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Important Rulings Emanating from the *Cipollone* Tobacco Trial

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INTRODUCTION

On June 13, 1988, in the Federal District Courthouse in Newark, New Jersey, a six person jury found the Liggett Group, Inc. tobacco company liable for breach of an express warranty made to Rose Cipollone, and awarded \$400,000 to Antonio Cipollone, the late Rose's husband. The jury's verdict represents the first time that a plaintiff has won a money damage award against a tobacco company.¹ The money verdict clearly is not the only significant aspect of the *Cipollone* case. The case is notorious for having established law with regard to discovery protective orders, and with regard to the doctrine of preemption.² What follows is a discussion of a series of legal issues that arose during the course of the *Cipollone* trial, which, although not as well known as such issues as preemption and discovery protective orders, are nonetheless significant and worthy of study.

I. THE ADMISSIBILITY UNDER FEDERAL RULE OF EVIDENCE 702 OF TESTIMONY OF DR. JEROME JAFFE, PLAINTIFF'S EXPERT IN THE FIELD OF HUMAN DEPENDENCE AND ADDICTION

Prior to the beginning of the *Cipollone* trial in February 1987, defendants in the case, Liggett Group, Inc., Philip Morris Incorporated and Loew's Theaters Incorporated, made a motion for an *in limine* hearing to determine, under Federal Rule of Evidence 702,³ the admissibility of the testimony of plaintiff's expert on ad-

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1. The matter is presently being appealed to the United States Court of Appeals for the Third Circuit.

2. See *Cipollone v. Liggett Group, Inc.*, 822 F.2d 335 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 487 (1987); 785 F.2d 1108 (3d Cir. 1986); 789 F.2d 181 (3d Cir. 1986); and 649 F. Supp. 664 (D.N.J. 1986).

3. Federal Rule of Evidence 702 reads:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto

diction, Dr. Jerome Jaffe. Plaintiff had advised defendants by means of a letter that Dr. Jaffe would testify *inter alia*:

[T]hat Mrs. Cipollone gives a reasonably typical history of a heavily dependent smoker who after trying to stop but failing thereafter avoids making serious efforts but temporizes by switching to what she felt were safer cigarettes. . . . To the degree dependence reduces the smoker's capacity to make free and fully flexible choices, Mrs. Cipollone's capacity to respond in a fully flexible and free way to the information on risks of smoking provided by the government and other sources of information was substantially reduced.

The defendants focused on the final element of Dr. Jaffe's opinion and characterized the evidence as being expert testimony in the field of "voluntary behavior," in other words, novel scientific evidence. Defendants argued that because Dr. Jaffe's testimony involved novel scientific evidence, under *United States v. Downing*⁴ the court was required to conduct a preliminary inquiry focusing on (1) the soundness and reliability of the process or technique used in generating evidence; (2) the possibility that admitting the evidence would overwhelm, confuse, or mislead the jury; and (3) the proffered connection between the scientific research or test result to be presented, and particular disputed factual issues in the case.⁵

Plaintiff argued that even if the court were to accept defendants' characterization of Dr. Jaffe's testimony as pertaining to "voluntary behavior," there was ample precedent allowing psychiatrists to testify as to the voluntariness of behavior.⁶ Plaintiff maintained that Dr. Jaffe's testimony as an expert in the field of drug dependence and addiction, and more specifically, tobacco dependence, was not novel scientific evidence at all. In support of this position, plaintiff presented considerable evidence of clinical and scholarly studies of the addictive effects of cigarette smoke.

In an opinion rendered October 13, 1987, the Honorable H. Lee Sarokin held that Dr. Jaffe's testimony concerning tobacco dependence was not "novel" scientific evidence within the meaning of *United States v. Downing*,⁷ and therefore, denied defendants' mo-

in the form of an opinion or otherwise.

FED. R. EVID. 702.

4. 753 F.2d 1224 (3d Cir. 1985).

5. *Id.* at 1237 n.15.

6. *United States v. Winters*, 729 F.2d 602 (9th Cir. 1984) (in an action for kidnaping and transporting women in interstate commerce for immoral purposes, the court permitted the government to call a psychiatrist as an expert to dispel the notion put forth by defendant that the victims had voluntarily submitted to the conduct by the criminal defendant).

7. 753 F.2d 1224 (3d Cir. 1985).

tion for an *in limine* hearing.⁸ Furthermore, the court held that based upon the record before it, Dr. Jaffe's proposed expert testimony was helpful to the trier of fact's understanding of the case, and was therefore admissible under Federal Rule of Evidence 702.⁹

In so holding, the court rejected defendants' overly generalized characterization of Dr. Jaffe's opinion as being concerned only with volition as an abstract concept, ruling instead that Dr. Jaffe's opinion was based in the more limited field of substance addiction, or tobacco dependence.¹⁰ The court was persuaded to rule in plaintiff's favor in light of the substantial evidence of clinical and scholarly studies, in both the private and public sectors, of the addictive effects of cigarette smoke.¹¹ Moreover, the court recognized that the study of chemical substance addiction and its effects is a recognized field of medical inquiry.¹² Furthermore, the court noted that the Surgeon General recognized the addictive potential of cigarette smoke.¹³ In light of the above facts, the court took judicial notice of the scientific field of the study of chemical dependence, specifically tobacco dependence.¹⁴

The court rejected defendants' argument that since medical authorities questioned the medical evidence concerning tobacco dependence, the evidence was novel, saying, "disagreement can exist in an established scientific field; an absence of unanimity over scientific evidence does not make the evidence 'novel.'"¹⁵ The court similarly rejected defendant's argument that the evidence was novel because Dr. Jaffe's deposition testimony indicated that there was no empirical scale which had been developed to measure the extent of this dependence. The court noted that while the absence of an empirical scale may undermine the validity of Dr. Jaffe's testimony in the eyes of the jury, it does not, however, indicate that expert testimony as to tobacco dependence is "novel" scientific evidence.¹⁶

8. *Cipollone v. Liggett Group, Inc.*, No. 83-2864, slip op. at 6 (D.N.J. Oct. 13, 1987).

9. *Id.*

10. *Id.* at 4.

11. *Id.*

12. *Id.*

13. *Id.* (The 1987 report of the Surgeon General entitled *Health Consequences of Smoking: Nicotine Addiction*, which discusses the addictive properties of cigarette smoke in greater detail than any previous Surgeon General report, was released several months after the court's ruling on defendants' motion *in limine*).

14. *Id.*

15. *Id.* at 5.

16. *Id.* at 6. During the course of the trial, defendants' moved to strike the trial testimony of Dr. Jaffe, arguing that Dr. Jaffe's testimony regarding Mrs. Cipollone's dependence upon cigarettes was insufficient to defeat a defense of contributory negligence,

The import of the court's ruling on defendants' motion *in limine* is twofold. First, the court legitimized the field of study of tobacco dependence, and arguably, tobacco litigation. If the trier of fact is convinced of the addictive qualities of the nicotine in cigarettes, it is less likely to blame the smoker for continued smoking. Second, the court further refined the concept of "novel" scientific evidence and narrowed its scope.

II. THE ADMISSIBILITY UNDER THE FEDERAL RULES OF EVIDENCE OF TESTIMONY OF DR. JEFFREY HARRIS, PLAINTIFF'S EXPERT ON STATE-OF-THE-ART IN THE TOBACCO INDUSTRY

In addition to permitting Dr. Jaffe's testimony, the Honorable H. Lee Sarokin allowed Jeffrey Harris, an M.D., Ph.D., and professor at Harvard Medical School, who was qualified as an expert in the area of scientific knowledge available to the manufacturers of cigarettes at various points in time, to give his opinion as to what information a reasonable manufacturer should have known and should have disclosed to users of its products. The court's decision to allow the testimony of both Dr. Jaffe and Dr. Harris reflects the liberal approach to the admissibility of scientific evidence embodied in the Federal Rules of Evidence and the applicable case law.

One of the issues in the case was whether the defendants had breached a duty to warn the public, including Rose Cipollone, about the hazards of cigarettes, prior to 1966, when the government required warnings to be placed on cigarette packages. Under *Feldman v. Lederle Labs*,¹⁷ a manufacturer is held to the standard of an expert in the field and "should keep abreast of the scientific advances."¹⁸ Moreover, "in some fields such as those impacting on public health, a manufacturer may be expected to be informed and affirmatively to seek out information concerning the public's

assumption of risk, or comparative fault. What defendants attempted to do in their motion to strike, as well as in their previous motion *in limine*, was to compare Dr. Jaffe's testimony regarding Mrs. Cipollone's dependence upon cigarettes and its affect upon her ability to choose whether or not to smoke to expert testimony proffered and rejected in criminal cases concerning whether people who are drunk or on drugs can "voluntarily" commit crimes. See, e.g., *United States v. Lyons*, 731 F.2d 243 (5th Cir. 1984), *cert. denied*, 469 U.S. 930 (1984); *United States v. Moore*, 486 F.2d 1139 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 980 (1973). The court held that such cases were inapposite in that they were not limited to an individual's substance addiction in relation to relieving the individual from responsibility for decisions whether or not to use the particular substance. *Cipollone v. Liggett Group Inc.*, No. 83-2864, slip. op. at 4 (D.N.J. Oct. 13, 1987). The court held that Dr. Jaffe's testimony regarding Mrs. Cipollone's ability to choose whether or not to continue smoking was relevant to whether her smoking was reasonable or voluntary, which issues were important to the critical question of causation and to defendants' affirmative defenses. *Id.*

17. 97 N.J. 429, 479 A.2d 374 (1984).

18. *Id.* at 453-54, 479 A.2d at 386.

use of its own product.”¹⁹ “Further, a reasonably prudent manufacturer will be deemed to know reliable information generally available or reasonably obtainable in the industry or in the particular field involved. Such information need not be limited to that furnished by experts in the field, but may also include material provided by others.”²⁰ Moreover, a manufacturer is under a duty “*whether or not* a causal relationship between use of product and various attendant difficulties has been definitively established at the time of the warning.”²¹ A duty to warn arises when there is “significant medical evidence of a possible health hazard, without waiting for a causal relationship to be established by definitive studies which, in some instances may not be feasible or would take many years.”²²

Plaintiff argued that Dr. Harris’ opinion as to what research and testing the tobacco company should have been performing and as to what information a reasonable manufacturer should have disseminated to the American public at various points in time fell within the liberal definition of “helpfulness” contemplated in Rule 702.²³

After a review of the scientific literature, Dr. Harris formulated his opinion that the tobacco companies should have researched and tested cigarettes before 1954, and should have disclosed information to the public regarding the health hazards associated with

19. *Id.* at 453-54, 479 A.2d at 387.

20. *Id.* (noting customer complaints, articles of preliminary findings by leading researchers in the field, research, and adverse reaction reports).

21. *Id.* at 454, 479 A.2d at 387 (emphasis added) (citing *McKee v. Moore*, 648 P.2d 21, 24 (Okla. 1982)).

22. *Id.* at 453-54, 479 A.2d at 387 (citing *Hamilton v. Hardy*, 37 Colo. App. 375, 385, 549 P.2d 1099, 1108 (1976); *McKee v. Moore*, 648 P.2d 21, 24 (Okla. 1982)).

23. See *supra* notes 3-5 and accompanying text; *United States v. Downing*, 753 F.2d 1224, 1229 (3d Cir. 1985) (this rule invests trial courts with broad discretion to admit expert testimony over the objection that it would improperly invade the province of the jury); S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 451 (3d ed. 1982) (under Rule 702, “an expert can be employed if his testimony will be helpful to the trier of fact in understanding evidence that is simply difficult, [though] not beyond ordinary understanding”). See also Notes of Advisory Committee on Proposed Rule 702 (Quoting Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952); 3 J. WEINSTEIN & M. BERGER, *WEINSTEIN’S EVIDENCE* § 702, at 702-12 n.6 (citing cases); 7 J. WIGMORE *EVIDENCE* § 1923 (3d ed. 1940) (“[T]he only true criterion is: On this subject can a jury from this person receive appreciable help? In other words, the test is a relative one, depending on the particular witnesses with reference to that subject, and is not fixed or limited to any class of persons acting professionally.”) *Cf.* *Breidor v. Sears, Roebuck & Co.*, 722 F.2d 1134, 1138 (3d Cir. 1983) (citing *Salem v. United States Lines*, 370 U.S. 31, 35 (1962)) (district court invested with broad discretion to admit or exclude expert evidence, and its action will be sustained unless manifestly erroneous); *Knight v. Otis Elevator Co.*, 596 F.2d 84, 87 (3d Cir. 1979) (noting the liberal policy of admitting expert testimony which will “probably aid” the trier of fact) citing *Universal Athletic Sales Co. v. American Gym, Recreational & Athletic Equipment Corp.*, 546 F.2d 530, 537 (3d Cir. 1976), *cert. denied*, 430 U.S. 984 (1977).

cigarettes. His opinion was further supported by, and in fact, Dr. Harris relied on, various internal documents and other testimony. For example, industry documents revealed:

- (1) It was unanimously agreed by the group present that the tobacco industry has lagged far behind other industries in product research.²⁴
- (2) The president of Liggett stated in Liggett's 1958 Annual Report: "My feeling in this business is that there isn't anything in this tobacco that is carcinogenic that is going to do the individual any harm."²⁵
- (3) Dr. Mold [Assistant Director of Research at Liggett] testified in his deposition (i) that he concluded in the late 50s or 60s that smoking caused lung cancer;²⁶ and (ii) that he wanted to publish all the information contained in Liggett's submission to the Surgeon General's Advisory Committee;²⁷
- (4) Historically, the joint industry funded smoking and health research programs have not been selected against specific scientific goals, but rather for various purposes such as public relations, political relations, and to gain position for litigation.
- (5) Thus, it seems obvious that reviews of such programs for scientific relevance and merit in the smoking and health field are not likely to produce high ratings.²⁸
- (6) Not more than fifty percent of the AMA/ERF research program was relevant to smoking.²⁹

Plaintiff argued that it was appropriate for Dr. Harris to read these statements to the jury, all of which were independently admissible in evidence, many of them admissions by defendants, and to comment about them in relation to his opinion on the complex subject of scientific knowability.³⁰

24. Record at 1007 (statement made in an internal document found in the files of Lorillard).

25. Record at 1092.

26. Record at 1195.

27. Record at 1218.

28. Record at 1235-36.

29. Record at 1245.

30. See FED. R. EVID. 703 ("[t]he facts or data in the particular case upon which an expert bases his opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject, the facts or data need not be admissible in evidence").

There is no doubt that proof of "scientific knowability," i.e., "cutting edge" is a complex subject. In *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 207, 447 A.2d 539, 548 (1982) the Supreme Court of New Jersey stated:

[S]cientific knowability, as we understand it, refers not to what in fact was known at the time, but to what *could have been* known at the time. In other words, even if no scientist had actually formed a belief that asbestos was dangerous, the hazards would be deemed knowable if a scientist could have formed that belief by applying research or performing tests that were available at the time. Proof of what could have been known will inevitably be complicated, costly, confusing and time-consuming. Each side will have to produce experts in the history of science

Defendants argued that Dr. Harris did not offer assistance to the jury in evaluating any complex scientific or technical terms. However, as plaintiff argued, Dr. Harris did not merely interpret the terms in the documents, rather, as a scientist he interpreted their meaning in the broader context of the tobacco companies' responsibility to the public at various points in time. The court dismissed defendants' argument.

Defendants also attempted to exclude Dr. Harris' testimony regarding scientific knowability based upon his review of company documents and deposition transcripts, on the basis of prejudice. The defendants cited cases saying that "expert testimony should be excluded when it assumes a posture of 'mythic infallibility' or has a false 'aura of reliability.'"³¹ Defendants once again relied upon the opinion of *United States v. Downing*,³² in which the Third Circuit considered the admission of novel scientific evidence and set forth a test for determining when scientific evidence was unduly prejudicial, thus warranting its exclusion.³³

The evidence at issue in *Downing* consisted of the testimony of a psychologist called by defendant as an expert on the reliability of eyewitness identification. The Court of Appeals for the Third Circuit vacated a judgment of conviction entered against the defendant on the basis of the district court's exclusion of the expert's proffered testimony.³⁴ The Third Circuit Court remanded the case to the district court for an evidentiary hearing concerning the admissibility of the expert testimony.³⁵ In so ruling, the Third Circuit Court noted:

The danger that scientific evidence will mislead the jury might be greater . . . where the jury is not presented with the data on which the expert relies, but must instead accept the expert's assertions as to the accuracy of his conclusions.³⁶

Another factor noted by the court in *Downing* indicating that scientific evidence is unduly prejudicial is "[t]he extent to which the

and technology to speculate as to what knowledge was feasible in a given year. We doubt that juries will be capable of even understanding the concept of scientific knowability, much less be able to resolve such a complex issue. (Emphasis in original).

31. *United States v. Ferri*, 778 F.2d 985, 990 (3d Cir. 1985), *cert. denied*, 476 U.S. 1172 (1986); *United States v. Downing*, 753 F.2d 1224, 1239 (3d Cir. 1985); *see American Bearing Co. v. Litton Indus.*, 729 F.2d 943, 949-50 n.14 (3d Cir. 1984), *cert. denied*, 469 U.S. 854 (1984); *New York v. Pullman, Inc.*, 662 F.2d 910, 915 (2d Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982); *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1223, 1256 (E.D.N.Y. 1985).

32. 753 F.2d 1224 (3d Cir. 1985).

33. *See supra* text accompanying notes 4-5.

34. *Downing*, 753 F.2d at 1243.

35. *Id.* at 1244.

36. *Id.* at 1239.

adverse party has had notice of the evidence and an opportunity to conduct its own tests or produce opposing experts.”³⁷

Plaintiff argued that Dr. Harris’ testimony was not unduly prejudicial under *Downing*. Because Dr. Harris read to the jury statements upon which he relied in formulating his opinions, including numerous scientific studies and articles, the jury could examine the statements for themselves and was not forced to accept Dr. Harris’ recommendation out of hand. In addition, defendants were provided with the substance of Dr. Harris’ testimony long before trial and thus, had ample opportunity to produce their own experts in response to Dr. Harris. Moreover, defendants were able to cross-examine Dr. Harris at trial and expose any weaknesses in his testimony. The court clearly agreed with plaintiff, saying:

Dr. Harris was permitted to explain to the jury the facts upon which his opinions were based. Defendants, on cross-examination, had the opportunity to question Dr. Harris’ use and understanding of the documents. Defendants, during their case, may present witnesses that seek to cast these documents in different light. Ultimately, as defendants point out, the jury will determine the significance of the evidence presented. Dr. Harris’ opinions, premised on the documents and depositions may assist the jury in making its determination.³⁸

The only restriction the court placed upon Dr. Harris’ testimony was that counsel not ask the witness “whether the defendants should have warned” or “whether the defendants were under a duty to warn.”³⁹ The court did not bar the witness from answering properly phrased questions by setting forth his recommendations for the tobacco companies. Defendants nonetheless argued that when Dr. Harris responded to questions invoking the word “warn,” or by saying that certain information “should have been disclosed” or that “the public had the right to know” particular information as part of the recommendations he would have made to the tobacco companies, Dr. Harris’ testimony was tainted because his responses embraced one of the ultimate issues in the case, namely whether defendants should have warned the public of the hazards of smoking prior to 1966.

Plaintiff argued that under our current rules of evidence, specifically Federal Rule of Evidence 704(a), the so-called “ultimate issue” rule was specifically abolished.⁴⁰

37. *Id.* at 1241; see *United States v. Baller*, 519 F.2d 463, 466 (4th Cir. 1975).

38. *Cipollone v. Liggett Group, Inc.*, No. 83-2864, slip op. at 3 (D.N.J. May 3, 1988).

39. Record at 957.

40. FED. R. EVID. 704(a) reads: “[T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” In support of his position that this evidence was admissible and

The court, in a brief opinion, held that Dr. Harris' responses to plaintiff's questions as to what his recommendations to defendants would have been at various times comported with the court's prior ruling concerning the prohibition against framing questions in terms of "duty to warn."⁴¹

The *Cipollone* court's willingness to admit the testimony of Dr. Jaffe and Dr. Harris reflects the fact that the Federal Rules of Evidence generally favor admission of evidence of a scientific nature. Whether the two conditions for admissibility of such evidence—a qualified witness who can assist the trier of fact—have been met, is a preliminary question addressed to the trial court, which has broad discretion in making these determinations.⁴² Moreover, under Rule 703, the facts or data upon which an expert may base his opinion have been expanded to include facts or data made known to the expert outside of court, in addition to those perceived by the expert first-hand and those made known to the expert at trial. Furthermore, with few exceptions, the expert may render an opinion on an ultimate issue in a case.

not barred by prejudice, plaintiff cited the following cases: *United States v. Fogg*, 652 F.2d 551 (5th Cir. 1981) (the court allowed an expert accountant called by the government to testify in a criminal tax evasion case that payments to defendant would be characterized as "constructive dividends"); *United States v. Milton*, 555 F.2d 1198, 1204 (5th Cir. 1977) (in a prosecution for conducting an illegal gambling business, the court affirmed a lower court's admission of expert testimony although it appeared to be a legal conclusion); *Wetherill v. University of Chicago*, 565 F. Supp. 1553 (N.D. Ill. 1983) (plaintiffs alleged injury by exposure in utero to diethylstilbestrol (DES), which was administered to their mothers as part of a university experiment; and the court allowed an expert to testify as to Illinois' informed consent standard, namely, whether "the reasonable medical practitioner of the same school, in the same or similar circumstances, would have told the patient of such [foreseeable] risks" of the challenged treatment); *Garrett v. Desa Indus.*, 705 F.2d 721 (4th Cir. 1983) (the court held that it was reversible error for the trial court to exclude the opinion testimony of a witness qualified with regard to the design of a particular machine (in that case, a stud driver) that the design of that machine was "unreasonably dangerous"; the court held that if the witness "is qualified to testify about the stud drivers' design and manufacture, he may render an opinion as to the ultimate issue in the case").

In each of the two cases cited by defendants in support of the exclusion of expert testimony regarding the so-called ultimate issue, *Matthews v. Ashland Chemical, Inc.*, 770 F.2d 1303 (5th Cir. 1985) and *Strong v. E.I. Dupont de Nemours Co.*, 667 F.2d 682 (8th Cir. 1981), the question asked of the expert was found by a court to be improper, thus justifying exclusion of the expert's testimony.

41. *Cipollone v. Liggett Group, Inc.*, No. 83-2864, slip op. at 2 (D.N.J. May 3, 1988).

42. 11 J. MOORE, W. TAGGART & J. WICKER, *MOORE'S FEDERAL PRACTICE* § 702.10[3] (3d ed. 1985).

III. JUDGE SAROKIN'S RULING ON DEFENDANT'S MOTION FOR DIRECTED VERDICT

A. *The Design Defect Claim*

One of plaintiff's initial causes of action in this matter was a design defect claim which alleged that defendants failed to market a safer, alternatively designed cigarette. In support of this cause of action, plaintiff presented evidence at the trial that such a safer, alternatively designed cigarette was feasible and available to defendants as early as 1971, during the period Rose Cipollone smoked. Dr. Jeffrey Harris, a qualified medical expert, testified that had defendants marketed the palladium nitrate process cigarette by 1971, when it was feasible to do so, Rose Cipollone's risk of contracting lung cancer would have been reduced by eight to seventeen percent. In addition, plaintiff presented the testimony of Dr. Joel Cohen, an expert in consumer behavior, who testified that in his opinion, Mrs. Cipollone would have tried the product.

Defendants argued that plaintiff had failed to prove proximate cause, because plaintiff was required, under the law, to present evidence that the alternative design more likely than not would have prevented plaintiff's injury.⁴³ Plaintiff argued that, under the "lost chance" doctrine,⁴⁴ he was only required to present evidence that defendant's conduct increased plaintiff's risk of contracting lung cancer and that such increased risk was a "substantial factor" producing plaintiff's condition.⁴⁵

The court was thus faced with the task of determining the appropriate test for measuring causation on the design defect claim. The court's task was complicated by the fact that no New Jersey court had expressly ruled on the applicability of the "lost chance" doctrine to product liability cases, and thus, the court had to predict how the New Jersey Supreme Court would decide this question.⁴⁶ The court predicted that the New Jersey Supreme Court would not apply the "lost chance" doctrine to this case.⁴⁷

In so holding, the court noted that the test of proximate cause in strict product liability actions is generally whether a defend-

43. See, e.g., *Brown v. United States Stove Co.*, 98 N.J. 155, 174, 484 A.2d 1234, 1244 (1984).

44. The theory behind the "lost chance" doctrine is that a plaintiff can recover for damage suffered as a result of another actor's nonfeasance that reduced the probability of avoiding an injury actually sustained. See *Cipollone v. Liggett Group, Inc.*, 683 F. Supp. 1487, 1494 (D.N.J. 1988); *Herber v. Johns-Manville Corp.*, 785 F.2d 79, 82-83 (3d Cir. 1986).

45. See, e.g., *Evers v. Dollinger*, 95 N.J. 399, 417, 471 A.2d 405, 414-15 (1984).

46. *Cipollone v. Liggett Group, Inc.*, 683 F. Supp. 1487, 1493 (D.N.J. 1988); See also *Hon v. Stroh Brewery*, 835 F.2d 510, 512 (3d Cir. 1987).

47. *Cipollone*, 683 F. Supp. at 1493-94.

ant's conduct was a substantial factor in bringing about an accident that caused a plaintiff's injury.⁴⁸ The court also noted that in *Brown v. United States Stove Co.*,⁴⁹ a design defect case, the New Jersey Supreme Court ruled that a plaintiff had failed to present a jury question on proximate cause in the absence of evidence that the alternative design would "realistically or likely . . . have prevented the kind of injury" incurred by plaintiff.⁵⁰ The court recognized that the "lost chance" doctrine had been applied by the New Jersey Supreme Court in the medical malpractice context in *Evers v. Dollinger*,⁵¹ wherein it was held that a physician who failed to diagnose cancer could be held liable if it was demonstrated that the physician's conduct increased plaintiff's risk and that this increased risk was a substantial factor in producing plaintiff's condition.⁵²

The court also took note that the New Jersey Supreme Court applied *Evers* to a claim for failure to rescue in *Hake v. Manchester Township*,⁵³ wherein the court held that given defendant's breach of a duty to assist plaintiff, plaintiff was only required to show that there was "a substantial possibility" that plaintiff might have been rescued if defendant had acted properly.⁵⁴ While the court acknowledged that the rationale of the "lost chance" doctrine could extend to product liability claims based upon a failure to act, the court was quick to note that the New Jersey courts had failed to apply the "lost chance" rule in product liability cases arising after *Evers*⁵⁵ and *Hake*.⁵⁶ Thus, the court was unwilling to invoke this doctrine, which would have eased the burden of establishing proximate cause by not requiring plaintiff to produce definitive proof that had defendant acted by developing the safer alternative cigarette, Mrs. Cipollone's injuries would have been prevented.⁵⁷

What likely motivated the court to find that the New Jersey Supreme Court would not adopt the "lost chance" doctrine in this

48. *Id.* at 1494 (citing *Malin v. Union Carbide*, 219 N.J. Super. 428, 439, 530 A.2d 794, 799 (1987); *Hull v. Getty Ref. & Mktg. Co.*, 202 N.J. Super. 461, 467, 495 A.2d 445, 449 (App. Div. 1985)).

49. 98 N.J. 155, 484 A.2d 1234 (1984).

50. *Id.* at 174, 484 A.2d at 1244; see *Cipollone*, 683 F. Supp. at 1494.

51. 95 N.J. 399, 471 A.2d 405 (1984).

52. *Id.* at 417, 471 A.2d at 415; see *Cipollone*, 683 F. Supp. at 1494.

53. 98 N.J. 302, 486 A.2d 836 (1985).

54. *Cipollone*, 683 F. Supp. at 1494; *id.* at 311, 486 A.2d at 841.

55. See, e.g., *Brown v. United States Stove Co.*, 98 N.J. 155, 484 A.2d 1234; *Campos v. Firestone Tire & Rubber Co.*, 98 N.J. 198, 485 A.2d 305 (1984).

56. See, e.g., *Malin v. Union Carbide*, 219 N.J. Super. 428, 530 A.2d 794 (1987); *Hull v. Getty Ref. & Mktg. Co.*, 202 N.J. Super. 461, 467, 495 A.2d 445 (App. Div. 1985). *Cipollone*, 683 F. Supp. at 1494.

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

products liability case was the fact that the New Jersey Legislature had recently passed a products liability act, a provision of which states that a manufacturer may not be held liable for a design defect if there did not exist a feasible alternative design "that would have prevented the harm."⁵⁸ In a footnote, the court noted that although it was not holding that the provision of this statute applied retroactively to this case, it expressed the view that the New Jersey Supreme Court would be unlikely to modify the standards set forth in *Brown*⁵⁹ and *Campos*⁶⁰ for pending cases not covered by this statute.⁶¹

The significance of the court's decision with respect to plaintiff's alternative design claim is that it substantially increases a plaintiff's burden to prove such a claim by requiring, in essence, that a plaintiff prove the impossible: prevention of an injury which actually occurred, as a result of the marketing of an alternative product which, in reality, defendants failed to do.

B. *The Intentional Wrongdoing Claim*

Another significant aspect of the court's decision regarding defendants' motion for a directed verdict was its finding that plaintiff had presented sufficient evidence from which the jury could conclude that defendants intentionally misled the public and/or deprived the public of information necessary to make informed choices about the hazards of smoking, and that defendants conspired to misrepresent and conceal facts regarding the dangers of smoking.⁶² The court stated:

The evidence presented also permits the jury to find a tobacco industry conspiracy, vast in scope, devious in its purpose and devastating in its results. The jury may reasonably conclude that defendants were members of and engaged in that conspiracy with full knowledge and disregard for the illness and death it would cause, and that Mrs. Cipollone was merely one of its

58. N.J. STAT. ANN § 2A:58C-3(a)(1) (West 1987).

59. *Brown v. United States Stove Co.*, 98 N.J. 155, 484 A.2d 1234 (1984).

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

61. *Cipollone*, 683 F. Supp. at 1495 n.7.

62. *Id.* at 1490-93, 1500. Count 8 of plaintiff's complaint provides, in pertinent part, that:

Defendants were or should have been at all times relevant hereto, in possession of medical and scientific data which indicated that the use of its cigarettes was hazardous to the health of consumers, but prompted by pecuniary motives, the defendants, Liggett Group, Inc., Philip Morris Incorporated and Loew's Theatres, Inc. individually and as members of the tobacco industry ignored and failed to act upon said medical and scientific data and conspired to deprive the public, and particularly the consumer of the defendants' products, of said medical and scientific data.

victims.⁶³

In so holding, the court rejected defendants' argument that plaintiff's claims, premised on suppression of information held by third parties, were preempted by the Federal Cigarette Labeling and Advertising Act.⁶⁴ The court also rejected defendants' argument that Mrs. Cipollone's continued smoking after the appearance of the congressionally-mandated warnings in 1966 relieved defendants of liability as a matter of law.⁶⁵ As was pointed out by plaintiff in his brief, the New Jersey courts have held that where a defendant is guilty of reckless or wanton misconduct, the rule that contributory conduct (or comparative negligence) is a bar to recovery does not apply.⁶⁶

In addition, the court agreed with plaintiff that he would be entitled to recover punitive damages, assuming that he made the requisite showing of "intentional wrongdoing in the sense of an 'evil minded act' or an act accompanied by a wanton and wilful disregard of the rights of another."⁶⁷ Most significantly, the court stated: "If the jury accepts the plaintiff's version of the facts as to the conduct of the defendants, *it is difficult to envision a more compelling case for an award of punitive damages.*"⁶⁸ It appears that the judge's opinion would favor future plaintiffs' tobacco cases. The question then arises, why, if the judge found that there was sufficient evidence for the jury to find the existence of a conspiracy in the case, did the jury find that defendants were not liable for conspiracy? Without delving into the minds of the jurors, it may have been the case that the jurors also found a conspiracy to exist, however, they may not have found the defendant's acts to be a proximate cause of Rose Cipollone's injuries,⁶⁹ which was required in order to find defendants liable on this cause of action. Perhaps, in another case involving a plaintiff with a different smoking history, a jury will find defendant tobacco companies liable for a conspiracy.

63. *Id.* at 1493.

64. *Id.* at 1499-1500 n.19; *See also* Cipollone v. Liggett Group, Inc., 649 F. Supp. 664, 674 (D.N.J. 1986).

65. *Cipollone*, 683 F. Supp. at 1500.

66. *See* Entwistle v. Draves, 102 N.J. 559, 510 A.2d 1 (1986) and Borelli v. Frollani, 92 N.J. Super. 203, 207, 236 A.2d 613, 616 (App. Div. 1967).

67. *Cipollone*, 683 F. Supp. at 1500.

68. *Id.* (emphasis added).

69. The jury found that Mrs. Cipollone was 80% responsible for her smoking behavior.

IV. PLAINTIFF'S UNREASONABLY UNSAFE PRODUCT RISK-UTILITY CLAIMS

On October 27, 1987, the Honorable H. Lee Sarokin granted defendants' motion for judgment on the pleadings and dismissed plaintiff's unreasonably unsafe product risk-utility claims, on the basis that New Jersey's recently enacted Section 3(a)(2) of the Product Liability Act⁷⁰ was applicable to the case and barred plaintiff's claims as a matter of New Jersey law.⁷¹ Section 3(a)(2) of the Act provides that a manufacturer may not be held liable on a design defect claim if:

The characteristics of the product are known to the ordinary consumer or user, and the harm is caused by an unsafe aspect of the product that is an inherent characteristic of the product and

70. 1987 N.J. Sess. Law Serv. 188-93 (Vol. 6 1987).

71. *Cipollone v. Liggett Group, Inc.*, No. 83-2864 slip op. at 5-6 (D.N.J. Oct. 27, 1987).

According to the New Jersey courts, seven factors are relevant to the determination of whether a product's utility outweighs its risk:

- (1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
- (2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
- (3) The availability of a substitute product that 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.

Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 174, 386 A.2d 816, 826-27 (1978) (quoting *Wade, On the Nature of Strict Tort Liability for Products*, 44 *Miss. L.J.* 825, 837-38 (1973)); See also *Cipollone v. Liggett Group, Inc.*, 644 F. Supp. 283, 290 (D.N.J. 1986), in which the court held that defendants were prohibited under New Jersey law from introducing evidence as to collateral social benefits of cigarette production stating: "[i]t is the benefit and utility to the cigarette smoker which is here in issue, and not the benefit to the cigarette industry or those in turn who benefit from its existence."

In *Cipollone*, the plaintiff argued that cigarettes are so dangerous and of such little utility that under the above-described risk-utility analysis, the court should find cigarettes to be defective and impose liability on the manufacturer. See 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, 607 (1988). *Cipollone v. Liggett Group, Inc.*, 644 F. Supp. 283, 286 (D.N.J. 1986). In general, a court engaged in a risk-utility analysis determines whether a product is defective by comparing the utility of the product with the risk of injury it poses to the public. Note, *supra*, at 607. In most cases of design defect, the plaintiff produces evidence of a technologically feasible, alternative design with which the court can compare the particular design at issue. *Id.* at 607. However, in *O'Brien v. Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (1983), the New Jersey Supreme Court held that in the absence of an alternative design, a jury may find a product defective if that product's usefulness is outweighed by its dangers. Note, *supra*, at 608-09.

that would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the class of persons for whom the product is intended.

If Section 3(a)(2) was found to have incorporated *Restatement (Second) of Torts*, section 402(A), comment (i) into New Jersey law, it would bar plaintiff's risk-utility claim. The issue faced by the court was whether the New Jersey Legislature intended this provision to apply to cases filed prior to the enactment of the Act. Section 8 of the Act addresses this question.

This Act shall take effect immediately except that provisions of this Act that establish new rules with respect to the burden of proof or the imposition of liability in product liability actions shall apply only to product liability actions filed on or after the date of enactment.⁷²

Under this provision, Section (3)(a)(2) would apply to this case, unless it established a new rule with respect to the imposition of liability in product liability actions.⁷³ What persuaded the court to find that Section (3)(a) was a provision codifying existing law was a New Jersey Assembly Insurance Committee Statement on this bill which addressed the Legislature's intent on this question:

Section 8 provides that the act shall take effect immediately, except that provisions of the act that establish new rules with respect to the burden of proof or the imposition of liability in product liability actions shall apply only to actions filed on or after the date of enactment. This provision is appropriate because certain provisions of the act simply codify the existing common law of the State, which should continue to apply in pending cases as well as new cases. For example . . . the New Jersey courts have adopted certain provisions of the commentary to the American Law Institute's *Restatement (Second) of Torts*, (e.g., comments i and k to section 402A) that are codified in this act. . . . Certain other provisions of the act . . . , however, establish new rules for products liability actions. . . . It is intended that such new rules apply to cases filed on or after the date of enactment.⁷⁴

The court further noted that in connection with section 3(a)(2), the legislative history states, "the 'consumer expectations' test has been recognized by New Jersey courts."⁷⁵ Thus, the court held that in passing the aforementioned Act, the New Jersey Legisla-

72. 1987 N.J. Sess. Law Serv. 188-193 (Vol. 6 1987).

73. *Cipollone v. Liggett Group, Inc.*, No. 83-2864, slip op. at 3 (D.N.J. Oct. 27, 1987).

74. *Id.* at 3-4 (D.N.J. Oct. 27, 1987) (citing Assembly Insurance Committee Statement, at 708). Section 1(a) of the Act contains the legislative finding that "committee statements that may be adopted or included in the legislative history of this act shall be consulted in the interpretation and construction of this act." *Id.* at 4.

75. *Id.* at 4.

ture considered Section 3(a)(2) as a codification of existing common law, and therefore intended that this section apply to pending cases.⁷⁶

Plaintiff thereafter filed a petition for rehearing of the issue of the applicability of the risk-utility test, in which he argued that the court had given undue weight to reports or statements by legislative committees in resolving whether Section 3(a)(2) represented preexisting New Jersey law or new law. Specifically, plaintiff argued that the provision of the Act said merely that the legislative history be *consulted* in the interpretation and construction of the Act but did not operate to incorporate the committee statements as part of the Act; nor to mandate the court's concurrence in such statements.

Plaintiff called the court's attention to *O'Brien v. Muskin Corp.*;⁷⁷ *Suter v. San Angelo Foundry & Machine Co.*;⁷⁸ and *Cepeda v. Cumberland Engineering Co.*⁷⁹ Although the New Jersey Supreme Court referred to "consumer expectations" in each of these cases, the "consumer expectations" test is quite different from the test referred to in these cases. These cases used the "consumer expectations" as a floor to manufacturer liability, rather than a ceiling. In other words, if a product does not perform as a consumer expected it to perform, then the manufacturer of the product would be liable. This is far different from the use of the phrase "consumer expectations" in comment (i) to Section 402A, which says that if a product conforms to a consumer's expectations with regard to the product's performance, then a manufacturer is relieved of liability with respect to the product. Thus, the latter use of the term "consumer expectations" refers to a quasi-assumption of the risk test, i.e., if the consumer is aware of certain hazards associated with a product, then a manufacturer cannot be found liable.

Plaintiff argued that if the court had exercised its undoubted right to limit the weight it attributed to the statements of the legislative committees to that which the statements deserved on their merits, the court would not have concluded that it was the intent of the New Jersey Legislature in adopting Section 8 of the Act to hold that Section 3(a)(2) was a codification of preexisting law, and not the promulgation of a new rule as to products liability in New Jersey. Plaintiff maintained that in each of the above cases,

76. *Id.* at 5. The court noted its disagreement with the legislature's interpretation of New Jersey common law, however, it held that it could not ignore the legislature's intentions in passing the Act. *Id.*

77. 94 N.J. 169, 463 A.2d 298 (1983).

78. 81 N.J. 150, 406 A.2d 140 (1979).

79. 76 N.J. 152, 386 A.2d 816 (1978).

the “consumer expectations” test was used as an evidentiary criterion for liability rather than for immunity, unlike the provision under discussion in Section 3(a)(2) of the Product Liability Act.⁸⁰ Plaintiff was also quick to point out that Judge Sarokin himself in a previous opinion rendered in this case,⁸¹ recognized the proper place in the law of New Jersey of the “consumer expectations” test:

According to the New Jersey Supreme Court’s most recent precedent in this regard, however, compliance with consumer expectations is simply not the only—nor even the most important—factor to consider when determining whether a manufacturer should be found liable for placing any product on the market. Although consumer’s expectations are relevant to the overall determination of whether a product’s risks outweigh its utility, a product that complies with those expectations, may, nonetheless, lead to strict liability if other considerations (for example, the “usefulness and desirability of the product” as balanced against “the likelihood that it would cause injury, and the probable seriousness of the injury”) indicate that the manufacturer acted unreasonably in placing the product on the market.⁸²

The court refused to reconsider its position with regard to the appropriate design defect test and plaintiff’s petition for rehearing was denied. Thus, plaintiff was prevented from presenting evidence at trial pertaining to his risk-utility claims.⁸³

80. The declared understanding by the *Cepeda* court as to the meaning of Comment (i) of Section 402(A) is merely that a normally useful product will not be regarded as defective where the harm in its use is solely because of improper or excessive use or adulteration. *Id.* at 170, 386 A.2d at 824-25. This is a completely different concept from the declaration in Section 3(a)(2) of the new Act that there is no liability for a product whose characteristics are known to the ordinary consumer, and the harm is caused by an unsafe aspect of the product that is an inherent characteristic of it, which would be recognized by the ordinary person who uses or consumes it. In *Suter*, the court stated that where it is “self-evident that the product is not reasonably suitable and safe and fails to perform, contrary to the user’s reasonable expectation that it would ‘safely do the jobs for which it was built’ . . . the manufacturer’s responsibility would be clear without more.” It is thus apparent that the attention of the court in *Suter*, insofar as reasonable expectations of the purchaser are concerned, was to circumstances which would inculpate the defendant as a matter of law, not those which would exculpate him. The mere assertion of the former proposition by the court does not necessarily imply adoption of a principle of immunity as a matter of law where the harm is not beyond the consumer’s expectations. The allusion to a “consumer expectations” test in the decision of *O’Brien* has no broader significance than that which was just explained in regard to the *Suter* opinion, which the *O’Brien* court cites as authority for its statement:

Another standard is the consumer expectations test, which recognizes that the failure of the product to perform safely may be viewed as a violation of the reasonable expectation of the consumer.

O’Brien, 94 N.J. at 182, 463 A.2d at 304.

81. *Cipollone*, 649 F. Supp 664, 670 n.2 (D.N.J. 1986).

82. *Id.* (citing *O’Brien*, 94 N.J. at 182-83, 463 A.2d at 304).

83. Significantly, on October 19, 1988, the New Jersey Supreme Court granted a plaintiff’s motion for leave to appeal a recent appellate division decision concerning the

When it came time to charge the jury in this case, plaintiff argued once again that the court should not charge the jury that a manufacturer has a duty to warn only if those dangers are beyond that which would be contemplated by the ordinary consumer because this version of the “consumer expectations” test had been rejected by the New Jersey courts. The court nonetheless charged the jury:

In considering whether Liggett was under a duty to warn, you should consider the extent to which ordinary consumers prior to 1966 were aware that cigarette smoking posed significant health risks. You need not consider whether consumers knew of particular diseases that could be caused—only whether consumers were aware that the product posed significant health risks. The obviousness of a product’s danger—as measured by such general consumer knowledge, not by a particular plaintiff’s knowledge—is one element to be considered in order for you to determine whether a duty to warn exists. However a manufacturer is not automatically relieved of its duty to warn merely because the danger is patent—known or apparent.

Plaintiff argued that the court should exercise its own judgment in deciding what weight, if any, to give to legislative statements regarding the state of preexisting common law, especially where the court itself found that the Assembly Committee’s description of that preexisting law was wrong. The effect of the court’s ruling on risk-utility was substantial in that it deprived plaintiff of a powerful cause of action when applied to a product such as cigarettes, which arguably have little utility, but which cause much damage. From a plaintiff’s perspective, it is hoped that the New Jersey Supreme Court will exercise its judgment in reviewing the appellate division’s decision in *Dewey v. R.J. Reynolds*.⁸⁴

impact of the new Products Liability Act in another tobacco case. See *Dewey v. Brown & Williamson Tobacco Corp.*, No. A-3227-86-TS, A-3229-86-TS, slip op. (App. Div. 1988).
84. *Id.*