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Products Liability: Breaking through the Cocoon of the Cigarette Industry

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Cover Page Footnote

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Emmanuel C. Nneji*

CONTENT

I. INTRODUCTION

Cigarette manufacturers have enjoyed a relatively sheltered environment with regard to their products and the products' capacity to cause injury to the consumer. Even in situations where the products contained foreign objects, such as bugs and parts of other elements, the courts have not always permitted recovery for damages arising from resulting injuries. The manufacturers assert various defenses, ranging from common knowledge to federal preemption.

The suits against cigarette manufacturers have immensely increased in number, diversity and intensity, each further adding to the evidence and public sympathy amassed against the industry. There was no major cause for concern for the industry with regard to the hazards attendant to the normal consumption of cigarettes until *Cipollone v. Liggett Group, Inc.*[1] Like *Borel v. Fibreboard Paper Prod. Corp.*[2] in the case of asbestos, *Cipollone* stands to determine the future of tobacco products liability litigation.

This article addresses the failure to warn and products liability claims against the cigarette industry. It will utilize some of the medical and scientific evidence available in the course of the industry's existence and the industry's internal communication documents which have come to light in the course of the *Cipollone* litigation. It will also consider the legal doctrines applied by the courts.

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II. WHAT THE INDUSTRY KNEW OR COULD REASONABLY HAVE KNOWN: A CASE OF CORPORATE INDIFFERENCE

The crux of liability for cigarette manufacturers is the issue of what they knew and should have warned about, or what they could reasonably have known using the technological and scientific standard at the time before or during which the cause of action arose. This section deals with the information, scientific and otherwise, that has been available and known or should have been known to the industry.

"[P]ublic awareness of dangers attributed to smoking has grown in intensity since 1900."[3] In any event, the companies have not stopped denying that their products are harmful.[4] The evidence concerning the hazards of smoking range from scientific to moral and religious condemnations. As early as 1604, King James I blasted tobacco use when he wrote that it is "[a] custom loathsome to the eye, hateful to the nose, harmful to the brain, dangerous to the lungs, and in the black stinking fume thereof nearest resembling the horrible Stygian smoke of the pit that is bottomless."[5] It is recorded that in 1642 Pope Urban VII ordered that persons using tobacco on church property be excommunicated. He declared:

> The use of the herb commonly called tobacco has gained so strong a hold on persons of both sexes, yea, even priests and clerics, that—We blush to state—during the actual celebration of holy mass, they do not shrink from taking tobacco through the mouth or nostrils, thus soiling the alter linen and infecting the churches with its noxious fumes, sacrilegiously and to the great scandal of the pious . . . .[6]

A poem published in 1905 chastised the habit of smoking thus:

> My breath is as sweet as the breath of blown roses, While you are a nuisance where'er you appear; There is nothing but snivelling and blowing of noses, Such a noise as turns any man's stomach to hear.[7]

In 1828, when the toxicity of nicotine was demonstrated, doctors reduced the prescription of tobacco for certain ailments.[8] In 1907 there was suspicion that manufacturers put substances in tobacco in order to cause addiction.[9] Prior to the twentieth century, the noxious nature of tobacco caused it to be banned in England, and heavy duties were imposed on imported tobacco.[10]

A causal connection between smoking and cancer of the mouth has been described as far back as the 19th century.[11] During the 1950's a causal relationship was established between heavy cigarette smoking and the incidence of lung cancer.[12] It was recognized in many countries that the incidence of lung cancer increased substantially in the period of 1910-60, the most convincing explanation accounting for it being excessive smoking.[13] The increased participation of women in smoking has a direct relationship with their rate of lung cancer.[14]

Studies conducted after 1950 monitored the smoking habits of groups of healthy persons. Conclusions draw from these studies indicated that heart and lung cancer mortality was higher among smokers than non-smokers of the same group.[15] "Studies in a half-dozen countries since World War II point to a consistently higher proportion of smokers among lung cancer patients than among 'control' groups of healthy persons or hospital patients with non-cancerous ailments."[16]

During World War II, it was documented that when the Germans occupied Norway and curtailed the consumption of cigarettes, there was a commensurate decline in coronary deaths; and after the war, a rise in cigarette smoking was matched by an increase in coronary deaths.[17] There were studies performed in 1923 and 1924 which showed the adverse effects of the contents of tobacco on the nervous system and mental functions.[18] While tobacco was used earlier for therapeutic purposes, it was also recognized to cause "many cases of acute poisoning."[19]

One study of the impact of smoking on athletic performance produced in 1918 stated that "[i]n the cases of able-bodied men smoking is associated with loss of lung capacity amounting to practically 10 per cent."[20] Most importantly, in 1945 a New Orleans surgeon, Dr. Alton Ochsner, linked cigarette smoking and cancer; and in 1952 Hammond and Horn studied more than 187,000 men in their fifties and sixties. This study demonstrated higher mortality of smokers.[21] In 1953, Drs. Wynder and Graham of the Sloan Kettering Institute For Cancer Research reported the results of their experiments which showed that 44 per cent of the mice painted with tobacco tar had developed skin cancer.[22] Researchers for a tobacco company involved in *Cipollone,* Liggett Group, Inc., replicated this experiment and obtained tumors using tar from two different brands of cigarettes.[23]

The unrelenting accumulation of evidence alarmed the industry thereby causing it to form the Tobacco Industry Research Committee (TIRC) to finance further research concerning smoking and health.[24] The purpose behind TIRC was to demonstrate the industry's social responsibility and "prove that smoking was not harmful, or at least keep the question open and undecided."[25] The industry was aware of the finding that "smoking conduced to lung cancer[;]" but it felt there was sufficient ambiguity and disagreement in medical opinions.[26]

III. PRE-PREEMPTION: LITIGATION PRIOR TO 1966

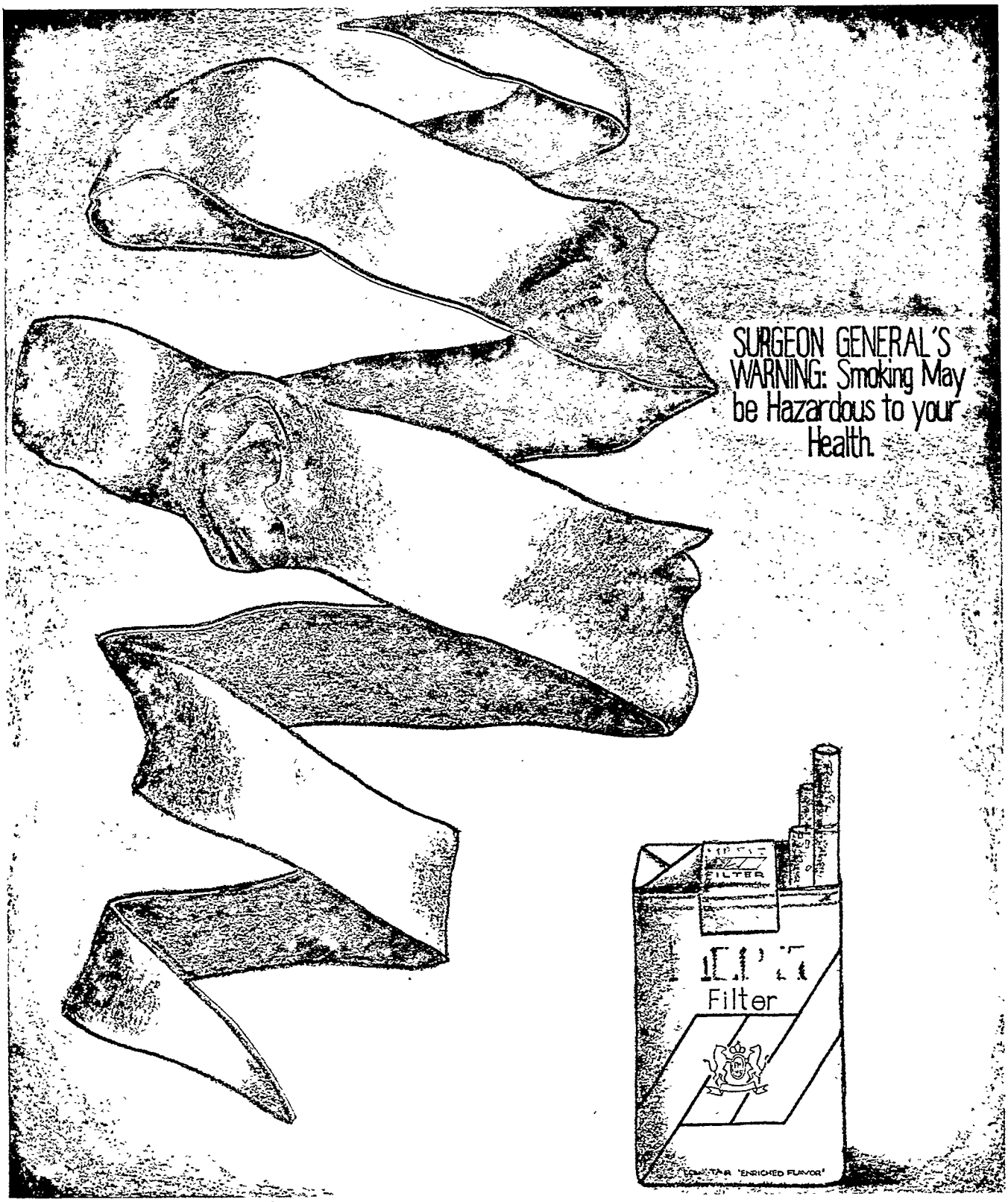
In the early 20th century, when the law of products liability had not developed to its current status, cigarette manufacturers were not held liable for injuries caused by foreign substances embedded in cigarettes. The doctrine of strict products liability was mired in the insistence of the courts that there be privity of contract between the manufacturer and the complaining consumer. Because an intermediary is involved in the process of distributing the manufacturer's products to consumers, and the consumer actually purchased from the intermediary, even though the intermediary did not alter the final product in any manner, the plaintiff could not recover, owing to lack of privity.

A. *Foreign Substance Cases*

In *Liggett & Meyers Tobacco Co. v. Cannon,*[27] the plaintiff bit into a bug while chewing tobacco manufactured by the defendant. His mouth and lips began to smart; shortly thereafter his face became swollen and he experienced dizziness. The court denied his claim because, in the court's view, tobacco was not a foodstuff and therefore did not qualify for the exception to the rule that "the manufacturer of an article or commodity placed by him on the market for sale and sold by another to an ultimate consumer is not liable to the [ultimate consumer] for injuries due to defects or impurities in the article or commodity."[28] The court recognized cigarettes as "inherently bad" and rationalized that one who purchases a product known to be unwholesome cannot charge unwholesomeness in a claim for injuries that resulted from the product.[29]

In *Block v. Liggett & Meyers Tobacco Co.,*[30] plaintiff's lips and tongue were punctured by a razor blade embedded in the cigarette manufactured by the defendant. His lips became swollen and puffy, requiring medical attention. The court stated that "cigarettes are not within the class of dangerous articles which render their manufacturer liable to strangers for a defect such as [the one complained of in this case]."[31]

In *De Lape v. Liggett & Meyers Tobacco Co.,*[32] applying California negligence law, the court sustained the plaintiff's claim for injuries incurred when he smoked a


SURGEON GENERAL'S WARNING: Smoking May be Hazardous to your Health.
Filter

defectively fabricated cigarette manufactured by the defendant.[33] The court awarded $2,250, plus costs, to plaintiff. There are several other "foreign substance" cases where plaintiffs have recovered against tobacco manufacturers.[34]

B. *Inherently Hazardous Cases*

In other cases where plaintiffs' claims were premised on the inherently hazardous nature of cigarettes, the defendant manufacturers have not been found liable. In *Ross v. Philip Morris & Co.*,[35] the court recognized that when implied warranty claims are asserted, the doctrine of strict liability prevails and needs no finding of privity to be sustained.[36]

Having dismissed the privity argument, the plaintiff's claim was then considered under the theory of strict liability. Reviewing the state of the art, the court

> fail[ed] to comprehend how the ends of justice could be served by adopting the fiction that the manufacturer of cigarettes was—as early as 1934— . . . in a better position, except in theory, than the consumer to ascertain the now highly-publicized causative relationship between smoking and cancer of certain areas of the body.[37]

The court further attempted to distinguish between cigarette and other cases where the products contained "readily identifiable foreign matter . . . ."[38]

The court in *Ross* suggested that the plaintiff's claim would have been formidable had it been shown that the harmful substance in cigarettes "was inherent to the original material or food but was not *intended* by the manufacturer to be included in the finished product that was sold . . . ."[39] (Emphasis added). It would seem that what the manufacturer intended to include in the finished product that comes in contact with the consumer is, in effect, guaranteed to be safe and harmless, the proviso being that the product be used in the manner prescribed and for the ordinary purpose(s) for which it is intended. It would follow that the public would seek to hold the manufacturer to a higher level of liability with regard to substances deliberately included in the product than where the substance entered the product by mere happenstance.[40]

In *Pritchard v. Liggett & Meyers Tobacco Co.*,[41] the court, under Pennsylvania law, stated that any factual or promissory affirmation to the public relating to the manufacturer's goods constitutes express warranty if the natural tendency of such affirmation is to induce members of the public to purchase the product.[42] Hence, the court reversed the lower court's finding that plaintiff had assumed the risk of injury by smoking cigarettes. The evidence did not show that the smoker knew or had notice of the harmful effects of smoking.[43]

In *Green v. American Tobacco Co.*,[44] the court, in a near victory for plaintiff, stated that the manufacturer's "plea of contributory negligence is . . . inapposite to a claim based on breach of implied warranty."[45] It accepted the scientific evidence showing the hazards of smoking.[46] In addition, the jury found that smoking defendant's cigarettes was the proximate cause of plaintiff's cancer. Nevertheless, in remanding to the lower court to determine the issue of liability, the court observed that the product can be reasonably fit and wholesome but still cause injury.[47]

Judge Cameron dissented in part, arguing that the court should have entered judgment for the plaintiff on the issue of liability.[48] "The warranty embodied by the law in every sale the company made to [plaintiff] was that the cigarettes purchased by him would not do him harm."[49] Any requirement that plaintiff show that "the cigarettes were not reasonably fit and wholesome for use by the general public" would essentially defeat the warranty.[50] The difficulty faced by the courts in these cases has been that of determining what the manufacturers knew and should have warned about, could reasonably have known, or did not know and could not have known.

The court's decision in *Green* arguably makes it acceptable for a manufacturer to introduce a totally unknown product to the market without first exhausting all aspects of preventive research and testing. The court's reasoning implies public trust in inventors to vigorously and thoroughly test their inventions before marketing them to the general public. What is now known about asbestos (and tobacco products) suggests that some manufacturers are willing to betray this trust and conduct minimal research and testing in order to make quick profits, relying upon the scientific community to fill in the gaps as problems arise. The principle of strict products liability is supposed to protect this public trust by compelling the inventor/manufacturer to test and market products at his own peril. To relax the manufacturer's obligation to consumers is to create a loophole whereby the consumer is exposed to injury and the manufacturer reaps a windfall profit.

IV. FEDERAL PREEMPTION AND THE THEORY OF ADDICTION

The courts' inability to chart a decisive course in the area of tobacco products liability was relieved when, in 1965, Congress passed the Federal Cigarette Labeling and Advertising Act.[51] It became easier for courts to deny claims against cigarette manufacturers on the grounds of federal preemption of state based claims.[52] While the tobacco industry sought to restrict the warning requirement, the Act was generally recognized as a blessing for the industry. One F.T.C. Commissioner involved in the enactment of the Act was quoted as saying:

> The tobacco industry is really a hell of a lot better off from the overall results than if nothing had been done. They have been removed from any responsibility for tort actions. They're selling a product that's got a warning. If you use that product, you do so at your own risk.[53]

Another factor to consider in this regard is that the Supreme Court has recognized the drastic effects of preemption in eliminating every other source of legal recourse, and, as a result, required both that the challenged state action unavoidably create a conflict with federal regulation and the clear intent of Congress be exclusive federal control.[54] In this regard, the operation of federal preemption against state tort claims involving smoking injuries does not meet the requirement set by the Supreme Court.

> The 'Declaration of Policy' and legislative history of the [Act] indicate that elimination of 'diverse, non-uniform and confusing cigarette labeling and advertising regulations' was the purpose of the preemption section. The intended meaning of 'regulation' is indicated in the definition and legislative history of the term 'state,' which was defined as 'political bodies' that 'pass ordinance[s], statutes, etc.' Courts are not political bodies that pass ordinances or statutes. Thus, it appears that civil liability, which is imposed by Courts, was not an evil whose elimination was sought by the Act.
>
> . . . The labeling acts manifest neither a congressional intention to preempt courts from granting money judgments nor a conflict between such judicially imposed liability and federal law.[55] (Brackets original).

Section 1334(a) of the Labeling Act provides: "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."[56] This does not prohibit the industry from voluntarily providing information about the health risks of smoking. Nevertheless, the manufacturers maintain in their public relations appearances that this provision prohibits them from including additional warnings; and in doing this they always state that the present warnings have been determined to be adequate by Congress.

Section 1334(b) prohibits both state law requirements or prohibitions based on smoking and health and respecting the advertising and promotion of cigarettes the packages of which conform to the labeling requirements.[57] Manufacturers argue that a finding of liability would, in effect, operate a state requirement that will cause them to alter the congressionally imposed labeling and advertising requirements.[58]

In any event, the preemptive force of the Labeling Act is not retroactive, thus a plaintiff who fashions a claim designed such that pre- and post-1966 causes of action are separated may avoid the operation of preemption on the whole claim. In *Cipollone* recovery was premised on the portion of injury determined to be attributable to the period of time before the Act entered into force.[59] The critical question would concern when the industry knew or could reasonably have known that its products caused certain injuries about which the public was not warned. The *Cipollone* jury seemed to accept that the industry knew or could reasonably have known of the hazardous nature of its products prior to, or during, the course of Mrs. Cipollone's smoking.[60] If sustained on appeal, as the strength of the District Court's legal analysis suggests is likely to happen, the last *Cipollone* decision[61] would form the bedrock of impending pre-preemption litigation.

The latent nature of the diseases is such that many such cases are yet to be litigated because the diseases are currently maturing and being diagnosed, while others are not yet detected. As a result, the industry may opt for settlement of pre-preemption cases while maintaining a defiant approach toward post-preemption cases. It appears the industry took a calculated risk which, in the end, promises substantial windfall profits.[62]

The public has become aware of the validity and reliability of the health allegations levied against cigarettes and their manufacturers, and it has become increasingly difficult for the industry to claim that it did not know and could not have known the capacity of cigarettes to cause harm to its consumers. The Labeling Act has the impact of providing a warning, thereby protecting the cigarette industry from subsequent tort liability, which consequently serves as a windfall for the tobacco industry.[63]

Because cigarette smokers become addicted to nicotine,[64] the present warnings are inadequate; they fail to apprise the public of the powerful impact of addiction on the ability to quit after a few packs or weeks of voluntary and experimental smoking.[65] It is one thing for a smoker to engage in smoking knowing it is hazardous, but presuming that he can quit at will; it is quite another to be trapped into continued and involuntary participation in the hazardous activity. In other words, one may choose to smoke the first ten packs or for the first two weeks and then quit; but if addiction is achieved, the person may be powerless to stop. As a result of this failure in warnings provided by the Labeling Act, it is hard to conclusively presume that the smoker had full knowledge and appreciation of all the significant risks involved in smoking.[66]

The problem of addiction has been known to exist, but the industry failed to disclose it presumably because it creates a captive market. Tobacco induces tolerance which generally requires continued reinforcement, thereby causing chronic indulgence.[67] "Certainly it has not been easy for a nicotine addict to recognize the harmful effects of his addiction, nor for an industry to accept that its products may cause serious disease among those who use them."[68] In 1828, nicotine was isolated from tobacco and determined to possess narcotic properties "so toxic that 'a fourth drop' was enough to kill a rabbit."[69]

The reactions attendant to cessation of smoking have been documented; they are the withdrawal symptoms

related to nicotine addiction. Any attempt to stop smoking may be followed by unpleasant experiences ranging from a craving of tobacco to anxiety, restlessness, irritability, and other physiological consequences.[70] The respiratory, circulatory and digestive systems are adversely affected.[71] Nicotine affects the central nervous system and diminishes psychomotor performance.[72] "It is definitely known that nicotine, chemical irritants and carcinogenic substances have a harmful physical effect during the process of smoking. Nicotine is especially toxic to the nervous system and affects the circulatory organs either directly or indirectly."[73]

One suggestion to counteract the harmful effects of smoking and addiction is the provision of a detailed warning, particularly since many smokers start the habit at a young age when they do not fully understand and appreciate the magnitude of the risk of addiction.[74]

> Given the fact that [about 85% of teenagers who experience more than one cigarette become regular dependent smokers], the tobacco industry's failure to join in the public effort to inform its young customers of the extreme danger of smoking takes on the appearance of unparalleled display of corporate indifference.[75]

While the various provisions and amendments to the Labeling Act may have improved the flow of information,[76] and while many people are aware of nicotine's addictive nature, the goal of protecting the unsuspecting public will never be completely achieved until the warning of addiction is included.

Liability for failure to warn of addiction has been found in a case unrelated to tobacco. In *Crocker v. Winthrop Laboratories,*[77] the manufacturer of an analgesic was initially held liable for failing to warn of the drug's addictive capacity. Plaintiff had become addicted to the drug after a few months during which he had been treated with the drug for frostbite. This addiction consequently led to his death. The jury found that, based on the scientific knowledge at the time the drug was placed in the market, the manufacturer could not have known of the addictive nature of the drug.[78] The jury also found that the plaintiff's reaction to the drug was owing to his unusual susceptibility to the drug or its intended effect.[79] However, the jury's finding of liability was based on the fact that the manufacturer had represented to the medical community that the drug would not induce physical dependence.[80] This representation could have been construed to induce reliance and dispensation of the drug on the part of plaintiff's physician.[81] The trial court's finding of misrepresentation comports with the general rule that:

> One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though
>
> (a) it is not made fraudulently or negligently, and
>
> (b) the customer has not bought the chattel from or entered into any contractual relation with the seller.[82]

In *Cipollone,* the plaintiff started smoking in 1942, when she was sixteen and in high school. She was influenced by the cigarette advertisements posturing glamorous women and featuring characteristics suggesting that smoking was not unhealthful. The women in the advertisements appeared to her as liberated women because they smoked. She switched brands several times. She also attempted to quit when her husband insisted that smoking was dangerous and brought her reports about smoking dangers. She was unable to quit and believed that cigarette manufacturers would not do anything that would harm anyone.

In the analysis of proximate cause in *Cipollone,* the court stated that there was evidence

> from which the jury could conclude that Mrs. Cipollone's smoking after 1966, in the face of congressionally mandated warnings, was not an intervening or superseding cause that would relieve [manufacturer] of liability. [There was] evidence that Mrs. Cipollone's *tobacco dependence* prevented her from making a free and fully informed decision as to her continued smoking.[83] (Emphasis added.)

The dependency-causing characteristics of cigarettes was known to the defendant, but warning was not provided; instead the defendant sought, through pre-1966 activities, "to provide a rationale through which tobacco-dependent smokers could justify continued smoking."[84] This helps to understand the court's failure to permit the operation of preemption against the claim. The pre-1966 failure to warn of addiction was part of the proximate cause of Mrs. Cipollone's injury which accumulated over the period of her 24 years of pre-1966 smoking.

V. POST-1966 CASES: THE ANOMALY OF TOBACCO INDUSTRY LIABILITY

The civil immunity enjoyed by the cigarette manufacturers is unparalleled in the history of products liability. No other producer of intimately consumed products can boast of this phenomenon,[85] except, perhaps, the alcohol industry. "The automobile, drug, and machine tool industries, as well as various consumer product industries, have all been held liable for injuries associated with their dangerous products."[86]

In similar products liability cases not involving tobac-

co products, manufacturers have, in a fairly consistent pattern, been held accountable for injuries to consumers of their defective products.[87]

> Under the principles of strict tort liability, the manufacturer is liable for injury or damage proximately caused by a defective product, although such manufacturer has exercised all possible care in the production of his product. The fact that the injury-causing defect was unknowable is of no consequence in such an action. As between the blameless user and the blameless manufacturer, the doctrine imposes the responsibility on the manufacturer, who placed the product on the market.[88]

This is further justified by the fact that "the manufacturer created the risk and has profited from the product,"[89] and has better cost distribution capacity than the consumer.[90]

The focus in strict products liability is the product, as opposed to the negligence standard of focusing upon the defendant, and "the threshold question is whether the product was in a defective condition at the time it left the manufacturer's control, rendering it unreasonably dangerous."[91] If such defect is the proximate cause of injury, the manufacturer is liable to the consumer,[92] except where proper and adequate warning was provided regarding the defective condition.[93] It has been held that the dilution of warnings resulting from overpromotion may create liability.[94] Furthermore, "[a] warning may be inadequate if it does not specify the risk presented by the product; is inconsistent with the manner of using the product; does not provide a reason; or does not reach foreseeable users."[95]

Each year there are at least three-hundred thousand deaths related to the use of tobacco products, yet the tobacco industry is the only industry with blanket immunity against the wave of twentieth-century products liability.[96] One explanation for this is the fact that the economic influence of tobacco has become so pervasive that "its cancerous web has created an atmosphere in which the government clearly prefers wealth, not health."[97] The economic interests affected by the tobacco debate are very organized and cohesive, and have substantial resources at their disposal, hence their capacity to lobby Congress effectively.[98]

Following the passage of the Labeling Act in 1965, cigarette manufacturers have relaxed their strategic standard and pattern of denying any claim that they knew of their products' hazards but failed to warn about such hazards. For example, a major cigarette manufacturer's lawyers wrote an article in which they insist that the hazardous nature of tobacco use has been a matter of common knowledge prior to the twentieth-century.[99] Apparently they failed to recognize that their argument that the public has known for several years is patently inconsistent with their claim of lack of knowledge of such hazards in failure to warn products liability litigations. The industry may eventually find out that the Labeling Act has not the type of sanitizing effect which may have encouraged the article.

It is untenable to claim that the public knew of the hazards before the industry; it is equally unacceptable to reject smokers' claims for their failure to heed reports of health hazards which the industry vehemently disputed. While other courts have allowed tobacco manufacturers to maintain this inconsistent position, the *Cipollone* court declined the invitation to continue it.[100]

In *Green*[101] the jury found that the plaintiff's injuries were caused by smoking, and in *Cannon*[102] the court characterized cigarettes as "inherently bad." In the flood of recent cases, *Cipollone* poses the biggest threat to the cigarette industry. For one thing, the plaintiff amassed substantive evidence which shows that there has been a cooperative effort to deny and refute any connection between smoking and health, and also to confuse the public and maintain an open channel of doubt about scientific reports that connect smoking and health.[103] "The jury may reasonably conclude that defendants were members of and engaged in [a tobacco industry] conspiracy with full knowledge and disregard for the illness and death it would cause . . . ."[104] Plaintiff also proffered evidence "to establish an intentional and deliberate campaign to undermine and neutralize the Surgeon General's warnings."[105]

In denying defendant's motion for directed verdict, the court reached the conclusion that there was ample evidence for the jury to conclude: (1) that defendant (Liggett) "should have warned of the health hazards of smoking at various times prior to 1966[;]"[106] (2) that "Liggett's pre-1966 conduct was a proximate cause of Mrs. Cipollone's illness and death. . . . Liggett's pre-1966 warranties proximately caused Mrs. Cipollone's pre-1966 smoking and . . . such smoking contributed substantially to her injuries[;]"[107] (3) that defendants intentionally concealed and misrepresented facts concerning the state of knowledge respecting the health consequences of smoking, knowing that such representations were false, and intending that consumers would rely on them to purchase cigarettes; hence defendants induced Mrs. Cipollone to purchase cigarettes on the basis of such representations, thereby causing her injury.[108] On the basis of the facts and evidence in *Cipollone*, and following the court's rationale, it is incumbent upon the Court of Appeals to sustain the decision.

In other cases, however, several other courts have held in favor of the cigarette manufacturers. In *Palmer v. Liggett Group, Inc.*,[109] the plaintiff alleged negligent failure to provide adequate warnings about the harmful effects of smoking, and that such negligence was the proximate cause of the smoker's death. It appears that plaintiff began smoking after the Labeling Act had gone into effect.[110] Hence, the court held that the Labeling Act preempted the state

law claims, and reversed the district court. The court noted that "Congress mandated the precise wording required in the label, rather than merely establishing the 'minimum requirements' standard often found in labeling acts . . . ."[111] The District Court had held that compensatory damages did not constitute extra-statutory regulation so as to be expressly preempted; but the Court of Appeals responded that it viewed compensatory damages as "potentially regulatory in nature."[112]

> The preemption clause . . . expressly prohibits 'state law,' not merely 'statutory law[,]' from imposing any 'requirement or prohibition' different from the Act's warning label. . . . If a manufacturer's warning that complies with the Act is found inadequate under state tort theory, the damages awarded and verdict rendered against it can be viewed as state regulation: the decision effectively compels the manufacturer to alter its warnings to conform to different state law requirements as 'promulgated' by a jury's findings.[113]

Furthermore, the practicalities of such a finding would involve a conflict between federal and state laws.[114]

The court, in equating civil liability with state mandated regulation, failed to recognize that the manufacturers could respond to their civil liability by providing additional warnings to make complete the one required by Congress. The label required by the Act must always appear and may not by state requirement be altered; but while the manufacturers are not at ease to alter the required label, they are not concomitantly restrained from making such improvements on the warnings as would enhance the information to the public regarding the health hazards of smoking. The wording of the Act permits them either to alert Congress upon discovery of previously unknown health hazards so that Congress will improve the warning label to reflect the new discovery, or to voluntarily provide additional warnings that would adequately warn of such hazards.[115]

In *Roysdon v. R.J. Reynolds Tobacco Co.*,[116] the court agreed with the manufacturer that the Act was intended to shield tobacco companies from exposure to tort liability, and that to require warnings beyond the federally mandated ones would defeat the purpose of labeling uniformity.[117] In *Palmer*,[118] the District Court denied a motion addressing preemption. The court reasoned that preemption of state claims would effectively immunize the industry from all tort liability, and this outcome was not intended by Congress.

Expressing similar sentiments, the District Court in *Cipollone* held that state civil remedy does not impose a new standard for cigarette labeling; it only informs the cigarette companies that they manufacture hazardous products at the risk of incurring damage claims against them. This decision was overturned by the Third Circuit Court of Appeals on the ground that preemption was implied in the Act owing to conflict between state and federal laws.[119] Actions under state law are preempted when they challenge the adequacy of federally mandated warnings.[120]

Successful assertion of common law claims would not impose any new regulations or labeling requirements. The Supreme Court has determined that the effect of compensatory and punitive damages is not regulatory.[121] In *Silkwood v. Kerr-McGee Corp.*,[122] the defendant challenged as regulatory, and therefore preempted by federal law, an award of $10 million in punitive damages. Finding no irreconcilable conflict between state and federal laws, or frustration of federal law, the court held that punitive damages were not regulatory and therefore not preempted.

VI. COMMON KNOWLEDGE V. DENIAL OF SMOKING HAZARDS: INTERNAL INCONSISTENCY

A. *Cigarette Cases*

The defense of common knowledge of hazards has been raised by the cigarette industry.[123] In *Miller v. Brown & Williamson Tobacco Corp.*,[124] the defendant contended that "products such as cigarettes cannot be deemed defective because the alleged risks of such products have been part of the common knowledge of consumers for years."[125] The court agreed, stating that "[i]f there were contaminants other than those commonly known to be present in their cigarettes, defendants presumably could be exposed to liability . . . ."[126]

In *Cipollone* the court recognized and dealt with the internal inconsistency of the manufacturer's assertion of common knowledge.[127] The court observed that the industry had, at other times and in court, asserted that "the evidence regarding the relationship between smoking and lung cancer is deficient and unreliable and without scientific and medical basis . . . ."[128] The defendant attempted to fault Mrs. Cipollone for her failure to accept and rely upon the allegedly inaccurate and unsupported information.[129] The ultimate implication of this position is that the allegedly inaccurate, unproven, and unreliable information was sufficient warning for the smoker, thereby foreclosing recovery of damages by the plaintiff who believed the industry's version of the information. The inherent inconsistency in this position was held sufficient to permit the jury to infer that defendant's contentions lacked good faith and credibility.[130] Furthermore,

> the irony of defendants' position is compounded by defendants' further assertion that the particular cancer suffered by Mrs. Cipollone is not the type of cancer caused by or associated with smoking while simultaneously contending that there is *no* type of cancer which has been proven to be caused by smoking.[131] (Emphasis in original.)

B. *Similarly Situated Product Cases*

The *Cipollone* decision is a substantial break from other tobacco injury cases as well as other cases dealing with injuries resulting from a similarly situated product—alcohol. In *Pemberton v. American Distilled Spirits Co.,*[132] the court said that manufacturers are required to warn of hidden and unknown (as opposed to obvious and well-known) dangers in their products; but the manufacturer is entitled to rely on the good judgment and common sense of the consumer.[133]

In *Garrison v. Heublein, Inc.,*[134] the court held that, in view of the dangers involved in the use of alcoholic beverages, manufacturer has no duty to warn consumers of the common "propensities" of alcohol.[135] In *Morris v. Adolph Coors Co.,*[136] the court said that the product involved was not "unreasonably dangerous" since it was not alleged that the product was dangerous to an extent beyond the contemplation of the ordinary consumer possessed of the ordinary knowledge common to the community as to the characteristics of the product.[137]

C. *Warnings, Generally*

An otherwise perfect product may be defective because the warning is deficient.[138] In *Maize*[139] the plaintiff was allowed to recover because the manufacturer failed to adequately warn of the danger from the toxic fumes of the cleaning fluid. In *Davis v. Wyeth Lab., Inc.,*[140] action was allowed against manufacturer of polio vaccine who failed to provide adequate warning about risk of contracting polio after vaccination. Plaintiff participated in a mass polio vaccination process, but acquired and became paralyzed with polio shortly thereafter. It was unclear whether plaintiff would have chosen to proceed with the inoculation had he been adequately warned about the risk of contracting polio;[141] but information regarding the vaccine had assured its safety.[142] It is presumed that the consumer will ordinarily advert to product hazards that are commonly known, whether or not such knowledge is attributable to him. A similar presumption operates where a warning is provided regarding the particular hazards of a product. It is incumbent upon the consumer to heed the warning or bear the risk of injury. The warning must apprise the consumer of the product hazards.

VII. EFFECTIVENESS OF WARNINGS IN THE PRESENCE OF OVERPROMOTION

Extensive product advertising and promotion has been acknowledged to carry the impact of diluting warnings which would ordinarily be adequate to inform consumers about the product's hazards. In *Brazzell v. United States,*[143] the court said that the intensive advertising approach taken by the government negated the warnings about the risks involved in immunization. In the satisfaction of the duty to give adequate warnings, manufacturers may not engage in advertising and promotion activities the natural consequence of which is to dilute the warnings.[144] "The tobacco industry is one of the few examples that come to mind which give warnings of the hazards associated with its product, and then, through advertising, seeks to induce the consumer to ignore such warnings."[145]

> The cigarette cases are largely predicated on allegations that tobacco manufacturers have not adequately warned consumers of the dangers attributed to smoking, but that to the contrary, their advertising and promotional practices have tended to allay the health concerns of the smoking public (by, for instance, associating smoking with images of health, glamour, success and happiness).[146]

In a case involving Liggett & Meyers Tobacco Company, the F.T.C. ordered the company to stop advertising its cigarettes as having no adverse effects.[147] The court noted that even the company's witnesses did not entertain the view that smoking was harmless.[148] Even in the presence of preemption, the F.C.C. granted a petition requesting significant television time for anti-smoking effort to combat the implications of televised commercials promoting cigarettes.[149] In sustaining the granting of the petition, the court stated that cigarette warnings were inadequate, and "merely flash[ed] danger signals without either particularizing the danger or providing facts on which it may be appraised."[150]

The television advertising by the cigarette companies reeled in huge profits, but following the decision, and after the anti-smoking campaign became successful through television, the cigarette companies did not mount a strong opposition to a ban on televised advertising of their products.[151] There were movements and organizations formed to combat cigarette advertising, particularly where such advertising made inaccurate claims.[152] These groups employed slogans designed to counteract the effectiveness of the cigarette advertisements and highlight the "advertisers' disregard of the health consequences of smoking [as well as] the insidious psychological appeal of the advertisements."[153] One example of such slogans is "The world is my ashtray," found interposed with an advertisement featuring the Marlboro Man and his wide open range.[154]

How effectively are cigarette warnings displayed? Generally the distance and speed of view only allow the viewer the impact of the attractive woman elegantly displayed with a cigarette and engaged in some enjoyable activity that appeals to the senses. In other instances, males appearing in these ads are given the appearance of ruggedness and riding healthfully on the open and unpolluted terrain looking toward the sunset—e.g., the Marlboro Man. In other cases similar to beer ads, some of the advertisements take a prurient nature.

Some cigarette advertisements have made particular spurious health claims. "For example, young smokers were

at one time assured that 'Chesterfield is Best For You' and that 'Nose, throat, accessory organs [are] not adversely affected by smoking Chesterfield.' "[155] In the 1950's cigarette companies marketed their products claiming reduced level and concentration of certain carcinogenic and other deleterious substances.[156] The introduction of the "filter" was hailed to reduce the tar and nicotine contents of cigarettes; hence many smokers switched to reflect this assurance of healthier cigarettes.[157] Even though the companies were hesitant to accept the implication that their previous products were unhealthy, statistical research confirmed that filters reduced the risk of illnesses induced by smoking.[158] These claims were perceived by the target audience as making positive health assurances; consequently, they had the impact of overwhelming health related fears that may have emanated from the tobacco hazards that were in the domain of common knowledge. The low tar wars of the period led to deceitful competition which ended in 1960 following voluntary agreement by the companies and after the Federal Trade Commission prohibited the deceitful claims about tar and nicotine contents.[159]

In *Lorillard v. Federal Trade Comm'n,*[160] the Fourth Circuit Court of Appeals held that the advertising claims by the company were false, deceptive and misleading, thereby warranting the cease and desist order issued by the Federal Trade Commission. The company had claimed that the advertised cigarettes contained less of certain popular toxic ingredients, such as nicotine, tars, resins and other irritants, than other cigarettes compared.[161] One of the typical advertisements presented to the court read:

> OLD GOLDS FOUND
> LOWEST IN NICOTINE
> OLD GOLDS FOUND
> LOWEST IN THROAT-IRRITATING
> TARS AND RESINS
>
> See impartial Test by Reader's Digest July Issue.
>
> See How Your Brand Compares with Old Gold.
>
> Reader's Digest assigned a scientific testing laboratory to find out about cigarettes. They tested seven leading cigarettes and Reader's Digest published the results.
>
> The cigarette whose smoke was lowest in nicotine was Old Gold. The cigarette with the least throat-irritating tars and resins was Old Gold.[162]

The court noted that

> [t]he fault with this advertising was not that it did not print all that the Reader's Digest article said, but that it printed a small part thereof in such a way as to create an entirely false and misleading impression, not only as to what was said in the article, but also as to the quality of the company's cigarettes.[163]

The injunction order of the FTC was sustained.

The injunction only serves to prevent future uses of the advertising, but the company has already benefited from the violation and does not incur any pecuniary loss to compel it to desist from such practices. Other companies may engage in the same practice expecting no other form of sanction than the injunction. In this light, it is a beneficial risk for a company to take because it makes a quick impression upon health-conscious smokers and attracts them before the advertising is stopped by the FTC. This is even more so since the company is not forced to replace the advertising with a statement of the court's conclusion or a corrected version of the advertisement.

In *Cooper v. R.J. Reynolds,*[164] the company advertised a brand of its cigarettes claiming, "20,000 doctors say that . . . cigarettes are healthful."[165] Obviously, these advertisements are intended by the companies to overwhelm any health related fears generated by both anti-smoking campaigns and the surgeon general's warnings.

> Interestingly, preemption is another arena in which the industry proclaims itself judge and jury. When it wishes to include more than what the Labeling Act calls for, it does not regard itself as preempted from doing so. Thus, pursuant to agreement rather than by statutory or regulatory fiat, companies list the level of tar and nicotine in an obvious statement regarding the health issue. In fact, it chooses not merely to state a level, but to do so in a manner that appears to add governmental approval, similar to finding 'U.S. Approved' stamped on a cut of meat.[166]

Under these circumstances, it would be fair to conclude that the warning notices and official admonitions relating to the hazards of smoking fail to achieve their intended objectives.[167]

VIII. CONCLUSION

It has generally been claimed by tobacco interests that "all those who have attempted to prove the evil effects of tobacco have failed to establish a valid scientific case[;]"[168] and that the alleged adverse effects of smoking have not been conclusively proven.[169] The available information concerning the hazards of smoking may not alter the pattern of post-1966 judicial decisions, but it is essential for a plaintiff who denominates his claims pre- and post-1966. More significantly, if *Cipollone* is sustained on appeal, this type of information would, at least, complement it and enable future pre-1966 claims to survive. In addition, it may advance the theory of addiction.[170]

It must not be ignored that the health and safety of the public, particularly those who would be deterred from smoking if they had full, unadulterated information about the health hazards of smoking, are the major concern of the effort to achieve adequate warning. Whether the scien-

tific evidence is conclusive or not, there is enough consensus in the medical community to warrant inclusion of warnings apprising the consuming public of suspected or disputed hazards. The public is safer when preventive and precautionary measures are taken. Waiting for conclusive evidence before warnings are put forward ignores the fact that the consumers are human beings, not guinea pigs or other laboratory animals.

Cipollone has put a remarkable burden upon the cigarette industry with regard to their "common knowledge" defense. This defense has been successful for the manufacturers of alcoholic beverages, particularly since Comment i of Restatement (Second) of Torts, Section 402A, uses alcohol and tobacco as examples of products which are theoretically purged of their hazardous nature by the mere judicial acceptance of the assertion that everyone knows, or should know, of such hazards. *Cipollone* effectively prevents the cigarette industry from claiming that it did not know of the hazardous nature of its products while it seeks to be purged of liability by claiming that its consumers know and should have accepted the same hazards vehemently disputed by the industry.

Congress may eventually take steps to rectify the preemption problem which forms the latest defense for the cigarette industry. This is, however, unlikely at this stage primarily because the Supreme Court has not said a word about the effect of the preemptive force of the Labeling Act on state-based tort claims brought against cigarette companies. At present, the circuit courts of appeal have had the last word in tobacco products liability litigation.

If *Cipollone* is sustained on appeal, it will also have the tertiary effect of raising concerns in the alcohol industry. This is primarily because tobacco and alcohol have traditionally been considered to have the same status. The failure of the alcohol industry to provide warnings is minimized by the fact that the industry, in contrast to the cigarette industry, desisted from categorical challenges and denials of commonly known and accepted hazards inherent in the consumption of alcoholic beverages.

In anticipation of successful products liability suits against the industry, and in the face of successful anti-smoking efforts, cigarette companies have intensified their efforts to acquire new product lines and diversify their stock portfolio in the junk food market. This will, in the end, help cushion the blow of successful litigation against the industry; but one recurring problem is the economics of the situation: the courts and Congress will have to make their decision(s) weighing the burden of lost taxes and jobs as well as the health hazards and injuries encountered by smokers.

ENDNOTES

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

2 Borel v. Fibreboard Paper Prod. Corp., 493 F. 2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974) (This case traces the history of medical and scientific research and knowledge relating to asbestos related diseases. It eventually became the cornerstone of asbestos injury litigations.). *See also* **P. Brodeur, Outrageous Misconduct** (1985).

3 *See* Crist & Majoras, infra note 99 at 559 (Attorneys for a tobacco company arguing in favor of a defense of common knowledge.).

4 *See* **The Tobacco Institute, The Cigarette Controversy: Why More Research Is Needed** (Feb. 1984); **The Tobacco Institute, Cigarette Smoking and Chronic Obstructive Lung Diseases: The Major Gaps in Knowledge** (1984). The titles of these materials suggest their dispositions.

5 **R. Walker Under Fire** 3 (1984).

6 **E. Northrup, Science Looks at Smoking** 117 (1957).

7 R. Walker, supra note 5 at 4, and corresponding footnote.

8 *Id.* at 6. *See also* C. **Van Proosdy, Smoking** 12 (1960).

9 *Id.* at 37.

10 R. Walker, *supra* note 5 at 3.

11 Proosdy, *supra* note 8 at 62.

12 *Id.* at 63.

13 *Id.* at 255.

14 *Id.* at 256. *But see* Northrup, *supra* note 6 at 84 ("Despite the fact that women are catching up with men in the smoking habit, the male-female ratio of lung cancer is widening instead of closing.").

15 Northrup, *supra* note 6 at 43.

16 *Id.* at 42.

17 *Id.* at 102-3. It is pointed out that the use of dietary fats experienced the same trend as cigarettes during that time, thus suggesting that certain relevant individual characteristics were ignored in the investigations. Id. In addition, it is doubtful that the impact of reduced consumption would be recognized in the same time frame when the reduction occurred. This is because (1) World War II lasted only six years; (2) tobacco injuries normally span more than six years of development. It would be more convincing if the impact of reduced consumption had been recognized at another point in the trajectory, rather than within the same period as the reduction.

18 **P. Schrumpf-Pierron, Tobacco and Physical Efficiency,** *Foreword* at V (1927). It is also indicated that a 'mass of clinical material regarding the physical effects of tobacco is very great, but much of it is inaccessible because printed in the periodical literature of many countries and in many languages." *Id.*

19 *Id.* at 8.

20 *Id.* at 53. *See also* **F. J. Pack, Tobacco and Human Efficiency** (1918).

21 R. Walker, *supra* note 5 at 72-3.

22 *Id.*

23 *See* Press Release, Saturday, March 26, 1988, 4, at 1.8, *infra* note 103.

24 R. Walker, *supra* note 5 at 73.

25 *Id. See also supra* note 23 at 7-10, at 3-3.13. The released documents extensively document the industry's internal memo and research reports which reflect the industry's cover-up and information designed to generate massive confusion among smokers. *See supra* note 103 for correspondence information.

26 R. Walker, *supra* note 5 at 119.

27 Liggett & Meyers Tobacco Co. v. Cannon, 178 S.W. 1009 (Tenn. 1915).

28 *Id.* at 1009.

29 *Id.* at 1010. The court's rationale here suggests (1) that there has been early judicial acceptance of the same health hazards which cigarette manufacturers have for long disputed, and that this should have alerted the industry to take steps to avoid further injuries; (2) assumption of risk on the part of the consumer; (3) universal knowledge of the hazardous nature of the product. Assumption of risk is presently legally presumed by operation of the Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, sec. 4, 79 Stat. 283 (1965), codified at 15 U.S.C. 1333 (1976).

30 Block v. Liggett & Meyers Tobacco Co., 296 N.Y.S. 922 (App. Term, 1st Dep't 1937).

31 Id. at 923. The use of "strangers" suggests the lack of privity in this case.

32 De Lape v. Liggett & Meyers Tobacco Co., 25 F. Supp. 1006 (1939).

33 Plaintiff's face was burned by sparks and blue or greenish-blue flame produced by the cigarette he was smoking. *Id.*

34 *See, e.g.*, Pillars v. R.J. Reynolds Tobacco Co., 78 So. 365 (1918) (human toe); Foley v. Liggett & Meyers Tobacco Co., 241 N.Y.S. 233 (App. Term 1930), *aff'd* 249 N.Y.S. 924 (1931) (mice); Corum v. R.J. Reynolds Tobacco Co., 171 S.E. 78 (1933) (fish hook); Liggett & Meyers Tobacco Co. v. Wallace, 69 S.W. 2d 857 (Tex. Civ. App. 1934) (particles of metal); Liggett & Meyers Tobacco Co. v. Rankin, 54 S.W.2d 612 (1932) (worms).

35 Ross v. Philip Morris & Co., 328 F. 2d 3 (1964).

36 *Id.* at 8. *See also* Williams v. Coca-Cola Bottling Co., 285 S.W. 2d 53, 55 (Mo. App. 1955) ("Considerations of public policy . . . and the protection of the health of the consuming public require that an obligation be placed upon the manufacturer . . . to see to it, at his peril, that the product he offers the general public is fit for the purpose for which it is intended. . . .").

37 328 F. 2d at 8. Compare this with passages discussing the scientific and medical research evidence concerning the hazards of smoking. *See supra* notes 3-26 and corresponding text.

38 328 F. 2d at 8-9.

39 *Id.* at 9-10.

40 In penal law, punishment (in a sense, damages awarded the state for the corruption of public morals and social sanctity) is graduated relative to a combined factor of intent and severity. In a real sense, tort damages take similar posture.

41 Pritchard v. Liggett & Meyers Tobacco Co., 350 F. 2d 479 (3rd Cir. 1965).

42 *Id.* at 483.

43 *Id.* "Reliance of the buyer is not a requisite of either the warranty or a right of action for its breach." *Id.*

44 Green v. American Tobacco Co., 325 F.2d 673 (5th Cir. 1963)

45 *Id.* at 679. The court went on to state that "implied warranty encompasses only the ordinary use or purposes for which the article is sold[,]" and within the standard of ordinary use and purposes, smoking 1-3 packs of cigarettes a day is not unusual and can be reasonably expected among smokers. It seems that the court intended a cut-off of three packs for normal daily consumption.

46 325 F. 2d at 676-7. The scientific evidence accepted by the court had been previously disputed by tobacco interests. See, *e.g.*, **Northrup.** The author contends that much of the association between smoking and health impairment is baseless and the result of overzealous, fanatical scientists and a sensationalist press. The evidence is labeled as statistical, as opposed to more reliable experimental evidence to the contrary.

47 325 F. 2d at 677 ("It is possible . . . that those findings are consistent with the standard of reasonableness, for . . . 'strict liability on the warranty of wholesomeness, without regard to negligence,' does not mean that goods are warranted to be foolproof or incapable of producing injury. . . ."). *See also* Lartigue v. R. J. Reynolds Tobacco Co., 317 F. 2d 19, 37 (5th Cir. 1963).

48 325 F. 2d at 679.

49 *Id.* at 680.

50 *Id.* at 681.

51 Pub. L. No. 89-92, sec. 4, 79 Stat. 283 (1965), codified at 15 U.S.C. 1333 (1976).

52 *See* notes 108-120, *infra*, and accompanying text.

53 *See* Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 **So. Cal. L. Rev.** 1423, n. 54 (1980).

54 *See, e.g.*, Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 141-143 (1963).

55 Garner, *supra* note 53 at 1453-54.

56 15 U.S.C. 1334(a) (1982).

57 15 U.S.C. 1334(b) (1982).

58 *See, e.g.*, Roysdon v. R.J. Reynolds Tobacco Co., 623 F. Supp. 1189 (E.D. Tenn. 1985), *aff'd*, 849 F. 2d 230 (6th Cir. 1988), *reh'g denied*, 1988 U.S. App. Lexis 14060 (6th Cir. Aug.1, 1988); Cipollone v. Liggett Group, Inc., 789 F. 2d 181 (3rd Cir. 1986).

59 *See* Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146 (D.N.J. 1984), *rev'd in part and remanded*, 789 F. 2d 181 (3rd Cir. 1986), *cert. denied*, 479 U.S. 1043, 107 S. Ct. 907 (1987).

60 *Cipollone*, 593 F. Supp. 1146 (D.N.J. 1984).

61 Cipollone, 683 F. Supp. 1487 (D.N.J. 1988).

62 The value of the windfall profits is the total of all the damages that would have been paid to smoking victims who either died, and were unable to claim damages, or did not choose to sue the industry, plus the value of the suits won by the industry and their chilling effect, less the costs of maintaining their tenacious defense and risk management/control mechanism.

63 Garner, *supra* note 53 at 1429.

64 *Id.* at 1430. *See also* **E. Corti, American History of Smoking** 42-3 (1932) (Several observations of addiction are discussed in this book).

65 Garner, *supra* note 53 at 1430.

66 *Id.* at 1431 (The warning requirement, in its present status, is vulnerable to attack on the grounds of inadequacy).

67 **Van Proosdy** *supra* note 8 at 258 (Discussing the influence of smoking on the individual and its role in social medicine).

68 *Id.* at *Foreword* V.

69 *Id.* at 12.

70 *U.S. Dept of Health, Education, and Welfare, Smoking and Health, Report of the Surgeon General*, Ch. 16, at 14 (1979) (hereafter *Surgeon General's Report). See also* **Northrup,** *supra* note 6, at 180 ("[I]t is wise to remember that for many persons, breaking the habit is a nerve-wracking experience; indeed it is one that few individuals manage to effect gracefully. Nail-biting, wife-nagging and similar frantic activities commonly accompany the swearing-off process.").

71 *Id. See also* **Van Proosdy** *supra* note 8 at 256-7.

72 *Surgeon General's Report, supra* note 70. *See also* **Van Proosdy** *supra* note 8 at 258.

73 *Id.* at 255.

74 Garner, *supra* note 53 at 1433.

75 *Id.* at 1434.

76 *See, e.g.*, The 1984 amendments to the Labeling Act requiring that the warnings be rotated and appear in various forms of the industry's permitted methods of advertising. 15 U.S.C. 1333(a)(1) (1984); 15 U.S.C. 1331(a)(2) (Supp. III 1985).

77 514 S.W. 2d 429 (Tex. 1974).

78 *Id.* at 432.

79 *Id.* at 431.

80 *Id.*

81 Nevertheless, the Texas Supreme Court failed to uphold the judgment stating that it was unprepared to predicate a conclusion of inadequacy of warning, in other words, liability, on the facts known at time of trial but not known when the drug was marketed. The court's reasoning was affected by the fact that the drug is *generally beneficial or good. Id.* at 433. This characterization hardly applies to cigarettes.

82 **Restatement (Second) of Torts** Sec. 402B (1965). This provision expressly removes any requirement of fraud, negligence or privity of contract from the determination of liability.

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

84 *Id.*

85 *See supra* note 53, at 1423-24 ("[O]nly the tobacco industry can boast of defeating every attempt to hold it accountable for injuries caused by its products."). *See also* Levin, *infra* note 96, at 200.

86 Gartner *supra* note 53, at 1423.

87 *See* **Restatement (second) of Torts** Sec. 402A (1965).

88 *See* **Kimble & Lesher, Products Liability** 178-179 Sec. 155 (1979).

89 *Id.* at 1985 Pocket Part.

90 *See id.* and cases cited therein.

91 Kimble *supra* note 88.

92 *Id.*

93 *Id.* at Sec. 193. *See also supra* note 87 at Comment j.

94 *See* D'Arienzo v. Clairol, Inc., 125 N.J. Super. 224, 310 A.2d 106 (1973).

95 *See* 17 American Bar Assoc., The Brief, Tort & Insurance Practice Section, No. 4, p. 12, 29 (Eaton & Woltjen, *Product Warnings in the Market Place*) (Summer 1988).

96 Garner, *supra* note 53 at 1424. The primary explanation given for this phenomenon is the strong economic hold which the tobacco industry has on the tobacco producing areas. "Indeed, tobacco sales constitute a major portion of the economy from the standpoint of both the gross national product and tax revenues." *See* Levin, *The Liability of Tobacco Companies—Should Their Ashes be Kicked?*, 29 **Ariz L. Rev.** 195, 197 (1987).

97 *Id.*

98 The lobby groups of the tobacco companies include the National Tobacco Institute and its affiliates, Candy and Cigarette Distributors, Operators of Restaurants and Taverns, etc. *See* **Feldman, Huang, Lyman & Sobeck, Legal Aspects of Smoking Regulation** 27-29 (1978).

99 *See* Crist & Majoras, *The "New" Wave in Smoking and Health Litigation—Is Anything Really So New?*, 54 **Tenn L. Rev.** 551, 601 (1987) (The authors are represented as lawyers for R.J. Reynolds Tobacco Co.). The industry may eventually find out that the Labeling Act does not have the type of sanitizing effect which may have encouraged the publication of the article by these lawyers.

100 *Compare Roysdon*, 849 F. 2d 230; Miller v. Brown & Williamson Tobacco Co., 679 F. Supp. 485 (E.D. Pa. 1988); with *Cipollone*, 683 F. Supp. 1487, 1492 (D.N.J. 1988).

101 *Green*, 325 F. 2d at 676-7.

102 *Cannon*, 178 S.W. 1009.

103 Tobacco Products Liability Project, *Cipollone Documents and Press Release*, Saturday, March 26, 1988. For document summaries and supplements of the evidence discovered in the process of *Cipollone*, write to: Tobacco Products Liability Project, 400 Huntington Avenue, Boston, MA 02115 or call (617) 437-2026 (Some of these materials may cost money to cover reproduction costs).

104 683 F. Supp. at 1493.

105 *Id.* at n. 3.

106 683 F. Supp. at 1496. The other defendants were granted directed verdicts because the plaintiff did not smoke their cigarettes prior to 1966 when the Labeling Act took effect; nevertheless, the implication of the finding against Liggett paints broadly across the industry.

107 *Id.* at 1497 and accompanying n. 13.

108 *Id.* at 1500.

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

110 *Id.* at 622. "[The court and the parties] agree[d] that the issue of the Act's preemptive force controls the disposition of virtually the entire case." *Id.* Recall that liability in *Cipollone* was premised on the defendant's pre-1966 activities and the smoker's injuries attributable to that period.

111 *Id.* at 623, n. 5. The Court of Appeals' rationale here fails to make what seems to be an important distinction: the warnings provided by the Act are framed such that political bodies (states) are precluded from requiring additional warnings, whereas the industry has the latitude to add to, or extend, the warnings so as to reflect future findings of hazard. *See* text to notes 54-55.

112 825 F.2d at 625, n. 10.

113 *Id.* at 627.

114 *Id.*

> Once a jury has found a label inadequate under state law, and the manufacturer liable for damages for negligently employing it, it is unthinkable that any manufacturer would not immediately take steps to minimize its exposure to continued liability. The most obvious change it can take . . . is to change its label. Effecting such a change in the manufacturer's behavior and imposing such additional warning requirements is the very action preempted by section 1334 of the Act.

Id. at 627-8.

115 The primary presumption underlying this analysis is that the Act essentially imposes a public policy liability upon the industry; thus, in that continuum, the industry may provide information that fulfills this liability, whereas it, arguably, may not include in the warning any information the natural consequence of which is to improve the purchase of cigarettes. Any selfserving disclosures may be presumptively suspect, if not automatic ground for sanctions.

116 *Roysdon*, 623 F. Supp. 1189.

117 *Id.* at 1191.

118 Palmer v. Liggett Group, Inc., 633 F. Supp. 1171 (D. MASS. 1986), *reversed*, 825 F. 2d 620 (1st Cir. 1987).

119 Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3rd Cir. 1986). *See also* and *compare* notes 110-114 and accompanying text. The impartiality of the appellate decision has been questioned because the judge had previously represented a major tobacco company in an identical case before he became a judge. *See* Levin, *supra* note 96 at 232.

120 *Palmer*, 825 F. 2d. 620.

121 *See Palmer*, 633 F. Supp. at 1175 and cases cited therein.

122 464 U.S. 238 (1984).

123 *See* Crist & Majoras, *supra* note 99.

124 Miller v. Brown & Williamson Tobacco Corp., 679 F. Supp. 485 (E.D. Pa. 1988).

125 *Id.* at 487. *See also* **Restatement (Second) or Torts** Sec. 402A, Comment i (1965) ("Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful . . . .").

126 *Miller*, 679 F. Supp. at 488.

127 683 F. Supp. at 1492.

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.*

132 Pemberton v. American Distilled Spirits Co., 664 S.W. 2d 690 (Tenn. 1984).

133 *Id.* at 693. Father brought action for the death of his son from alcohol overdose. The Tennessee Supreme Court held that there was no duty to warn of dangers apparent to the consumer. *Id.*

134 Garrison v. Heublein, Inc., 673 F.2d 189 (7th Cir. 1982).

135 *Id.* at 192. The plaintiff had alleged physical and mental injuries suffered as a result of consuming the defendant's alcoholic beverages over a twenty year period.

136 Morris v. Adolph Coors Co., 735 S.W. 2d 578 (Tex. App: Fort Worth 1987).

137 *Id.* at 583. The plaintiff was injured in an automobile collision with an intoxicated teenage driver. *See also* **Restatement (Second) of Torts** Sec. 402A, Comment i (1965)("Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics . . . .").

138 *See* Ferebee v. Chevron Chemical Co., 736 F. 2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062 (1985); Davis v. Wyeth Lab., Inc., 399 F. 2d 121 (9th Cir. 1968); Freund v. Cellofilm Properties, Inc., 87 N.J. 229, 432 A. 2d 925 (1981); Maize v. Atlantic Refining Co., 352 Pa. 51, 41 A. 2d 850 (1945).

139 *Maize*, 352 Pa. 51, 41 A. 2d 850.

140 *Davis*, 399 F. 2d 121.

141 *Id.* at 124. However, the plaintiff is entitled to the presumption that he would have read the warning.

142 *Id.* at 125.

143 Brazzell v. United States, 633 F. Supp. 62 (N.D. Iowa 1985).

144 *Supra* note 95 at 29-30.

145 *See* **Kimble & Lesher, supra** role 88 at 199 Sec. 193, n.13.

146 *See* Crist & Majoras, *supra* note 99 at 559.

147 Matter of Liggett & Meyers Tobacco Co., 55 F.T.C. 354 (1958).

148 *Id.* at 360. For an extensive list of (potential) express warranties by the tobacco industry, *see* Levin, *supra* note 96, at 236. These ads and others communicate impressions of safety, even if one smoked for a long time. *Id.*

149 *See* Banzhaf v. F.C.C., 405 F. 2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). Congress followed in this step by enacting the 1970 and other amendments to the warning label. *See* Levin, *supra* note 96 at 210. For examination of the inadequacy of these warnings, *see id.* at 211-15.

150 405 F. 2d at 1089.

151 *See* **Walker,** *supra* note 5 at 100-101 (1984).

152 *Id.*

153 *Id.*

154 *Id.*

155 *See* Garner, *supra* note 53 at 1447. "If physicians can be persuaded to disregard obvious drug risks, certainly teenagers can be persuaded to disregard less than obvious cigarette risks." *Id.* at 1443.

156 **Walker,** *supra* note 5 at 77.

157 *Id.*

158 *Id.*

159 *Id.* at 76 (cited *New Yorker*, 73 Feb. 25, 1964).

160 Lorillard v. Federal Trade Comm'n, 186 F. 2d 52 (4th Cir. 1950).

161 For the quality and health claims made by the company, *see id.* at 54-55.

162 *Id.* at 57. The rest of the advertisement continues *Id.* at 58.

163 *Id.*

164 Cooper v. R.J. Reynolds, 234 F. 2d 170 (1st Cir. 1956).

165 *Id.* at 173, n. 1. The same brand of cigarettes was claimed to be "harmless to the respiratory system." *Id.*

166 **Levin,** *supra* note 96 at 235 (citations omitted).

167 The risk of addiction and relevant warnings to that effect are pertinent in any effort to improve the efficacy of the warnings on cigarette packages and advertisements. *See* Garner, *supra* note 53 at 1437.

168 **Northrup,** *supra* note 6 at 179.

169 *See* **Feldman,** *supra* note 98 at 28, n. 17.

170 *See Cipollone*, 683 F. Supp. at 1498. *See also* Garner, *supra* note 53 at 1434 (discussing the viability of the failure to warn of addiction theory).