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ATTORNEY GENERAL'S WARNING: LEGISLATION MAY NOW BE HAZARDOUS TO TOBACCO COMPANIES' HEALTH

INTRODUCTION

"My intuitive feeling is, we've got the start of a runaway forest fire here for the tobacco industry."¹

History has been kind to cigarette manufacturers. The tobacco industry has been able to douse the numerous individual product liability lawsuits that now have the appearance of small camp fires.² However, a spark escaped when two states recently filed suits against various manufacturers to recover health care costs for smoking-related illnesses among state employees.³ The fire began to burn brighter when the Florida Legislature amended the state's Medicaid Third-Party Liability Act⁴ to allow the state's Attorney General to sue tobacco manufacturers to recover of Medicaid payments made due to illnesses resulting from the use of tobacco products.⁵ The "forest fire" has now spread to the federal legislature. Senators Frank R. Lautenberg (D-New Jersey) and Tom Harkin (D-Iowa) recently introduced a bill⁶ based upon the new Florida statute.⁷ The two pieces of legislation both contain language that could prove to be extremely harmful to the health of tobacco industry profits.⁸

Public policy requires this new wave of legislation and litigation. Without it, taxpayers will be required to absorb huge costs, and cigarette manufacturers will continue to escape liability for the harm that their products cause.⁹ However, a tobacco industry spokesperson has vowed to challenge the new

1. Maria Mallory, *Florida May Kick the Tar Out of Tobacco*, BUS. WK., July 4, 1994, at 29 (quoting Robert McKnight, executive vice-president of the Florida Chamber of Commerce).

2. The tobacco industry has faced numerous lawsuits over the past four decades that were brought by individual plaintiffs. See *infra* pp. 32-46. To date, the industry has never paid any amount of compensation to individuals with smoking-related illnesses. See Donald W. Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423, 1425 (1980).

3. *Nationline: Tobacco Suit*, USA TODAY, June 8, 1994, at 3A. In May, Mississippi sued thirteen tobacco companies to recover funds expended on hospital care required by state employees due to smoking-related illnesses. *Id.* West Virginia Attorney General Darrell McGraw Jr. announced his intentions to file a similar suit. *Id.*

4. Medicaid Third Party Liability Act, 1994 Fla. Sess. Law. Serv. ch. 94-251, § 4 (codified as amended at FLA. STAT. ANN. ch. 409.910 (West 1994)).

5. H.R. 71, 1994 Spec. Sess. D § 9, FLA. STAT. ANN. ch. 409.910 (West 1994).

6. S. 2245, 103d Cong., 2d Sess. (1994).

7. 140 Cong. Rec. S7784-04, S7784 (daily ed. June 28, 1994) (statement of Sen. Lautenberg).

8. See *infra* notes 19-29.

9. It has been estimated that the Medicare program will incur \$800 billion in expenditures over the next twenty years due to tobacco-related illnesses. 140 Cong. Rec. S7784-04, S7784 (referring to a Columbia University Center on Addiction and Substance Abuse Report).

Florida law.¹⁰ The stage has been set for another wave¹¹ of litigation that could seriously burn the tobacco industry.

Part I examines the significant aspects of the revised Florida statute and the proposed federal Senate bill.¹² Part II reviews the development and current status of the laws in Florida, Ohio, and federal courts in regards to the toxic tort¹³ theories included in the legislation.¹⁴ Part III of this Comment provides a review of the judicial treatment of tobacco cases and past legislative actions toward tobacco.¹⁵ Part IV discusses the due process challenge that could be advanced by the tobacco industry.¹⁶ Finally, Part V concludes with predictions as to the likely success the Medicaid Third-Party Act¹⁷ will have in achieving its goals, and as to the tobacco industry's ability to contain the heightened forest fire.¹⁸

PART I: RECENT LEGISLATIVE ACTIONS

The Florida Legislation

Florida's newly amended Section 409.910 has numerous features that ease the State's burdens in maintaining a case against cigarette manufactur-

10. Michelle Healy, *Florida Can Sue Tobacco Firms For Illness Costs*, USA TODAY, May 27, 1994, at 1D. Tom Lauria, spokesperson for the Tobacco Institute, called the legislation "a travesty and poor public policy." *Id.*

11. Two distinct "waves" of litigation regarding cigarette manufacturer liability have been recognized to date. See *infra* pp. 32-46. See also Paul G. Crist & John M. Majoras, *The "New" Wave in Smoking and Health Litigation – Is Anything Really So New?*, 54 TENN. L. REV. 551, 552 (1987).

12. See *infra* notes 19-30.

13. This Comment examines tobacco (especially cigarettes, due to the nicotine content) as a product that could be included in the category of toxic tort cases. Toxic tort cases have been defined as:

[T]hose in which the plaintiff seeks compensation for harm allegedly caused by exposure to a substance that increases the risk of contracting a serious disease, but does not cause an immediately apparent response. These cases generally involve a latency period of latency or incubation prior to the onset of the disease. In most cases the increased risk of the disease does not diminish or dissipate, even with the cessation of exposure. . . . The vast majority of toxic tort cases, however, are related to cancer and the issue of carcinogenesis. . . .

Bert Black & David E. Lilienfeld, *Epidemiological Proof in Toxic Tort Litigation*, 52 FORDHAM L. REV. 732, 733 n.1 (1984).

14. See *infra* pp. 7-32.

15. See *infra* pp. 32-46.

16. See *infra* pp. 46-50.

17. See 1994 Fla. Sess. Law Serv. ch. 94-251, § 4 (West).

18. See *infra* pp. 50-61.

ers. First, lawmakers abrogated typical defenses used by defendant manufacturers.¹⁹ The specific defenses of comparative negligence, assumption of risk, and the catch-all phrase of “all other affirmative defenses normally available” were added by the statute as it was enacted on July 1, 1994.²⁰ The second major addition was the concept of joint and several liability.²¹

The largest and most significant provisions added to the statute allow the Attorney General to seek recovery under a single proceeding (effectively a class action), require the evidence code to be liberally construed, allow causation to be proven by use of statistical evidence, abolish the need to identify individual recipients under certain circumstances, and allow the Attorney General to proceed under a market share theory.²² The last important addition

19. 1994 Fla. Sess. Law Serv. ch. 94-251, § 4. Abrogation of defenses was consistent with the intent of the legislature to hold tobacco companies liable, even though tobacco is not specifically mentioned in the amended statute. However, tobacco is mentioned in the House Summary of the initial bill text. See H.R. 71, 1994 Spec. Sess. D. 1994 Fla. Sess. Law Serv. ch. 94-251, § 4 states:

(1) It is the intent of the Legislature . . . Principles of common law and equity as to assignment, lien, subrogation, comparative negligence, assumption of risk, and all other affirmative defenses normally available to a liable third party, are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources; such principles shall apply to a recipient's right to recovery against any third party, but shall not act to reduce the recovery of the agency pursuant to this section. The concept of joint and several liability applies to any recovery on the part of the agency. It is intended that if the resources of a liable third party become available at any time, the public treasury should not bear the burden of medical assistance to the extent of such resources. Common law theories of recovery should be liberally construed to accomplish this intent.

20. 1994 Fla. Sess. Law Serv. 409.910, § 4 (1)(West).

21. “A liability is said to be joint and several when the creditor may demand payment or sue one or more of the parties to such liability separately, or all of them together at his option.” BLACK'S LAW DICTIONARY 837 (6th. ed. 1990). The term also refers to “a liability that a business either shares with other tort-feasors or bears individually without the others”. *Id.*

22. 1994 Fla. Sess. Law Serv. ch. 94-251, § 4 (9) states:

In the event that medical assistance has been provided by Medicaid to more than one recipient, and the agency elects to seek recovery from liable third parties due to actions by the third parties or circumstances which involve common issues of fact or law, the agency may bring an action to recover sums paid to all such recipients in one proceeding. In any action brought under this subsection, the evidence code shall be liberally construed regarding the issues of causation and of aggregate damages. The issue of causation and damages in any such action may be proven by use of statistical analysis.

(a) In any action under this subsection wherein the number of recipients for which medical assistance has been provided by Medicaid is so large as to cause it to be impracticable to join or identify each claim, the agency shall not be required to so identify the individual recipients for which payment has been made, but rather can proceed to seek recovery based upon payments made on behalf of an entire class of recipients.

to the Florida statute prevents any Medicaid recipient from joining the lawsuit as a party to the action.²³

The Proposed Federal Legislation

The federal proposal has been titled the Medicare and Medicaid Third Party Liability Act.²⁴ This Senate Bill contains the same provisions as the amended Florida statute²⁵ except for four (4) significant items. The first important difference is the deletion of the abrogation clause contained in the Florida statute.²⁶ The Senate bill does not contain a similar provision.²⁷ Secondly, the federal bill allows the use of statistical evidence, epidemiological evidence, or both, to prove the issue of causation.²⁸ Thirdly, the federal bill also provides for an alternative means of recovery under a theory of concerted action or enterprise liability.²⁹ The last difference in the legislation is the

(b) In any action brought pursuant to this subsection wherein a third party is liable due to its manufacture, sale, or distribution of a product, the agency shall be allowed to proceed under a market share theory, provided that the products involved are substantially interchangeable among brands, and that substantially similar factual or legal issues would be involved in seeking recovery against each liable third party individually.

23. 1994 Fla. Sess. Law Serv. ch. 94-251, § 4 (12)(a) states:

... The provisions of this subsection shall not apply to any actions brought pursuant to subsection (9), and in any such action, no notice to recipients is required, and the recipients shall have no right to become a party to any action brought under such subsection.

24. S. 2245, 103d Cong., 2d Sess. (1994).

25. Highlights of the bill include recovery based on a class of recipients, causation proven through statistical evidence, and allowance of a market share theory. *Id.*

26. See 1994 Fla. Sess. Law Serv. ch. 94-251, § 4, *supra* note 19.

27. See S. 2245, 103d Cong., 2d Sess. (1994). Nowhere in the bill, in present form, are the defenses mentioned or removed.

28. S. 2245 (c), 103d Cong., 2d Sess. (1994) states: Rules Of Evidence.

In any action brought under this section, the Federal Rules of Evidence shall be construed, regarding the introduction and probative value of evidence on the issues of causation and damages, in order to effectuate the purpose of this Act to the greatest extent possible. The issues of causation and damages in any such action may be proven by the use of statistical analysis or epidemiological evidence, or both.

29. S. 2245 (d), 103d Cong., 2d Sess. (1994) states: Share of Liability.

In any action brought under this section in which a third party is liable due to its manufacture, sale, or distribution of a tobacco product, the Attorney General shall be allowed to proceed under a market share theory, if the products involved are substantially interchangeable and substantially similar factual or legal issues would be involved in seeking recovery against each liable third party individually. In the alternative, the Attorney General shall be allowed to proceed under a theory of concerted action or enterprise liability, or both, if warranted by the facts presented to the court.

express intent of the introducing Senators to limit the recovery actions to tobacco manufacturers.³⁰

PART II: DETERMINING THE CULPABLE PARTY

Causation Requirements

One of the largest problems with toxic tort cases has been the ability to prove actual causation.³¹ The most basic principles of causation require a reasonable connection between the act of the defendant and the damage suffered by the plaintiff.³² As Prosser states:

[L]egal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.³³

The tort system has conventionally used the preponderance of the evidence rule to resolve the causal connection problem.³⁴ The plaintiff must introduce evidence that leads to the conclusion that more likely than not, the defendant was a substantial factor in bringing about the result.³⁵ Black's Law Dictionary defines "preponderance of evidence":

As standard of proof in civil cases, is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is evidence which as a whole shows that the fact sought to be proved is more *probable* than not. *Braud v. Kinghen*, La. App., 310 So. 2d 657,

But see Henry J. Reske, *New Torts Restatement Debated*, A.B.A. J., Aug. 1994, at 24. (discussing the proposed ALI'S RESTATEMENT (THIRD) OF TORTS § 402A that indicates a trend away from the consumer expectation theory of strict products liability with the Institute's adoption of a risk-utility balancing test standard for design defects).

30. *See* 140 CONG. REC. S7784-04, S7786 (daily ed. June 28, 1994) (statement of Sen. Harkin). Senator Harkin stated "Tobacco is the only product on the market today that when used as intended causes death, disease, and disability. It is a product that deserves to be singled out and treated differently." *Id.* Senate Bill 2245 specifically includes the words "tobacco products" in § (3)(a)(1) & § (3)(d) which contain the potential effect of this legislation to a single industry.

31. *See infra* notes 146 and 170.

32. W. L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 41, at 236 (4th ed. 1971).

33. *Id.* at 237.

34. David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851, 857 (1984).

35. PROSSER, *supra* note 32, at 241.

659. With respect to burden of proof in civil actions, means greater weight of evidence, or evidence which is more credible and convincing to the mind. That which best accords with reason and *probability*. The word "preponderance" means something more than "weight"; it denotes a superiority of weight, or outweighing. The words are not synonymous, but substantially different. . . . It is that degree of proof which is more *probable* than not. . . .³⁶ (emphasis added).

The First Step – Causation Relaxation?

The ability to introduce evidence into federal court is governed by the Federal Rules of Evidence,³⁷ with the majority of states adopting some version of the rules that apply to state cases.³⁸ Evidence is generally admissible if it is relevant and helpful to the factfinder in the decision making process.³⁹ Only evidence that is prejudicial, confusing, or misleading should be excluded.⁴⁰

Medical and scientific evidence is of specific concern to this Comment. Both plaintiffs and defendants use medical experts to introduce scientific evidence and lend credibility to their arguments.⁴¹ Testimony of experts is covered by Article 7 of the Federal Rules of Evidence.⁴² As long as a witness qualifies as an expert,⁴³ he can present an opinion based upon facts obtained through firsthand observation, presentation at trial, or prior review of data

36. BLACK'S LAW DICTIONARY 1182 (6th ed. 1990). See also *In re Dillon*, 620 N.E.2d 302, 304 (Ohio Court of Claims June 2, 1993) (discussing burden of proof on applicant for award of reparations).

37. FED. R. EVID., Pub. L. No. 93-595, § 1, 88 Stat. 1929 (1975) (now codified at 28 U.S.C.A. (West 1984)).

38. JACK B. WEINSTEIN ET. AL., EVIDENCE: 1993 RULES, STATUTES, AND CASE SUPPLEMENT iii (1993). As of January 1, 1993, thirty-four (34) states and Puerto Rico had adopted a form of the Federal Rules. Florida adopted the rules in 1979 (See FLA. STAT. ANN. ch. 90.101-90.958 (West 1979)) and Ohio did the same in 1980 (See OHIO R. EVID.).

39. FED. R. EVID. 401 (Definition of "Relevant Evidence") states: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

40. FED. R. EVID. 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time) states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

41. Black & Lilienfeld, *supra* note 13, at 738.

42. See FED. R. EVID. 702 - 706. Rule 701 is not applicable to this section of the Comment because it deals with lay witnesses.

43. A witness can qualify as an expert through knowledge, skill, experience, training or education. FED. R. EVID. 702. See *State v. Buell*, 489 N.E.2d 795, 802 n.5 (Ohio 1986) (stating that OHIO R. EVID. 702 is an exact transcription of the federal rule) *cert. denied*,

before entering the courtroom.⁴⁴

The long standing standard for the use of scientific tests was developed in *Frye v. United States*.⁴⁵ The appellant in the case had been convicted of second degree murder.⁴⁶ At trial, the appellant attempted to introduce the results of a systolic blood pressure deception test through an expert.⁴⁷ The trial court refused to allow the use of this evidence.⁴⁸ The Court of Appeals affirmed because it was not confident that the systolic blood pressure deception test had gained acceptance or been proven by the scientific community.⁴⁹ Therefore, from 1923 until the adoption of the more liberal Federal Rules of Evidence, expert testimony was required to be based upon a principle or discovery that was "sufficiently established to have gained general acceptance in the particular field in which it belongs."⁵⁰

However, in 1993, the United States Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁵¹ The case was a products liability claim for alleged birth defects caused by the mother's ingestion of the drug Bendectin.⁵² The defendant presented an expert witness, a physician - epidemiologist, to testify that the drug was not a human teratogen⁵³ that caused birth

107 S.Ct. 240 (1986); *State v. Douglas*, No. 16616, 1994 WL 466717, at *2 (Ohio App. 9 Dist. Aug. 31, 1994) (qualification of an expert witness "is within the sound discretion of the trial court and will not be reversed absent a clear abuse of that discretion." (quoting *State v. Jones*, Summit App. No. 11981/11997, unreported at 8 (July 24, 1985)).

44. FED. R. EVID. 703 advisory committee's note. It should be noted that the committee did not desire that all data be introduced by any expert. The notes state that the data must "be of a type reasonably relied upon by experts in the particular field." *Id.*

45. 293 F. 1013 (D.C. Cir. 1923). *Contra Andrews v. State*, 533 So. 2d 841 (Fla. 5th Dist. Ct. App. 1988) (holding *Frye* test may exclude reliable evidence, therefore Florida would adopt a relevancy approach in accepting DNA "fingerprinting"); *State v. Johnston*, 529 N.E.2d 898, 905 (Ohio 1988) (rejecting the *Frye* test and adopting an individualized inquiry test for the admission of testimony that was recollected through hypnosis).

46. *Frye*, 293 F. at 1013.

47. *Id.* at 1014.

48. *Id.* The expert scientist had administered the test prior to trial. The first attempt to have him explain the results was denied. The defendant then offered to perform the test in front of the jury in the courtroom, but was once again denied permission. *Id.*

49. *Id.*

50. *Id.* The *Frye* test has been classified as a very strict requirement. See *Biskup v. McCaughtry*, 20 F.3d 245, 252 (7th Cir. 1994) (stating that *Frye* is used where strict exclusionary rules are desired); *United States v. Farrar*, 25 M.J. 856, 857 (C.M.A. 1988) (stating that the Court of Military Appeals abandoned the strict *Frye* test in *United States v. Mustafa*, 22 M.J. 165 (C.M.A. 1986)), *aff'd*, 28 M.J. 387 (C.M.A. 1989); Cf. James E. Starrs, *Frye v. United States Restructured and Revitalized: A Proposal to Amend Federal Evidence Rule 702*, 26 JURIMETRICS J. 249, 258 (1986).

51. 113 S. Ct. 2786 (1993).

52. *Daubert*, 113 S. Ct. at 2791.

53. *Id.* A teratogen is anything that can cause the development of abnormal structures in an

defects.⁵⁴ The plaintiff countered with eight (8) experts who concluded that Bendectin actually caused the defects.⁵⁵ The plaintiff's experts based their conclusions on test tube and animal studies, along with a new review of previously published human studies.⁵⁶ The district court granted summary judgment for the defendant because application of the *Frye* standard excluded plaintiff's evidence from consideration.⁵⁷ The Ninth Circuit Court of Appeals affirmed the decision.⁵⁸

The Supreme Court reversed and held that the *Frye* test had been superseded by the Federal Rules of Evidence.⁵⁹ The Court held that the drafters of the rules did not mention *Frye* and that a continuation of the rigid standard would conflict with the "liberal thrust" of the Federal Rules.⁶⁰ For purposes of admitting scientific, statistical, and epidemiological evidence, it is now the responsibility of the trial judge to ensure the expert testimony is relevant and reliable.⁶¹

Acceptance of Statistical Evidence

As evidenced by the decision in *Daubert*, the law must evolve and keep pace with science as it advances through the refinement of mathematics and statistical analysis. The proper use and interpretation of statistical evidence

embryo resulting in a severely deformed fetus. CLARENCE W. TABER, *TABER'S CYCLOPEDIA OF MEDICAL DICTIONARY 1835-6* (Clayton L. Thomas ed., 16th ed. 1989). Taber's provides a table of teratogenic and fetotoxic drugs which includes diethylstilbestrol and tobacco smoking. *Id.* at 1834-35.

54. 113 S. Ct. at 2791.

55. *Id.*

56. *Id.* at 2791-92.

57. *Id.* at 2792. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 727 F. Supp. 570 (S.D. Cal. 1989), *aff'd*, 951 F.2d 1128 (9th Cir. 1991), *rev'd*, 113 S. Ct. 2786 (1993).

58. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 951 F.2d 1128 (9th Cir. 1991), *rev'd*, 113 S. Ct. 2786 (1993).

59. *Daubert*, 113 S. Ct. at 2793. *Contra Olvera v. Florida*, 641 So. 2d 120, 121 n.1 (Fla. 5th Dist. Ct. App. 1994) (restating that the Florida Supreme Court in *Flanagan v. State*, 625 So. 2d 827, 828-89 (Fla. 1993) refused to accept *Daubert* and Florida would continue to use *Frye* standard for novel scientific evidence).

60. 113 S. Ct. at 2794.

61. *Id.* at 2795. The Court provided some guidelines for determining the reliability of evidence:

- 1) Has the theory or technique been tested?;
- 2) Has the theory been subjected to peer review and publication?;
- 3) What is the known or potential rate of error?; and
- 4) Is there actually "general acceptance" of the theory?

for the purpose of proving causation has become an area of great discussion.⁶² *Smith v. Rapid Transit*⁶³ is a frequently cited case that provides a simple foundation for understanding the use of mathematics for proof of causation.

In *Smith*, the plaintiff was forced off the road by a bus which caused her vehicle to hit a parked vehicle.⁶⁴ A suit was filed even though she was unable to positively identify the bus through description.⁶⁵ At trial, she attempted to prove the culpability of the defendant by producing evidence that he owned a bus and operated a bus line on the same street where her accident occurred.⁶⁶ However, the court stated that this proof was mere conjecture because nothing prohibited other buses from also using the street for passage.⁶⁷ The mathematics of the evidence offered by the plaintiff only showed that the defendant's bus *may* have caused the accident.⁶⁸ The inability to present additional evidence led to the dismissal of the claim.⁶⁹

Even though *Smith* was decided by a Massachusetts court, the case illustrates how Ohio law has developed with respect to the use of statistical evidence. A statement by Judge Grey demonstrates the important role mathematical principles have played in decisions by Ohio courts.⁷⁰ In applying

Id. at 2796-97.

This last guideline is not an absolute requirement as it was in the *Frye* test; it is now only an inquiry to help determine if the court should be skeptical. *Id.* at 2797. *See, e.g.,* United States v. Lee, 25 F.3d 997 (11th Cir. 1994) (holding that Federal Rule of Evidence 702 applied to both the ability of an expert to testify about scientific concepts and about the actual application of the concepts). *See also* Chikovsky v. Ortho Pharmaceutical Corp., 832 F. Supp. 341, 346 (S.D. Fla. 1993) (by applying the four guidelines of *Daubert*, the court disqualified the plaintiff's expert because his opinion was not based on valid scientific principles; his testimony was deemed not reliable under the criteria of Rule 702). In the application of the principles stated above, courts have decided in eleven (11) toxic tort cases against the admittance of novel scientific evidence, while allowing introduction in only two (2). Peter Huber, *Fact Versus Quack*, FORBES, July 4, 1994, at 132.

62. *See generally* Ann Taylor, *Public Health Funds: The Next Step In The Evolution Of Tort Law*, 21 B.C. ENVTL. AFF. L. REV. 753 (1994); Joseph Sanders, *From Science To Evidence: The Testimony On Causation In The Bendectin Cases*, 46 STAN. L. REV. 1 (1993); Daniel A. Farber, *Toxic Causation*, 71 Minn. L. Rev. 1219 (1987).

63. 58 N.E.2d 754 (Mass. 1945).

64. *Id.* at 754-55.

65. *Id.* at 755.

66. *Id.* The defendant conceded that he operated three bus lines within the city; one of which was located on the street where the plaintiff incurred the accident. *Id.* at 755 n.1.

67. *Id.* at 755.

68. *Id.* The court stated that it was insufficient to use mathematics to only show that chances favor the hypothesis to be proven; the proposition must still be proven by a preponderance of the evidence, *citing* Sargent v. Massachusetts Accident Co., 29 N.E.2d 825, 827 (Mass. 1940).

69. *Smith*, 58 N.E.2d at 755.

70. *See* State v. Wooten, 1989 WL 74880, at *27 (Athens Co. C.A. June 29, 1989) (Grey,

these principles, a number of cases decided in Ohio have distinguished between possibility and probability.⁷¹

In *State v. Holt*,⁷² the defendant had been convicted of rape.⁷³ The state's expert had conducted a Neutron Activation Analysis of a sample of the victim's pubic hairs and hairs found in the defendant's clothing.⁷⁴ The expert could only testify that the hair samples were similar and were likely to be from the same person.⁷⁵ The Ohio Supreme Court reversed the conviction because the interpretation of scientific facts must be based on probabilities, not possibilities.⁷⁶ The court reasoned that "likely" means something less than probable and therefore, the expert's testimony was confusing and misleading to the jury.⁷⁷

The court continued to clarify the distinction in *Cooper v. Sisters of Charity of Cincinnati, Inc.*⁷⁸ In this medical malpractice case, the court held that proof of the proximate cause of the injury had to be expressed in terms of probability.⁷⁹ The terms "maybe" and "around" do not suggest probability because they do not mean "more likely than not."⁸⁰ The threshold is a definitive statement that the event has a greater than fifty percent (50%) probability of occurring.⁸¹

J., dissenting) (arguing that incompetent evidence disguised as expert testimony is prejudicial per se, the judge stated that courts have applied the laws of mathematics and statistical probability just as they have applied the laws of the legislature).

71. One of the leading cases is *Shumaker v. Oliver B. Cannon & Sons, Inc.*, 504 N.E.2d 44 (Ohio 1986). The plaintiff alleged that he developed pancreatic cancer as a result of his exposure to toxic fumes from a sealant applied by the defendant. *Id.* at 45. An expert testified on the plaintiff's behalf, but stated that with a reasonable degree of probability, the exposure "could" have caused the cancer. *Id.* at 46. Because of the qualifying word "could", the court held the expert's testimony only amounted to the possibility, not a probability. *Id.* at 47.

72. 246 N.E.2d 365 (Ohio 1969).

73. *Id.* at 365.

74. *Id.*

75. *Id.* at 367-68.

76. *Id.* at 368.

77. *Id.* at 367-68.

78. 272 N.E.2d 97 (Ohio 1971). (A boy had suffered a head injury from a bicycle accident. The defendant treated the child in the emergency room, but did not concentrate his examination on the portion of the head that eventually led to the brain hemorrhaging causing the death).

79. *Id.* at 103.

80. *Id.* at 104. The expert witness had reviewed the medical records and determined that the child may have survived surgery with around a fifty percent (50%) chance if the medical procedures would have been performed by the defendant. *Id.*

81. *Id.* at 104. See *Stinson v. England*, 633 N.E.2d 532, 538 (Ohio 1994) (medical malpractice claim requiring an expert opinion of a causative event to be expressed in terms of probability); *Lee v. Metrohealth Medical Center*, No. 62430, 1993 WL 158250, at *10

The Second Circuit Court of Appeals considered the scientific evidence acquired through DNA testing for use in a rape trial.⁸² The defendant was convicted and appealed on the grounds that DNA test results were not generally accepted nor admissible under the *Frye* standard.⁸³ The court of appeals held that the Federal Rules of Evidence had superseded the *Frye* test,⁸⁴ but it stated its preference for a balancing test to determine if the reliability of the evidence outweighed the potential negative impact on the jury.⁸⁵ After subjecting the test procedure to scrutiny under the five factors, the court ruled that the DNA results were properly admitted as scientific evidence and upheld the conviction.⁸⁶

Value of Epidemiological Evidence

Another form of evidence used in mass and toxic torts litigation to prove causation is epidemiological studies.⁸⁷ Epidemiology is the science of defin-

(Ohio App. 8 Dist. May 13, 1993) (medical malpractice case where expert testimony only concluded causation was a possibility, not a probability), *dismissed*, 619 N.E.2d 1026 (Ohio 1993).

82. *United States v. Jakobetz*, 955 F.2d 786 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 104 (1992).

83. *Id.* at 789. The prosecution obtained semen samples from the defendant and from the victim when she was treated at the hospital following the attack. *Id.* The expert concluded that the probability of the occurrence of the defendant's genotype was one (1) in three hundred million (300,000,000) in white males. *Id.* at 793.

84. *Id.* at 794. It is interesting to note this declaration by the court of appeals occurred prior to the *Daubert* decision.

85. *Id.* (restating the five stage balancing test that it had announced in *United States v. Williams*, 583 F.2d 1194, 1198-99 (2d Cir. 1978), *cert. denied*, 439 U.S. 1117 (1979)). The balancing test requires consideration of the following factors:

- 1) The potential rate of error;
- 2) The existence and maintenance of standards;
- 3) Care and concern which scientific technique has been utilized and whether it appears susceptible to abuses;
- 4) The existence of a relationship to other scientific tests that have their results regularly admitted into evidence; and
- 5) The presence of a fail-safe trait or the probability that a false or misleading test result will be to the defendant's benefit or detriment. *Jakobetz*, 955 F.2d at 794 (summarizing the factors set forth in *Williams*).

Contra United States v. Two Bulls, 918 F.2d 56, 59 (8th Cir. 1990) (stating that DNA tests were so potentially influential to the jury that a stricter standard than *Frye* should be adopted within that jurisdiction), *reh'g granted*, 925 F.2d 1127 (8th Cir. 1991).

86. *Jakobetz*, 955 F.2d at 800.

87. Susan R. Poulter, *Science and Toxic Torts: Is There a Rational Solution to the Problem of Causation?*, 7 HIGH TECH. L. J. 189, 201 (1992).

ing and explaining the interrelationships of factors that determine disease frequency and distribution.⁸⁸ As the definition implies, the epidemiologist uses statistical methods in an attempt to quantifiably link a specific factor to a disease that appears within a selected population.⁸⁹ In toxic tort litigation, an observational study is usually performed by an epidemiologist.⁹⁰ The study is retrospective in nature because of the long latency period associated with most toxic substances.⁹¹ The final output of a study is a statement of the incidence rate.⁹² "The incidence rate is a measure of the *probability* that an individual will develop the disease" being studied if he is exposed to the specific factor used in the study.⁹³ This allows the causal link to be expressed in a probabilistic sense.⁹⁴

Epidemiological evidence was discussed at length in the case of *In re Joint Eastern and Southern District Asbestos Litigation*.⁹⁵ The plaintiff was a widow who brought a wrongful death action claiming that her husband died from colon cancer that was caused by exposure to asbestos.⁹⁶ The plaintiff presented two expert witnesses who relied upon the decedent's medical

88. TABER, *supra* note 53, at 606.

89. Black and Lilienfeld, *supra* note 13, at 755. Along with statistics, the researcher also employs the rules and methods from the disciplines of sociology and demography. These areas form the parameters of a particular study by indicating a general correlation between a factor and a disease. This leads the researcher to an initial hypothesis that will be tested. *Id.* at 754-55.

90. *Id.* at 755-56. Two types of studies can be employed: experimental and observational. *Id.* at 755. The experimental method involves 1) the determination of a population to be studied and 2) a controlled, systematic exposure of a subset of the group to the item being studied. *Id.* at 756. This type of study produces results that are very conclusive, but it is often impossible to use this method due to the undesirable nature of exposing people to certain risks. *Id.* The observational method allows the scientist to study individuals who have already been diagnosed and classified by exposure status (such as smoker or non-smoker). *Id.* The researcher can watch these groups over a period of time (prospective study), review the past exposure (retrospective study), or consider the current exposure (cross-sectional study). *Id.* The purpose of all the studies would be to statistically determine the incidence rate of lung cancer (in this example) between the classified groups. *Id.* at 756.

91. *Id.* at 759.

92. *Id.* at 754.

93. *Id.* This statement of the rate of incidence is most reliable when the study is performed with human subjects (not animal), the confidence intervals have been kept small (by using a large population base and precise measurement techniques), and the data passes various tests that indicate bias in the results. Troyen A. Brennan, *Causal Chains and Statistical Links: The Role of Scientific Uncertainty in Hazardous-Substance Litigation*, 73 CORNELL L. REV. 469, 509-12 (1988).

94. Brennan, *supra* note 93, at 509.

95. 758 F. Supp. 199 (S.D.N.Y. 1991), *rev'd*, 964 F.2d 92 (2d Cir. 1992).

96. *Id.* at 200.

records and epidemiological evidence in reaching their conclusion that asbestos exposure probably caused the colon cancer.⁹⁷ The trial court granted the defendant's motion for summary judgment, relying on a requirement that the plaintiff establish a greater than fifty percent (50%) probability that the defendant's action caused the cancer.⁹⁸ The court stated that the epidemiological study must demonstrate a relative risk factor greater than two (2.0) if no clinical evidence is offered to prove causation.⁹⁹

The Second Circuit Court of Appeals reversed and remanded.¹⁰⁰ It determined that the plaintiff presented enough evidence to survive a summary judgment.¹⁰¹ The court stated since both clinical and epidemiological evidence had been presented,¹⁰² the epidemiological evidence alone did not have to be relied upon for proving causation.¹⁰³ The court declined to discuss the

97. *Id.* at 201.

98. *Id.* at 202, (citing *In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740, 785 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988)).

99. *Id.* at 202. The relative risk is a ratio that expresses the likelihood that a person who is exposed to a toxic substance will contract the disease being studied versus a person who was not exposed. *Id.* A relative risk of one (1.0) means that the toxic substance does not affect the rate of disease among the population being studied. *Id.* A relative risk of two (2.0) doubles the chances that the toxic substance caused the disease in the person that was exposed. *Id.* The following is a simple illustration of how relative risk is determined:

Two sample populations would be selected at random on the basis of exposure to a toxic substance (nicotine, for example). The first group would be a control group that was not exposed to nicotine. One hundred (100) people are found to have lung cancer anyway. The second group would contain only persons exposed to nicotine. One hundred fifty (150) people are found to have lung cancer in this group. The relative risk would be one and a half (1.5).

The court reasoned that epidemiology cannot show which fifty (50) persons contracted cancer as a result of the exposure; therefore there was a one in three chance that the particular plaintiff should be compensated for injuries. *Id.* at 202. Because this equates to a probability of only thirty-three percent (33%), summary judgment must be granted because a plaintiff is unable to produce evidence that would satisfy the fifty-percent (50%) burden for a showing of the preponderance of the evidence. *Id.* at 202-03.

100. *In re Joint Eastern and Southern District Asbestos Litigation*, 964 F.2d 92 (2d Cir. 1992).

101. *Id.* at 96.

102. *Id.* at 96-97. The court of appeals considered the plaintiff's own medical records to be clinical evidence. *Id.* at 97. The experts used these records, as well as epidemiological studies, their personal knowledge, and the removal of other possible causes of cancer to determine that asbestos was the probable cause of the plaintiff's cancer. *Id.*

103. The court pointed to *Grassis v. Johns-Manville Corp.*, 591 A.2d 671 (N.J. Super. 1991). *Id.* The plaintiff sued to recover for alleged colon cancer as a result of a fifteen (15) year exposure to asbestos dust while employed by the defendant. *Grassis*, 591 A.2d at 672-73. The trial judge prohibited the plaintiff's doctor from testifying because she relied on epidemiological studies that had a causative incidence rate below 2.0. *Id.* at 674-75. The appellate court reversed and stated that if an epidemiological study is not introduced as direct evidence of causation, it can be used and explained by a qualified expert even if it does not

trial court's threshold level of two (2.0) for a relative risk factor in deciding to accept epidemiological evidence as proof of causation.¹⁰⁴

On remand,¹⁰⁵ the district court again discussed epidemiological evidence at length.¹⁰⁶ It considered the *Grassis* requirement¹⁰⁷ and other interpretations of that holding.¹⁰⁸ In order to determine if the plaintiff's evidence was actually sufficient to withstand summary judgment, the court considered five additional factors beyond the relative risk ratio:¹⁰⁹

1) The consistency of the association between the substance and the disease (to be determined by comparing the particular study offered in evidence with other studies);

2) The dose-response relationship between the substance and the disease (to be determined by approximating the incidence of disease in a population if they were exposed to various levels of the substance);

3) The results of experimental studies¹¹⁰ (to be determined by comparing the offered results with the results from actual experiments conducted with animals);

4) The plausibility of a biological link between the substance and the disease (to be determined by the probability that the disease could occur due to known biological and chemical structures); and

5) The coherence between the substance and the disease (to be determined by how many other factors could have contributed to the development of the disease in the plaintiff).¹¹¹

After applying these "Sufficiency Criteria"¹¹² to the plaintiff's evidence,

conclude the risk factor to be 2.0 or greater. *Id.* at 676. A higher standard of admissibility for such studies should be required only if it is offered as substantive evidence. *Id.*

104. *In re* Joint Eastern and Southern District Asbestos Litigation, 964 F.2d at 97.

105. *In re* Joint Eastern and Southern District Asbestos Litigation, 827 F. Supp. 1014 (S.D.N.Y. 1993).

106. *Id.* at 1027-38.

107. *Id.* at 1028-29. *See supra* note 103.

108. *Id.* Determining the need for a higher standard of scientific evidence if the only clinical evidence was the elimination of other potential factors. *See* Landrigan v. Celotex Corp., 605 A.2d 1079 (N.J. 1992); Dafler v. Raymark Indus., Inc. 611 A.2d 136 (N.J. Super. 1992), *aff'd*, 622 A.2d 1223 (N.J. 1992).

109. Throughout the opinion, the court continued to discuss the relative risk ratio (later termed the SMR or Standardized Mortality Ratio), even though the Appeals Court had not taken issue on that point. *See generally* *In re* Joint Eastern and Southern District Asbestos Litigation, 827 F. Supp. 1014 (S.D.N.Y. 1993).

110. *See supra* note 90 (regarding the different types of epidemiological studies that may be undertaken by scientists).

111. *In re* Joint Eastern and Southern District Asbestos Litigation, 827 F. Supp. at 1037-38.

112. *Id.* at 1037. The court defined the five elements to be collectively referred to as the

the court found that only the plausibility element was satisfied.¹¹³ Therefore, all of the defendants' motions for judgment as a matter of law¹¹⁴ were granted.¹¹⁵

The Use of Market Share Theory – Liability Relaxation Too?

Along with the proof of causation, a theory of liability must be expounded that will ultimately hold only culpable parties liable. In recognition of this principle, the Florida statute provides for the use of market share method of apportioning liability.¹¹⁶ The term "market share"¹¹⁷ has been open to ambiguity and interpretation. As a result, the basic theory has evolved through judicial interpretation.¹¹⁸ The market share theory is a judicially created exception to basic tort principles because it relieves the plaintiff of the requirement of identifying a single tort-feasor, and shifts to the defendant the burden of proving that the injury was not caused by its product.¹¹⁹ The theory gained a legal foothold in the pharmaceutical arena with cases that involved diethylstilbestrol (DES).

DES, a prescription drug to help prevent the possibility of a miscarriage

"Sufficiency Criteria". *Id.*

113. *Id.* at 1038. The final outcome is arrived at based on the number of the "Sufficiency Criteria" met by the offered evidence. *Id.* Evidence that is deemed sufficient will meet the majority of the criteria. *Id.* If the evidence does not meet any of the criteria, it should not be relied upon to support a jury verdict for the plaintiff. *Id.*

114. FED. R. CIV. P. 50(b). This rule allows the court to let the jury verdict stand, reopen the judgment and order a new trial, or direct the entry of a judgment as a matter of law. The standard for the last determination is FED. R. CIV. P. 50(a)(1), which states:

If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may "determine the issue against that party and may" grant a motion for judgment as a matter of law against that party "with respect to a" claim, or a defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

115. *In re Joint Eastern and Southern District Asbestos Litigation*, 827 F. Supp. at 1038.

116. 1994 Fla. Sess. Law Serv. ch. 94-251, § 4(b), Fla. Stat. ch. 409-910 (West 1994).

117. "Market share" is defined as the percentage of the total sales in a given market that is controlled by a given firm. BLACK'S LAW DICTIONARY 971 (6th ed. 1990).

118. *See Brown v. Superior Court*, 751 P.2d 470, 485 (Cal. 1988) (requiring a substantial share of the manufacturers to be joined in the action); *Conley v. Boyle Drug Co.*, 570 So. 2d 275, 284 (Fla. 1990) (requiring a narrow market definition); *George v. Parke-Davis*, 733 P.2d 507, 512 (Wash. 1987) (market share should be determined on a local level versus a national level); *Martin v. Abbott Laboratories*, 689 P.2d 368, 382 (Wash. 1984) (allowing exculpatory defenses if defendant did not produce particular product or did not participate in the relevant market).

119. *Goldman v. Johns-Manville Sales Corp.*, 514 N.E.2d 691, 693 (Ohio 1987).

during pregnancy, was marketed from 1941 to 1971.¹²⁰ The Food and Drug Administration (FDA) cautiously authorized this particular use and allowed the drug to be marketed as a miscarriage preventer.¹²¹ The prescribed DES was manufactured by numerous companies to a generic formula that was filed in the United States Pharmacopoeia.¹²² It was also typically administered in a generic dosage.¹²³ However, the FDA revoked the marketing license in 1971¹²⁴ and DES could no longer be promoted as a treatment for the prevention of miscarriages.

Market Share Theory Origination

The market share theory was judicially developed in the landmark case of *Sindell v. Abbott Laboratories*.¹²⁵ In *Sindell*, the plaintiff developed adenocarcinoma (a form of cancer) due to the DES her mother ingested while she was in utero.¹²⁶ She was unable to identify the specific manufacturer of the DES taken by her mother.¹²⁷ The Supreme Court of California held manufacturers of a drug made from an identical formula would be liable if the plaintiff successfully joined a substantial share of the drug manufacturers in the relevant market.¹²⁸ The defendants must then accept the burden of exculpating themselves in order to escape liability.¹²⁹ If a defendant is unable to prove it could not have caused the harm to the particular plaintiff, the company is then responsible for the proportion of the judgment that is represented by its share of the market.¹³⁰

In adopting the market share theory, the court considered but rejected three other tort recovery theories. The alternative liability theory¹³¹ was

120. *Sindell v. Abbott Laboratories*, 607 P.2d 924, 925 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980).

121. *Id.*

122. *Id.* at 933. The listing is a scientific constant and all manufacturers are required to use the formulas pursuant to 21 U.S.C.A. § 351(b). *Id.*

123. *Id.* at 926.

124. *Id.* at 925.

125. 607 P.2d 924 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980). In its decision, the California Supreme Court relied heavily upon a law review comment that advocated for a new remedy to be fashioned for the unique nature of the DES claims. See Naomi Sheiner, *DES and A Proposed Theory of Enterprise Liability*, 46 *FORDHAM L. REV.* 963 (1978).

126. *Sindell*, 607 P.2d at 926.

127. *Id.*

128. *Id.* at 937.

129. *Id.*

130. *Id.*

131. See *Summers v. Tice*, 199 P.2d 1 (Cal. 1948)(The plaintiff had been shot and either

rejected because it required that all potential tort-feasors be named as defendants.¹³² This was not feasible in the DES cases due to the large number of manufacturers.¹³³ The court also rejected the concert of action theory.¹³⁴ The theory could not be advanced because it required four factual findings: the failure of an industry to properly test a product; the failure to issue sufficient warnings; reliance of the manufacturer on testing data compiled by external sources; and “piggybacking” on other companies marketing techniques.¹³⁵ DES manufacturers did not fit these categories.¹³⁶ Finally, the court rejected the enterprise theory.¹³⁷ This theory did not apply because of the large num-

one of two hunters could equally have caused the injury. Both hunters had negligently fired in the direction of the plaintiff. The California Supreme Court felt justified in shifting the burden of proof to the each of the defendants since each one would be in a better position to prove he did not cause the injury. Alternative liability shifts the burden of proving causation from an innocent plaintiff to equally liable defendants.).

132. *Sindell*, 607 P.2d at 931.

133. *Id.* at 930-31. The *Sindell* opinion estimated the number of manufacturers at around 200. *Id.* However, a more detailed analysis places the number of manufacturers between 94 and 300 because some producers did not market DES for miscarriage prevention. See Sheiner, *supra* note 125, at 964 n.3.

134. *Sindell*, 607 P.2d at 932. Prosser explains the concerted action theory as a “joint tort” that imposed vicarious liability on all parties involved due to the intentional actions that furthered the tortious act. See PROSSER, *supra* note 32, at 291-93.

135. *Sindell*, 607 P.2d at 932.

136. *Id.* at 933.

137. *Id.* at 935. The court stated that the enterprise theory was broadly defined so that any enterprise would be responsible for all of the injuries and damages caused by that particular entity. *Id.* at 928 n.9, citing Howard C. Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153, 158 (1976). Because this theory might be used when plaintiffs cannot identify the cause of their injury, seven elements must be proven to shift the burden of proof to defendants:

- 1) It is not the plaintiff's fault for the inability to identify the cause of the injury and liability is due to the nature of the defendant's conduct;
- 2) A defective generic product was made by all defendants;
- 3) The injury was caused by this product defect;
- 4) A duty was owed to the plaintiff's class;
- 5) Clear and convincing evidence exists that shows the injury was a result of a product made by one of the defendants, such as a high percentage of the market is represented by the joined defendants;
- 6) No industry wide safety standard existed for the manufacture of the defective product; and
- 7) All defendants were tort-feasors that satisfy the requirements of the proposed cause of action (negligence, warranty, or strict liability).

Sheiner, *supra* note 125, at 995. See also *Hall v. E.I. Du Pont De Nemours & Co., Inc.*, 345

ber of DES producers and because safety testing had not been delegated to a trade association.¹³⁸

In *Brown v. Superior Court*,¹³⁹ the California court refined their original pronouncement of the *Sindell* market share theory. *Brown* held that a market share approach was not available in an action brought under theories of fraud¹⁴⁰ or breach of warranty¹⁴¹ in California.¹⁴² The court stated that while it did not address the issue of joint and several liability in *Sindell*, omission of such a discussion should not have been interpreted to have actually imposed joint and several liability.¹⁴³ The *Brown* court held that a defendant would be only severally liable because joint liability would be inconsistent with the goals of the market share theory.¹⁴⁴

The Florida Viewpoint

The leading case in Florida on the market share approach is *Conley v. Boyle Drug Company*.¹⁴⁵ In *Conley*, the plaintiff filed suit against eleven manufacturers and marketers of DES¹⁴⁶ on theories of negligence, strict liability, breach of warranty, and fraud.¹⁴⁷ Because the plaintiff could not identify

F. Supp. 353 (E.D.N.Y. 1972).

138. *Sindell*, 607 P.2d at 935.

139. 751 P.2d 470 (Cal. 1988).

140. In order to prosecute a claim of fraud, the plaintiff must show that the defendant made misrepresentations upon which the plaintiff detrimentally relied and that the misrepresentations were either intentionally made or made with fraudulent knowledge. *Id.* at 483-84.

141. Express warranty has two elements: a seller must conform to any promises made concerning his product and the plaintiff must detrimentally rely on those express promises. *Id.* at 484. Implied warranty arises because the product is assumed to be fit for ordinary purposes or intended use. *Id.*

142. *Id.*

143. *Id.* at 485.

144. *Id.* at 486. The court restated its reasoning for the adoption of the market share theory in *Sindell*, but clarified that if joint liability were imposed, the defendants would not be charged with the proportionate responsibility correlated to the probability that they caused the plaintiff's injury. *Id.*

145. 570 So. 2d 275 (Fla. 1990).

146. *Conley v. Boyle Drug Co.*, 477 So. 2d 600, 601 (Fla. 4 Dist. Ct. App. 1985), *decision quashed*, 570 So. 2d 275 (Fla. 1990). The Court of Appeals affirmed the trial court's dismissal of the case saying that they did not feel justified in accepting a relaxed causation requirement, but it did certify the following question to the Supreme Court: "Does Florida Recognize A Cause Of Action Against A Defendant For Marketing Defective DES When The Plaintiff Admittedly Cannot Establish That A Particular Defendant Was Responsible For The Injury?" *Conley*, 570 So. 2d at 278. *Id.* at 607 (emphasis omitted).

147. *Conley*, 570 So. 2d at 279.

the specific DES manufacturer that caused her particular injury,¹⁴⁸ she pleaded for reduced causation and identification requirements through the adoption of alternative liability, concert of action, enterprise liability, or a market share theory of liability.¹⁴⁹

In an opinion that showed a reluctance to relax causation principles, the court stated that “[m]arket share liability is generally looked upon as a theory of last resort”, developed to provide a remedy where there is an inherent inability to identify the manufacturer of the product that caused the injury.”¹⁵⁰ Therefore, if a plaintiff is able to identify the specific tort-feasor that caused the injury and traditional remedies are available, there is no reason to resort to a risk contribution remedy.¹⁵¹ The court added a due diligence requirement to the existing body of market share standards.¹⁵² This forces plaintiffs to reasonably attempt to identify and locate the manufacturer responsible for the injury.¹⁵³ The Florida court followed *Brown* by limiting the use of the theory to negligence actions and prohibiting the use when allegations of fraud, breach of warranty, or strict liability are made.¹⁵⁴

The *Conley* decision narrowed the application of the market share theory by applying geographic restrictions, limiting the time frame to only the ingestion period of the specific plaintiff, and only joining in the manufacturers of the type of DES used by the plaintiff’s mother.¹⁵⁵ The defendant manufacturer could exculpate itself only by showing that it neither marketed nor distributed DES during the period of the particular plaintiff’s DES exposure.¹⁵⁶ All remaining defendants were presumed to have equal market shares unless a specific actual share was demonstrated by a preponderance of the evidence.¹⁵⁷ The other defendants’ shares were then inflated to ensure that one hundred percent (100%) of the relevant market was accounted for.¹⁵⁸

148. A number of factors contributed to the plaintiffs’ identification problem in the DES cases: the drug was generic in nature, there were a large number of producers, permanent prescription and pharmacy records were scarce, and the long latency period. See Lee Gunn & J. Meredith Webster, *Florida’s Adoption of the Market-Share Products Liability Theory - Drugs and Beyond* 65 FLA. B. J. 37 (March 1991).

149. *Conley*, 570 So. 2d at 279.

150. *Id.* at 285 (quoting *Celotex Corp. v. Copeland*, 471 So. 2d 533, 537 (Fla. 1985)).

151. *Id.* at 286.

152. *Id.* at 285.

153. *Id.*

154. *Id.* at 286.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

The court rejected the defendants' due process, equal protection, and access to courts' challenges because a defendant was not precluded from presenting a defense, nor was liability imposed in an arbitrary manner.¹⁵⁹ The plaintiff still had a significant burden to prove that the defendant acted tortiously.¹⁶⁰ Also, each defendant could be exonerated if it could establish the inability to have caused the plaintiff's injury.¹⁶¹

Prior to *Conley*, the Florida court had the opportunity to consider the application of the market share theory of liability for use in the asbestos-related injury case of *Celotex Corp. v. Copeland*.¹⁶² In *Celotex*, the court found that the plaintiff developed asbestosis from exposure to various asbestos products during his thirty-three year career as a boilermaker.¹⁶³ Sixteen defendants were named in the original complaint and the plaintiff urged the court to adopt the market share theory as announced in *Sindell*.¹⁶⁴

The Supreme Court reversed the decision of the Florida district court of appeal¹⁶⁵ and rejected the use of market share theory in the case.¹⁶⁶ Two factors contributed to its decision: the ability of the plaintiff to identify eleven of the defendants as suppliers of products to which he was specifically exposed, and the unique characteristics that distinguished asbestos from DES.¹⁶⁷ The court was able to avoid the ultimate question of overall acceptance or rejection of the theory in Florida because the case did not justify a major policy shift in the state's product liability law.¹⁶⁸

159. *Id.* at 287.

160. *Id.*

161. *Id.*

162. 471 So. 2d 533 (Fla. 1985).

163. *Id.* at 534.

164. *Id.* at 534-35.

165. *Copeland v. Celotex Corp.*, 447 So. 2d 908 (Fla. 3 Dist. Ct. App. 1984), *decision quashed*, 471 So. 2d 533 (Fla. 1985). The district court of appeal had reversed the judgment of the trial court and approved the use of the market share theory in asbestos litigation. *Id.* at 916. However, the court certified the question to the Supreme Court inquiring if the *Sindell* market share theory should be adopted in Florida. *Celotex*, 471 So. 2d at 534. *Id.* at 916 n.8.

166. *Celotex*, 471 So. 2d at 539. The court agreed with the appeals court dissent that the theory should not apply whenever a plaintiff is able to identify at least one manufacturer who caused his injury. *Id.* at 537.

167. *Id.* at 537-38. The main asbestos trait that influenced the court was the divergent toxicity of products. *Id.* at 538. The geographic origin, the usable form, and the percentage used in a product can each dramatically influence the ability of the particular product to cause harm or disease. *Id.* These traits are in contrast to the common formula of DES and the consistent toxicity due to the steady dosage ingested by the pregnant women. *See supra* pp. 22-23.

168. *Id.* at 539.

The Ohio Viewpoint

In Ohio, the market share theory was considered in *Goldman v. Johns-Manville Sales Corp.*¹⁶⁹ The case was an asbestos liability action brought by a bakery employee who had allegedly developed cancer due to contact with products containing asbestos.¹⁷⁰ The plaintiff advanced both the alternative and market share liability theories.¹⁷¹ The Common Pleas Court of Lucas County refused to acknowledge either theory, and granted summary judgment for the defendants.¹⁷² The Lucas County Court of Appeals reversed, held that both theories were applicable, and recognized the market share theory.¹⁷³ However, the Supreme Court held that neither theory, especially market share, would apply in asbestos litigation in the State of Ohio.¹⁷⁴ The Court could conceive of no problem in greater need of a legislative solution.¹⁷⁵

A market share theory can only be used in Ohio when an alternative theory fails to apply.¹⁷⁶ The first criteria for applying a market share theory is fungibility of the products that could have caused the harm.¹⁷⁷ The court differentiated between the DES involved in the *Sindell* case and asbestos.¹⁷⁸

169. 514 N.E.2d 691 (Ohio 1987). See also *Tirey v. Firestone Tire & Rubber Co.*, 513 N.E.2d 825 (Montgomery County, C. P. 1986).

170. *Goldman*, 514 N.E.2d at 692. The court stated that the plaintiff was unable to pinpoint the specific product or the specific manufacturer that may have caused his cancer. *Id.* at 693. This finding ultimately led to the reversal because the plaintiff failed to establish through the evidence the identity of any manufacturer that supplied products to his employer. *Id.* at 699. See also *Thompson v. Johns-Manville Sales Corp.*, 714 F.2d 581 (5th Cir. 1983), *cert. denied*, 465 U.S. 1102 (1984) (rejecting both alternative and market share theories when plaintiff unable to identify all defendants that supplied asbestos products to his employer).

171. *Goldman*, 514 N.E.2d at 692. The Ohio standard for alternative liability was announced in *Minnich v. Ashland Oil Co.*, 473 N.E.2d 1199 (Ohio 1984). The court stated that a plaintiff in the State of Ohio must still prove that two or more defendants committed tortious acts and that he was injured as a proximate result of those acts. *Id.* at 1200.

172. *Goldman*, 514 N.E.2d at 692.

173. *Id.* at 693.

174. *Id.* at 701-02.

175. *Id.* at 701. The court found the language used by the Iowa Supreme Court in *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67 (Iowa 1986) persuasive. The Iowa court rejected the market share theory on a broad policy basis because it felt that a judicially imposed acceptance would be "social engineering" that was more appropriately the responsibility of the state legislature. *Goldman*, 514 N.E.2d at 701-02.

176. *Goldman*, 514 N.E.2d at 693 n.3.

177. *Id.* at 700.

178. *Id.* The court stated that DES was manufactured by numerous companies, but all of the firms used a single formula. *Id.* Because of the single formulation, there was no bias or unfairness for holding companies liable for their share of the market. See *supra* note 122. Asbestos, on the other hand, was a generic name for a family of minerals that differed widely based upon type of the product it was used as a component in. *Goldman*, 514 N.E.2d at 700.

The criteria of fungibility was enough to reject market share in this case.¹⁷⁹

Another requirement appears to be the ability to name the largest supplier of the harmful product within the relevant market.¹⁸⁰ The court cited *Hannon v. Waterman S.S. Corp.*¹⁸¹ for the proposition that it would be desirable to name the “main actor in the marketplace” in order to achieve the substantial share requirement used in *Sindell*.¹⁸² The court felt that a market share theory should be used in cases involving fewer complexities than asbestos litigation.¹⁸³ Therefore, the market share theory is still not viable in Ohio asbestos litigation.¹⁸⁴

PART III: TOBACCO'S SMOKY HISTORY

The First Wave

Five early cases formed the initial attack on cigarette manufacturers.¹⁸⁵ In *Pritchard v. Liggett & Myers Tobacco Co.*,¹⁸⁶ the plaintiff¹⁸⁷ brought suit on the theories of negligence and breach of express warranty.¹⁸⁸ During prosecution of the warranty claim, the plaintiff alleged that he smoked Chesterfield cigarettes manufactured by Liggett & Myers because of the advertising that proclaimed the safety of the product.¹⁸⁹ The company had placed numer-

179. *Goldman*, 514 N.E.2d at 701.

180. *Id.* at 701.

181. 567 F. Supp. 90 (E.D. La. 1983) (an asbestos case rejecting the application of market share theory to such cases).

182. *Goldman*, 514 N.E.2d at 701.

183. *Id.*

184. *Id.* at 702.

185. See *Cooper v. R.J. Reynolds Tobacco Co.*, 234 F.2d 170 (1st Cir. 1956) (fraudulent advertising); *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961) (negligence and breach of express warranty); *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962) (breach of implied warranty of fitness for use under Florida law), *certified question answered*, 154 So. 2d 169 (Fla. 1963), *answer to certified question conformed to*, 325 F.2d 673 (5th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964); *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir. 1963) (breach of implied warranty and negligence), *cert. denied* 375 U.S. 865 (1963); *Ross v. Phillip Morris & Co.*, 328 F.2d 3 (8th Cir. 1964) (breach of implied warranty, negligence, fraud and deceit by false advertising).

186. 295 F.2d 292 (3d Cir. 1961).

187. Mr. Pritchard's suffering from lung cancer was extensive. He had lost over fifty pounds of body weight, experienced recurring vomiting and hemorrhaging, suffered an inability to swallow, and continual shortness of breath. *Pritchard*, 295 F.2d at 299.

188. *Id.* at 294.

189. *Id.* at 296-97. The following is an example of the advertising that was used to promote the Chesterfield brand: “The constant quality tests and advanced research in Chesterfield's

ous ads in magazines such as *Time* and *Life*, advertised in the daily newspaper read by Mr. Pritchard, and enlisted a trusted spokesperson.¹⁹⁰

On his negligence claim, the plaintiff attempted to prove that the company had performed adequate testing to show the link between cigarette smoking and cancer.¹⁹¹ The jury returned a finding that Mr. Pritchard's consumption of Chesterfield cigarettes were a cause of his lung cancer.¹⁹² However, the jury also found that assumption of risk barred the plaintiff from being awarded any compensation.¹⁹³

The appeals court found that the questions of causation, the reasonableness of conducting more tests, and the reasonableness of the plaintiff's reliance on the advertisements should all have been submitted to the jury.¹⁹⁴ A new trial was awarded to the plaintiff because of the prejudicial and fundamental mistake of misstatement of the law in the instructions given by the trial court.¹⁹⁵ In order for the jury to find assumption of risk, the plaintiff would

modern laboratories are your guarantee that Chesterfields will always be much milder – the best cigarette for you to smoke.” *Id.* at 297.

190. *Id.* The newspaper advertisements ran for a period of two consecutive years. *Id.* The cigarette brand was advertised by Arthur Godfrey on his highly regarded radio show. *Id.* His statements were explicit and were meant to be very convincing to the general public:

That they mean what they say—that specialist said it, Liggett and Myers have substantiated it. Remember that when you're wondering about cigarettes. Smoke Chesterfields – they're good. Thank you. *Id.*

Another radio ad continued:

You hear stuff all the time about 'cigarettes are harmful to you' this and that and the other thing. . . . Here's an ad, you've seen it in the papers—please read it when you get it. If you smoke it will make you feel better, really. Nose, throat, and accessory organs not adversely affected by smoking Chesterfield. *Id.*

The court noted that it believed “the clear import of this advertising campaign was to lead smokers to believe that in order to ‘Play Safe—Smoke Chesterfield.’” *Id.*

191. *Id.* at 300. It was shown that Liggett & Myers had commissioned a separate firm to test the hazards associated with their product. *Id.* The results of the test were inconclusive at best and a reviewing doctor noted that many test participants experienced harmful effects as a result of smoking Chesterfields. *Id.* The company disregarded this information and concluded that its product did not harm the nose, throat, or other organs and proceeded to use this information in the advertising campaign. *Id.* See *supra* note 190.

192. *Pritchard v. Liggett & Meyers Tobacco Co.*, 350 F.2d 479, 482 (3d Cir. 1965), *cert. denied*, 382 U.S. 987 (1966), *modified*, 370 F.2d 95 (3d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967) (appeal from the remanded trial from 295 F.2d 292 (3d Cir. 1961)).

193. *Id.* In all of the early cigarette litigation, the tobacco companies asserted the defenses of assumption of risk or contributory negligence. See Leila B. Boulton, *Tobacco Under Fire: Developments in Judicial Responses to Cigarette Smoking Injuries*, 36 CATH. U. L. REV. 643, 647 (1987).

194. 295 F.2d 292 (3d Cir. 1961).

195. 350 F.2d at 486.

have had to have known the dangers of smoking and voluntarily exposed himself to the harm.¹⁹⁶ The court was not convinced of this fact by a review of the evidentiary record.¹⁹⁷

In *Lartigue v. R. J. Reynolds Tobacco Co.*,¹⁹⁸ the plaintiff had smoked at least two packs of cigarettes a day for fifty-five years.¹⁹⁹ His claim urged the court to hold the manufacturer absolutely liable under a claim of implied warranty.²⁰⁰ The court stated that the safety standard for products and warnings is the same under both theories of implied warranty and negligence.²⁰¹ Under this standard, a manufacturer would only be required to insure against foreseeable risks, and would not be held strictly liable for all harm caused by its products.²⁰² In this case, the defendant was found not to have been aware of "the harmful effects which no developed human skill or foresight can afford."²⁰³

The plaintiff in *Ross v. Philip Morris & Co.*²⁰⁴ also asserted a claim based upon breach of implied warranty.²⁰⁵ Philip Morris advanced the defenses of assumption of risk and contributory negligence.²⁰⁶ Evidence of a general

196. *Id.* at 485.

197. *Id.* The court could not believe that Liggett & Myers was not aware of the health hazards, while at the same time presenting a defense that required Mr. Pritchard to be completely knowledgeable and continue using an inherently dangerous product. *Id.*

198. 317 F.2d 19 (5th Cir. 1963), *cert. denied*, 375 U.S. 865 (1963).

199. *Id.* at 22. Mr. Lartigue had a long history of diseases in his medical background. However, his advanced stage cancer required the removal of his larynx and most of his vocal cords in 1954. *Id.* He died of lung cancer one year later. *Id.*

200. *Id.*

201. *Id.* at 37 (quoting 2 FOWLER V. HARPER & FLEMING JAMES, THE LAW OF TORTS, § 28.22, at 1584 (1961)). See *Tierstein v. Licht*, 345 P.2d 341 (Cal. 2d Dist. Ct. App. 1959) (stating that the standard is reasonable care).

202. *Lartigue*, 317 F.2d at 36. Injuries that occur as a result of foreseeable risks are considered a cost of doing business and the manufacturer should build these expenses into the cost of the product. *Id.*

203. *Id.* at 23 (quoting the jury instructions of the trial judge). An explanation was given by the court that people who smoked before it was discovered that a possible link existed between cigarette smoking and cancer could not rely on a tobacco company "warranty" that cigarettes did not contain any carcinogenic element. *Id.* at 39-40.

204. 328 F.2d 3 (8th Cir. 1964).

205. *Id.* at 5. The plaintiff dropped the fraud and deceit issue on appeal and also decided not to pursue the issue of negligence either. *Id.* The only claim that remained for consideration was implied warranty. *Id.*

206. *Id.* The plaintiff had smoked up to four packs per day of Philip Morris cigarettes exclusively for eighteen years. *Id.* He also drank heavily at various times throughout his life (this fact contributed to the debate over the cause in fact of the cancer). *Id.* Mr. Ross developed throat cancer and had to have a neck dissection and tracheotomy. *Id.* This operation required him to breathe through an opening in his neck and speak only with the aid of an electronic device. *Id.*

causal relationship between cancer and smoking was presented by the plaintiff.²⁰⁷ However, the court found this evidence inapplicable because no attempt was made to show that the defendant's product did not comply with the standards of the industry.²⁰⁸

This court also determined that reasonableness was the standard to be used in Missouri for claims of implied warranty.²⁰⁹ Accordingly, the court held that the defendant was only liable for known dangers associated with the product.²¹⁰ This liability standard provided an incentive for tobacco companies to fully research the harmful effects of their products, and shifted the burden of proving the foreseeability of harm to the defendant, who must prove that nobody could have foreseen the danger.²¹¹ Judgment was entered for the defendant.²¹²

The case of *Green v. American Tobacco Co.*²¹³ came the closest to a plaintiff victory during this first wave of cases.²¹⁴ The jury at the first trial found that the Lucky Strike cigarettes made by the defendant caused the plaintiff's cancer, but refused to hold American Tobacco Company liable because it could not foresee the harmful effects.²¹⁵ This resulted in a certified question being submitted to the Florida Supreme Court²¹⁶ which held that a

207. *Id.* at 9-10.

208. *Id.* Without asserting that the cigarettes lacked an essential element or contained some type of foreign substance, the court was unwilling to find that the defendant produced a defective product in light of the knowledge that existed prior to 1952. *Id.* at 8.

209. *Id.* at 10. See *Morrow v. Caloric Appliance Corp.*, 372 S.W.2d 41 (Mo. 1963) (en banc) (case determining reasonableness standard relied upon by the 8th Circuit). The federal court had diversity jurisdiction over the claim and therefore had to determine questions of law as though the Missouri Supreme Court was issuing the decision. *Ross*, 328 F.2d at 7.

210. *Id.* at 13-14.

211. *Id.* at 12-13. The court felt that this was a significant burden to place upon defendants and would provide a substantial incentive to warn consumers if a harmful effect was actually determined to exist. *Id.*

212. *Id.* at 16.

213. 304 F.2d 70 (5th Cir. 1962) (breach of implied warranty of fitness for use under Florida law), *certified question answered*, 154 So. 2d 169 (Fla. 1963), *conformed to*, 325 F.2d 673 (5th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964).

214. Boulton, *supra* note 193, at 648-49.

215. *Green*, 304 F.2d at 71-72.

216. 154 So. 2d 169 (Fla. 1963). The following question was certified:

Does the law of Florida impose on a manufacturer and distributor of cigarettes absolute liability, as for breach of implied warranty, for death caused by using such cigarettes from 1924 or 1925 until February 1, 1956, the cancer having developed prior to February 1, 1956, and the death occurring February 25, 1958, when the defendant manufacturer and distributor could not on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight, have known that users of such cigarettes would be endangered, by the inhalation of the main stream smoke from such cigarettes, of contracting cancer of the lung?

manufacturer's knowledge of harm is irrelevant in an action of implied warranty of fitness.²¹⁷

In the second trial, the jury again decided in favor of the defendant but the Fifth Circuit again reversed.²¹⁸ The court held that Mr. Green could rely on an implied warranty that cigarettes were fit for their intended purpose.²¹⁹ A rehearing was held en banc and the Fifth Circuit overruled its earlier decision.²²⁰ This time, the court was influenced by the comments of the dissenting judge's opinion in the second appeal²²¹ and held that cigarettes were not defective even though a large percentage of users could develop cancer.²²²

The Federal Legislative Response

In response to the above mentioned cases and to a 1964 Surgeon General's report²²³ that concluded that "cigarette smoking is a health hazard of sufficient importance in the United States to warrant remedial action,"²²⁴ Congress passed the Federal Cigarette Labeling and Advertising Act.²²⁵ This

Id. at 170.

217. *Id.* at 170-71. The court cited its earlier decision in *Carter v. Hector Supply*, 128 So. 2d 390 (Fla. 1961) that expressly negated any knowledge requirement on the part of a manufacturer or distributor. *Green*, 304 F.2d at 71.

218. *Green v. American Tobacco Co.*, 391 F.2d 97, 101 (5th Cir. 1968), *overruled by*, 409 F.2d 1166 (5th Cir. 1969), *cert. denied*, 397 U.S. 911 (1970).

219. *Id.* at 106.

220. *Green v. American Tobacco Co.*, 409 F.2d 1166 (1969) (en banc), *cert. denied*, 397 U.S. 911 (1970).

221. *See generally Green*, 391 F.2d at 106-13 (Simpson, J., dissenting).

222. *Green*, 409 F.2d at 1167 (Coleman, J., dissenting). The judge argued that cigarettes must be a defective product because they have been known to have killed millions of people. *Id.*

223. *See Shaukat Karjeker, Federal Preemption of Cigarette Products Liability Claims Creates a Need for Congressional Action*, 6 REV. LITIG. 339, 342 (1987), *citing* U.S. DEPT. OF HEALTH, EDUCATION, AND WELFARE, SMOKING AND HEALTH, REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICES (1964).

224. *Id.*

225. Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, § 2, 79 Stat. 282 (codified as amended at 15 U.S.C.A. §§ 1331-40 (1984)). Section 1331 states:

It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—(1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

Id.

Act had two purposes: the first was to provide consistent regulation of labeling and advertising of tobacco products throughout the states, and the second was to inform the public of the health risks associated with smoking.²²⁶ These two purposes seemed to be in conflict and required Congress to balance the objectives of protecting the national economy and protecting the public health.²²⁷

The Act required that a specified warning be placed on every package of cigarettes.²²⁸ However, the warning became stronger in 1970 when the Act was amended for the first time.²²⁹ In the Act's last amendment in 1984, Congress mandated that four warnings pertaining to cancer causation, reduction of health risks, pregnancy complications, and carbon monoxide in cigarette smoke be placed on cigarette packs on a rotational basis.²³⁰

The Act was preemptive in nature.²³¹ The express preemption prohibited

226. 15 U.S.C. § 1331 (1993). See Christopher J. Gaglin, *Cipollone v. Liggett Group, Inc.: A Preemptive Lucky Strike?*, 26 AKRON L. REV. 311, 312 (1992); Lee Gordon and 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, 861 (1992).

227. See Karjeker, *supra* note 223, at 345. The author notes that Congress recognized the importance of the tobacco industry to the national economy. *Id.* The Act was to provide a shield for the industry from the expected onslaught of legislation from various states. *Id.*

228. *Id.* The original warning that was mandated to appear on all cigarette packs was "Caution: Cigarette Smoking May Be Hazardous to Your Health." *Id.*

229. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 2, 84 Stat. 88 (1970), amended by Act of Oct. 12, 1984, Pub. L. No. 98-474, § 4, 98 Stat. 2201 (1984). The new warning stated "Warning. The Surgeon General Has Determined That Smoking is Dangerous to Your Health." *Id.*

230. Karjeker, *supra* note 223, at 345-46. Four specific warnings are now mandated. The statements are:

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

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

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

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide

15 U.S.C.A. § 1333 (1993).

The Act regulates the appearance of these warnings on cigarette packs (Subsec. A(1)); on all advertising media (Subsec. A(2)); and on outdoor billboards (Subsec. A(3)). Subsection B states the visual requirements by dictating the size of lettering, the contrasting type or background, and the relative location on the item. Subsection C requires that the four mandated warnings appear on a quarterly rotational basis. 15 U.S.C.A. § 1333 (1993).

231. The power of Congress to preempt state law is derived from the Supremacy Clause where it states:

the States from imposing any further requirements if the cigarette packages complied with the federal mandate.²³² However, the original Act²³³ and its amendments²³⁴ did not address the availability of common law tort actions to plaintiffs who were harmed from their use of tobacco products.

The Second Judicial Wave

There are two major cases that symbolize the second attack on cigarette manufacturers. In *Cipollone v. Liggett Group, Inc.*,²³⁵ the plaintiff brought suit based on theories of negligence, strict liability, and breach of express warranty.²³⁶ Even though the suit was intended to compensate Rose Cipollone for the injuries she suffered as a result of smoking cigarettes,²³⁷ the various court decisions focused upon the Labeling Act's preemption provisions.²³⁸

The trial court defined the issue of *Cipollone* in terms of the ability of a plaintiff to bring a claim under state tort laws when cigarette manufacturers

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, . . . shall be the supreme Law of the Land; . . ." U.S. CONST. art. VI, § 2.

See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977) (stating that Congressional acts will override state laws if the two are in conflict). See also *Roysdon v. R. J. Reynolds Tobacco Co.*, 849 F.2d 230-34 (6th Cir. 1988) (state law claim for failure to warn conflicts with Act and is therefore preempted); *Stephen v. American Brands, Inc.*, 825 F.2d 312, 313 (11th Cir. 1987) (denial of motion to strike defense of preemption under a claim of inadequate warning of dangers); *Gunsalus v. Celotex Corp.*, 674 F. Supp. 1149, 1159 (E.D. Pa. 1987) (holding that claims for manufacture and sale of defective tobacco products before effective date of Act were not preempted).

232. 15 U.S.C.A. § 1334, entitled "Preemption", states:

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

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

233. Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, § 5, 79 Stat. 283 (1965).

234. See Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 88 (1970) (now codified as 15 U.S.C. § 1333(b)(1993)).

235. 593 F. Supp. 1146, (D.N.J. 1984), *rev'd*, 789 F.2d 181 (3d Cir. 1986).

236. *Id.* at 1149.

237. Rose Cipollone contracted lung cancer. *Id.* She and her husband originally filed suit against three cigarette manufacturers. *Id.* However, during the course of the first trial Mrs. Cipollone died as a result of her cancer. *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 183 (3d Cir. 1986). Her husband pursued the claim individually and as administrator of her estate. *Id.*

238. See *Gagin*, *supra* note 226, at 311-12.

have complied with the federally mandated warning.²³⁹ The defendant argued that common law tort claims had a regulatory effect and were therefore barred as a result of the preemption.²⁴⁰ The court was not persuaded by this argument and stated that tort law is only a motivator to refrain from acting due to the potential liability.²⁴¹ The court held that claims of inadequate warning were not barred by the Act because the Act is not conclusive proof of the adequacy of the warning.²⁴² Plaintiffs should be able to attempt to prove the inadequacy of the warning.²⁴³

However, the Third Circuit Court of Appeals reversed because the ruling would interfere with the objective and purpose of the Labeling Act.²⁴⁴ The reversal was based upon two holdings: the district court should not have decided the issue of preemption if an actual conflict did not exist between the state and federal statutes²⁴⁵ and secondly, the district court should not have removed the preemption defense because such a decision was not supported by the facts in the record.²⁴⁶ The court did not feel obligated to answer the appeal on the trial court's statement of the issue.²⁴⁷ Therefore, the Third Circuit held that the Act preempts any state law claim that challenges the adequacy of the warnings or actions with respect to advertising and promo-

239. *Cipollone*, 593 F. Supp. at 1148.

240. *Id.* at 1155.

241. *Id.* The finding of liability requires a choice by the defendant: he may make financial payment of the award and decide to alter the product or face the potential for further liability in other cases. *Id.* at 1156. Even though it could be argued that an adverse decision would seem to suggest a change of behavior to a defendant, it is not a mandate and is therefore not regulatory. *Id.*

242. *Id.* at 1148. The example discussed in the opinion concerns the pharmaceutical industry. *Id.* at 1148-49. That industry is heavily regulated for purposes of safety and the issuance of warnings of potentially harmful effects of the products. *Id.* However, the court points out that drug companies have never been relieved of liability if a particular warning was proved inadequate. *Id.* As discussed earlier, special recovery methods have been developed in the pharmaceutical arena. *See supra* note 122.

243. *Cipollone*, 593 F. Supp. at 1148.

244. *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 187 (3d Cir. 1986).

245. *Id.* at 188. A court should not determine an issue if the litigants only present a hypothetical situation. *Id.* The facts of the case must demonstrate the actual conflict. *Id.* (citing *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982)).

246. *Cipollone*, 789 F.2d at 188. A court must permit a defense unless "the insufficiency of the defense is 'clearly apparent'." *Id.* *See* *May Department Stores Co. v. First Hartford Corp.*, 435 F. Supp. 849, 855 (D. Conn. 1977) (quoting CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1381, at 676 (1990)).

247. *Cipollone*, 789 F.2d at 188. The opinion presented the text of 28 U.S.C. § 1292(b) in a footnote. *Id.* at 188 n.8 (stating the procedural requirements of a certified question). The court stated that they were free to decide the appeal and not be bound by the trial court's issue statement. *Id.* at 188 n.9 (citing *Johnson v. Alldredge*, 488 F.2d 820 (3d Cir. 1973), *cert. denied*, 419 U.S. 882 (1974)).

tion of cigarettes.²⁴⁸ On remand, the district court determined that Cipollone's claim based on warranty that was preempted.²⁴⁹

The other major case in the second wave of litigation was *Palmer v. Liggett Group, Inc.*²⁵⁰ In *Palmer*, the plaintiff brought a claim of negligence for inadequate warnings of the danger of the cigarette products her husband had been using when he developed, and subsequently died from, lung cancer.²⁵¹ Once again, as in *Cipollone*, the main issue was preemption of state common law tort actions by the federal Labeling Act.²⁵² The district court ruled that the claim was not preempted because of Congress' omission of an express preemption provision.²⁵³

The court cited numerous Congressional acts that eliminated common law suits.²⁵⁴ Even though the Act did not include a savings clause,²⁵⁵ as had been included in the Occupational Safety and Health Act,²⁵⁶ the court focused on the omission due to the presumption against preemption.²⁵⁷ The opinion also contained an analysis of the potential inconsistent application of the Act if manufacturers were found liable in one state and not in another.²⁵⁸ The judge reasoned that if companies decided to place warnings on cigarette packages, above and beyond that required by the Act, no inconsistency existed.²⁵⁹

248. *Cipollone*, 789 F.2d at 187.

249. *Cipollone v. Liggett Group, Inc.*, 649 F. Supp 664, 675 (D.N.J. 1986), *cert. denied*, 479 U.S. 1043 (1987).

250. 633 F. Supp. 1171 (D. Mass. 1986), *rev'd*, 825 F.2d 620 (1st Cir. 1987).

251. *Id.* at 1172. The plaintiff brought suit on her own behalf and as administratrix of her late husband's estate. *Id.*

252. *Id.* at 1173.

253. *Id.* The court recognized that other jurisdictions had ruled in the opposite fashion. *Id. Compare Palmer v. Liggett Group, Inc.*, 633 F. Supp. 1171 (D. Mass. 1986) with *Roysdon v. R.J. Reynolds Tobacco Co.*, 623 F. Supp. 1189 (E.D. Tenn. 1985) (holding that exposure to state law tort claims would interfere with Congress' intention of insuring uniform labeling requirements), *aff'd*, 849 F.2d 230 (6th Cir. 1988).

254. *Palmer*, 633 F. Supp. at 1174. The citations include the Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. §§ 1715z-17(d), 1715z-18(e); the Copyright Act of 1976, 17 U.S.C. § 301(a); and the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a) & (c)(1). *Id.* See Jeffrey Trauberman, *Compensating Victims of Toxic Substances Pollution: An Analysis of Existing Federal Statutes*, 5 HARV. ENVTL. L. REV. 1 (1981) (for a thorough discussion of federal statutes pertaining to all types of toxic substances).

255. A savings clause is generally used in a statute to provide an exception of a special thing from the general things mentioned in the statute. BLACK'S LAW DICTIONARY 1343 (6th ed. 1990).

256. See Occupational Safety and Health Act of 1970, 29 U.S.C. § 653(b)(4) (declaring that the Act does not preempt state workman's compensation laws).

257. *Palmer*, 633 F. Supp. at 1175.

258. *Id.* at 1179.

259. *Id.* at 1177. The decision reasoned that nothing in 15 U.S.C. § 1333 prevented additional

Common law liability did not equate to regulatory efforts by the states.²⁶⁰

However, this decision was short lived because the First Circuit Court of Appeals reversed.²⁶¹ The Court of Appeals also based its decision upon principles of statutory construction.²⁶² The decision found the Labeling Act's language to be straightforward and unambiguous.²⁶³

The court's focus turned to the Act's desired goal of achieving a balance between public health and the national economy.²⁶⁴ If state tort claims were allowed to proceed, subjecting tobacco companies to liability, there would be an excessive disruption of the balance that was achieved by the standards and preemption promulgated in the Act.²⁶⁵ The court held that "state law," as used in the Labeling Act, included common law as well as statutory law.²⁶⁶ The opinion rejected the district court's conclusion that a finding of liability was not regulatory.²⁶⁷ The First Circuit believed a liable manufacturer would be compelled to revise its warnings and the real effect would be the same as having state regulation of cigarette warnings.²⁶⁸

In summary, *Palmer* and *Cipollone* determined that state common law tort claims for inadequate warnings were preempted by the Labeling Act, and generally ended the second wave of litigation.²⁶⁹

PART IV: POTENTIAL DOWNPOUR ON FOREST FIRE

A Due Process Challenge?

The challenge to the new legislation will most likely be in the form of a procedural due process claim. The term, "due process", originated in the Fifth Amendment of the United States Constitution when the amendment was rati-

warnings from appearing on packages – the Act only prevented states from requiring these type of warnings through legislative means. *Id.*

260. *Palmer*, 633 F. Supp. at 1177.

261. *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987).

262. *Id.* at 623. The court discussed the rule of statutory construction which looks to a statute's plain meaning. *Id.* The court commented that this case would be decided relying on Congress' true intention. *Id.*

263. *Id.* at 626.

264. *Id.* Here again, the court found Congress' intention to be express because 15 U.S.C. § 1331 states the purpose of the Labeling Act. *Id.*

265. *Id.*

266. *Id.* at 627.

267. *Id.* at 627-28.

268. *Id.* at 628.

269. Karjeker, *supra* note 223, at 344. The fact that two United States circuit courts agreed

fied in 1791.²⁷⁰ This clause applies only to the federal government.²⁷¹ Due Process was applied to the states when the Fourteenth Amendment was added to the Constitution in 1868.²⁷² In addition to the federal Constitution, states passed their own constitutions to govern how their citizens would be governed. Florida's Constitution contains a due process clause very similar to the federal clauses.²⁷³ The wording of Ohio's Constitution differs from the previous examples,²⁷⁴ but has been interpreted to extend the same privileges to the citizens of the state.²⁷⁵

Due process has always been a vague term without precise definition.²⁷⁶ Without a clear and concise definition of due process, the elements of a challenge must begin with broad definitions. However, a number of United States Supreme Court decisions have provided guidance on the substance of a due process challenge. A corporation may institute such a suit because the Court has stated that even though a corporation is not a "citizen" within the meaning of the Privileges and Immunities Clause,²⁷⁷ it is a "person" within the

on the preemption issue and the United States Supreme Court denied certiorari in *Cipollone* seemed to dampen many of the hopes of finding the tobacco companies liable for injuries that resulted from the use of their products. *Id.*

270. U.S. CONST. amend. V states: "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ." The United States Supreme Court has stated that the idea of "due process of law" was derived from the phrase "by the law of the land", which was found in the Magna Carta. See *Den ex. dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1855).

271. JETHRO K. LIEBERMAN, *THE EVOLVING CONSTITUTION* 169 (1992). The Supreme Court has recognized the Fourteenth Amendment's terminology for the application of due process to state law to mean the same as the language used in the Fifth Amendment's application to federal law. See *Twining v. New Jersey*, 211 U.S. 78, 100-1 (1908).

272. U.S. CONST. amend. XIV, § 1 states: "No state shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

273. FLA. CONST. art. I, § 9 states: "No person shall be deprived of life, liberty, or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal trial to be a witness against himself."

274. OHIO CONST. art. I, § 16 (Redress in courts) states:

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

275. *Mominee v. Scherbarth*, No. L-84-171, 1985 WL 7071, at *16 (Ohio Ct. App. Mar. 22, 1985) (challenge to amended statute of limitations in medical malpractice case), *aff'd*, 503 N.E.2d 717 (Ohio 1986). The court held, "Ohio courts . . . have interpreted 'due course of law,' as being synonymous with 'due process of law.' Consequently, the requirements under Ohio due process of law are essentially the same as those found in the United States Constitution." *Id.*

276. See *Lassiter v. Dept. of Social Services of Durham County*, 452 U.S. 18, 24 (1981).

277. U.S. CONST. art. IV, § 2. ("The citizens of each State shall be entitled to all Privileges

meaning of the Equal Protection²⁷⁸ and Due Process Clauses.²⁷⁹

In a case that originated in Ohio, but ended up in the United States Supreme Court, the standard method for determining the validity of a state statute is to first examine whether the law is contrary to fundamental principles of liberty and justice.²⁸⁰ Another broad based interpretation is to determine if the legislation shocks a person's sense of fair play.²⁸¹ In an attempt to narrow the definition, the Court announced three distinct factors to consider in a due process challenge:

1) Determination of the extent that private interest will be affected by the official action;

2) Determination of the risk of erroneous deprivation of such private interest through procedures used and value of any additional or substitute procedural safeguards; and

3) Determine the government interests, including fiscal and administrative burdens that would be incurred as a result of the additional procedures.²⁸²

Due process has also been applied to the area concerning defenses. In the early cases that challenged workers' compensation or employers' liability laws, the United States Supreme Court reviewed the ability of a state to reduce or eliminate certain defenses. In *New York Central R. R. Co. v. White*,²⁸³ it was determined that a state legislature could alter, or even set aside the common-law rules of negligence, assumption of risk, contributory negligence, and fellow-servant doctrine if some reasonably just substitute was provided.²⁸⁴ In the worker compensation statutory scheme, the defenses that were abolished were substituted with a system that assured the employer of limited liability.²⁸⁵

A similar rule was delineated in 1919 when the Court held that states

and Immunities of Citizens in the several States.”).

278. U.S. CONST. amend. XIV, § 1 also states: “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” Since the 1954 case of *Bolling v. Sharpe*, 347 U.S. 497, the concept of equal protection has applied to all federal, state, and local governments of the United States. See LIEBERMAN, *supra* note 271, at 183.

279. *Grosjean v. American Press Co., Inc.*, 297 U.S. 233, 244 (1936).

280. *In re Groban*, 352 U.S. 330, 334 (1957), *aff'g* 128 N.E.2d 106 (Ohio 1955).

281. *Galvan v. Press*, 347 U.S. 522, 530 (1954). The court upheld a decision of deportation of an alien even though his act of joining the Communist Party was legal when done. *Id.* at 531. The dissent strongly criticized this as an application of an ex post facto law. *Id.* at 534. (Douglas, J., dissenting).

282. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

283. 243 U.S. 188 (1917).

284. *Id.* at 197-201.

285. *Id.* at 201.

have a wide range of legislative discretion (within the bounds of the Fourteenth Amendment) and the wisdom of the legislative acts are generally not reviewable by the courts unless it appears the changes are arbitrary and unreasonable.²⁸⁶ For example, the Arizona legislature enacted an employer liability law²⁸⁷ that required compensation to be paid to any non-negligent employee if the sustained injury was incurred as a result of his occupation.²⁸⁸

In *American Surety Co. v. Baldwin*,²⁸⁹ the Court stated that due process requires that there be an opportunity to present every available defense.²⁹⁰ A Florida court determined that a regulatory hearing that does not give the defendant a right to present reasonable and legitimate defenses cannot be considered a proper application of due process of law.²⁹¹

PART V: AN EVALUATION

At the initial thought of more tobacco litigation, the same questions of causation come to mind as were presented in the Agent Orange litigation:²⁹² how can a litigant identify the defendant that caused the injury?; how can the injury to the litigant be shown if only statistical and epidemiological evidence show an increased incidence of disease due to exposure?; and how does a particular litigant connect his injury to the defendant's product?²⁹³ The Florida legislature has addressed all of these questions in the new Medicaid Third Party Liability Act.²⁹⁴

Camouflaging of the Individual

From the outset, the statute allows the individual to be removed from the suit as much as possible. The initial stage of the legislation allows a class

286. *Arizona Copper Co., Ltd., v. Hammer*, 250 U.S. 400, 419 (1919).

287. *Arizona Employers' Liability Law*, ARIZ. REV. STAT. ANN. § 23-801 (1993).

288. *Arizona Copper Co.*, 250 U.S. at 418.

289. 287 U.S. 156 (1932).

290. *Id.* at 168. However, the court did not expand on what constituted an "available" defense. *See id.*

291. *State ex rel. Paoli v. Baldwin*, 31 So. 2d 627 (Fla. 1947) (denial of due process by making horse trainer an absolute insurer of ensuring horse is drug free and then revoking a valuable license (property) if horse was found to have been drugged).

292. *See In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

293. Paul Sherman, *Agent Orange and the Problem of the Indeterminate Plaintiff*, 52 BROOK. L. REV. 369, 371 (1986).

294. *See Medicaid Third Party Liability Act*, 1994 Fla. Sess. Law Serv. ch. 94-251, § 4(a), FLA. STAT. ch. 409.10 (West 1994).

action to be brought against the tobacco manufacturers.²⁹⁵ If the number of Medicare and Medicaid recipients is so large that it is impracticable to identify each individual claim, the Attorney General does not have to identify each individual claimant and can proceed with the case on behalf of the entire class of benefit recipients as long as the circumstances involve common issues of fact or law.²⁹⁶ The description provided in the legislation appears to comport with Federal Rule of Civil Procedure 23, which governs class actions.²⁹⁷ The action would probably be maintainable under Rule 23(b)(3).²⁹⁸ The class certification would seem to be the most effective and efficient manner of determining the questions of causation and liability because these areas overshadow any other questions pertaining to specific individuals.²⁹⁹

The respective Attorneys General (state and federal) will attempt to keep the Medicaid and Medicare recipients together as a class.³⁰⁰ This tactic would be desirable because all of the claimants have shared the same basic type of harm.³⁰¹ The dangerous aspect of this tactic is that all of the claims will share

295. 1994 Fla. Sess. Law Serv. ch. 94-251, § 9 (West); S. 2245 § 3(a)(1)-(b)(2), 103d Cong., 2d Sess. (1994).

296. 1994 Fla. Sess. Law Serv. ch. 94-251, § 9(a); S. 2245 § 3(b)(2), 103d Cong., 2d Sess. (1994).

297. FED. R. CIV. P. 23(a) states: Prerequisites to a Class Action.

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

298. FED. R. CIV. P. 23(b)(3) states: Class Actions Maintainable.

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . .

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. . . .

299. *But see* Rosenfeld v. A.H. Robins Co., 407 N.Y.S.2d 196 (N.Y. Sup. Ct. 1978) (refusing to certify the class in an IUD products liability action because common question of law and fact did not predominate citing the inability to prove individual causation), *appeal dismissed*, 385 N.E.2d 1301 (N.Y. 1978).

300. It has been argued that for the purpose of the determination of the relevant scientific standard to be used in mass toxic tort cases, it is irrelevant if the cases are kept together as a class action or tried individually. See Gerald W. Boston, *A Mass-Exposure Model of Toxic Causation: the Content of Scientific Proof and The Regulatory Experience*, 18 COLUM. J. ENVTL. L. 181, 307 (1993) (citing the opinions of Judge Weinstein for both the class action and the individual plaintiff cases in the Agent Orange litigation).

301. Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 HASTINGS L. J. 301, 308 (1992). While mass torts differ from product to product,

in the same fate.³⁰² On the other hand, the counsel for tobacco companies will desire to segregate the cases. If the defense would succeed in differentiating the cases and gain an early victory, they would then have the doctrine of stare decisis on their side.³⁰³

But just because a suit proceeds as a class action does not guarantee success. The problem faced by individual plaintiffs is the same in class actions - the problem of causation.³⁰⁴ It has been argued that a class suit is no more useful than a series of individual suits until the causation problem is resolved.³⁰⁵ It appears that the new legislation has resolved the causation problem through the use of statistical or epidemiological evidence.

Liability Connection through the Market Share Theory

The Medicaid Third Party Liability Act specifically provides for a market share theory if the products are substantially interchangeable among brands.³⁰⁶ Indirect support for applying this proposition to cigarettes was given in the dissenting opinion of the *Green* case from the first wave of tobacco litigation.³⁰⁷ Judge Simpson stated, “[Cigarettes] are exactly like all others of the particular brand and virtually the same as all other brands on the market.”³⁰⁸ This type of description would help to classify cigarettes as a fungible product,³⁰⁹ but tobacco may possess some distinguishing characteristics. Even if differences exist between brands, it may still be appropriate to apply a market share approach as long as liability attaches based upon each manufacturer's contribution to the harm that was done.³¹⁰

they are all characterized by the fact that the component cases share a single underlying type of harm. *Id.*

302. *Id.* When a large number of claims are based on the same principles of procedure and substance they become classified as mass tort actions. *Id.* Because of the factual similarity, the claims usually share the same outcome. *Id.*

303. *Id.* at 305.

304. Richard Delgado, *Beyond Sindell: Relaxation of Cause-In-Fact Rules for Indeterminate Plaintiffs*, 70 CAL. L. REV. 881, 888-89 (1982).

305. *Id.*

306. 1994 Fla. Sess. Law Serv. ch. 94-251 § 9(b) (West).

307. See *Green v. American Tobacco Co.*, 391 F.2d 97, 106 (5th Cir. 1968) (Simpson, J., dissenting), *overruled*, 409 F.2d 1166 (5th Cir. 1969), *cert. denied*, 397 U.S. 911 (1970). Judge Simpson was attempting to differentiate cigarettes from other products that were found to be defective. *Id.* at 110. He described cigarettes as being without an obvious, harmful, foreign body in the product. *Id.* He concluded that cigarettes were not a defective product. *Id.*

308. *Id.*

309. A fungible product is described as being identical with others of the same nature and possessing no important traits that would easily identify the specific producer. BLACK'S LAW DICTIONARY 675 (6th ed. 1990).

310. David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law"*

However, the DES plaintiffs who were successful in using the market share theory were never able to positively identify a specific manufacturer of the drug.³¹¹ In all prior tobacco litigation, the plaintiffs were able to accomplish this normal requirement of tort law.³¹² The *Conley* court indicated that the market share liability theory would not apply where any manufacturer was identifiable.³¹³ The legislature appears to have extended the use of the theory beyond its original, judicially defined, purpose.³¹⁴

The second trait that could distinguish cigarettes is the differing levels of tar and nicotine.³¹⁵ One author has suggested that manufacturers of Agent Orange should have been differentiated because of the varying amounts of dioxin used in the products.³¹⁶ He argued that no deterrence is achieved when all manufacturers are held liable if their products actually differ.³¹⁷ Even though this may be a valid argument, the new legislation is not intended to be a deterrent to the tobacco companies.³¹⁸ The use of the market share theory in the Florida legislation seems to ensure that all named defendants will be liable once it is shown that cigarettes, of all types, cause health problems.

Causal Connection through Math and Science

When Prosser wrote that causation is one of the "simplest and most

Vision of the Tort System, 97 HARV. L. REV. 849, 868 (1984).

311. See *supra* text accompanying notes 125-44.

312. See *supra* p. 33 and note 206 at 36. Some plaintiffs had smoked the same brand for many years and could even state the amount of daily consumption.

313. Lee Gunn & J. Meredith Wester, *Florida's Adoption of the Market-Share Products Liability Theory - Drugs and Beyond*, 65 FLA. B. J. 37, 41 (March 1991).

314. See *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980), *vacated*, 607 P.2d 924 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980).

315. These differences may exist within the same brand—each Philip Morris Alpine Full Flavor cigarette contains fifteen (15) milligrams of tar and one (1) milligram of nicotine as compared to an Alpine Light cigarette which contains nine (9) milligrams of tar and seven-tenths (0.7) of a milligram of nicotine. 1994 PHILIP MORRIS ADVERTISEMENT. The numbers can be compared to Philip Morris' Benson & Hedges 100's which contain five (5) milligrams of tar and four-tenths (0.4) of a milligram of nicotine. *Id.*

316. Sherman, *supra* note 293, at 383 n.77. Cf. *Celotex Corp. v. Copeland*, 471 So. 2d 533 (Fla. 1985) (holding that a market share theory would not apply in asbestos cases due to the lack of uniformity among products).

317. Sherman, *supra* note 293, at 283 n.77. If a type of risk allocation tool is applied in these cases, such as market share liability, the burden is unfairly placed on potentially innocent manufacturers to exculpate themselves. This burden shifting fails to give manufacturers any incentive to reduce or eliminate the harm that could be caused by their products. *Id.*

318. See generally 140 Cong. Rec. S7784-04 (daily ed. June 28, 1994) (statements of Sen. Lautenberg and Sen. Harkin). The thrust of the comments in the Record indicate a desire for the tobacco industry to help pay for the disease that their products are inflicting on the citizens of the United States. There is no indication for the desire to reduce or eliminate the production

obvious" problems in the determination of tort liability,³¹⁹ it is doubtful he was addressing the complex issues brought about by toxic tort cases. The causation requirement has avoided being reduced to a single formula, applicable in all situations.³²⁰ In his article *Trial by Mathematics*,³²¹ Laurence Tribe suggests that mathematical information must be converted from a general application to a specific case to be useful as evidence.³²²

The shortcoming of epidemiological statements of rates and probabilities is that they apply to a group; not a specific individual.³²³ The studies produce statistics that are truly applicable only to the population represented by the studied sample.³²⁴ This creates uncertainty when the results are applied to any one individual.³²⁵ In absolute terms, epidemiology cannot conclusively prove causation.³²⁶ However, epidemiology is the only generally accepted scientific discipline that utilizes both statistics and medical science to establish the causes of human disease.³²⁷

Because of the inability to definitively identify the cause of the disease, the magnitude of probability required by the court will be outcome determinative.³²⁸ For toxic torts, the threshold appears to be fifty percent (50%) probability.³²⁹ Sufficient evidence to meet this burden should be available to the Florida Attorney General because it has already been shown that the incidence of lung cancer in cigarette smokers is twenty (20) times that in non-

of tobacco products. *Id.*

319. PROSSER, *supra* note 32, at 237.

320. Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1737, 1737 (1985).

321. Laurence H. Tribe, *Trial By Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971).

322. *Id.* at 1346. Professor Tribe uses an example throughout his paper that relies on the *Smith* case and the potential for successfully proving causation through the use of a mathematical statement of probability. *See id.* at 1341 n.37.

323. Brennan, *supra* note 93, at 512. The author uses an example: An epidemiological study is done to determine if a rare tumor is caused by a certain carcinogen. The results indicate that 45% of the lung cancers observed occurred as a result of exposure to the carcinogen. As to each individual, it is not absolute that the carcinogen caused his cancer. *Id.* *See, e.g.,* Abbott v. Mayfield, No. C-910506, 1992 WL 229522, at *3-4 (Ohio App. 1 Dist. 1992) (the court rejected a witness as an unqualified medical expert because as an epidemiologist, he was not licensed to practice medicine and treat patients on an *individual* basis. In footnote 2 on page 4, the court defined epidemiology as "the study of disease patterns within populations rather than a disease pattern in an individual patient").

324. Brennan, *supra* note 93, at 512.

325. *Id.*

326. Steve Gold, *Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence*, 96 YALE L. J. 376, 380 (1986).

327. Black & Lilienfeld, *supra* note 13, at 736.

328. Gold, *supra* note 326, at 384.

329. *Id.* at 385 n.49.

smokers.³³⁰ To prevail, the State must find a qualified expert (probably several) to testify that the probability that the represented population was harmed by smoking the cigarettes of the named defendants was fifty percent (50%) or greater.

One strength embodied in the federal legislation is its clear statement on the admissibility of epidemiological evidence.³³¹ The Florida statute provides for statistical evidence only.³³² However, Florida legislators may have intended the term to include epidemiological evidence since statistics and probabilities play a significant role in epidemiological studies. The language of the statute provides for a means to include, rather than to exclude, techniques of finding liability.³³³ Federal legislators must have been concerned about courts' acceptance of epidemiological evidence in the case of tobacco because of the specific inclusion in the Senate bill.³³⁴ However, since the Florida statute excluded specific language about the admissibility of epidemiological evidence, Florida courts may interpret the statute to exclude such evidence.

A Blurred Line For The Challenge

The tobacco industry, too, has a tool available to mount a challenge: procedural due process. As discussed earlier, this concept has never been rigidly defined and affords the courts some room in making determinations. The industry will group the numerous points that lessen the burden of the state to show that the overall effect is a denial of due process. The elimination of positive defendant identification through market share, the removal of the individuality through a class action, and the reduction of the proof of causation through statistics or epidemiology could persuade a court to rule that the law is unfair and offends a sense of liberty and justice.

Supporting Public Policy Arguments

In 1965, the federal government first enacted preemptive legislation in an attempt to find a balance between the risk to the public's health from cigarette smoking and the risk to the national economy if tobacco companies were held liable for the harm caused by their products.³³⁵ In 1994, it is time to re-

330. Orrin E. Tilevitz, *Judicial Attitudes Towards Legal and Scientific Proof of Cancer Causation*, 3 COLUM. J. ENVTL. L. 344, 373 (1977) citing, W. HUEPER & W. CONWAY, CHEMICAL CARCINOGENESIS AND CANCERS 127 (1964).

331. See S. 2245, § 3(c), 103d Cong., 2d Sess. (1994).

332. See 1994 Fla. Sess. Law Serv. Ch. 94-251 § 9 (West).

333. *Id.*

334. See S. 2245, § 3(c), 103d Cong., 2d Sess. (1994).

335. Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146, 1147 (D.C.N.J. 1984), *rev'd*,

examine these risks in light of the tremendous costs that society (particularly every American taxpayer) will be required to absorb in the Medicaid payments associated with smoking-related health problems. The costs, stated as findings of fact in the Senate bill, are simply astounding: in 1994 alone, tobacco related illnesses and diseases will cause the Federal Government to spend nineteen billion dollars (\$19,000,000,000) in Medicare and Medicaid in-patient hospital costs; the Medicare trust fund trustees estimated that the fund could be insolvent by the year 2001 due to expenditures of one hundred twenty eight billion dollars (\$128,000,000,000) for diseases related to smoking.³³⁶ Also, a 1992 Surgeon General's report concluded that lifetime medical costs for smokers total \$501 billion more than those incurred during the lifetime of non-smokers.³³⁷

The balancing test pendulum may be swinging toward a finding of tobacco manufacturer liability for good reasons. The tobacco industry has experienced a decline in numerous areas.³³⁸ In terms of Gross National Product, tobacco products have declined from approximately 0.3% of the total in 1980 to 0.07% in 1989 if constant dollars are used for the calculation.³³⁹ Even

789 F.2d 181 (3d Cir. 1986). From his comments, it appears that Judge Sarokin did not fully agree with the protection offered by the preemptive Act. He stated:

The legislative history of the Act here involved reflects a candid concern for the economy of the entire country if cigarette manufacturing were curtailed or eliminated. One would hope that those fiscal considerations were weighed against the costs of illness and death caused by cigarette smoking as well as the moral responsibility of protecting the young and future generations who have not yet begun to smoke. *Id.*

For a recent case on the issue of protecting young people from the aggressive and very appealing marketing techniques used by tobacco companies, see *Mangini v. R. J. Reynolds Tobacco Co.*, 875 P.2d 73 (Cal. 1994) (holding that a claim under the state's unfair competition statute to eliminate "Joe Camel" from advertisements was not barred by the preemption clause of the Federal Cigarette Labeling and Advertising Act). Cf. Steven W. Colford and Ira Teinowitz, *Congressman Douses Threat to Joe Camel*, ADVERTISING AGE, June 13, 1994, at 22 (focusing on the 3-2 decision of the Federal Trade Commission to stop an investigation of R. J. Reynolds for the use of Joe Camel as an unfair marketing tool aimed at children).

336. 140 Cong. Rec. S7784-04, *S7785 (daily ed. June 28, 1994)

337. SMOKING AND HEALTH IN THE AMERICAS 136 (U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health 1992).

338. Total cigarette industry employment has fallen from 46,000 in 1980 to 34,000 in 1992. STATISTICAL ABSTRACT OF THE UNITED STATES 1993: THE NATIONAL DATA BOOK 420 (U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, 113th ed. 1993). The percentage of current users of cigarettes has declined in all age groups, especially in the 18 to 25 year old group. *Id.* at 136. Based upon national samples, 48.8% of this age group were current cigarette smokers in 1974 as compared to 32.2% in 1991. *Id.* Another study from the Tobacco Institute cites the rate of decline in regular smokers from 44% of Americans in 1964 to only 26% in 1990. John McLaughlin, *A New Smoking Study Has Already Lit Some Tempers*, RESTAURANT BUSINESS, July 1, 1994, at 22.

339. Statistical abstract of the United States 1993: The National Data Book, *supra* note

the percentage of tax contribution to the states' treasuries has declined from 2.7% of all state taxes collected in 1980 to 1.9% in 1991.³⁴⁰

CONCLUSION

After comparing the purely economic statistics, it appears that less emphasis should be placed on the protection of the national economy by imposing liability on the tobacco industry. The health care costs greatly exceed the tax benefit the states derive from the sale of cigarettes.³⁴¹ Even though it has been suggested that smoking may have some small positive benefits,³⁴² the current evidence overwhelmingly shows the negative effects and costs to society.

The stakes are high for the tobacco industry. The once powerful lobbies, such as the National Rifle Association, do not have the same clout that they once enjoyed. A new warning has been issued by the Florida legislature and the fire is burning brighter.³⁴³ Will anyone come to the rescue or will more fuel be added to the fire? It appears that the Medicaid Third-Party Liability Act will accomplish its goal of recovering money for smoking-related illness unless the higher courts decide to extinguish the flames.

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341, at 443. The data used was current as of 1991 and the calculation is based upon 1982 constant dollars.

340. *Id.* at 302. Total state taxes collected from all sources in 1980 amounted to \$137,075,000,000. Tobacco products contributed \$3,738,000,000. In 1991, total state tax collections totaled \$310,561,000,000. Of this amount, \$5,980,000,000 can be attributed to tobacco products. *Id.*

341. The author realizes that the industry contributes corporate income tax as well as generating personal income taxes from the employees. However, it seems that most of this economic benefit is realized by a few select states where the tobacco industry calls home. In 1992, the states that harvested the largest acreage of tobacco are (in descending order): North Carolina, Kentucky, Tennessee, South Carolina, Virginia, and Georgia. STATISTICAL ABSTRACT OF THE UNITED STATES 1993: THE NATIONAL DATA BOOK, *supra* note 341, at 670.

342. See Peter Brimelow, *Thank You For Smoking . . . ?*, FORBES, July 4, 1994, at 80. The article states that cigarette smoking may be beneficial in controlling behavior (based on the stimulant) and a reducing the incidence of Parkinson's disease, Alzheimer's disease, endometrial cancer, prostate cancer, osteoarthritis, colon cancer, and ulcerative colitis. *Id.* at 80-81. Numerous studies are mentioned that show a 30% to 50% decrease of these diseases among smokers versus non-smokers. *Id.*

343. See Mark Curriden, *The Heat Is On*, A.B.A. J., Sept. 1994, at 58-61. The article explores the next potential wave of litigation by private plaintiffs due to the recent testimony of tobacco industry executives and the rulings of a House of Representative's subcommittee. A number of renowned plaintiffs attorneys are forming a well funded and well organized coalition to challenge the industry based upon fraud and deceit claims evolving from early company studies that reveal knowledge of the harm and dangers of the cigarette.

