

## New Theories of Cigarette Liability: The Restatement (Third) of Torts and the Viability of a Design Defect Cause of Action

Alex J. Grant

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# NEW THEORIES OF CIGARETTE LIABILITY: THE RESTATEMENT (THIRD) OF TORTS<sup>†</sup> AND THE VIABILITY OF A DESIGN DEFECT CAUSE OF ACTION

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<sup>†</sup> RESTATEMENT (THIRD) OF TORTS (Tentative Draft No. 1, 1994).

## INTRODUCTION

Tobacco products liability litigation has consisted of two waves of suits, neither of which has brought appreciable success to plaintiffs. Plaintiffs in the first wave of cigarette cases, brought during the 1950s and 1960s, failed to record a single victory because common law tort and warranty principles did not support recovery at that time. The second wave, filed during the 1980s, stalled due to the inadequacy of failure to warn tort theories. This Note examines design defect theory as an alternative basis for holding cigarette manufacturers liable for injuries caused by smoking, and concludes that high-tar, high-nicotine cigarettes are defectively designed because a reasonable alternative design exists — the low-yield cigarettes marketed by the tobacco companies themselves.

Accompanying the second wave suits is a growing impetus for more effective, and indeed, more intrusive measures to suppress cigarette consumption as a means of improving public health. Renewed interest in the tobacco problem on the part of the Surgeon General,<sup>1</sup> the Food and Drug Administration, politicians, the media, physicians, and others makes 1994 potentially a watershed year in the fight to control tobacco use.<sup>2</sup> The tobacco control effort encompasses a whole range of issues, including taxation, product regulation, indoor air policies, and underage access to cigarettes.<sup>3</sup> Product liability litigation has a role to play in this effort. Traditionally, this type of litigation in tobacco cases has been unsuccessful due to the courts' special treatment of cigarettes.<sup>4</sup> This Note argues that the time has come for the tobacco industry to face the same rules as every other product manufacturer and that the Restatement (Third) of Torts will help eradicate the notion that cigarettes, as a product, deserve special treatment.

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<sup>1</sup> See Antonia C. Novella, *From the Surgeon General, U.S. Pub. Health Serv.*, 270 JAMA 806 (1993).

<sup>2</sup> See Philip J. Hilts, *U.S. Agency Suggests Regulating Cigarettes as an Addictive Drug*, N.Y. TIMES, Feb. 26, 1994, at A1; Jolie Solomon, *Smoke From Washington*, NEWSWEEK, Apr. 4, 1994, at 45.

<sup>3</sup> See Novella, *supra* note 1, at 806. See generally U.S. DEP'T OF HEALTH AND HUMAN SERVS., REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS, A REPORT OF THE SURGEON GEN. 465-644 (DHHS Pub. No. (CDC) 89-8411, 1989) [hereinafter 25 YEARS OF PROGRESS] (providing a broad overview of smoking control policies).

<sup>4</sup> See discussion *infra* Part I.E.1.

While this Note explores the possibilities of opening a viable theory of legal liability, it leaves unanswered some of the more practical problems of tobacco litigation.<sup>5</sup> Issues such as jury selection and the superior resources of the tobacco companies are of secondary importance when measured against the need to establish a viable theory of legal liability.<sup>6</sup> While litigation is always an uncertain venture, victory for plaintiffs will eventually come — given the large number of potential lawsuits — once courts recognize a strong theory of liability.

This Note focuses on the possibilities of establishing a design defect cause of action under a reasonable alternative design test. This theory has the potential for imposing liability for injuries caused by smoking in large numbers of cases.<sup>7</sup> As such, successful litigation under design defect theories may have an enormous impact on the tobacco control effort generally. The large number of potential plaintiffs, coupled with the seriousness of the injuries caused by smoking, may not create exposure for tobacco companies that would compare to the losses sustained by asbestos manufacturers in the asbestos litigation.<sup>8</sup> The design defect theory proposed by this Note, however, would hold manufacturers of the most dangerous cigarettes responsible for the injuries caused by their products.<sup>9</sup> The seriousness with

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<sup>5</sup> One problem with the failure to warn theory has been hostility of many jurors to warning-based theories when they perceive that the dangers of cigarette smoking are apparent. See Marcia Stein, *Cigarette Products Liability Law in Transition*, 54 TENN. L. REV. 631, 670 (1987). Design defect theory avoids this problem by focusing on the product and not on the consumer's expectations.

<sup>6</sup> *But see id.* Stein argues that the problem "now is not in getting to the jury, but in getting across to the jury." *Id.* Of course, the Supreme Court decision in *Cipollone v. Liggett Group, Inc. (Cipollone II)*, 112 S. Ct. 2608 (1992) (preempting most failure to warn claims), made it more difficult to reach the jury. See discussion *infra* Part I.C.2.

<sup>7</sup> This contrasts with warning theories, which are dependent on when the plaintiff began smoking. See discussion *infra* Part I.C.2.

<sup>8</sup> See Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 385 (1993) (noting the seven billion dollars already spent and the resulting bankruptcies of 16 of the 25 major corporate defendants in the asbestos litigation).

<sup>9</sup> Professors Henderson and Twerski, the Reporters for the Restatement (Third) of Torts, have argued that it is "fantasy" to expect courts to "open their doors to litigate the fate of politically unpopular products such as cigarettes and alcoholic beverages" in the same way as they did in the asbestos cases. James A. Henderson, Jr. & Aaron D. Twerski, *Stargazing: The Future of*

which the tobacco companies have taken the litigation challenge is ample testimony to the potential impact of successful product liability suits.<sup>10</sup> By holding cigarette manufacturers liable for the injuries caused by their products, prices for the more dangerous cigarettes will surely rise, discouraging consumption if consumers are unwilling to pay higher prices reflecting cigarettes' true overall cost.<sup>11</sup>

## I. PRODUCTS LIABILITY DOCTRINE AND ITS APPLICATION TO TOBACCO LITIGATION

### A. DEVELOPMENT OF THE RESTATEMENT (SECOND) OF TORTS

Section 402A of the Restatement (Second) of Torts revolutionized modern products liability law.<sup>12</sup> Throughout the first part of the twentieth century, liability for defective products steadily broadened. The abandonment of the privity requirement in negligence actions<sup>13</sup> and then in implied warranty actions,<sup>14</sup> and the dispensing with particularized proof of negli-

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*American Products Liability Law*, 66 N.Y.U. L. REV. 1332, 1336-37 (1991) [hereinafter *Stargazing*]. While Henderson and Twerski believe that "[c]ourts will refuse to enter the political thicket to impose the kinds of liability that likely would spell the death knell to such products [as cigarettes, alcohol, and airbags]," *id.* at 1336, their analysis does not speak to liability on a reasonable alternative design theory. See discussion *infra* Part III.A.1.

<sup>10</sup> Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 857 (1992) (discussing the win-at-any-cost strategy taken by cigarette manufacturers in defending all lawsuits).

<sup>11</sup> This conclusion is based on the cost-spreading economic model of tort liability. If a product creates a liability for a manufacturer, but the product is still profitable, the manufacturer will increase the price of the product to cover the liability. For example, if one in every 10,000 widgets causes a consumer to suffer \$10,000 of bodily harm, and the manufacturer is held liable for this amount, the price of widgets will increase slightly to reflect this new 'cost' of the product. See William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1120 (1960).

<sup>12</sup> See, e.g., James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1512-13 (1992) [hereinafter *Revision of § 402A*].

<sup>13</sup> See, e.g., *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) (holding defendant automobile manufacturer liable for negligence even though plaintiff was not the immediate purchaser of the vehicle).

<sup>14</sup> See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960) (holding that the implied warranty of merchantability for an automobile extends not only to the actual purchaser, but also to his family members and

gence in some cases (*res ipsa loquitur*),<sup>15</sup> signaled a movement towards greater liability for manufacturers and sellers of defective products. Section 402A, drafted by Reporter William Prosser, took a giant step forward by formulating a standard of strict liability in tort.<sup>16</sup> When the American Law Institute adopted section 402A in 1965, only California recognized strict liability.<sup>17</sup> Within twenty years, virtually every jurisdiction had embraced strict liability, with most adopting the very language of section 402A.<sup>18</sup>

Under section 402A, a product must be "unreasonably dangerous" and "defective" for strict liability to attach. This formulation has applied to all three types of defect: manufacturing, design, and warning.<sup>19</sup> Simply put, "defective" means that the product is in a "condition not contemplated by the ultimate consumer."<sup>20</sup> The additional requirement that a product be "unreasonably dangerous" excludes from liability products such as whiskey, butter, and tobacco, the dangers of

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others using the automobile with his permission).

<sup>15</sup> *Res ipsa loquitur* literally means "the thing speaks for itself." See, e.g., *Escola v. Coca Cola Bottling Co.*, 140 P.2d 436 (Cal. 1944) (holding bottling company liable under *res ipsa loquitur* even though plaintiff could not point to any specific negligence on the part of defendant).

<sup>16</sup> Section 402A of the second Restatement states that:

(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.

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

<sup>17</sup> See *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1962) (holding the manufacturer of a power tool strictly liable for injury sustained by user).

<sup>18</sup> See, e.g., ME. REV. STAT. ANN. tit. 14, § 221 (West 1964); *Revision of § 402A, supra* note 12, at 1512-13.

<sup>19</sup> See discussion *infra* parts I.C to I.E.

<sup>20</sup> RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965).

which are well known and accepted by consumers, but which are at the same time not "entirely safe for all consumption."<sup>21</sup>

The "unreasonably dangerous" prong of 402A<sup>22</sup> has confused courts and has been the source of a great deal of bad case law<sup>23</sup> that the new Restatement is attempting to correct.<sup>24</sup> However, the choice of this black letter language and the creation of a special category of exempted products was not inadvertent; rather the American Law Institute made a conscious choice to avoid subjecting the tobacco industry to liability for their harmful products.<sup>25</sup> The recorded proceedings of the American Law Institute show that Dean Prosser adopted the "unreasonably dangerous" and "defective" standard because the potential liability of the tobacco industry concerned certain advisors.<sup>26</sup> Discussing a draft of section 402A in 1961, in the midst of the first wave suits, advisors to the Restatement project feared that liability would destroy the tobacco industry.<sup>27</sup> The specific exemption for "good tobacco" in comment i was the result.<sup>28</sup>

## B. FAILURE OF THE FIRST WAVE CASES

Beginning in 1954, smokers injured by the effects of cigarette smoking sued, with the help of risk-taking personal injury lawyers, the tobacco companies which had supplied them with

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<sup>21</sup> *Id.* cmt. i.

<sup>22</sup> See *id.* for the genesis of the consumer expectations test: "[U]nreasonably dangerous . . . means dangerous to an extent beyond that which would be contemplated by the ordinary consumer." *Id.*

<sup>23</sup> The consumer expectations test has been difficult to apply and has often led to unfortunate outcomes. See W. Page Keeton, *Products Liability: Design Hazards and the Meaning of Defect*, 10 CUMB. L. REV. 293, 302-05 (1979).

<sup>24</sup> RESTATEMENT (THIRD) OF TORTS § 2 cmt. e (Tentative Draft No. 1, 1994) ("[C]onsumer expectations do not constitute an independent standard for judging the defectiveness of product designs.").

<sup>25</sup> Stein, *supra* note 5, at 641-42.

<sup>26</sup> *Id.* at 642 (discussing 38 A.L.I. PROC. 87-88 (1961)).

<sup>27</sup> *Id.*

<sup>28</sup> "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer . . . Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous." RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

the product.<sup>29</sup> Plaintiffs then, as now, faced a determined and well-financed adversary that rejected any compromise.<sup>30</sup> While the tobacco companies' aggressiveness may have been a significant factor in the failure of the first wave cases,<sup>31</sup> plaintiffs also faced a very different legal climate. Before 1965 and the adoption of strict liability in section 402A of the Restatement (Second) of Torts, plaintiffs were forced to rely on traditional common law principles of warranty and negligence, even though courts had begun to hint at liability without fault.<sup>32</sup>

Three of the fully litigated cigarette cases, *Lartigue v. R.J. Reynolds*,<sup>33</sup> *Pritchard v. Liggett & Myers Tobacco Co.*,<sup>34</sup> and *Green v. American Tobacco Co.*<sup>35</sup> from this first wave all failed on negligence theories.<sup>36</sup> Courts at that time felt that the risk of harm from cigarette smoking was not sufficiently foreseeable,<sup>37</sup> which eliminated the duty upon which negligence liability depends.<sup>38</sup> Theoretically, implied warranty of merchantabili-

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<sup>29</sup> Rabin, *supra* note 10, at 857. *Lowe v. R.J. Reynolds Tobacco Co.*, No. 9673(C) (E.D. Mo. filed Mar. 10, 1954), was the first of over 100 cases that were filed in this wave of litigation and eventually dropped without formal disposition. *Id.*

<sup>30</sup> *See id.* Professor Rabin suggests that the tobacco defendants simply wore the plaintiffs down through their superior resources.

<sup>31</sup> *Id.* at 857-60 (describing ways in which the plaintiffs' attorneys were outmatched by those attorneys working for the tobacco companies).

<sup>32</sup> *See, e.g., Escola v. Coca Cola Bottling Co.* 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring) (arguing that public policy demands that the manufacturer incur absolute liability for placing a defective product on the market).

<sup>33</sup> 317 F.2d 19 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963).

<sup>34</sup> 350 F.2d 479 (3d Cir. 1965), *cert. denied*, 382 U.S. 987 (1966).

<sup>35</sup> 304 F.2d 70 (5th Cir. 1962).

<sup>36</sup> Anthony J. Rossi, *The Cigarette-Cancer Problem: The Plaintiff's Choice of Theories Explored*, 34 S. CAL. L. REV. 399, 400 (1961).

<sup>37</sup> *See* Richard A. Wegman, *Cigarettes and Health: A Legal Analysis*, 51 CORNELL L.Q. 678, 711-12 (1966) (citing *Green*, *Lartigue*, and *Ross v. Philip Morris & Co.*, 328 F.2d 3 (8th Cir. 1964)). It is ironic that defendants escaped liability in the first wave on the grounds that the dangers of smoking were not foreseeable, while in the second wave suits they argued that the obviousness of the dangers should completely shield them from liability. Paul G. Crist and John M. Majoras, who represent R.J. Reynolds Tobacco Co. in smoking and health cases, make precisely this argument. *See* Paul G. Crist & John M. Majoras, *The "New" Wave in Smoking and Health Litigation — Is Anything Really So New?*, 54 TENN. L. REV. 551, 595 (1987).

<sup>38</sup> *See, e.g., Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928) ("[T]he risk reasonably to be perceived defines the duty to be obeyed.").



ty was a theory of liability that did not depend upon fault.<sup>39</sup> Nevertheless, courts required plaintiffs in the first wave cases to make fault-like showings such as foreseeability and reliance.<sup>40</sup> This approach resulted in reducing warranty theory in the cigarette cancer cases to "nothing more than one of negligence."<sup>41</sup> This meant that plaintiffs had to overcome the difficult proof problems in making out a negligence claim.<sup>42</sup>

Just as negligence and warranty proved to be inadequate doctrines in the first wave, the recognition of strict products liability in section 402A did nothing to improve plaintiffs' prospects. Comment i took from plaintiffs with one hand what strict liability had given with the other.<sup>43</sup> In fact, section 402A and comment i "stopped the cigarette products liability litigation in its tracks."<sup>44</sup>

### C. FAILURE TO WARN

A product may be defective because it lacks a sufficient warning of its dangers. Specifically, if a product does not alert the consumer or user to foreseeable risks of harm, courts may impose liability on a seller or manufacturer of the product.<sup>45</sup>

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<sup>39</sup> Wegman, *supra* note 37, at 710.

<sup>40</sup> *Id.* at 710-11.

<sup>41</sup> Rossi, *supra* note 36, at 411.

<sup>42</sup> In a negligence regime, defendants are not always held responsible for all their negligence, in part because plaintiffs frequently face difficulties in proving all of the elements of the claim. See James A. Henderson, Jr., *Coping with the Time Dimension in Products Liability*, 69 CAL. L. REV. 919, 932 (1981).

<sup>43</sup> See discussion *infra* Part I.E.1.

<sup>44</sup> See Stein, *supra* note 5, at 639. For example, *Green v. American Tobacco Co.*, 409 F.2d 1166 (5th Cir. 1969), a case which plaintiffs litigated for 12 years, finally died in 1969 when the Court of Appeals for the Fifth Circuit held that comment i conclusively barred strict liability claims. The court had rejected this position in an earlier opinion, 391 F.2d 97 (5th Cir. 1968). See also *Green v. American Tobacco Co.*, 391 F.2d 97, 106 (1968) (Simpson, J., dissenting) (agreeing with comment i that cigarettes are not unreasonably dangerous simply because smoking may have harmful effects).

<sup>45</sup> RESTATEMENT (THIRD) OF TORTS § 2(c) (Tentative Draft No. 1, 1994).

### 1. *Prominence in Second Wave Suits*

In the second wave suits, plaintiffs initially envisioned failure to warn under section 402A as the most promising road to victory.<sup>46</sup> As discussed in the previous section, plaintiffs in the first wave cases foundered on the difficulties of proving negligence. Commentators saw the relaxation of proof for failure to warn under strict liability as an opportunity to succeed where the first wave cases failed.<sup>47</sup> In some jurisdictions, strict liability does not require that the manufacturer have actual or constructive knowledge of the product's dangers.<sup>48</sup> This is consistent with the rhetoric of strict liability, namely that the plaintiff impugns the product rather than the defendant's behavior,<sup>49</sup> and the defendant's fault is not at issue. Of course, the smoker plaintiff still faces the jury's skepticism when he argues that he should have been warned of a danger that is widely known.<sup>50</sup> Moreover, courts often balk at requiring manufacturers to warn of "obvious" dangers.<sup>51</sup>

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<sup>46</sup> In tobacco cases decided within the last ten years, failure to warn has been the predominant theory advanced. *See, e.g.*, *Cipollone v. Liggett Group, Inc.* (*Cipollone II*), 112 S. Ct. 2608 (1992); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987); *Baker v. Liggett Group, Inc.*, 132 F.R.D. 123 (D. Mass. 1990); *Gianitsis v. American Brands, Inc.*, 685 F. Supp. 853 (D.N.H. 1988).

<sup>47</sup> *See* Stein, *supra* note 5, at 662. Stein further notes that even under the strict liability standard, proof of causation may be a difficult task. *Id.*

<sup>48</sup> *See* *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539 (N.J. 1982) (stating that culpability is irrelevant in strict liability cases; the court need ask only whether the product is reasonably safe for its foreseeable purposes).

<sup>49</sup> *See* *Barker v. Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978) (holding that a product must be evaluated in light of reasonably foreseeable uses, not merely the manufacturer's intended uses).

<sup>50</sup> *See* *Crist & Majoras, supra* note 37, at 557-59 (arguing that the dangers of tobacco have been well known for years and that people smoke because they enjoy it). *Contra* discussion *supra* notes 33-37 and accompanying text for the irony of this position.

<sup>51</sup> *See, e.g.*, *Jamieson v. Woodward & Lothrop*, 247 F.2d 23 (D.C. Cir.), *cert. denied*, 355 U.S. 855 (1957). The Tentative Draft of the Restatement (Third) of Torts also rejects warnings for known risks. RESTATEMENT (THIRD) OF TORTS § 2 cmt. g (Tentative Draft No. 1, 1994). This approach is "supported by an overwhelming majority of jurisdictions." *Id.* reporters' note (citations omitted).

## 2. Preemption by Federal Labeling Act

Despite the attractiveness of failure to warn theories, defendants have challenged them as preempted by the Federal Cigarette Labeling and Advertising Act of 1965<sup>52</sup> and the Public Health Cigarette Smoking Act of 1969.<sup>53</sup> The tobacco companies argued that Congress had implicitly preempted state tort law claims based on warning and advertising theories. They succeeded in most cases,<sup>54</sup> however, some courts came to opposite results,<sup>55</sup> and the United States Supreme Court granted certiorari to resolve the controversy.<sup>56</sup> The Supreme Court held that the 1969 Act preempted virtually all warning-based tort theories in cigarette litigation.<sup>57</sup> As a result, federal law bars claims caused by post-1969 warning deficiencies. The practical effect of this ruling is that failure to warn theories are extremely difficult to litigate,<sup>58</sup> and that plaintiffs should look to establishing other causes of action.

### D. MANUFACTURING DEFECTS

As a doctrinal matter, liability for injuries caused by manufacturing defects in mass-produced products is relatively uncontroversial. This type of defect occurs when "the product departs

<sup>52</sup> 15 U.S.C. §§ 1331-1341 (1988).

<sup>53</sup> 15 U.S.C. § 1334 (1988) (requiring that no additional statement relating to smoking and health be placed on cigarette packages beyond those mandated by the Act).

<sup>54</sup> See, e.g., Pennington v. Vistron Corp., 876 F.2d 414 (5th Cir. 1989); Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230 (6th Cir. 1988); Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987); Stephen v. American Brands, Inc., 825 F.2d 312 (11th Cir. 1987); Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986) (interlocutory appeal in case that became *Cipollone II*).

<sup>55</sup> See, e.g., Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239 (N.J. 1990); Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655 (Minn. 1989).

<sup>56</sup> *Cipollone v. Liggett Group, Inc.*, 111 S. Ct. 1386 (1991), *granting cert.* to 893 F.2d 541 (3d Cir. 1990).

<sup>57</sup> *Cipollone v. Liggett Group, Inc. (Cipollone II)*, 112 S. Ct. 2608, 2624 (1992).

<sup>58</sup> See Angela M. Lowell, *Cipollone v. Liggett Group, Inc.: The Effect of the Federal Cigarette Labeling and Advertising Act on State Common Law Claims*, 16 AM. J. TRIAL ADVOC. 477, 491-92 (1992); Jason Crawford, Note, *Overcoming Tobacco Company Immunity: Cipollone Clears an Uncertain Path*, 27 GA. L. REV. 253, 262-270 (1992).

from its intended design."<sup>59</sup> Thus a manufacturing flaw fits easily within section 402A's "unreasonably dangerous" and "defective" test.<sup>60</sup> This type of defect can be characterized as a "glitch" in the manufacturing process that causes a few products from a product line to fail to perform as intended and consequently to present dangers to consumers.<sup>61</sup>

Manufacturing defects in tobacco products have long been a source of tort liability in situations where the tobacco is impure. Tobacco containing explosive materials<sup>62</sup> or other foreign substances<sup>63</sup> provides a clear basis for recovery. Comment i of section 402A specifically noted that "tobacco containing something like marijuana may be unreasonably dangerous."<sup>64</sup> As a practical matter, however, manufacturing defects in cigarettes are very rare; therefore only a few plaintiffs have brought suits under this theory.<sup>65</sup> In sum, manufacturing defect is a solid theory of liability, but it does not cover cigarettes generally, making it an insufficient means of recovery and an insignificant part of the tobacco control effort.

#### E. DESIGN DEFECTS

Unlike manufacturing defects, design defects implicate an entire product line. A manufacturer may fabricate a product in accordance with the manufacturer's specifications, but the question may remain "whether the specifications themselves create unreasonable risks."<sup>66</sup> In other words, the product

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<sup>59</sup> RESTATEMENT (THIRD) OF TORTS § 2(a) (Tentative Draft No. 1, 1994).

<sup>60</sup> See, e.g., *Singleton v. International Harvester Co.*, 685 F.2d 112, 115 (4th Cir. 1981) (dictum). The court, in discussing § 402A and the contours of products liability law, states that "[i]n manufacturing defect cases, the plaintiff proves that the product is defective by simply showing that it does not conform to the manufacturer's specifications." *Id.*

<sup>61</sup> RESTATEMENT (THIRD) OF TORTS § 2 cmt. b (Tentative Draft No. 1, 1994).

<sup>62</sup> See *Liggett & Myers Tobacco Co. v. DeLape*, 109 F.2d 598 (9th Cir. 1940).

<sup>63</sup> See, e.g., *Caudle v. F.M. Bohannon Tobacco Co.*, 16 S.E.2d 680 (N.C. 1941) (tobacco containing fish hook raised a jury question as to manufacturer's negligence).

<sup>64</sup> RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

<sup>65</sup> The only reported decisions involving manufacturing defects in tobacco products are *DeLape*, 109 F.2d 598, and *Caudle*, 16 S.E.2d 680.

<sup>66</sup> RESTATEMENT (THIRD) OF TORTS § 2 cmt. c (Tentative Draft No. 1, 1994).

performs as intended, but is nonetheless unreasonably dangerous. To evaluate the intended design, some external standard is required.<sup>67</sup> Courts have taken various approaches in establishing that external standard, and the scope of cigarette liability varies with each approach.

1. *RESTATEMENT (SECOND) OF TORTS, Section 402A, Comment i*

Section 402A's "defective" and "unreasonably dangerous" standard — with its application to all types of defects — has spawned confusing doctrine. Nevertheless, its application in tobacco cases has been relatively straightforward. Comment i, the provision that was formulated with tobacco litigation in mind, specifically addresses tobacco in the design defect context: "*Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous.*"<sup>68</sup> The very language of comment i seems to reject conclusively design defect liability for tobacco. Given the widespread adoption of section 402A by statute or by judicial opinion, comment i is often "the beginning and end of [the] analysis."<sup>69</sup>

2. *Consumer Expectations Test*

If section 402A had the force of statute in all states, comment i would conclusively bar all design defect liability for tobacco products. However, most courts that have decided cigarette cases look beyond comment i to evaluate the design defect claim under the general test adopted by the given jurisdiction.<sup>70</sup> Many jurisdictions construe the "unreasonably dangerous" prong of section 402A to imply a "consumer expecta-

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<sup>67</sup> Design defects are unlike manufacturing defects, where the product fails to meet its own specifications. See discussion *supra* Part I.D.

<sup>68</sup> RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965) (emphasis added).

<sup>69</sup> Crist & Majoras, *supra* note 37, at 585. Some courts have dismissed design defect claims for cigarettes simply by citing comment i. See *Gunsalus v. Celotex Corp.*, 674 F. Supp. 1149 (E.D. Pa. 1987); *Hite v. R.J. Reynolds Tobacco Co.*, 578 A.2d 417 (Pa. Super. 1990).

<sup>70</sup> See, e.g., *Kotler v. American Tobacco Co.*, 926 F.2d 1217 (1st Cir. 1990) (applying Massachusetts' standard requiring a safer alternative design).

tions" test.<sup>71</sup> The inquiry under this standard is whether the product failed to perform as the average consumer would expect it to perform.<sup>72</sup> Appellate courts applying this test to cigarettes have rejected design defect causes of action.<sup>73</sup> In *Roysdon v. R.J. Reynolds Tobacco Co.*,<sup>74</sup> the Court of Appeals for the Sixth Circuit ruled that the defendant's cigarettes posed no greater risks than those "known to be associated with smoking." The court concluded that because tobacco has been used for some 400 years, and knowledge of its dangers is "widespread," the cigarettes which caused the plaintiff's injury were not defective as a matter of law.<sup>75</sup> It is unlikely that any court will impose generic liability on tobacco under the consumer expectations test.<sup>76</sup>

### 3. Reasonable Alternative Design

Of the jurisdictions that reject the consumer expectations test, most apply an alternative design test wherein the product is defective if a reasonable alternative design would have avoided plaintiff's injury.<sup>77</sup> This approach is also known as "risk-utility," because the issue is whether, in considering the risk and utilities of the two competing designs, the alternative design is a marginal improvement over the design at issue.<sup>78</sup> Courts that require a reasonable alternative design have rebuffed smoker plaintiffs on the ground that they failed to offer any proof of an alternative design to the defendants' cigarettes.<sup>79</sup>

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<sup>71</sup> See, e.g., *Heaton v. Ford Motor Co.*, 435 P.2d 806 (Or. 1967).

<sup>72</sup> See *id.*; see also *Barker v. Lull Eng'g Co.*, 573 P.2d 443 (Cal. 1978).

<sup>73</sup> See *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988); *Rogers v. R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045 (Ind. Ct. App. 1990).

<sup>74</sup> 849 F.2d at 236.

<sup>75</sup> *Id.*

<sup>76</sup> See *Crist & Majoras*, *supra* note 37, at 587-90.

<sup>77</sup> *Revision of § 402A*, *supra* note 12, at 1532-34.

<sup>78</sup> See *Troja v. Black & Decker Mfg. Co.*, 488 A.2d 516 (Md. App. 1985) (quoting *Phipps v. General Motors Corp.*, 363 A.2d 955, 959 (Md. App. 1976)). Unfortunately, the terminology has caused this standard to be confused with *broad-based* risk-utility balancing, also referred to as *O'Brien* risk-utility, which is discussed in Part I.E.4 of this Note.

<sup>79</sup> See *Kotler v. American Tobacco Co.*, 926 F.2d 1217 (1st Cir. 1990); *Miller v. Brown & Williamson Tobacco Corp.*, 679 F. Supp. 485 (E.D. Pa. 1988).

In one case, the plaintiffs did offer proof of a safer alternative design, but the court dismissed the claim because proximate cause was not shown. The district court in *Cipollone v. Liggett Group, Inc. (Cipollone I)*,<sup>80</sup> considered plaintiff's offer of proof that the tobacco industry could have marketed a "palladium cigarette"<sup>81</sup> as early as 1971, which would have reduced Mrs. Cipollone's risk of developing lung cancer by eight to seventeen percent.<sup>82</sup> Importantly, the court did not impugn the design defect theory itself, but instead held that an eight to seventeen percent chance of avoiding the injury did not satisfy the proximate cause element.<sup>83</sup> The court considered a New Jersey case that had loosened traditional proximate cause requirements by holding that plaintiffs need only show that the defendant's nonfeasance was a "substantial factor" in producing the injury,<sup>84</sup> rather than a greater than fifty percent "but for" cause of the harm.<sup>85</sup> However, the court in *Cipollone I* "predicted" that the New Jersey Supreme Court would not apply this "lost chance" doctrine to product liability cases.<sup>86</sup> To sum-

<sup>80</sup> 683 F. Supp. 1487 (D.N.J. 1988).

<sup>81</sup> The plaintiffs discovered that Liggett, Lorillard, Philip Morris and R.J. Reynolds had researched the effect of palladium catalysts on reducing harmful substances from cigarette smoke during the 1960s and that Liggett had planned to market a palladium cigarette in the spring of 1978. The palladium cigarette, in studies on mice, greatly reduced the risks of cancer, and was characterized as a "safe" cigarette in internal memoranda. See Lee Gordon & Carol A. Granoff, *A Plaintiff's Guide to Reaching Tobacco Manufacturers: How to Get the Cigarette Industry Off its Butt*, 22 SETON HALL L. REV. 851, 884 (1992) (citing *Additional Incriminating Documents Released*, TPLR PRESS RELEASE 1 (Tobacco Products Liability Project, Boston, Mass., March 26, 1988 Supp.) and discussing various plaintiff's exhibits from *Cipollone I* that are available from the TPLR).

<sup>82</sup> *Cipollone I*, 683 F. Supp. at 1493.

<sup>83</sup> *Id.* at 1495.

<sup>84</sup> See *Evers v. Dollinger*, 471 A.2d 405 (N.J. 1984) (holding that delay in failing to diagnose and render proper treatment increased risk to the decedent).

<sup>85</sup> The *Cipollone I* court went on to hold that "defendant's conduct" must be a "substantial factor" in producing the injury. 683 F. Supp. at 1494. The court made clear that "substantial factor" in this context means that if the defendant had used the alternative design, it would have prevented the plaintiff's injury. *Id.* This is a very different conception of "substantial factor" than that of the "lost chance" doctrine discussed *infra* note 86.

<sup>86</sup> 683 F. Supp. at 1494. Normally, the plaintiff must prove that, more likely than not, the defendant caused in fact the plaintiff's injury. See Smith

marize, this case shows that when plaintiffs put forth evidence of "safer" cigarettes courts are willing to consider alternative designs of cigarettes.

#### 4. O'Brien<sup>87</sup> *Risk-Utility*

In contrast to the use of risk-utility to balance competing designs of the same product, *O'Brien* risk-utility considers whether the product itself is generically defective. This extraordinary concept was hatched by Professor John Wade who advanced a list of seven factors to consider in determining whether a product was "reasonably safe."<sup>88</sup> The first of these factors — "usefulness and desirability of the product — its utility to the user and to the public as a whole" — essentially allows courts to ponder whether a company should have marketed the product at all.<sup>89</sup>

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v. Rapid Transit Inc., 58 N.E.2d 754 (Mass. 1945) (Blue Bus Case). The "lost chance" doctrine is an exception to this rule and has been a source of liability only in medical malpractice cases when, although some cause other than the one at issue in the case is greater than fifty percent responsible for an injury, the doctor's negligence decreases the patient's *chance* for recovery. See generally Darrell L. Keith, *Loss of Chance: A Modern Proportional Approach to Damages in Texas*, 44 BAYLOR L. REV. 759 (1992).

<sup>87</sup> *O'Brien v. Muskin Corp.*, 463 A.2d 298 (N.J. 1983).

<sup>88</sup> John Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837-38 (1973).

<sup>89</sup> *Id.* at 837. The other six factors are:

(2) The safety aspects of the product — the likelihood that it will cause injury, and the probable seriousness of the injury.

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

*Id.* at 837-38.



*O'Brien v. Muskin Corp.*<sup>90</sup> was the first judicial decision to rely on Wade's seven factors and impose design defect liability on a product when there was *no alternative design*, in other words, no defect in the traditional sense.<sup>91</sup> The plaintiff in *O'Brien* was a young man who dove, uninvited, into a neighbor's aboveground pool. He struck his head against the bottom of pool, and sustained serious injuries.<sup>92</sup> The plaintiff argued that the vinyl bottom was so slippery as to constitute a design defect, even though no alternative material was available.<sup>93</sup> Because the plaintiff conceded that the manufacturer could not have made the product better, he sought recovery on the theory that all aboveground pools are defective. The New Jersey Supreme Court accepted this argument and held that a jury question existed on whether "the risks of injury so outweighed the utility of the product as to constitute a defect."<sup>94</sup>

The implication of *O'Brien* and other cases<sup>95</sup> adopting its rationale is that courts may find generic products defectively designed. Under the *O'Brien* risk-utility standard, the issue becomes whether the "product's usefulness outweighs its dangers."<sup>96</sup> Weighing the product's risks in this context is similar to traditional risk-utility balancing under the reasonable alternative design standard discussed in the previous section. On

<sup>90</sup> 463 A.2d 298 (N.J. 1983).

<sup>91</sup> Courts used Dean Wade's factors in considering design defect questions, but none found a defect in the absence of an alternative design. See, e.g., *Troja v. Black & Decker Mfg. Co.*, 488 A.2d 516 (Md. 1985). The *O'Brien* court reached its result because, under Wade's formulation, the existence of an alternative design is only one factor to be considered.

<sup>92</sup> 463 A.2d at 302.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 306.

<sup>95</sup> After *O'Brien*, Louisiana adopted this broad-based risk-utility standard by imposing liability for injuries caused by asbestos products under a similar analysis. See *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110 (La. 1986). Similarly, in *Kelley v. R.G. Industries, Inc.*, 497 A.2d 1143 (Md. 1985), the Court of Appeals of Maryland considered whether to impose strict liability on manufacturers of handguns known as "Saturday Night Specials." Looking to federal and state gun regulations, the court concluded that, in light of the product's extreme danger and minimal utility, the marketing of these handguns was a wrongful act. *Id.* at 1159.

<sup>96</sup> Mary Griffin, Note, *The Smoldering Issue in Cipollone v. Liggett Group, Inc.: Process Concerns in Determining Whether Cigarettes Are a Defectively Designed Product*, 73 CORNELL L. REV. 606, 608-09 (1988).

the utility side of the equation, however, the inquiry becomes a comparison of a world with and without the product.<sup>97</sup>

For those who seek to suppress the consumption of a product, the attractiveness of *O'Brien* risk-utility balancing is its general indictment of that product, a judicial determination that the world would be better off without it.<sup>98</sup> Nevertheless, plaintiffs in cigarette cases have largely failed to convince courts to adopt the *O'Brien* test for tobacco.<sup>99</sup> In *Gianitsis v. American Brands, Inc.*,<sup>100</sup> the smoker plaintiff asked for a simple determination of whether he could state a cause of action under an *O'Brien* design defect theory. The court emphatically declined to adopt such an "expansive doctrine of strict products liability."<sup>101</sup> Noting that the plaintiff was candidly proposing a theory of liability that could destroy an industry, the court would not allow a design defect claim without proof of an alternative design.<sup>102</sup>

The sole exception to this trend arose, not surprisingly, in New Jersey, the jurisdiction in which *O'Brien* was decided. In *Dewey v. R.J. Reynolds Tobacco Co.*,<sup>103</sup> a wrongful death action, the plaintiffs asserted a general theory of design defect based on *O'Brien*. The trial court allowed the plaintiffs to attempt to prove that the "risks posed by cigarettes outweighed their utility."<sup>104</sup> The Appellate Division and Supreme Court of

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<sup>97</sup> See *id.* Collateral economic benefits of the product, such as employment for those who manufacture it, cannot be considered as part of the product's utility. See *Cipollone v. Liggett Group, Inc.*, 644 F. Supp. 283, 289-90 (D.N.J. 1986). Instead, the benefits to consumers may only be balanced against the risks to those consumers. See *id.*

<sup>98</sup> See generally Richard A. Daynard et al., *Report of the Tobacco Policy Research Study Group on Tobacco Litigation*, TOBACCO CONTROL, 1992:1 (Supp.), at S37 (espousing "risk/utility" theory as part of a general effort to suppress tobacco use).

<sup>99</sup> See, e.g., *Kotler v. American Tobacco Co.*, 926 F.2d 1217 (1st Cir. 1990) (applying Massachusetts law); *Miller v. Brown & Williamson Tobacco Corp.*, 679 F. Supp. 485 (E.D. Pa. 1988); *Hite v. R.J. Reynolds Tobacco Co.*, 578 A.2d 417 (Pa. Super. 1990).

<sup>100</sup> 685 F. Supp. 853 (D.N.H. 1988).

<sup>101</sup> *Id.* at 859.

<sup>102</sup> *Id.* at 855-59. Pennsylvania courts have been similarly unreceptive to broad-based risk-utility theory. See, e.g., *Hite v. R.J. Reynolds Tobacco Co.*, 578 A.2d 417 (Pa. Super. 1990).

<sup>103</sup> 523 A.2d 712 (N.J. Super. Ct. Law Div. 1986).

<sup>104</sup> *Id.* at 717.

New Jersey affirmed the ruling on the strength of *O'Brien*.<sup>105</sup>

Contained within the favorable decision on design defect liability in *Dewey*, however, was dictum that New Jersey's new products liability statute<sup>106</sup> would have barred plaintiff's cause of action. Ms. Dewey prevailed only because the New Jersey statute, enacted in response to *O'Brien*, did not apply retroactively.<sup>107</sup> The New Jersey legislature, concerned with the expansion of liability under *O'Brien*, imposed an additional test for design defect, the consumer expectations test.<sup>108</sup> The court in *Dewey* noted that the plaintiff could not show that the "unsafe aspect" of cigarettes was unknown, and held that liability would not attach under consumer expectations.<sup>109</sup> The Louisiana legislature also overturned its courts' attempt to fashion broad-based risk-utility.<sup>110</sup> The result is that, aside from several cigarette cases pending before the enactment of the New Jersey statute, no jurisdiction applies the *O'Brien* rationale to design defect cases.<sup>111</sup>

At the moment, *O'Brien* may be a dead letter, but tobacco litigation may not have seen the last of the concept of categorical liability. First, courts may be tempted to reimpose *O'Brien* liability, especially when faced with a case involving an extremely dangerous product, such as cigarettes.<sup>112</sup> Second, it is

<sup>105</sup> *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239 (N.J. 1990).

<sup>106</sup> N.J. STAT. ANN. § 2A:58C-3 (West 1989).

<sup>107</sup> 577 A.2d at 1255.

<sup>108</sup> N.J. STAT. ANN. § 2A:58C-3a(2) (West 1989).

<sup>109</sup> 577 A.2d at 1252-53 (citing N.J. STAT. ANN. § 2A:58C-3a(2)).

<sup>110</sup> See LA. REV. STAT. ANN. § 9:2800.56(1) (West 1991) (requiring an alternative design for design defect liability).

<sup>111</sup> See RESTATEMENT (THIRD) OF TORTS § 2 cmt. c, reporters' note (Tentative Draft No. 1, 1994).

<sup>112</sup> The insight of *O'Brien* that there can be liability for very dangerous products even though there is no alternative design will be difficult to eradicate. See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1089 (5th Cir. 1973) ("decision to market . . . a product requires a balancing of the product's utility against its . . . dangers") (dictum); *Wilson v. Piper Aircraft Corp.*, 577 P.2d 1322, 1328 n.5 (Or. 1978) (categorical liability possible). Indeed, an earlier draft of the Restatement (Third) of Torts left open the possibility of liability without alternative design in extreme cases where the product's dangers dwarfed its utility (e.g., toy guns that could cause serious bodily injury). RESTATEMENT (THIRD) OF TORTS § 2 cmt. c (Council Draft No. 1A, 1994). The Council of the American Law Institute voted down this position, but the persistence of the debate demonstrates that *O'Brien* still has

very possible that the Food and Drug Administration will regulate cigarettes as a drug, which would almost certainly result in a total ban because cigarettes are "too hazardous."<sup>113</sup> This pronouncement would make categorical liability persuasive because courts would be following the lead of a quasi-legislative body, similar to the concept of negligence per se where conduct prohibited by statute is, by definition, negligence.<sup>114</sup>

While the clear trend has been away from design defect liability in the absence of an alternative design, wholesale rejection of categorical liability would be unwise policy.<sup>115</sup> Such a policy might completely shield from liability products which are by nature egregiously dangerous, while subjecting other, safer products to countless suits simply because those products could have been designed a little better. The absence of an alternative design may indicate more than anything else the product's overall danger and lack of utility. The end result is that cigarettes, which have "little social utility, meet no preexisting consumer needs and contribute to at least 350,000 deaths per year,"<sup>116</sup> may escape liability altogether.<sup>117</sup>

The new Restatement clearly rejects *O'Brien*,<sup>118</sup> but nonetheless imposes a type of broad-based risk-utility on a specific product category, prescription drugs.<sup>119</sup> Under section four of the Tentative Draft of the Restatement (Third) of Torts, manufacturers and sellers of prescription drugs and medical devices may be held liable if:

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some influential proponents.

<sup>113</sup> See Philip J. Hilts, *U.S. Agency Suggests Regulating Cigarettes as an Addictive Drug*, N.Y. TIMES, Feb. 26, 1994, at A1.

<sup>114</sup> See *Martin v. Herzog*, 126 N.E. 814, 815 (N.Y. 1920) (Cardozo, J.).

<sup>115</sup> But see James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1297-1328 (1991) [hereinafter *Liability Without Defect*] (arguing against categorical liability and predicting the demise of *O'Brien*).

<sup>116</sup> Stein, *supra* note 5, at 631 (footnotes omitted) (citing Kenneth E. Warner, *The Economics of Smoking: Dollars and Sense*, 83 N.Y. ST. J. MED. 1273 (1983)).

<sup>117</sup> One commentator has proposed the development of a new tort specifically designed to cover products such as tobacco. See A.A. White, *The Intentional Exploitation of Man's Known Weaknesses*, 9 HOUS. L. REV. 889 (1972).

<sup>118</sup> See discussion *infra* part II.A.

<sup>119</sup> RESTATEMENT (THIRD) OF TORTS § 4(b)(4) (Tentative Draft No. 1, 1994).

The foreseeable risks of harm . . . were sufficiently great in relation to its therapeutic benefits as to deter a reasonable medical provider, possessing knowledge of such foreseeable risks and therapeutic benefits, from prescribing the drug or medical device for any class of patients.<sup>120</sup>

This standard does not inquire into the costs and benefits of a reasonable alternative design of the drug, but instead looks to the overall risks and utility of the drug itself to determine whether doctors should ever prescribe it. This is an approach analogous to that of *O'Brien*.<sup>121</sup> In fact, the principal case relied upon in section 4(b)(4) is *Tobin v. Astra Pharmaceutical Prods., Inc.*,<sup>122</sup> where the court held that a design defect claim could succeed if, in light of the known risks, the product manufacturer should not have marketed the drug at all.<sup>123</sup> This theory is precisely what plaintiffs injured by egregiously dangerous products assert.

Because broad-based risk-utility is available for some products under the new Restatement, the issue becomes why other products, such as cigarettes, are not subject to a similar standard. It seems bizarre that egregiously dangerous products should receive preferential treatment over prescription drugs and medical devices. Whereas prescription drugs are at least intended to improve human health, cigarettes, aboveground pools, and handguns bring about only marginal social benefits. Tort reform advocates criticize products liability for discouraging the introduction of useful products onto the market.<sup>124</sup> The tort system should not encourage the production of cigarettes, while discouraging innovation in the area of prescription drugs and medical devices.

On the other hand, the strong arguments against the concept of categorical liability should not be minimized.<sup>125</sup> In

<sup>120</sup> *Id.* (emphasis added).

<sup>121</sup> RESTATEMENT (THIRD) OF TORTS § 4 cmt. f, reporters' note (Tentative Draft No. 1, 1994).

<sup>122</sup> 993 F.2d 528 (6th Cir. 1993).

<sup>123</sup> RESTATEMENT (THIRD) OF TORTS § 4(b)(4), reporters' note (Tentative Draft No. 1, 1994).

<sup>124</sup> PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 3 (Aug. 1991) (report of the Quayle Comm'n).

<sup>125</sup> See *Liability Without Defect*, *supra* note 115.

the cigarette context, Paul Crist and John Majoras, lawyers for R.J. Reynolds Tobacco Co., have argued that the federal statute<sup>126</sup> which has preempted warning and advertising claims<sup>127</sup> also preempts broad-based risk-utility theories.<sup>128</sup> Congress, they assert, has already performed the risk-utility balancing for cigarettes and has concluded that "cigarettes, properly labelled, may lawfully be sold."<sup>129</sup> Crist and Majoras say, in effect, that Congress has implicitly determined that the benefits of cigarettes outweigh their risks, so the courts should defer to the legislature on this issue. Similarly, the market can be seen as performing an a priori risk-utility balancing function — if a product is available on the market, society has decided that the utility of the product outweighs its risks.

The new Restatement and some commentators have taken a different tack, criticizing *O'Brien* from a legal process standpoint. Specifically, they view the decision of whether a product should or should not be available as one that the judiciary is not equipped to make.<sup>130</sup> Given the superior ability of legislatures and administrative agencies to investigate complex questions of fact, these entities are better equipped to handle "polycentric" issues.<sup>131</sup> Polycentric issues, such as the desirability of cigarettes, are considered non-justiciable<sup>132</sup> because courts cannot decide them with the normal application of legal principles.<sup>133</sup> *O'Brien* presents problems for courts because "[t]he comparison of a product with [a] no product alternative involves an overwhelming number of competing value choices."<sup>134</sup> For these

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<sup>126</sup> 15 U.S.C. § 1334 (1988).

<sup>127</sup> See discussion *supra* part I.C.2.

<sup>128</sup> See Crist & Majoras, *supra* note 37, at 581.

<sup>129</sup> See *id.*

<sup>130</sup> See RESTATEMENT (THIRD) OF TORTS § 2 cmt. c (Tentative Draft No. 1, 1994); *Liability Without Defect*, *supra* note 115, at 1300-08; Griffin, *supra* note 96, at 619-22.

<sup>131</sup> See generally Griffin, *supra* note 96, at 620-23 (describing the difficulties courts have in deciding these cases and noting legislatures' greater abilities to engage in fact-finding).

<sup>132</sup> See *id.* at 621 n.76.

<sup>133</sup> See generally James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901 (1982) (discussing how limitations on tort liability can sometimes be explained in terms of the judiciary's inability to handle certain issues).

<sup>134</sup> Griffin, *supra* note 96, at 621; see *id.* at 619-22.

reasons, legislatures or agencies should arguably be charged with imposing broad-based tort liability.<sup>135</sup>

Under any theory of generic liability, smoker plaintiffs would fare well,<sup>136</sup> but it seems that the strong arguments in favor of *O'Brien*-type liability simply have not persuaded the courts or many commentators.<sup>137</sup> Professors Henderson and Twerski predict that "the movement to declare products . . . categorically defective will be over and done with well before the end of the century."<sup>138</sup> The position of the new Restatement will reinforce the requirement of a reasonable alternative design, notwithstanding the anomalous treatment of prescription drugs.

## II. DEVELOPMENT OF THE RESTATEMENT (THIRD) OF TORTS

Just as the Restatement (Second) of Torts greatly influenced the development of modern products liability law, the Restatement (Third) of Torts will most likely have a significant effect, particularly in determining the viability of design defect theories as applied to cigarettes. Professors James Henderson<sup>139</sup> and Aaron Twerski<sup>140</sup> are the Reporters for the products liability sections of the new Restatement. Both have actively attempted to clarify design defect and failure to warn

<sup>135</sup> See RESTATEMENT (THIRD) OF TORTS § 2 cmt. c (Tentative Draft No. 1, 1994).

<sup>136</sup> "Plaintiffs can argue that cigarettes serve no independent need and that cigarette smoking is addictive and self-perpetuating. Consumers continue to smoke, not to relax or to lose weight, but simply to alleviate the discomfort of not smoking." Stein, *supra* note 5, at 667 (citations omitted).

<sup>137</sup> See, e.g., *Liability Without Defect*, *supra* note 115, at 1329-30; Note, *Handguns and Products Liability*, 97 HARV. L. REV. 1912, 1915-20 (1984); Stephen J. Foley, Jr., Note, *Products Liability — Strict Liability in Tort — State-of-the-Art Evidence Relevant to Risk-Utility Analysis in Design Defect Cases — O'Brien v. Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (1983), 15 SETON HALL L. REV. 120, 142-44 (1984); Kim D. Larsen, Note, *Strict Products Liability and the Risk-Utility Test for Design Defect: An Economic Analysis*, 84 COLUM. L. REV. 2045, 2067 (1984).

<sup>138</sup> *Stargazing*, *supra* note 9, at 1336 ("We have little doubt that the attempts by some courts to use risk-utility analysis to impose liability on entire product categories in the absence of feasible alternative designs are doomed to failure.").

<sup>139</sup> Frank B. Ingersoll Professor of Law, Cornell Law School.

<sup>140</sup> Professor of Law, Brooklyn Law School.

doctrine over the past twenty years.<sup>141</sup> Rather than reworking the essence of section 402A and American products liability law, Henderson and Twerski are seeking to reduce the vague "defective" and "unreasonably dangerous" standard to functional tests for determining defect.<sup>142</sup>

#### A. REJECTION OF *O'BRIEN*

Professors Henderson and Twerski reject *O'Brien* risk-utility balancing in the new Restatement.<sup>143</sup> Sensitive to process concerns<sup>144</sup> in pronouncing entire product categories defective, the Tentative Draft of the new Restatement finds the *O'Brien* approach unsupported in the case law and unwise as a matter of policy.<sup>145</sup> Now that the new Restatement has achieved Tentative Draft status, it will undoubtedly influence judicial decisions, and plaintiffs will face an uphill battle in trying to invoke broad-based risk-utility for any product, including tobacco.

#### B. REASONABLE ALTERNATIVE DESIGN

The Restatement (Third) of Torts instead proposes a reasonable alternative design standard<sup>146</sup> for design defect claims.<sup>147</sup> Specifically, liability will attach under a design defect theory when:

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<sup>141</sup> See, e.g., James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265 (1990); *Liability Without Defect*, *supra* note 115.

<sup>142</sup> See RESTATEMENT (THIRD) OF TORTS § 1 cmt. a (Tentative Draft No. 1, 1994); see also *Stargazing*, *supra* note 9, at 1513, 1526-29 (discussing the problems and unresolved issues surrounding the modern application of § 402A).

<sup>143</sup> See *id.* § 2(b) (basing design defect liability on a showing of a reasonable alternative design). Illustration 4 of comment c tracks the *O'Brien* facts and concludes that without any alternative design the plaintiff "has failed to establish a case of defective design under Subsection 2(b)." *Id.* § 2 cmt. c, illus. 4.

<sup>144</sup> See *id.* § 2 cmt. c.

<sup>145</sup> RESTATEMENT (THIRD) OF TORTS § 2 cmt. d, reporters' note (Tentative Draft No. 1, 1994).

<sup>146</sup> See discussion *supra* part I.E.3.

<sup>147</sup> RESTATEMENT (THIRD) OF TORTS § 2(b) (Tentative Draft No. 1, 1994).



The foreseeable risks of harm posed by the product could have been reduced by the adoption of a *reasonable alternative design* by the seller or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.<sup>148</sup>

The key issue under this rule is a determination of whether the alternative design proposed by the plaintiff is "reasonable." This determination is made by a risk-utility analysis that compares the two versions of the product. The alternative design must be one that would have "reduced the foreseeable risks of harm posed by the product" at an acceptable cost.<sup>149</sup>

Comment d to section two sets forth a non-exhaustive list of nine factors<sup>150</sup> to guide courts in deciding whether a product is defectively designed. At trial, the jury must determine whether the alternative design, on balance, provides net benefits to the product, remembering that the alternative design must increase *overall* safety. The design cannot simply avoid the plaintiff's injury while making the product more dangerous in other respects. The failure to limit the number of factors, and the failure to prioritize the nine factors listed,<sup>151</sup> will probably improve plaintiffs' chances of reaching the jury on design defect claims by muddying the waters enough to avoid summary judgment.<sup>152</sup>

<sup>148</sup> *Id.* (emphasis added).

<sup>149</sup> *Id.* § 2 cmt. c.

<sup>150</sup> *Id.* § 2 cmt. d. The nine factors are: (1) magnitude of foreseeable risks; (2) nature and strength of consumer expectations; (3) effects of alternative design on cost of production; (4) effects of alternative design on product function; (5) advantages and disadvantages of the proposed safety features; (6) effects on product longevity; (7) maintenance and repair; (8) esthetics; and (9) marketability. The comment states that these factors are included in, but not exhaustive of, the "broad range of factors [that] may legitimately be considered in determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe." *Id.*

<sup>151</sup> *Cf.* *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987), *cert. denied*, 488 U.S. 898 (1988) (Easterbrook, J., dissenting) (arguing that multi-factor tests tend to raise jury questions whereas simple legal *rules* allow trial courts to decide cases as a matter of law).

<sup>152</sup> These criteria could also open the door to substantial differences among jurisdictions on the defectiveness of similar products, since courts will inevitably weigh the factors differently.

### C. CAUSATION UNDER THE NEW RESTATEMENT

The Tentative Draft of the Restatement (Third) of Torts includes a provision regarding causation that may be significant for cigarette cases that assert an alternative design. Section six of the new Restatement allows recovery when the design defect "increases the harm" to the victim.<sup>153</sup> In other words, the plaintiff may have suffered some injury absent the defect, but the defect "enhanced" her injury.<sup>154</sup> Under section six, defendants would be liable for the increased harm.<sup>155</sup>

In *Cipollone I*, the one case in which the plaintiff attempted to prove an alternative design, the court directed a verdict for the defendants on the design defect claim, based on a failure to show proximate cause.<sup>156</sup> While the plaintiff made a showing that the alternative design would have reduced her chances of developing lung cancer by eight to seventeen percent, the court held that these percentages were too low to satisfy the proximate cause element of her claim.<sup>157</sup>

Under the new Restatement, a plaintiff alleging the same facts as the plaintiff did in *Cipollone I*<sup>158</sup> could argue that an eight to seventeen percent increase in her susceptibility to lung cancer meets the increased harm/enhanced injury test for proximate cause, even if the alternative design would not have prevented her lung cancer altogether. It is an open question, however, whether this rule would apply to products like cigarettes. Comment a of section six notes that most "enhancement" of injury cases involve automobile crashworthiness, although it states that this theory "may arise with other products."<sup>159</sup>

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<sup>153</sup> RESTATEMENT (THIRD) OF TORTS § 6(a) (Tentative Draft No. 1, 1994) (emphasis added).

<sup>154</sup> *Id.* § 6 cmt. b.

<sup>155</sup> *Id.* § 6 cmt. d ("[S]ubsection 6(c) provides that when plaintiff has proved [the] defect caused [an] increase in harm, the product seller is subject to liability for all the harm suffered by the plaintiff when proof does not support apportionment of liability between the product seller and non-defect-related causes that contributed to the plaintiff's harm.").

<sup>156</sup> *Cipollone v. Liggett Group, Inc.*, 683 F. Supp. 1487, 1495 (D.N.J. 1988); see *supra* notes 80-86 and accompanying text.

<sup>157</sup> 683 F. Supp. at 1495.

<sup>158</sup> *Id.* at 1489-93.

<sup>159</sup> RESTATEMENT (THIRD) OF TORTS § 6 cmt. a (Tentative Draft No. 1, 1994).

Unfortunately, the comments give almost no guidance on section six's relevance to products other than motor vehicles.

#### D. REJECTION OF COMMENT i

Finally, the new Restatement effectively overturns comment i of section 402A of the Restatement (Second) of Torts<sup>160</sup> by discarding the per se rule of comment i, and allowing plaintiffs to show a reasonable alternative design for products such as "alcoholic beverages, tobacco, small firearms and aboveground swimming pools."<sup>161</sup> While the new Restatement precludes *O'Brien* liability for such egregiously dangerous products, it opens the door to a traditional design defect cause of action.

This rule for egregiously dangerous products reflects a more sound rationale than the one underlying comment i. As discussed above, imposing liability for generic product defects is a major expansion of design defect doctrine. Consequently, courts and legislatures have hesitated to adopt the *O'Brien* approach, realizing that broad-based risk-utility could eliminate certain products from the market. These concerns explain the rejection of per se liability.

On the other hand, comment i espoused per se immunity, premised in part on the notion that "tobacco cancer victims [were] like allergic or hypersensitive consumers."<sup>162</sup> Given this assumption, manufacturers or sellers would owe no duty to the small percentage of people adversely affected by the product.<sup>163</sup> This explains comment i's grouping together of tobacco, sugar (for diabetics), and good whiskey (for alcoholics).<sup>164</sup> By this time, the notion that tobacco induces cancer in only a small percentage of its users can be rejected out of hand.<sup>165</sup> The

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<sup>160</sup> RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965); see discussion *supra* Part I.E.1.

<sup>161</sup> RESTATEMENT (THIRD) OF TORTS § 2 cmt. c (Tentative Draft No. 1, 1994) (emphasis added).

<sup>162</sup> See Stein, *supra* note 5, at 665 n.230 (discussing W. Page Keeton's approach to cigarettes and products liability).

<sup>163</sup> See *id.*

<sup>164</sup> RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

<sup>165</sup> See 25 YEARS OF PROGRESS, *supra* note 3, at 33-116. The Surgeon General concluded that "smoking is responsible for more than one of every six deaths in the United States." *Id.* at i.

new Restatement's approach rests on firmer footing, eschewing both per se liability and per se immunity.

### III. PRACTICABILITY AND DESIRABILITY OF DESIGN DEFECT LITIGATION

This Part analyzes the possibilities of design defect litigation, and raises a number of arguments that bolster the applicability of design defect theory to cigarette cases. In addition, this section considers the usefulness of product liability litigation as part of the general tobacco control effort.

#### A. ANALYSIS OF A DESIGN DEFECT CAUSE OF ACTION UNDER A REASONABLE ALTERNATIVE DESIGN TEST

The background section of this Note demonstrated how most courts have adopted the reasonable alternative design standard for design defect claims.<sup>166</sup> The Tentative Draft of the Restatement (Third) of Torts indicates that this rule will continue to be the trend in products liability law.<sup>167</sup> The issues for tobacco litigation are (1) whether plaintiffs can adduce proof of alternative designs of cigarettes and (2) whether the utilities of these designs outweigh their risks.

##### 1. *Applying Reasonable Alternative Design to Cigarettes*

Cigarettes, due to the tobacco industry's own efforts, are not generic products. Current brands range widely in their tar and nicotine content,<sup>168</sup> two of the substances which make cigarettes so harmful to human health.<sup>169</sup> "Low tar" cigarettes, and other designs, including more effective filters, already exist on the market, allowing plaintiffs to show an alternative, technologically feasible design. Defendant tobacco companies

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<sup>166</sup> See discussion *supra* part I.E.3.

<sup>167</sup> See discussion *supra* part II.B.

<sup>168</sup> See generally FEDERAL TRADE COMM'N, TAR, NICOTINE, AND CARBON MONOXIDE OF THE SMOKE OF 568 VARIETIES OF DOMESTIC CIGARETTES (1993) [hereinafter FTC REPORT]. Carlton "King Filters" contain 1 mg of tar and 0.1 mg of nicotine, whereas the Philip Morris "Commander" contains 27 mg of tar and 1.7 mg of nicotine. *Id.* at 3, 9 app. (Tables).

<sup>169</sup> Cf. Thomas C. Schelling, *Addictive Drugs: The Cigarette Experience*, 255 SCI. 430 (1992) (detailing the addictive nature of nicotine).

will have trouble disputing this point, because they have developed these different designs themselves. The crucial question is whether plaintiffs can avoid summary judgment and present their case to the jury. If plaintiffs can consistently reach the jury, it seems certain that they will eventually carry their burden of persuasion and recover for their injuries.<sup>170</sup>

To avoid dismissal, plaintiffs must show that low-yield cigarettes increase safety at an acceptable cost.<sup>171</sup> In fact, lower-yield cigarettes are associated with a lower risk of lung cancer,<sup>172</sup> even though the risk of heart disease is undiminished.<sup>173</sup> A conceptual key to the plaintiff's proof is the fact that cigarette smoking has a dose-response relationship with a number of diseases, meaning that, in a population, higher levels of smoking tend to produce more lung cancer.<sup>174</sup> Therefore, the reduction in the amount of tar from 40 mg, the average yield for cigarettes in 1950,<sup>175</sup> to 1 mg for the lowest-yield cigarettes produced today,<sup>176</sup> should presumably result in an

<sup>170</sup> Of course, a jury question, by definition, is one on which reasonable minds can differ. Repeat litigation on the reasonableness of alternative designs for cigarettes will yield eventual victory, even if the odds for any one case are less than 50 %.

<sup>171</sup> See RESTATEMENT (THIRD) OF TORTS § 2 cmt. c (Tentative Draft No. 1, 1994). Admittedly, this is a significant barrier to recovery, since it is disputed whether "light" cigarettes are safer at all. See John Slade et al., *Report of the Tobacco Policy Research Study Group on Tobacco Products*, TOBACCO CONTROL, 1992:1 (Supp.), at S5. Indeed, many tobacco control advocates view attempts to promote seemingly safer alternatives as a cynical ploy by manufacturers to keep customers smoking. See *id.*; see also Wegman, *supra* note 37, at 680-81.

<sup>172</sup> U.S. DEPT OF HEALTH AND HUMAN SERVS., *THE HEALTH CONSEQUENCES OF SMOKING: THE CHANGING CIGARETTE*, A REPORT OF THE SURGEON GEN. 81-87 (figs. 1 & 2) (1981) [hereinafter *THE CHANGING CIGARETTE*].

<sup>173</sup> See 25 YEARS OF PROGRESS, *supra* note 3, at 183; see also Neal L. Benowitz, *Health and Public Policy Implications of the "Low-yield" Cigarette*, 320 NEW ENG. J. MED. 1619, 1619-20 (1989).

<sup>174</sup> 25 YEARS OF PROGRESS, *supra* note 3, at 43-46; *THE CHANGING CIGARETTE*, *supra* note 172, at 6-8.

<sup>175</sup> *Id.* at 80.

<sup>176</sup> Benowitz, *supra* note 169, at 1620. Today, the disparities between high-yield and low-yield cigarettes are still large. For example, "Winston Filters" contain up to 18 times the amount of tar and 15 times the amount of nicotine of lower yield cigarettes. See FTC REPORT, *supra* note 168, at 13 (Winston "King Filters" have 18 mg of tar and 1.5 mg of nicotine, while Carlton "King Filters" have 1 mg of tar and 0.1 mg of nicotine).

enormous reduction in smoking-related lung cancer in the population that now smokes the low-yield cigarettes. However, the actual effects of lower-yield cigarettes are far from proportional because smokers tend to inhale more deeply when smoking low-yield cigarettes.<sup>177</sup>

Of course, it is the empirical proof of lowered risk of lung cancer that is essential for plaintiffs. Studies comparing the mortality rates for smokers of high, medium, and low-yield cigarettes demonstrate that, for both sexes, the risk of lung cancer is twenty to forty percent lower for low-yield smokers than for high-yield smokers.<sup>178</sup> These studies defined low-yield to be less than 17.6 mg of tar, which included many cigarettes that today would be high-yield.<sup>179</sup> Moreover, no studies have measured the effect of smoking today's "ultra-low" yield cigarettes, which contain as little as 1 mg tar and 0.1 mg nicotine.<sup>180</sup>

Under the risk-utility balance, the reasonableness of an alternative design depends in part on the utility of the alternative version of the product.<sup>181</sup> For example, the micronite filter, introduced during the 1950s in Kent cigarettes, decreased the attractiveness of the product, and consumers complained that smoking a Kent was like "smoking through a mattress."<sup>182</sup> The decreased "pleasure" of low-yield cigarettes will be the most effective ammunition for tobacco companies in defending design defect claims. Cigarette manufacturers will

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<sup>177</sup> 25 YEARS OF PROGRESS, *supra* note 3, at 85; *see also* Schelling, *supra* note 169, at 432. Without attempting to prove that low-yield cigarettes will bring proportionate benefits, plaintiffs can argue that the jury should properly consider whether the alternative design increases overall safety in light of these disparate levels of tar and nicotine.

<sup>178</sup> *See* Benowitz, *supra* note 173, at 1620 (citing THE CHANGING CIGARETTE, *supra* note 172; Participants of the Fourth Scarborough Conference on Preventative Medicine, *Is There a Future for Lower-Tar Yield Cigarettes?*, 2 LANCET 1111, 1111-14 (1985); D.W. Kaufman et al., *Tar Content of Cigarettes in Relation to Lung Cancer*, 129 AM. J. EPIDEMIOLOGY 703, 703-11 (1989)).

<sup>179</sup> *See* THE CHANGING CIGARETTE, *supra* note 172, at 81.

<sup>180</sup> *See* Benowitz, *supra* note 173, at 1620.

<sup>181</sup> The Tentative Draft of the Restatement (Third) of Torts discusses "the nature and strength of consumer expectations" as a factor in considering the reasonableness of the alternative design. *See* RESTATEMENT (THIRD) OF TORTS § 2 cmt. d (Tentative Draft No. 1, 1994).

<sup>182</sup> *See* Wegman, *supra* note 37, at 681.

most likely argue that smokers seek precisely the characteristics that low-yield cigarettes lack, making them a poor substitute and an unreasonable alternative.

Cigarette manufacturers will probably take the position that the "decreased attractiveness" of low-yield cigarettes is so great that it will overwhelm the decreased cancer rates.<sup>183</sup> Moreover, the popular perception is that smoker preferences for high-yield cigarettes are, in fact, deeply ingrained.<sup>184</sup> However, a historical perspective shows that since 1950, tobacco companies have radically altered cigarettes to deliver far less tar and nicotine.<sup>185</sup> Before 1950, filter cigarettes were unavailable, but within fifteen years, they had gained acceptance by the majority of smokers,<sup>186</sup> and today occupy almost the entire market.<sup>187</sup> From 1950 to 1987, the average yield of tar and nicotine underwent a similar transformation, with tar decreasing from 40 mg<sup>188</sup> to 13 mg,<sup>189</sup> and nicotine decreasing from 2.2 mg<sup>190</sup> to 0.9 mg.<sup>191</sup> Indeed, the high-yield cigarettes of today (18 mg of tar), which tobacco companies might argue are irreplaceable in the eyes of consumer, were the low-yield cigarettes of the 1960s.<sup>192</sup>

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<sup>183</sup> Cf. Crist & Majoras, *supra* note 37, at 559. Crist and Majoras, who serve as counsel to R.J. Reynolds Tobacco Co. in smoking and health cases, argue that tobacco use is remarkably resilient, despite societal admonitions to stop. *Id.* This notion of smokers' ingrained and stubborn preferences is used to argue that any alternative design would be inadequate.

<sup>184</sup> See Lynn T. Kozlowski, *Evidence for Limits on the Acceptability of Lowest Tar Cigarettes*, 79 AM. J. PUB. HEALTH 198, 198 (1989).

<sup>185</sup> W.S. Rickert, "Less Hazardous" Cigarettes: Fact or Fiction?, 83 N.Y. J. MED. 1269, 1269-70 (1983); see THE CHANGING CIGARETTE, *supra* note 172, at 5.

<sup>186</sup> See Wegman, *supra* note 37, at 681. The widespread acceptance of filter cigarettes is significant in light of the fact that consumers originally perceived them as "harder to inhale, less aromatic, and yield[ing] less of a kick." Ruth Brecher et al., THE CONSUMERS UNION REPORT ON SMOKING AND THE PUBLIC INTEREST 128 (1963); see also Rickert, *supra* note 185, at 1269-70.

<sup>187</sup> THE CHANGING CIGARETTE, *supra* note 172, at 214 (fig. 9).

<sup>188</sup> *Id.* at 80.

<sup>189</sup> Benowitz, *supra* note 173, at 1619.

<sup>190</sup> THE CHANGING CIGARETTE, *supra* note 172, at 80.

<sup>191</sup> Benowitz, *supra* note 173, at 1619.

<sup>192</sup> See *id.* at 1620.

The perception of lower health risks from low-yield products explains these trends.<sup>193</sup> These trends show that lower yields may *increase* the attractiveness of the product by soothing smokers' fears about the health consequences of their habit.<sup>194</sup> This temporal view of consumer preferences is an important component of the plaintiff's case. It challenges the assumption of smoker inflexibility and adds another factor to the risk-utility analysis, making it more difficult for courts to determine, as a matter of law, that low-yield cigarettes are not a reasonable alternative design.

In addition, the attractiveness of cigarettes is not limited to their physiological effects. Indeed, cigarette smokers seek to conform to peer pressure, project a certain image, and occupy their hands.<sup>195</sup> The low-yield cigarette delivers these perceived benefits as well as its high-yield counterpart. Alternative cigarette designs do not eviscerate the product's utility, only diminish it to some degree for some consumers.<sup>196</sup>

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<sup>193</sup> See Kenneth E. Warner & John Slade, *Low Tar, High Toll*, 82 AM. J. PUB. HEALTH 17, 17 (1992) (citing FEDERAL TRADE COMM'N STAFF REPORT ON THE CIGARETTE SMOKING ADVERTISING INVESTIGATION (1981)). Warner and Slade state that smokers perceive low-yield cigarettes as having lower risk than high-yield cigarettes. *Id.* They also state that smokers perceive moderate use of low-yield cigarettes as being virtually risk free. *Id.*

<sup>194</sup> See Benowitz, *supra* note 173, at 1620; see also Wegman, *supra* note 37, at 680-81. See generally 25 YEARS OF PROGRESS, *supra* note 3, at 259-378 (Chapter 5: Changes in Smoking Behavior and Knowledge About Determinants).

<sup>195</sup> Cf. Neal D. Benowitz, *Cigarette Smoking and Nicotine Addiction*, 76 MED. CLINICS N. AM. 415, 418-19 (1992) (discussing behavioral, personal, and social factors contributing to the attractiveness of cigarettes to consumers).

<sup>196</sup> After weighing the costs and benefits of low-yield cigarettes, the factual issue of the reasonableness of the alternative design is inconclusive. In this context, a smoker plaintiff should be able to convince the court that she has raised a jury question. In *Cipollone I*, the one case in which a plaintiff put forth an alternative design (the palladium cigarette), defendants did not attempt to dismiss the cause of action on the ground that no reasonable jury could find that the palladium cigarette was a reasonable alternative. 683 F. Supp. 1487, 1493 (D.N.J. 1988). Instead, the defendants argued that proximate cause could not be satisfied, an argument that carried the day. *Id.* at 1493, 1495; see *supra* notes 80-86 and accompanying text.



## 2. *The Consumer Sovereignty Argument: Why Consumer Choice Is Not Dispositive on the Question of Liability*

Because low-yield cigarettes are an actual alternative, available on the market, and rejected by many smokers, defendants may argue that "consumer sovereignty" should preclude liability. Undoubtedly, consumer preferences deserve significant weight in the risk-utility balance; indeed, consumer expectations and marketability of the product are explicitly cited factors in the new Restatement<sup>197</sup> and are considered by most courts<sup>198</sup> which have entertained design defect claims. However, the simple fact that the plaintiff smoker *chose* the more dangerous version of the product is not dispositive.

The reality is that even in cases where the plaintiff chose the more dangerous design, liability often follows. For example, in *Reed v. Chrysler Corp.*,<sup>199</sup> the Iowa Supreme Court upheld a design defect claim in which the plaintiff alleged that the steel top for a Jeep CJ-7 was a better alternative design than the fiberglass top he bought.<sup>200</sup> The steel top was available on other Jeep models, and, in fact, steel tops were the industry standard at the time of manufacture.<sup>201</sup> Similarly, in a case involving a riding lawnmower, the plaintiff stated a cause of action for defective design when the mower failed to include a "deadman's control," a safety device that stops the mower blades when the operator is not in control of the machine.<sup>202</sup> This

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<sup>197</sup> RESTATEMENT (THIRD) OF TORTS § 2 cmt. d (Tentative Draft No. 1, 1994).

<sup>198</sup> See, e.g., *Troja v. Black & Decker Mfg. Co.*, 488 A.2d 516, 519-20 (Md. Ct. Spec. App. 1985) (discussing the balancing process for determining whether a product is unreasonably dangerous, the court cites "the chances of consumer acceptance of a model incorporating such features" as an important factor in the risk-utility analysis) (citing *Singleton v. Int'l Harvester Co.*, 685 F.2d 112, 115-16 (4th Cir. 1981)).

<sup>199</sup> 494 N.W.2d 224 (Iowa 1992).

<sup>200</sup> *Id.* at 228.

<sup>201</sup> *Id.* at 227-28.

<sup>202</sup> *Ames v. Sears, Roebuck & Co.*, 514 A.2d 352 (Conn. App. Ct. 1986) (holding that the trial court properly instructed the jury that in determining whether the lawnmower was defective, it could consider both the existence of other mowers containing such devices and the absence of a warning regarding a lack of a deadman's control on the mower in question). This case illustrates yet another problem with the consumer sovereignty argument, namely, the injured bystander who had no involvement in choosing the more dangerous

device was feasible and on the market when the mower was purchased.<sup>203</sup> Indeed, the plaintiff might have chosen the riding mower, for example, in part *because* it lacked the safety device. Safety devices such as a deadman's control are often annoying, imposing more safety than some consumers might like.<sup>204</sup> Nonetheless, the duty to provide reasonably safe products is one imposed by law, and unless cigarettes are to occupy a preferred position in our tort system, courts must recognize alternative designs of presently marketed cigarettes in design defect cases.<sup>205</sup>

Refusal to consider alternative designs for cigarettes on the market contravenes the important principle in tort law that industry standards are relevant in determining standards of due care. Since *The T.J. Hooper* case, in which Judge Learned Hand held that industry practice is relevant but not dispositive on the question of negligence,<sup>206</sup> courts have looked to conformance with industry standards in determining tort liability.<sup>207</sup> In the context of products liability, industry or government standards are relevant to the issue of whether the design of the

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design.

<sup>203</sup> *Id.* at 355; *see also* *Gootee v. Colt Indus., Inc.*, 712 F.2d 1057, 1065-66 (6th Cir. 1983) (applying Michigan law) (holding that it was error to exclude evidence of alternative design developed by others in the gun industry).

<sup>204</sup> *Cf.* Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 EMORY L.J. 1 (1993) (arguing that the current tort system interferes with individual autonomy and should be altered to recognize and accommodate the desires of consumers who may make informed decisions to engage in activities that may involve more risk than 'reasonable' or 'average' consumers would tolerate).

<sup>205</sup> *See, e.g.*, *Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652 (1st Cir. 1981). The court upheld a design defect claim where the plaintiff alleged that she had been injured by the high concentration of estrogen in an oral contraceptive when a safer version of the pill was available and was marketed by the defendant manufacturer. *Id.* at 654-55. This case presented a particularly strong case for liability because defendant Ortho sold the oral contraceptive which injured the plaintiff even though it had developed a pill that contained half as much estrogen, and was as effective in preventing pregnancy as the higher dose. *Id.* at 655 n.4.

<sup>206</sup> 60 F.2d 737, 739-40 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932).

<sup>207</sup> *See, e.g.*, *Krzywicki v. Tidewater Equip. Co.*, 600 F. Supp. 629, 635-36 (D. Md. 1985) (holding that industry practice was relevant but not controlling in a determination of negligence); *Rucker v. Norfolk & Western Ry.*, 396 N.E.2d 534, 536 (Ill. 1979) (stating that "evidence of compliance with federal standards is relevant to the issue of whether a product is defective").

product is defective.<sup>208</sup> Normally, for product manufacturers who do not follow industry standards, plaintiffs use failure to conform as a sword.<sup>209</sup> The consumer sovereignty argument would turn failure to conform to industry standards into a shield, so long as the more dangerous design was available on the market and some consumers chose it. This would violate a well-established principle (the relevance of industry standards), and provide a defense for companies making riskier products than the industry as a whole.<sup>210</sup>

The proper place for consumer preferences is one factor in the risk-utility balancing of alternative designs.<sup>211</sup> Making consumer sovereignty a dispositive concept by refusing to consider available and marketed alternative designs would overturn much case law and fly in the face of common sense.

<sup>208</sup> See, e.g., *Anderson v. Hyster Co.*, 385 N.E.2d 690 (Ill. 1979) (holding that defective design may be proved by non-conformance with industry standards or the availability of alternative designs at the time of manufacture); *Alderman v. Wysong & Miles Co.*, 486 So. 2d 673, 679 (Fla. Dist. Ct. App. 1986) (finding that industry standards are admissible in design defect case).

<sup>209</sup> See, e.g., *Robinson v. G.G.C. Inc.*, 808 P.2d 522, 525-27 (Nev. 1991) (holding evidence of industry standards admissible in design defect case); *Rodgers v. Harris Corp.*, Civ. A. No. 86-5282 1989 WL 73803 (E.D. Pa. June 27, 1989) (admitting evidence of competitor's design in design defect case); *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 382 (Mo. 1986) (en banc) (upholding a \$1.5 million judgment for airplane crash plaintiffs on the strength of evidence that the manufacturer failed to design component parts in keeping with industry standards).

<sup>210</sup> Alternative designs available at the time the product was sold, in one respect, present the strongest case for liability. Remember that before a plaintiff can argue that the alternative design is reasonable in light of all the risk-utility factors, she must show that it is feasible. To do so the plaintiff will produce expert testimony regarding the feasibility of prototypes that arguably *could* have been adopted by the defendant, but were not. See, e.g., *Lake v. Firestone Tire & Rubber Co.*, No. 90-1787, 1991 WL 114440, at \*3 (6th Cir. June 27, 1991) (dismissing design defect claim because plaintiff failed to offer sufficient evidence of the feasibility of the purported alternative design). However, in cases like *Lake*, defendants can impugn the designs developed by plaintiffs as abstractions, rather than real-world, practical possibilities. In the case of an alternative design marketed by the defendant or a competitor, the design cannot be dismissed as unworkable. See *id.* at \*3 & n.3.

<sup>211</sup> RESTATEMENT (THIRD) OF TORTS § 2 cmt. d (Tentative Draft No. 1, 1994) (listing nine non-exhaustive factors to guide courts in design defect cases; factor number nine is "marketability"). See *supra* note 150 and accompanying text. In addition, defendants can argue that the best evidence of the utility of a product is that large numbers of consumers choose to use it.

Indeed, if some jurisdictions are willing to consider *subsequent* design changes as relevant to the feasibility and reasonableness of alternative designs,<sup>212</sup> "then evidence of prior or contemporaneous design features are certainly relevant and admissible to prove that the product in question [is] defective."<sup>213</sup>

### 3. *The Scope of Liability Under a Reasonable Alternative Design Standard*

Unlike *O'Brien* liability, a reasonable alternative design standard does not impose categorical liability, meaning that this standard would implicate only the most dangerous cigarettes, while allowing less dangerous cigarettes to stay on the market.<sup>214</sup> In fact, the tort system would channel smokers from high-yield to low-yield cigarettes by including the internalized costs of tort judgments in the price of high-yield cigarettes.

The limit on liability for higher yield cigarettes would be the ability of injured smokers to establish causation. The key evidence on this issue are studies that compare mortality rates for high, medium, and low-tar cigarette smoking.<sup>215</sup> Even if plaintiffs can persuade courts to adopt an "enhancement of the injury" approach, the law still requires plaintiffs to show that the alternative design would have produced a different outcome or at least a real reduction in the risk of harm.<sup>216</sup> Therefore, the evidence becomes persuasive only when smokers can point to large disparities in safety between the cigarette actually smoked and the low-yield cigarette. Smokers who have consumed cigarettes with upwards of 40 mg of tar can point to studies showing that these cigarettes cause cancer at a higher rate than low-yield cigarettes. On the other hand, plaintiff smokers who have consumed relatively low-tar or medium-tar

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<sup>212</sup> See *Ault v. International Harvester Co.*, 528 P.2d 1148, 1150 (Cal. 1975) (en banc) (admitting evidence that manufacturers substituted a safer alternative three years after plaintiff's injury occurred); *Caterpillar Tractor Co. v. Beck*, 624 P.2d 790, 793-94 (Alaska 1981); *Shaffer v. Honeywell, Inc.*, 249 N.W.2d 251, 257 n.7 (S.D. 1976).

<sup>213</sup> *Ames v. Sears, Roebuck & Co.*, 514 A.2d 352, 355 (Conn. App. Ct. 1986).

<sup>214</sup> Moreover, victims of heart disease could not bring successful lawsuits under this theory since medical evidence shows that low-yield cigarettes do not reduce the risk of heart disease. See *supra* note 173 and accompanying text.

<sup>215</sup> See THE CHANGING CIGARETTE, *supra* note 172, at 82-84 (fig. 2).

<sup>216</sup> See *supra* notes 84-86 and accompanying text.

cigarettes will probably be unable to show that the failure to adopt the low-yield design caused their injury.

The foregoing analysis demonstrates that design defect is a viable cause of action. The general standard of a reasonable alternative design is a well-established legal principle.<sup>217</sup> Moreover, cigarette manufacturers have developed feasible prototypes that are somewhat safer, that many consumers accept, and that diminish the usefulness of the product only on the margins. Under these circumstances, smoker plaintiffs can avoid summary judgment, allowing juries to decide the close question of whether high-yield cigarettes are defective in light of the costs and benefits of alternative designs.

## B. DESIGN DEFECT THEORY AS PART OF THE TOBACCO CONTROL EFFORT

This section discusses design defect theory as a means of imposing liability on tobacco manufacturers and sellers, and asks whether, as a matter of public policy, litigation of this type is desirable. Because the tort system currently imposes costs on all types of products, there exists no compelling justification for exempting extremely dangerous products such as cigarettes.<sup>218</sup>

### 1. *Public Policy Supports the Use of the Reasonable Alternative Design Test for Cigarettes*

The many problems associated with broad-based risk-utility (*O'Brien*)<sup>219</sup> simply do not present themselves with the limited risk-utility balancing of the reasonable alternative design test. Paul Crist and John Majoras, lawyers for R.J. Reynolds Tobacco Co., attempt to apply their preemption argument<sup>220</sup> to all design defect theories, based on the notion that federal statutes

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<sup>217</sup> See discussion *supra* parts I.E.3, II.B; see, e.g., *Kotler v. American Tobacco Co.*, 926 F.2d 1217, 1225 (1st Cir. 1990) (under Massachusetts warranty law, "a safer alternative design is a sine qua non for the imposition of liability").

<sup>218</sup> This position is consistent with the principles underlying the new Restatement's rejection of the Restatement (Second)'s comment i to § 402A, which had explicitly exempted cigarettes from the otherwise expanding field of products liability. See RESTATEMENT (THIRD) OF TORTS § 2 cmt. c (Tentative Draft No. 1, 1994); see also discussion *supra* part II.D.

<sup>219</sup> See discussion *supra* part II.A.

<sup>220</sup> See *supra* notes 126-129 and accompanying text.

implicitly preclude almost all liability for tobacco companies.<sup>221</sup> Of course, this would be a very broad reading of Congress' intent, and would extend the preemption doctrine farther than any court that has considered the issue.<sup>222</sup> Moreover, those skeptical of *O'Brien* from a legal process point of view endorse the reasonable alternative design standard.<sup>223</sup> In fact, the new Restatement rejects *O'Brien* but holds open the possibility of cigarette liability under the alternative design approach.<sup>224</sup> In sum, reasonable alternative design as applied to cigarettes is a judicially manageable standard, and does not contravene or infringe upon federal legislation.

## 2. *Litigation as a Means of Suppressing Cigarette Consumption*

Cigarettes may be found defective under the reasonable alternative design standard, which would put them on equal footing with all other products. As a public policy choice, however, the reasonable alternative design theory may be undesirable because litigation itself is ill-equipped to solve many of the problems associated with tobacco consumption.<sup>225</sup> Indisputably, design defect liability would provide significant compensation for smokers who develop cancer or other ailments due to tobacco use. From a fairness perspective, compensation for

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<sup>221</sup> See Crist & Majoras, *supra* note 37, at 578-82.

<sup>222</sup> See, e.g., *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 234 (6th Cir. 1988). The Supreme Court in *Cipollone v. Liggett Group, Inc.* (*Cipollone II*), 112 S. Ct. 2608 (1992), did not consider whether design defect claims were preempted by federal statutes, probably because no lower court had ever adopted that interpretation.

<sup>223</sup> See, e.g., Griffin, *supra* note 96, at 627. Compare *Liability Without Defect*, *supra* note 115 (Henderson and Twerski argue against adoption of *O'Brien*-type liability) with *Revision of § 402A*, *supra* note 12, at 1520 (Henderson and Twerski argue for the reasonable alternative design standard).

<sup>224</sup> See RESTATEMENT (THIRD) OF TORTS § 2 cmt. c (Tentative Draft No. 1, 1994). To be clear, Henderson and Twerski reject cigarette liability under the *O'Brien* approach. See *id.* § 2 cmt. c, reporters' notes. The Reporters, however, do not take a position in the new Restatement on how tobacco would be treated under the reasonable alternative design approach, but leave that determination to the courts. See *supra* note 161 and accompanying text.

<sup>225</sup> Some tobacco control advocates see litigation as a means of exposing the tobacco companies' "knavery," thereby lessening their political influence. See Daynard et al., *supra* note 98, at S38. This is a dubious goal, in light of the enormous costs of mass litigation.

smoking-related injuries is justifiable on the grounds that those who profit from cigarette production should pay for the harms caused by their products when an acceptable safer design is available. Cigarette companies also should be forced to internalize the true costs of tobacco production; otherwise, smokers will over-consume the product, leading to economic inefficiency.<sup>226</sup> In addition, tobacco manufacturers would also be in a better position to spread the risk among all users of tobacco in the form of insurance, which the market price of cigarettes would reflect.<sup>227</sup>

The increased cost of cigarettes is an important factor in considering how design defect liability would affect future cigarette consumption. A common concern is that liability would destroy the tobacco industry,<sup>228</sup> and judging from the industry's take-no-prisoners approach to litigation, it seems that tobacco manufacturers share that perception.<sup>229</sup> However, one analyst has calculated that imposing cigarette liability would increase the cost of a pack of cigarettes by only twenty-two cents.<sup>230</sup> Given differing opinions, and the inherent speculativeness in predicting the future, the effects that design defect liability would have on price are virtually impossible to predict.

<sup>226</sup> See *Orchard View Farms, Inc. v. Martin Marietta Aluminum Inc.*, 500 F. Supp. 984, 989 (D. Or. 1980) (noting that each enterprise must "bear its total production costs," the court imposed liability for the "externalized cost" of defendant's operations); see also RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965) ("[P]ublic policy demands that the burden of accidental injuries caused by products intended for consumption be placed on those who market them.").

<sup>227</sup> See Prosser, *supra* note 11. Dean Prosser advances the "risk-spreading" argument that manufacturers of defective products should absorb the losses that result from the use of their products because they are in a better position than those who are injured to pass these losses on to consumers through higher prices. *Id.* at 1120.

<sup>228</sup> Of course, the kind of liability proposed by this Note is confined to high-yield cigarettes, and does not threaten the existence of the entire industry. Additionally, the industry can choose whether to remove the higher-yield cigarettes from the market, or keep the product and pay the judgments against it.

<sup>229</sup> See Rabin, *supra* note 10, at 857.

<sup>230</sup> Mark Rust, *Legal Attack on Tobacco Flares*, AM. MED. NEWS, Sept. 20, 1985, at 1, 29 (discussing a Wall Street analyst's projection that "65,000 people a year winning \$100,000 each will add only twenty-two cents to the price of a pack of cigarets [sic]."). Of course, such a modest increase might *undercut* the case for liability since liability probably would do little to suppress consumption.

Regardless of the amount, any price increase will resemble a tax in some respects, and therefore should depress demand for the product.<sup>231</sup> Studies show, however, that demand for tobacco is relatively inelastic, meaning that it is not very price-sensitive.<sup>232</sup> This means that products liability litigation must impose significant costs on tobacco manufacturers in order to fundamentally suppress tobacco consumption. From an efficiency perspective, litigation is inferior to taxation because of its huge transaction costs. Indeed, some estimates claim that one-half of the money paid into the tort system goes to administrative costs.<sup>233</sup> However, tort judgments serve an intangible purpose that taxation does not, namely, disapproval of the behavior which gave rise to liability.<sup>234</sup>

In the end, the case for tobacco liability via design defect theories relies on traditional justifications for products liability: compensation for injuries, loss spreading, and internalization of the product's true social costs. The effectuation of all of these policies would benefit tobacco control efforts, primarily by increasing the price of cigarettes. Liability would operate as an automatic tax on cigarettes,<sup>235</sup> immune from the politics and influence of tobacco companies over government taxation policies.<sup>236</sup> Finally, liability is fair. If products such as automobiles and appliances must face the tort system, then so should one of the most dangerous products ever produced.<sup>237</sup>

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<sup>231</sup> David Sweanor et al., *Report of the Tobacco Policy Research Study Group on Tobacco Pricing and Taxation in the United States*, TOBACCO CONTROL, 1992:1 (Supp.), at S31, S33.

<sup>232</sup> *Id.* at S32-33 (discussing various studies on the price elasticity of tobacco). *But see* 25 YEARS OF PROGRESS, *supra* note 3, at 533-40 (discussing the price elasticity of tobacco and price sensitive demand among teenagers).

<sup>233</sup> Stephen D. Sugarman, *Personal Injury Law Doesn't Work*, THE SACRAMENTO BEE, Sept. 24, 1989, at F01.

<sup>234</sup> *See generally* Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1983) (taking the view that many controversies *should* be adjudicated because of the message that judgments send to the rest of society).

<sup>235</sup> Assuming that the tobacco companies do not choose to spread the increased liability exposure through raised prices of different products due to other realities of the consumer markets.

<sup>236</sup> *See* Sweanor et al., *supra* note 231, at S32. Research shows that cigarette taxation, when adjusted for inflation, has steadily declined since the 1950s. *Id.*

<sup>237</sup> *See* Rabin, *supra* note 10, at 878.



## CONCLUSION

In the recent *Cipollone II* decision,<sup>238</sup> the Supreme Court erected a roadblock to recovery for plaintiffs in the second wave cigarette cases. Throughout the 1980s, plaintiffs' lawyers and commentators saw failure to warn theories as the surest path to victory. Considering the *Cipollone II* holding that all post-1969 warning claims are preempted by the federal Public Health Cigarette Smoking Act,<sup>239</sup> plaintiffs must develop new theories of legal liability. A design defect cause of action offers the prospect of imposing liability on the most dangerous cigarettes.

The Tentative Draft of the Restatement (Third) of Torts, although a cautious document, is a key to this strategy because it reverses the presumption of immunity for cigarettes and places them on an equal footing with all other products. Convincing courts that low-yield cigarettes may be a reasonable alternative design is the central challenge facing plaintiffs. The risk/utility balance for high-yield cigarettes presents a classic reasonable alternative design question that juries should decide. Encouraging this kind of design defect litigation also constitutes good public policy; cigarette manufacturers do not deserve preferential treatment in the tort system, but must instead bear the true costs of their activities.

*Alex J. Grant*<sup>†</sup>

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<sup>238</sup> *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992).

<sup>239</sup> 15 U.S.C. § 1334 (1988).

<sup>†</sup> Candidate for J.D., 1995. I would like to thank Amy Ralph for her insight and dedication in helping me prepare this Note for publication. I would also like to thank Professors James A. Henderson, Jr. and Richard J. Bonnie for their help in developing and clarifying many of the issues presented in this Note.