs are aided in surmounting the manufacturers' defense in those jurisdictions which have adopted the *Restatement (Second) of Torts*, section 402A definition of assumption of the risk.²⁹⁸ Under the *Restatement* approach, courts would deny recovery to plaintiffs only if the cigarette manufacturer could demonstrate that the plaintiff's decision to smoke was unreasonable.²⁹⁹ Even if plaintiff sues in a jurisdiction which has not adopted the *Restatement* approach, cigarette manufacturers will encounter difficulty proving that plaintiff assumed the risk. Under any definition of assumption of the risk, the manufacturer must prove that the plaintiff appreciated and voluntarily encountered a known danger. To overcome this defense, plaintiffs will argue that they did not appreciate fully the

²⁹¹ See Wegman, *supra* note 29, at 707-08 for a suggested model of proof of the causal connection between cigarette smoking and a plaintiff's lung cancer. See also *supra* notes 121-22 and accompanying text for the requirements of proof of causation.

²⁹² The synergistic effect of cigarette smoking and asbestos is widely acknowledged. THE HEALTH CONSEQUENCES OF SMOKING — A REPORT OF THE SURGEON GENERAL 179 (1980) [hereinafter 1980 SURGEON GENERAL'S REPORT]. The smoker who works with asbestos is 92 times as likely to get cancer than a nonsmoker. *Id.*

²⁹³ 1979 SURGEON GENERAL'S REPORT, *supra* note 2, at viii. For example, a woman who smokes while taking oral contraceptives increases her risks of heart disease. 1980 SURGEON GENERAL'S REPORT *supra* note 292, at 98-101.

²⁹⁴ Proof, especially in the area of heart disease, might depend on whether plaintiff has a family history of congenital heart disease. 1979 SURGEON GENERAL'S REPORT, *supra* note 2, ch. 1, at 17.

²⁹⁵ There exists a synergistic effect of cigarette smoking combined with alcohol consumption on the development of cancer of the esophagus. 1979 SURGEON GENERAL'S REPORT, *supra* note 2, ch. 13, at 25.

²⁹⁶ See *supra* notes 125-26 and accompanying text.

²⁹⁷ See Garner, *Cigarette Dependency*, *supra* note 29, at 1447-48.

²⁹⁸ RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965).

²⁹⁹ See *supra* notes 135-39 and accompanying text. Plaintiff also must have been competent to assess the dangerousness of a situation. For a discussion of plaintiff's competence to assess tobacco's hazards, see Note, *Assumption of the Risk and Strict Products Liability*, *supra* note 137, at 812-13. See *supra* notes 140-41 and accompanying text for a discussion of the unreasonableness requirement of assumption of the risk under the *Restatement's* definition.

actual hazards of cigarette smoking and that the addictive nature of smoking precludes a finding of voluntariness.

In those jurisdictions that have adopted the *Restatement* approach, it is unlikely that courts will deem unreasonable plaintiff's decision to smoke. The tobacco industry uses advertising and marketing techniques that are designed to encourage smokers to overlook the hazards of cigarettes.³⁰⁰ Typical advertisements associate cigarettes with social success and minimize the hazards of smoking by the use of thematic imagery and catchy slogans.³⁰¹ For example, the Newport brand of cigarettes pictures young people engaged in some sort of athletic activity and uses the slogan "Alive with Pleasure."³⁰² Furthermore, although the cigarette manufacturers complied with the federal warning requirements by placing the "Surgeon General's Warning" on the cigarette package, they have vehemently denied that cigarettes cause illness and death to smokers.³⁰³ Consequently, in those jurisdictions that have adopted the *Restatement* definition of assumption of the risk, the cigarette manufacturers will be in the untenable position of arguing that plaintiffs' decision to smoke was unreasonable despite their consistent denial of the health hazards of smoking. In sum, the cigarette manufacturers' promotional efforts should preclude a determination that the plaintiff's decision to smoke was unreasonable and the assumption of the risk defense should fail.

In those jurisdictions which have not adopted the *Restatement* approach to assumption of the risk³⁰⁴ and thus do not require a showing that plaintiff acted unreasonably, the cigarette plaintiff still can present a strong case against the assumption of the risk defense. The assumption of the risk defense requires the cigarette manufacturer to prove that the plaintiff had actual knowledge and appreciated the severity of the dangers of smoking and that, despite this knowledge, he or she voluntarily began or continued to smoke.³⁰⁵ Moreover, assumption of the risk employs a subjective standard, which evaluates each particular plaintiff's knowledge regarding a product's dangers.³⁰⁶ Thus, while a plaintiff can be said to have assumed the risk of some abstract "health hazard,"³⁰⁷ the manufacturer nonetheless must bear the burden of proving that plaintiff knowingly assumed the risk of the specific dangers of smoking, that is, of contracting lung cancer, heart disease, or the cigarette-induced ailment from which plaintiff suffers or suffered.³⁰⁸ Because a significant percentage of the population does not appreciate fully the possibility and

³⁰⁰ See 1981 FTC STAFF REPORT, *supra* note 169, ch. 2, at 2.

³⁰¹ *Id.*

³⁰² 1985 FTC REPORT, *supra* note 286, at 11.

³⁰³ See *supra* notes 186-87 and accompanying text.

³⁰⁴ See *supra* note 137.

³⁰⁵ See *supra* notes 132-38 and accompanying text.

³⁰⁶ *Williams v. Brown Mfg. Co.*, 45 Ill. 2d 418, 430-31, 261 N.E.2d 305, 312 (1970). See also RESTATEMENT (SECOND) OF TORTS § 496d comment i (1965) (courts apply a subjective standard to assumption of the risk in determining "what the particular plaintiff sees, knows, understands and appreciates"). See also *supra* note 135 for cases illustrating the subjective standard applied to assumption of the risk.

³⁰⁷ For instance, the warning provided by cigarette packages between 1970 and 1985 warned only that cigarette smoking is dangerous, without more specific warnings. See 15 U.S.C. § 1333 (1970).

³⁰⁸ To be barred from recovery plaintiffs must knowingly assume and appreciate a product's risk. See, e.g., *Hogue v. A.B. Chance Co.*, 592 P.2d 973, 975 (Okla. 1978); *Haugen v. Minnesota Mining & Mfg. Co.*, 15 Wash. App. 379, 550 P.2d 71, 74 (1976).

severity of the risks attendant to cigarette smoking,³⁰⁹ defendant manufacturers are likely to encounter great difficulty proving that plaintiff assumed the specific risks of smoking.

The assumption of risk defense also should fail because tobacco addiction effectively negates the voluntary nature of cigarette smoking.³¹⁰ Under both the *Restatement* approach and the traditional version of assumption of the risk doctrine, defendant must show that the cigarette plaintiff knowingly and voluntarily assumed the health hazards of smoking.³¹¹ If plaintiff began to smoke before the warnings appeared on the cigarettes, or if plaintiff can prove lack of actual knowledge³¹² of the deleterious effects of cigarette smoking, including its addictive nature,³¹³ the plaintiff cannot be said to have voluntarily assumed the risk by choosing to smoke. Even if a smoker becomes fully apprised of the dangers of smoking, the addictive nature of cigarette smoking should render this subsequent knowledge irrelevant.³¹⁴ Smoking becomes involuntary to the smoker who is addicted. Thus, the assumption of the risk defense should fail because the addictive nature of smoking precludes a finding that the plaintiff voluntarily continued to smoke.

Nevertheless, some jurisdictions characterize assumption of the risk as a type of contributory negligence and then apply comparative fault principles to diminish the ultimate damage award in proportion to plaintiff's own lack of concern for his or her safety.³¹⁵ Application of comparative fault principles in the second generation of cigarette suits will permit courts to find the cigarette manufacturer liable for failing to warn of the deleterious effects of cigarette smoking, while allocating to the smoker individual responsibility in the decision to commence or continue smoking.³¹⁶ Courts would apportion damages according to the jury's determination of the parties' relative responsibility for the smoker's illness. Thus, plaintiff's own disregard for the risks of smoking would reduce the damages attributable to the cigarette manufacturer for failing to warn of those dangers.

Plaintiffs face two significant obstacles in the second generation of cigarette suits; establishing causation and overcoming the assumption of the risk defense. Although causation represents a formidable obstacle, it is by no means impossible to establish. First, there is a significant wealth of information available regarding the health conse-

³⁰⁹ See *supra* note 237.

³¹⁰ Professor Donald Garner, a noted authority on tobacco litigation, first advanced the addiction theory of recovery in his seminal article: *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423 (1980).

³¹¹ See *supra* notes 134-35. As early as 1965, Justice Traynor recognized the legal significance of tobacco addiction: "Given the habit forming nature of cigarettes, it is questionable how voluntary many consumers are continuing to smoke." Traynor, *The Ways and Means of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 371 (1965) (cited in Garner, *Cigarette Dependency*, *supra* note 29, at 1449).

³¹² See, e.g., *Heil Co v. Grant*, 534 S.W.2d 916, 920-21 (Tex. Civ. App. 1976).

³¹³ Despite the medical profession's conclusion that cigarette smoking is addictive, see *supra* notes 189-90, the majority of the population does not believe smoking to be addictive. 1981 FTC STAFF REPORT, *supra* note 169, ch. 3, at 40.

³¹⁴ See Garner, *Cigarette Dependency*, *supra* note 29, at 1441. Professor Garner argues, "the courts should recognize that once a smoker is addicted, any subsequent information he receives on the dangers of smoking is largely irrelevant." *Id.* Further, among those who quit, the recidivism rate is between 60% and 70% within the first six months. *Id.* at 1441 n.131 (citing Berg, *The High Cost of Self-Deception*, 5 PREVENTATIVE MED. 483, 483 (1976)).

³¹⁵ See *supra* note 153.

³¹⁶ See *supra* notes 153-58.

quences of smoking. Furthermore, plaintiffs are aided by a presumption that had an adequate warning been provided, plaintiff would have read and heeded it.

Second-generation cigarette plaintiffs also should be able to defeat the manufacturer's defense of assumption of the risk. The general public's lack of specific knowledge regarding the health hazards of smoking, the addictive nature of smoking, and the cigarette manufacturers' advertising and marketing activities all render unlikely a finding that plaintiff assumed the risks of smoking. Nevertheless, some courts, by applying their comparative fault rules may permit plaintiff's own disregard for the dangers of cigarette smoking to reduce the plaintiff's ultimate recovery.

D. Policy Justifications Support Cigarette Manufacturer Liability

Several public policy goals support courts' imposition upon cigarette manufacturers of strict liability for failure to warn.³¹⁷ First, by permitting plaintiffs to recover against the manufacturers for their cigarette-induced illnesses, courts can ensure that the secondary costs of cigarette smoking, that is, medical expenses and disability payments, are borne by the manufacturer. Next, the imposition of strict liability will force the cigarette manufacturers to warn adequately of the dangers of smoking. Finally, the fear of additional tort suits will encourage the cigarette manufacturers to refrain from deceptive advertising practices.

One of the principal purposes of the imposition of strict liability is to ensure that the injured party does not bear the cost of injuries caused by a defective product; rather, the manufacturer who can spread the cost among all consumers by pricing the product bears the cost.³¹⁸ Today the general public, the majority of whom are nonsmokers, bears the financial burden associated with smoking. The cost of illness and death caused by cigarette smoking, in terms of medical expense and lost income, is an estimated thirty-eight billion dollars per year.³¹⁹ Imposition of strict liability upon the cigarette manufacturers for failure to warn will shift the economic burden now upon society at large and plaintiffs in particular to the tobacco industry.³²⁰ The cigarette manufacturers, however, undoubtedly will pass on to the consumer the multi-million dollar judgments or the costs

³¹⁷ Professor Donald Garner thoroughly analyses the policy considerations behind cigarette manufacturer liability. Garner, *Welfare Reform*, *supra* note 29, at 270.

³¹⁸ See *Henningsen v. Bloomfield Motors Inc.*, 32 N.J. 358, 379, 161 A.2d 69, 81 (1960); *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 57, 63-64, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963). Professors Montgomery and Owen argue, "[t]he cost of injuries flowing from typical risks inherent in products can fairly be put upon the enterprises marketing the products as a cost of doing business, thus assuring that these enterprises will fully 'pay their own way' in the society from which they derive their profits." Montgomery and Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803, 809-10 (1976).

³¹⁹ 130 CONG. REC. S11847 (daily ed. Sept. 26, 1984) (13 billion dollars in medical costs and 25 billion dollars in lost economic productivity per year). See generally Garner, *Cigarette Dependency*, *supra* note 29, at 1462-65 (tobacco companies, rather than the general public, should bear the costs of smoking). Private health insurance bears a large portion of the financial burden associated with smoking. Federal, state, and local governments also indirectly subsidize the cigarette smoker and the tobacco industry, through public health facilities and care, welfare payments and disability, and social security benefits. *Id.* at 1462-63.

³²⁰ Cf. *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 57, 63-64, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963), *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 205, 447 A.2d 539, 547 (1982).

of liability insurance. Thus, the smoker, rather than the general public, will bear the cost of smoking.³²¹

The threat of imposition of strict liability upon the product manufacturer is another significant policy justification for the imposition of cigarette manufacturer liability.³²² The inadequacy of cigarette warnings, past and present, illustrates the need for strict liability as a deterrent to the cigarette manufacturers' persistent disregard of their duty to warn consumers of the health hazards of smoking. To safeguard themselves from future liability, prudent cigarette manufacturers would employ conspicuous and detailed health warnings, perhaps comparable to the package inserts found in many consumer products and medications. Indeed, proponents of tobacco product liability argue that only a package insert specifically enumerating the risks of smoking and the appearance of a skull-and-crossbones on the cigarette pack would satisfy the cigarette manufacturer's duty to warn.³²³

Finally, and perhaps most importantly, imposing liability upon the cigarette manufacturers would force the manufacturers to change their advertising practices. Cigarette liability would deter the use of advertising imagery and overpromotion of cigarettes. At a minimum, manufacturers would have to eliminate advertisements which encourage the smoker to rationalize or ignore the health hazards of smoking. Liability also would compel cigarette manufacturers to discontinue their constant reference to the smoking "controversy," as only the tobacco industry seems to find "controversy" in the documented medical evidence that smoking is a cause of illness and death.

CONCLUSION

Cigarettes are responsible for the deaths of over 350,000 Americans each year, yet the cigarette manufacturers never have been held liable for the illness, suffering and death that their product causes. Today there are numerous cases pending throughout the United States seeking to hold cigarette manufacturers strictly liable for failure to provide adequate warnings of the dangers of smoking. Evolution in the field of products liability law and substantial evidence linking cigarette smoking to several diseases, in-

³²¹ This ignores, however, the cost to society in terms of insurance costs, decreased GNP, and welfare disbursements. Legislative initiative is required to insure that the manufacturer bears the full cost of cigarette production beyond any damages awarded for failure to warn. Professor Garner suggests that the government levy a safety tax upon the cigarette manufacturer. Garner, *Cigarette Dependency*, *supra* note 29, at 1464. Under this approach, the government places a heavier tax burden on the manufacturer of more dangerous cigarettes than on the manufacturer of less dangerous cigarettes. Garner, *Welfare Reform*, *supra* note 29, at 326-27. Garner also advocates civil adjudication as a method of cost internalization. *Id.* at 314-26. Under this approach, the government would grant the various welfare agencies a right to recover from the cigarette manufacturer costs paid out which are attributable to smoking illness. *Id.* at 314. Professor Garner recommends a special administrative tribunal, similar to workmen's compensation boards, as the appropriate fact-finding mechanism to implement recovery under civil adjudication. *Id.* at 318-19. Whatever mode of risk distribution is chosen, it is clear that legislative initiative is necessary to compel the tobacco industry to internalize the costs of cigarette-induced disease. Given the tremendous power which the tobacco industry wields in Congress, Congress should organize an impartial task force to devise an effective risk allocation proposal.

³²² *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 207, 447 A.2d 539, 548 (1982). See generally Wade, *supra* note 13, at 826; Montgomery and Owen, *supra* note 318, at 828; Cowan, *Some Policy Bases of Product Liability*, 17 STAN. L. REV. 1077, 1086-87 (1965).

³²³ Margolick, *supra* note 1, at B4, col. 3.

cluding cancer, heart disease, chronic bronchitis and emphysema, suggest that plaintiffs in the second generation of cigarette suits should be successful.

Cigarette manufacturers should be held liable for the illness and death their products cause because they failed to provide timely and adequate warnings of the fatal consequences of smoking. Prior to 1965, the cigarette package contained absolutely no warning of the hazards of smoking. Because there was an established body of scientific evidence linking smoking to fatal disease and death long before 1965, the cigarette manufacturers should be found to have breached their duty to warn. Additionally, the warnings that the cigarette manufacturers have provided since 1965 have been woefully inadequate to satisfy the manufacturer's duty to warn. These warnings have not been sufficiently comprehensive, specific or intense to apprise the consumer fully of the hazards of smoking. Furthermore, any utility that the Surgeon General's warnings may have had was negated by the tobacco industry's aggressive marketing efforts and deceptive advertising techniques. In sum, cigarette manufacturer liability for failure to warn is based upon well-established product liability principles.

Plaintiffs in the second generation of cigarette suits nevertheless will be confronted with two substantial obstacles to recovery, establishing causation and overcoming the assumption of the risk defense. These obstacles are by no means insurmountable. The tremendous wealth of scientific evidence of the health hazards of smoking will be instrumental in proving plaintiffs' claim that smoking caused their illness. Furthermore, the addictive nature of smoking and the ignorance of the majority of the population to the extent and severity of the hazards of smoking virtually precludes a finding that the smoker assumed the risk of cigarette-induced disease. In short, no compelling reason exists to continue to allow the cigarette manufacturers to enjoy immunity from liability for the harm their product causes. Applying currently accepted product liability standards, courts should find the cigarette manufacturers strictly liable for failing to provide timely and adequate warnings of the hazards of cigarette smoking.

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