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Richard N. Pearson

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I. INTRODUCTION

At the end—indeed on the last night—of the 1994 legislative session, the Florida Legislature passed a law authorizing the State to seek reimbursement for Medicaid-generated medical expenses.[1] The article

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1. 1994 Fla. Laws ch. 94-251 (codified at FLA. STAT. §§ 16.59, 409.907, 409.910 (Supp. 1994)).

by Professor Van Alstyne, *Denying Due Process in the Florida Courts: A Commentary on the 1994 Medicaid Third-Party Liability Act of Florida*,[2] suggests that the Act presents significant issues of constitutionality under the Constitution of the United States.[3] The Act may also fall short of complying with the Florida Constitution.[4] It is not my aim here to discuss the constitutional issues. Nor will I address the need or desirability of the State to look outside traditional federal and state funding for the Medicaid program.[5] Anyone who pays moderate attention to current events knows that a wide array of public welfare programs, including Medicaid, are in deep trouble. Rather, my purpose is to try to determine just how the Act goes about implementing its stated goal of looking to outside sources for reimbursement of Medicaid-generated medical expenses. I will also express some thoughts on whether the Act is the best way to impose medical expense liability on those outside sources.

The State of Florida has already brought suit against a variety of defendants.[6] Although the 1995 Florida Legislature repealed the Act,[7] the Governor of Florida vetoed the repealing Act.[8] Perhaps as a hedge against repeal, the Complaint alleges causes of action "in both equity and common law" as well as under the Act.[9] Indeed, other states have

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2. William W. Van Alstyne, *Denying Due Process in the Florida Courts: A Commentary on the 1994 Medicaid Third-Party Liability Act of Florida*, 46 FLA. L. REV. 563 (1994).

3. *See id.* at 564-65, 583-87.

4. A declaratory judgment action challenging the Act on a variety of grounds, both federal and state, has been filed by several plaintiffs. *See* Associated Indus. of Fla., Inc. v. Florida, Civ. No. 94-3128 (Fla. 2d Cir. filed June 30, 1994), *appeal docketed*, No. 86,213 (Fla. Aug. 9, 1995).

5. A bill authorizing the United States Attorney General to pursue similar claims for reimbursement of federal health care expenditures made necessary by a condition caused by the use of tobacco products was introduced into the Senate in 1994. *See* S. 2245, 103d Cong., 2d Sess. (1994).

6. Florida v. American Tobacco Co., Civ. No. 95-1466AO (Fla. 15th Cir. Feb. 21, 1995). This case has been stayed pending the outcome of Florida v. Associated Indus. of Fla., Inc., No. 86,213 (Fla. filed Aug. 9, 1995). *American Tobacco Co.* (Civ. No. 95-1466AO) (order granting stay).

7. Fla. SB 42 (1995).

8. FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1995 REGULAR SESSION, HISTORY OF SENATE BILLS at 36, SB 42.

9. Complaint ¶ 3, *American Tobacco Co.* (Civ. No. 95-1466AO). Indeed, one of the lawyers representing the State recently observed that the Act "merely codified common law," and thus is not necessary for the success of the suit. *See* Claudia MacLachlan, *Recent Tobacco Rulings Give Both Sides the Jitters*, NAT'L L.J., June 12, 1995, at B1, B3. But in West Virginia, a trial judge, in dismissing most of the State's claims for Medicaid reimbursement, ruled that the State Attorney General had no common law authority to bring the action. *See* Claudia MacLachlan, *Cigarette Makers Claim Gain in Court*, NAT'L L.J., May 15, 1995, at B1.

brought similar actions without statutory authority.[10]

Based on the discussion surrounding the adoption of the Act, the Legislature's clear purpose in enacting it was to seek reimbursement of medical expenditures made on behalf of recipients that are attributable to cigarette smoking.[11] Although the Act itself is not so limited, most of the discussion in this commentary will involve such manufacturers.

II. THE NATURE OF THE STATUTORY CAUSE OF ACTION

The Act is very confusing, and shows all the earmarks of the last-minute, inadequately considered legislation that it is. The nature of the cause, or causes, of action that are authorized by the Act is not clear.

The Act carries forward the right of the State to subrogation against those who have caused the need for Medicaid medical expenses and who are liable to the recipient on any theory.[12] Subrogation is a legal device by which one person, the subrogee, has paid money to another person, the subrogor, which should have been paid by a third person.[13] It is said that the subrogee "stand[s] in the shoes" of the subrogor, and enforces the subrogor's right to payment.[14] Subrogation commonly arises in insurance contexts, in which the insurer has paid the insured, pursuant to the policy, an amount the insured is also entitled to recover from someone else.[15] For example, a property damage carrier may pay its insured for damage to an automobile arising from an accident in which another person is liable to the insured in tort. The insurer is subrogated to the right that the insured has to recover from that other person.[16]

In the Medicaid context, the pre-1994 Medicaid statute specifically provided for subrogation on behalf of the State "to any rights that an applicant, recipient, or legal representative has to any third-party benefit

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10. Claims have been filed against tobacco companies by the States of Mississippi, *see* Michael Janofsky, *Mississippi Seeks Damages from Tobacco Companies*, N.Y. TIMES, May 24, 1994, at A12, and Minnesota, *see* Barry Meier, *Health Insurer Joins Minnesota's Suit Against Tobacco Producers*, N.Y. TIMES, Aug. 18, 1994, at B10. As the latter headline indicates, a health insurer also seeks reimbursement of tobacco-related insurance payments in the Minnesota suit. *See id.*

11. *See, e.g.*, Tim Nickens, *Florida in Forefront of Smoking Fight*, MIAMI HERALD, May 27, 1994, at 1A.

12. *See* FLA. STAT. § 409.910(1) (Supp. 1994).

13. *See* ROBERT E. KEETON & ALAN I. WIDDIS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES 219 (1988).

14. *Id.*

15. *Id.*

16. *Id.* Professor Van Alstyne's hypotheticals, and his analysis of them, suggest that he views subrogation as at least one theory of recovery established by the Act. *See* Van Alstyne, *supra* note 2, at 567-71.

for the full amount of medical assistance provided by Medicaid."[17] This subrogation right was not changed by the 1994 Act.[18]

It seems unlikely, however, that the State will pursue the claim against the tobacco manufacturers by way of subrogation, notwithstanding the subrogation language in the statute. The statute specifically provides that the State's recovery is not to be affected by the defenses, such as comparative negligence, normally applicable in an action brought by or through the injured persons.[19] Proceeding by way of subrogation also would raise a number of procedural problems. Would the State, for example, be able to present a subrogation claim against the defendants separate from any tort claims brought by the recipients for their personal injuries? Would the ability of the State to pursue a subrogation action in Florida be affected by the class action filed in Louisiana against cigarette manufacturers on behalf of "all nicotine dependent persons," their representatives and families?[20]

Even though a subrogation claim against the tobacco companies is theoretically possible under the Act, the principal thrust of the Act, as reflected in the Complaint,[21] is to create an independent action in the State.[22] But the nature of the independent action is not clear. Does the Act create an entirely new cause of action in the State, apart from any cause of action the recipients may have? Or does recovery by the State depend on a wrong to the recipients, thus making the right of the State in some sense derivative from that of the recipients?

A theory of recovery entirely independent of any wrong to the recipients could take either of two forms, neither of which is very likely. One theory of recovery might be based on cause. It would not be necessary for the State to prove that the defendants committed any wrong—only that they caused a condition requiring medical expenses compensated through Medicaid. Or it might be that the Act requires a wrong, but one to the State and not to the recipients. If a wrong is required, the Act certainly does not define what such a wrong might be.

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17. FLA. STAT. § 409.910(6)(b) (1993).

18. *See* FLA. STAT. § 409.910(6)(b) (Supp. 1994).

19. *Id.* § 409.910(1).

20. *See* Castano v. American Tobacco Co., 160 F.R.D. 544, 549 (E.D. La. 1995) (certifying the class). Whether that decision will survive on appeal is open to question. *See In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1304 (7th Cir. 1995) (refusing certification of a class composed of hemophiliacs who alleged that they were infected with HIV as a result of using blood concentrate manufactured by the defendants).

21. *See* Complaint, *American Tobacco Co.* (Civ. No. 95-1466AO).

22. FLA. STAT. § 409.910(6)(a) (Supp. 1994) provides that the State "has a cause of action against a liable third party to recover the full amount of medical assistance provided by Medicaid, and such cause of action is independent of any rights or causes of action of the recipient." *Id.*

There is some support for the conclusion that the Act requires the State to prove that the defendants committed some established wrong to the recipients, from which the State derives its right to recover. The Act authorizes the State to seek reimbursement from "liable third parties,"[23] a term that is not defined in the Act. But the term, and the absence of any definition, does suggest that recovery may be had from those who are liable apart from the Act—that is, those who would have been, and are, liable to the recipients on some theory that predates the Act. On this view, the Act creates a new plaintiff for an old cause of action, and not a new cause of action as such. And to the extent that the Complaint sheds any light on the matter, the counts are all phrased in traditional tort terms. My discussion here will proceed on the assumption that the Act does not create an entirely new cause of action.

The provision added by the Act that creates the State's cause of action is:

> (9) 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.
>
> (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

23. *Id.* § 409.910(9).

third party individually.[24]

If, as I have suggested, this Act does not create an entirely new theory of recovery, what sorts of existing theories of recovery, involving wrongs to the Medicaid recipients, are available to the State? In the following discussion, I will focus primarily on what might be characterized as traditional products liability actions, although I will mention briefly other theories set out in the Complaint.

A. Products Liability—The Requirement of a Defect

Under traditional products liability law—even under strict liability—it is not enough for the plaintiff to prove that a product made and sold by the defendant caused the plaintiff's harm. The product must be defective in some way as well.[25]

The tentative draft of the *Restatement (Third) of Torts: Products Liability* (*Restatement of Products Liability*)[26] has adopted what has emerged as the uniformly accepted categorization of product defects. A product may be defective because it has a manufacturing defect, there was inadequate warning of non-obvious dangerous characteristics, or the design was unreasonably unsafe.[27] Thus, the mere fact that cigarettes cause harm does not make them defective.[28]

So far, no one has claimed that the harm caused by cigarette smoking results from manufacturing defects—unintended departure of cigarettes from their design.[29] Indeed, the complaint is that cigarettes are harmful because that is the way they are designed. One theory that plaintiffs have relied on to characterize cigarettes is that the

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24. *Id.*

25. RESTATEMENT (SECOND) OF TORTS § 402A (1965). This section imposes liability on "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer." The Supreme Court of Florida has specifically turned to § 402A as a source of products liability law. *See* West v. Caterpillar Tractor Co., 336 So. 2d 80, 84 (Fla. 1976).

26. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Tent. Draft No. 2, 1995) [hereinafter RESTATEMENT OF PRODUCTS LIABILITY]. Several sections of this *Restatement*, including § 2, were tentatively approved at the May 1995 meeting of the American Law Institute.

27. *Id.* § 2. In Cheshire Medical Ctr. v. W.R. Grace & Co., 49 F.3d 26 (1st Cir. 1995), the court rejected the plaintiff's theory that recovery was proper on a single product defect theory even in the absence of proof of a manufacturing, design, or warning defect. *Id.* at 36.

28. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965) ("Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful . . . .").

29. This is not to say that such a claim might not be possible. *See* Ronald Smothers, *Recall of Contaminated Cigarettes Leaves Many Smokers Unfazed*, N.Y. TIMES, June 2, 1995, at A18. An impurity in a chemical used in the filters of cigarettes manufactured by Philip Morris causes "dizziness and irritation of the eyes, nose and throat." *Id.*

manufacturers did not warn users of the hazards of smoking.[30] However, the ability of a plaintiff to recover for cigarette-caused injury on a warning theory has been circumscribed by *Cipollone v. Liggett Group, Inc.*, which held that state law cannot impose on cigarette manufacturers a duty to warn inconsistent with the congressionally-mandated warning that now appears on cigarette packages.[31] This federal preemption, however, did not extend to all claims arising out of cigarette related injury; the Court ruled that plaintiffs could maintain actions based on breach of express warranty, fraudulent misrepresentation, and conspiracy to misrepresent or conceal.[32] It will certainly take years before the full scope of federal preemption is finally resolved, but it is clear that there can be no liability based on the failure of a cigarette manufacturer to warn about smoking-related hazards so long as the congressionally-required warning is given.[33] It is worth noting here that in the Louisiana class action case, the plaintiff included a grab-bag of claims which were not based on failure to warn.[34] The Complaint filed by the State of Florida also takes somewhat of a shotgun approach, alleging ten counts, none of which expressly rely on failure to warn as a basis of liability.[35]

There is some language in the Complaint that suggests reliance on unsafe design as a theory of liability. Paragraph 70 alleges that "[t]he

30. *See, e.g.*, Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2613 (1992).

31. *Id.* at 2618. The Court in *Cipollone* ruled that causes of action based on pre-1969 failures to warn were not preempted by federal law. *Id.* However, the federal law creating the Medicaid program was enacted by Congress in 1965, *see* Health Insurance for the Aged Act, Pub. L. No. 89-97, 79 Stat. 344 (1965) (codified in scattered sections of 26 U.S.C., 42 U.S.C., and 45 U.S.C. (1988)), and was not implemented in Florida until 1969, *see* 1969 Fla. Laws ch. 268 (codified at FLA. STAT. § 409.266 (1993)). Thus, the State would have had no pre-1969 medical expenses in connection with Medicaid recipients. *See id.*

32. *See Cipollone*, 112 S. Ct. at 2621-25 (plurality opinion). Although only four Justices of the Supreme Court joined in the plurality opinion setting out the surviving causes of action, *see id.* (plurality opinion), two other Justices concluded that the federally-mandated warning preempted all claims. *Id.* at 2632 (Scalia, J., concurring in part). Three Justices concluded that no claims were preempted. *Id.* at 2625 (Blackmun, J., concurring in part). Thus, there was a 6-3 majority concluding that warning claims were preempted, and a 7-2 majority that the claims listed in the text were not preempted.

33. As to federal preemption generally, see Richard C. Ausness, *Federal Preemption of State Products Liability Doctrines*, 44 S.C. L. REV. 187 (1993).

34. *See* Castano v. American Tobacco Co., 160 F.R.D. 544, 548 (E.D. La. 1995). The substantive causes of action included "misrepresentation; intentional infliction of emotional distress; negligence and negligent infliction of emotional distress; violation of consumer protection statutes under state law; breach of express warranty; breach of implied warranty; strict product liability; and redhibition pursuant to the Louisiana Civil Code." *Id.*

35. *See* Complaint ¶¶ 141-208, Florida v. American Tobacco Co., Civ. No. 95-1466AO (Fla. 15th Cir. Feb. 21, 1995).

Tobacco Companies could have designed and manufactured a safer cigarette, but refused to do so."[36] Whether that theory will succeed is an intriguing question. In most states today, to prevail on a design theory, the plaintiff must establish that there was a feasible and safer alternative design that would have prevented the plaintiff's harm.[37] The benefit from smoking is the psychic satisfaction that smokers get—satisfaction of the need to smoke with a drink or after a good meal, for example, or satisfaction derived from the image the smoker wishes to project.[38] What is a safer cigarette, and would it satisfy these "needs" as well as those currently marketed?

The counts in the Complaint do not rely specifically, however, on a feasible alternative design theory. Count four of the Complaint alleges that cigarettes are "unreasonably dangerous due to their design" for two reasons: they are not as safe as ordinary consumers expect them to be, and the dangers of cigarettes outweigh any benefits from their use.[39] The first theory of design liability has its origins in warranty law, and was adopted by section 402A of the *Restatement (Second) of Torts* as the test of when a product was in a "defective condition unreasonably dangerous to the user."[40] This "consumer expectations" perspective is also embodied in the Florida pattern jury instructions.[41] Whether this will turn out to be a fruitful avenue for recovery is more problematic. Consumer expectations as a test of design liability has come under heavy fire of late, and may not survive as a viable basis of liability.[42]

Even if there is something left to the consumer expectations test, how it will play out in the cigarette litigation is uncertain. People have known for years—decades even—that smoking is unhealthy.[43] On the

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36. *Id.* ¶ 70.

37. *See* RESTATEMENT OF PRODUCTS LIABILITY, *supra* note 26, § 2(b) & cmt. c.

38. The Complaint goes into considerable detail of how cigarette "advertising is used to create a mental image associating smoking with good health, glamorous and athletic lifestyles, with success and sexual attractiveness." Complaint ¶ 99, *American Tobacco Co.* (Civ. No. 95-1466AO).

39. *Id.* ¶ 163.

40. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965). The definitions in comment *g* to § 402A of "defective condition," and in comment *i* of "unreasonably dangerous," are geared to the perceptions of the ordinary consumer. *Id.* § 402A cmts. g & i.

41. *See In re* Standard Jury Instructions (Civil Cases), 435 So. 2d 782 (Fla. 1983). Instruction PL 5 states in part: "A product is unreasonably dangerous because of its design if [the product fails to perform as safely as an ordinary consumer would expect . . . .]" *Id.* at 783 n.*.

42. The *Restatement of Products Liability* specifically rejects consumer expectations as an independent basis of design liability. *See* RESTATEMENT OF PRODUCTS LIABILITY, *supra* note 26, § 2, cmt. f.

43. The author of this commentary recalls from his high school days, which preceded the

other hand, the tobacco companies are in the somewhat unenviable position of having to argue that it has not been established conclusively that cigarettes are hazardous to the health, but if they are, then everybody knows it. Perhaps they can avoid this dilemma by arguing that the public perception of cigarettes, although erroneous, is that they are harmful, even if they really are not. In any event, it is unlikely that there are many in the general population of smokers who now believe, or ever believed, that smoking cigarettes is harmless.

The second design theory of the Complaint is that the dangers of the design outweigh any benefits.[44] The allegation here might be that on a risk/utility balancing, an alternative feasible and safer design was available and should have been adopted. I have already addressed this basis of liability.[45] But the tone of this count suggests that the State may be out for bigger game—cigarettes are defective even if there is no safer alternative cigarette. This sort of per se defectiveness has been described as "product-category liability,"[46] and it has been accepted by a few courts, although it no longer appears to be the law in any state. The argument is that cigarettes are so dangerous and so devoid of social

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1964 Surgeon General's Report on smoking-related health hazards by more years than he is willing to admit, the description of cigarettes as "cancer sticks." Awareness of the adverse health effects goes back even further in time. *See, e.g.*, Austin v. State, 48 S.W. 305 (Tenn. 1898) (upholding the constitutionality of a statute that made it illegal to sell cigarettes), *aff'd*, 179 U.S. 343 (1900). In so holding, the Supreme Court of Tennessee observed:

> We think . . . [cigarettes] are . . . wholly noxious and deleterious to health. Their use is always harmful, never beneficial. They possess no virtue, but are inherently bad, and bad only. They find no true commendation for merit or usefulness in any sphere. On the contrary, they are widely condemned as pernicious altogether. Beyond question, their every tendency is towards the impairment of physical health and mental vigor. There is no proof in the record as to the character of cigarettes; yet their character is so well and so generally known to be that stated above that the courts are authorized to take judicial cognizance of the fact. No particular proof is required in regard to those facts, which, by human observation and experience, have become well and generally known to be true; nor is it essential that they shall have been formally recorded in written history or science to entitle courts to take judicial notice of them.

Id. at 306 (citations omitted). The court was unquestionably on stronger ground when it took judicial notice of the harmful effects of smoking than it was in taking notice of the more value-laden conclusion that cigarettes have no true merit or usefulness. *Id.* at 308. Substitute "booze" for "cigarettes" in this passage, and certainly many judges, at that time, and perhaps today as well, would still agree with it.

44. Complaint ¶ 163, *American Tobacco Co.* (Civ. No. 95-1466AO).

45. *See supra* text accompanying notes 16-22.

46. James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1297 (1991).

utility that they should not be marketed at all, even if there is no substitute. This theory appears to have had its genesis in *O'Brien v. Muskin Corp.*,[47] in which the court ruled that a vinyl liner of an above-ground swimming pool might be defective even in the absence of a feasible and safer alternative—it might be so dangerous that the jury could conclude that it should not have been marketed at all.[48] A similar approach was taken in *Kelly v. R.G. Industries*[49] with respect to handguns known as "Saturday Night Specials."[50] And in *Halphen v. Johns-Manville Sales Corp.*,[51] the court ruled that the theory might apply to asbestos products.[52] However, state legislatures have stepped in to overrule all three cases.[53]

The new *Restatement of Products Liability* takes an ambivalent position with respect to this sort of product-category liability. The first tentative draft specifically excluded such liability in Comment *c*:

> The requirement in § 2(b) that plaintiff show a reasonable alternative design applies even though the plaintiff alleges that the category of product sold by the defendant is so dangerous that it should not have been marketed at all. Thus common and widely distributed products such as alcoholic beverages, tobacco, firearms, and above ground swimming pools may be found to be defective only upon proof of the requisite conditions . . . .[54]

After some debate on the floor at the May 1994 meeting, a new Comment was approved which provides in part:

> *d. Design defects: possibility of manifestly unreasonable design.*
> Several courts have suggested that the designs of some products are so manifestly unreasonable, in that they have low social utility and high degree of danger, that liability should attach even absent proof of a reasonable alternative

47. 463 A.2d 298 (N.J. 1983), *overruled by statute*, N.J. STAT. ANN. § 2A:58c-3 (1982).

48. *Id.* at 306.

49. 497 A.2d 1143 (Md. 1985), *overruled by statute*, MD. CODE ANN., CRIM. LAW § 36-I (1990).

50. *Id.* at 1159.

51. 484 So. 2d 110 (La. 1986), *overruled by statute*, LA. REV. STAT. § 9.2800.56(1) (West 1991).

52. *Id.* at 113.

53. *See supra* notes 47, 49, 51. In New Jersey and Louisiana, however, the statutes were held not to be applicable retroactively. *See* Gilboy v. American Tobacco Co., 582 So. 2d 1263, 1264 (La. 1991); Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239, 1252 (N.J. 1990).

54. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Tent. Draft No. 1, 1994).

> design . . . . If a court were to adopt this characterization of the product, it could conclude that liability should attach without proof of a reasonable alternative design. The court would condemn the product design as defective and not reasonably safe because the extremely high degree of danger posed by its use or consumption so substantially outweighs its negligible utility that no rational adult, fully aware of the relevant facts, would choose to use or consume the product.[55]

But in approving the new Comment *d*, the ALI left Comment *c* intact. The two Comments appear to be in complete conflict, so that both those arguing for and against product-category liability can find support.

The liability of tobacco manufacturers could not be established on the basis of Comment *c* if there is no reasonable safer alternative. How would the State fare if emphasis is given to Comment *d*? It is not likely that the State will have any problem proving the down-side of cigarettes—that they do cause harm, and considerable harm at that. The problem, of course, is how the utility of a product is to be measured—does utility include the psychic benefit that consumers actually derive from the product—an empirically determined utility? If so, it is hard to see how cigarettes could fall into the category of products with "negligible utility." For whatever reason, a lot of people seem to get a lot of enjoyment out of smoking.

Perhaps, however, the test is not the utility that people actually get from the product, cigarettes for example, but the utility that "rational" adults get—the test is whether a rational adult would "use or consume" the product. Under such a "normative" approach to utility, it might be seen as relatively easy for courts to conclude that rational adults would not use cigarettes, no matter how many millions of cigarette smokers there are. If a court were willing to impose its own notions of rationality to determine that cigarettes have low social utility,[56] there are other products that could fall under the product-category liability hammer. Alcoholic beverages come quickly to mind. There is no doubt that the principal benefit that comes from the consumption of that drink before dinner, or from a glass or two of wine with dinner, is psychic.[57] The

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55. RESTATEMENT OF PRODUCTS LIABILITY, *supra* note 26, at cmt. d.

56. Would a judge that smokes and gets enjoyment—utility—from smoking have to recuse himself or herself? For that matter, would a nonsmoking judge be able to fairly make the value judgment about whether the utility that smokers get from cigarettes is rational?

57. I am aware that some studies have recently touted the health benefits of a glass of wine a day. But that benefit is just a side benefit and is almost totally irrelevant, I am sure, to the psychic benefit that the drink provides. People certainly consumed two glasses of wine a day, and then some, before any health benefits were revealed. And I wonder how many doctors

harm, on the other hand, that comes from drinking is enormous—rivaling, perhaps, even the harm that cigarette smoking causes. If cigarettes fail to pass muster under a normative utility/benefit test, it is hard to see how alcohol would.[58] And there are many other products the benefit of which is simply that they provide pleasure, even though they involve considerable risk. Certainly, marijuana should not be legalized. And indeed, often it is the risk—the thrill—that is the attraction of some products. Parachutes used for recreational sky diving and scuba equipment come quickly to mind. Fireworks also would be subject to category liability; as inspiring as they might be at Fourth of July celebrations, their only benefit is psychic.[59]

Whether the State can convince the Florida Supreme Court to adopt, and if so, whether cigarettes should be subject to, product-category liability is not at all clear.[60] To the extent that products should be banned from the marketplace because the risks outweigh the benefits by a wide margin, or for any other reason for that matter, it is more appropriate that the decision be made by the legislature, which has wider access to the information necessary to make the required balancing. Comment *c* to section 2 of the *Restatement of Products Liability* makes just this point.[61]

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would recommend that a teetotalling patient take up drinking for its health benefits. Not many, I would guess.

58. One commentator has argued that alcoholic beverage manufacturers should be strictly liable for injuries caused, not to the consumer, but to "innocent bystanders" who are injured by someone else's overconsumption. *See* Robert F. Cochran, *"Good Whiskey," Drunk Driving, and Innocent Bystanders: The Responsibility of Manufacturers of Alcohol and Other Dangerous Hedonic Products for Bystander Injury*, 45 S.C. L. REV. 269, 271 (1994). Under the product-category liability theory, alcohol manufacturers would be liable to all who are injured by overconsumption of alcohol, including the over-consumers. *Id.* at 317-22.

59. It is interesting that cigars do not seem to have been the subject of the category-liability debate. Perhaps they are not as widely used as cigarettes, and thus the total harm may not be as great. And it may be that although the benefit from smoking cigars is psychic, that benefit may be more socially acceptable. Thomas R. Marshall, Vice-President to Woodrow Wilson, once observed, "What this country needs is a good five-cent cigar." JOHN BARTLETT, FAMILIAR QUOTATIONS 673 (15th ed. 1980). More recently, "Cigar Aficionado," a publication calling itself "A magazine for men of exceptional taste," has emerged. The cover of the Summer 1995 issue shows a smiling Jack Nicholson, the well-known actor, brandishing a large stogie. Featured articles include "Women and Cigars—The Hot New Trend," and "Rating Small Cigars." On the other hand, cigars were banned in some restaurants and in most airlines long before cigarettes were, suggesting that perhaps cigars involve external costs that cigarettes were not perceived to have.

60. The Supreme Court of Louisiana has left open the possibility that cigarettes can be so characterized. *See* Gilboy v. American Tobacco Co., 582 So. 2d 1263, 1265 (La. 1991).

61. RESTATEMENT OF PRODUCTS LIABILITY, *supra* note 26, § 2, cmt. c states:

> [C]ourts have not imposed liability for categories of products that are

B. Other Theories Stated in the Complaint

The Complaint states a variety of other counts, which I shall discuss here only briefly. I think that the State will have a hard time recovering under most of the counts if it cannot establish that cigarettes are defective in the products liability sense just discussed.

1. Count One: Restitution—Unjust Enrichment[62]

In tort actions, the measure of recovery is generally restorative—the defendant is liable for the monetary equivalent of what it would take to put the plaintiff in the pre-tort condition.[63] Restitution is sometimes available to a tort plaintiff, and in those cases the plaintiff is entitled to recovery based on the benefit the defendant derived from the tort, rather than what it would take to restore the plaintiff to the pre-tort condition.[64] Restitution also is a remedy for "unjust enrichment"—cases in which the defendant has not breached any contract or tort duty to the plaintiff, but in which it would be "unjust" for the defendant to keep the benefits reaped from the transaction.[65]

To the extent that the State is relying on restitution as a remedy for tort, the State obviously must prove a tort. If the State is successful in that regard, then resort to restitution is not necessary. If the State fails to establish a tort, then to recover restitutionary damages the State must establish that the defendants have been unjustly enriched in the absence of any independent wrong.[66] While count one does allege that the State has discharged the defendants' obligation to pay the medical expenses generated by cigarette smoking,[67] that allegation seems nothing more than another way of saying that the defendants have committed a wrong toward the Medicaid recipients, and therefore the State.

> generally available and widely used and consumed, solely on the ground that they are considered socially undesirable by some segments of society. Instead, courts have concluded that the issue is better suited to resolution by legislatures and administrative agencies that can more appropriately consider whether distribution of such product categories should be prohibited.

Id.

62. Complaint ¶¶ 141-48, *American Tobacco Co.* (Civ. No. 95-1466AO).

63. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 7 (5th ed. 1984).

64. *See* DAN. B. DOBBS, LAW OF REMEDIES ch. 4 (2d ed. 1993).

65. *See id.*

66. *See id.* at 553.

67. *See* Complaint ¶¶ 151-52, *American Tobacco Co.* (Civ. No. 95-1466AO).

2. Count Two: Indemnity[68]

This count appears to completely overlap count one, alleging the right to recover in restitution. The allegation is that the State has paid medical expenses on behalf of Medicaid recipients, as a result of which the defendants have been unjustly enriched, and should for that reason "indemnify" the State.[69] The State's right to indemnity would thus depend on whether there is some basis in substantive law which would create an obligation on the part of the defendants to pay for the Medicaid's recipients smoking-related medical expenses. This count alleges no such substantive basis.

3. Count Three: Negligence[70]

This appears to be a boilerplate count. The allegations are that the defendants had a duty to use reasonable care in the manufacture and distribution of their cigarettes, and that they breached that duty.[71] In the end, whether the defendants could be found to have been negligent would depend on whether cigarettes are defective in the products liability sense. If they are, this separate negligence count is redundant. If they are not, then it is hard to see how the defendants could be negligent in producing and marketing nondefective products.

4. Count Five: Breach of Express and Implied Warranties[72]

One claim in this count is that the defendants have breached the implied warranty of merchantability.[73] To be merchantable under section 2-314 of the *Uniform Commercial Code* (U.C.C.), the product must be "fit for the ordinary purposes for which such goods are used."[74] It is generally held that the U.C.C. concept of unmerchantability and the strict tort liability concept of product defect are identical.[75] For that reason, the State's success on a breach of warranty of merchantability claim would depend on whether cigarettes are defective in the products liability sense.

The outcome under the express warranty claim may be less clear-cut, but it is still in considerable doubt. Section 2-313 of the U.C.C. defines

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68. *Id.* ¶¶ 149-54.
69. *Id.* ¶ 153.
70. *Id.* ¶¶ 155-59.
71. *Id.* ¶¶ 156-57.
72. *Id.* ¶¶ 166-72.
73. *Id.* ¶ 169.
74. U.C.C. § 2-314 (1994); FLA. STAT. § 672.314 (1993).
75. *See, e.g.*, Duford v. Sears, Roebuck & Co., 833 F.2d 407, 411-12 (1st Cir. 1987).

an express warranty as an "affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain."[76] The U.C.C. also provides that "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."[77] Whether courts will determine that the typical advertising and promotion of cigarettes are sufficient to create an express warranty is an iffy proposition. Cigarette advertising has generally followed a pattern of image creation rather than specific statements about any particular characteristic. In one recent case,[78] the court dismissed an express warranty claim against tobacco manufacturers on the grounds that the advertising and promotional materials relied upon by the plaintiff did not constitute express warranties as to health.[79] The Complaint does not contain any allegation that the advertising and promotion of cigarettes contained any specific statements that smoking will not cause harm.

5. Count Six: Negligent Performance of a Voluntary Undertaking,[80] and Count Seven: Intentional Misrepresentation[81]

Although these two counts appear to be aimed at different sorts of conduct—in count six, negligence and in count seven, intentional misrepresentation—the allegations in both are quite similar. The allegations in count six are that the defendants "knowingly and actively" published "fraudulent science,"[82] and "suppressed negative research

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76. U.C.C. § 2-313 (1994); FLA. STAT. § 672.313(1)(a) (1993).
77. U.C.C. § 2-313 (1994); FLA. STAT. § 672.313(2) (1993).
78. Burton v. R.J. Reynolds Tobacco Co., 884 F. Supp. 1515 (D. Kan. 1995).
79. *Id.* at 1527-28. The court observed:

> Granted, the advertisements do tend to portray smoking in a positive light, through the use of professional athletes, movie stars, and other attractive persons shown enjoying cigarettes. The advertisements also refer to the subject cigarettes variously as "mild" and "smooth." Indeed, the positive representation of smoking presented in the advertisements would be an inducement to purchase the cigarettes, but such a result is the very purpose strived for in all advertising. The mere fact that smoking is portrayed in a positive manner does not, as plaintiff contends, lead to a conclusion that such advertisements expressly warrant that smoking "does not present any significant health consequences." In fact, health consequences are not discussed in any of the advertisements.

Id.

80. Complaint ¶¶ 173-79, *American Tobacco Co.* (Civ. No. 95-1466AO).
81. *Id.* ¶¶ 180-87.
82. *Id.* ¶ 175.

data regarding cigarettes and health."[83] Count seven is more detailed in the allegations, but like count six, focuses on the suppression of information and intentional misstatements about the health risks of smoking.[84]

Claims based on fraudulent misrepresentation are not preempted by the federal law establishing the form and content of warnings as to the hazards of cigarette smoking.[85] The allegations in the Complaint that seem closest to supporting these counts rely on communications made to the public at large, and not to individual purchasers as such.[86] As a result, the underlying basis of liability looks like "public misrepresentation" as that cause of action is defined in section 402B of the *Restatement (Second) of Torts*.[87] Under this theory, it is not necessary that the representation be the product of fraudulent intent, or even negligence; it is enough if it is inaccurate.[88] Whether there can be recovery for misrepresentation depends, of course, on what the defendants said. Like statements alleged to constitute an express warranty,[89] general statements relating to quality designed to promote a product are not sufficient to constitute the kind of representations as to which liability can attach.[90] Furthermore, not only must there be reliance on the representation by the consumer, but that reliance must be justifiable as well.[91] It is just too soon to tell whether the State will

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83. *Id.* ¶ 176.

84. *See id.* ¶¶ 181-84.

85. *Cipollone*, 112 S. Ct. at 2623-24.

86. *See* Complaint ¶¶ 167-68, *American Tobacco Co.* (Civ. No. 95-1466AO).

87. *See* RESTATEMENT (SECOND) OF TORTS § 402B (1965). This provision states:

> 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 consumer has not bought the chattel from or entered into any contractual relation with the seller.

Id.

88. *See id.*

89. *See supra* text accompanying note 78.

90. *See* RESTATEMENT (SECOND) OF TORTS § 402B cmt. g (1965), which states: "[This section] does not apply to statements of opinion, and in particular it does not apply to the kind of loose general praise of wares sold which, on the part of the seller, is considered to be 'sales talk,' and is commonly called 'puffing'. . . ." *Id.*

91. RESTATEMENT (SECOND) OF TORTS § 402B cmt. j (1965). "[This section] does not apply where the misrepresentation is not known, or there is indifference to it, and it does not

be successful on these counts.

6. Count Eight: Conspiracy and Concert of Action,[92] and Count Nine: Aiding and Abetting Liability[93]

These counts also overlap each other considerably. Under the preceding counts, each defendant would be liable only for harm that that defendant caused, and for that reason allocation of the damages among the various defendants would be a daunting task, one likely doomed to fail. The purpose of these two counts is very likely to permit the application of joint and several liability, so that all the defendants will each be liable for the total damages.[94] Thus, these counts do not allege any substantive bases of liability not already covered by the preceding counts. Success here will depend on whether the State can prove the kind of concerted action necessary to support joint and several liability. Count eight does allege that the defendants did form two organizations, the Tobacco Institute and the Council for Tobacco Research: two instrumentalities by which the conspiracies were allegedly implemented,[95] but otherwise the allegations are fairly general.

7. Count Ten: Injunctive Relief[96]

Like counts eight and nine, this count is essentially procedural, and asks the court to order the defendants to cease their wrongful behavior and to take steps to eliminate the effects of their past behavior.[97] As to the latter, for example, the State asks the court to order the defendants to finance a "corrective public education campaign relating to the issues of smoking and health."[98]

The purpose of this count-by-count discussion is not to provide the last word on the chances of the State's success. Perhaps the State's strongest case will be under counts six and seven involving misrepresentation.[99] But even those counts will present problems for

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influence the purchase of subsequent conduct." *Id.*

92. Complaint ¶¶ 188-98, *American Tobacco Co.* (Civ. No. 95-1466AO).

93. *Id.* ¶¶ 199-204.

94. The Act does provide for the possibility of market share liability under some circumstances. *See* FLA. STAT. § 409.910(9)(b) (Supp. 1994). But that kind of liability is different from the joint and several liability that would attach if the State prevails on these counts.

95. Complaint ¶¶ 191-96, *American Tobacco Co.* (Civ. No. 95-1466AO).

96. *Id.* ¶¶ 205-08.

97. *Id.* ¶ 208.

98. *Id.*

99. *See supra* text accompanying notes 80-91.

the State. One thing is fairly sure: even if the constitutional issues are resolved in favor of the State, and that will take some time, the State can expect a long, hard fight—one that is not likely to be resolved for many years. Furthermore, it is not clear that at the end of that fight the State will emerge the winner.

III. THE NATURE OF THE COMMON LAW CAUSE OF ACTION

The Complaint alleges causes of action not only based on the Act, but grounded in the common law as well.[100] Apart from subrogation, which I have already discussed,[101] I am not sure just what independent common law cause of action the State has in mind. I can think of no case in which the plaintiff has recovered a loss based on harm to another, in which the theory of recovery is independent of, not derivative from, the other's right to recover. The State can certainly ask the Supreme Court of Florida to create such a right, but I think that the court is unlikely to do so. The common law develops by analogy, and I can think of no analogous right to the State's theory of recovery. Furthermore, it seems unlikely that the court itself would create an independent action in favor of the State if the Legislature has specifically refused to do so.

IV. SCOPE OF THE ACT—PERSONS LIABLE

While the discussion after the Act was passed indicated that its drafters and the Florida Legislature intended it to apply to cigarette manufacturers, the Act is not so limited. The Act gives the State the authority to recover from any "liable third party."[102] I have already mentioned manufacturers of alcoholic beverages as candidates for liability under the Act.[103] To the extent that the State can prevail on a products liability theory,[104] intermediate sellers in the chain of distribution of cigarettes would also be exposed to liability.[105]

Nor are "liable third parties" limited to product sellers, but include anyone who has caused the need for medical treatment of a Medicaid recipient. Thus, a person who has negligently injured a recipient in an automobile accident is subject to liability under the Act. And under the

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100. Complaint ¶ 3, *American Tobacco Co.* (Civ. No. 95-1466AO).

101. *See supra* text accompanying notes 16-22.

102. FLA. STAT. § 409.910(1) (Supp. 1994).

103. *See supra* text accompanying notes 57-58.

104. *See supra* part II.A.

105. The *Restatement (Second) of Torts* § 402A, which the Supreme Court of Florida adopted in West v. Caterpillar Tractor Co., 336 So. 2d 80, 86 (1976), imposes strict liability on any seller of a defective product. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

Act, that third party would be liable to the State without regard to any defenses, such as comparative negligence, which would be available in a suit brought directly by the recipient.

V. PROOF AND ALLOCATION OF DAMAGES

Assuming that the State can surmount all of the difficulties suggested so far in this commentary, and the constitutional arguments made by Professor Van Alstyne and the defendants, there remains the problem of how the amount of medical expenses to which the State is entitled will be calculated. Clearly, the State is not entitled to reimbursement for all expenditures for medical care of Medicaid recipients—the State will have to establish how much of the total expenditures were caused by smoking cigarettes. The Act has two provisions designed to ease the burden that the State would normally have in proving damages. First, the State need not identify by name the individual recipients, but rather can recover based on "payments made on behalf of an entire class of recipients."[106] Second, "[t]he issue of causation and damages . . . may be proven by use of statistical analysis."[107] While both may simplify somewhat proof of damages, difficult problems of proof will still remain.

Although the Act does not require the State to list the Medicaid recipients for whom medical expenditures have been made, the State will, I imagine, have to establish who among the recipients are, or have been, smokers. This might be less of a problem than it would appear to be at first. Sampling methods could perhaps be used instead of asking each recipient for his or her smoking history.

But after the relevant number of smokers is determined, how much of the State's total Medicaid expenditures for medical treatment should be allocated to smoking? Obviously, statistical proof will be required here—but proof as to what? We do see from time to time assertions that smoking adds so many billions of dollars to the cost of medical care, but statistics like that hardly help. There might be studies as to the percentage increase in medical expenses paid, but the defendants no doubt will argue that the State has to come up with valid and reliable statistics. Permitting the use of statistical analysis does not mean that the State can use any set of statistics it comes up with. The problem will be complicated by the fact that some recipients who do not smoke now may have smoked at some time in the past. Furthermore, current medical expenses may be affected by how long the recipient smoked,

106. FLA. STAT. § 409.910(9)(a) (Supp. 1994).
107. *Id.* § 409.910(9).

and how long ago he or she quit. Information like that could be produced by the sampling process, but linking the results of that sample to the total of Medicaid medical expenses to arrive at an allocation of the expenses will not be easy.[108]

Assuming that some acceptable gross figure of Medicaid medical expenditures attributable to smoking can be arrived at, how will the damages based on those expenditures be allocated among the defendants? After all, not all of the smoking recipients smoked cigarettes manufactured by all of the defendants. In suits by individual smokers against tobacco companies, the allegations usually are that the plaintiff smoked one, or perhaps two brands over a smoking lifetime.[109] The Complaint, and the Act, indicate two ways to help the State avoid this allocation problem.

First, the Act provides that liability of the defendants shall be joint and several.[110] Joint and several liability would ordinarily apply in a case like this only if the defendants acted in concert to cause the harm, or if they acted independently to cause indivisible harm.[111] The latter theory would not be available unless all recipients smoked cigarettes manufactured by all the defendants—something both unlikely to have happened and unlikely to be capable of proof. Concert of action as a basis of joint and several liability is the more likely theory, and the complaint does contain allegations that the defendants did indeed engage in behavior which, if proven, would support joint and several liability.[112]

One theory worth mentioning in passing, although the complaint does

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108. Whether smoking causes a net loss to society is the subject of an intriguing analysis in W. KIP VISCUSI, CIGARETTE TAXATION AND THE SOCIAL CONSEQUENCES OF SMOKING (1994), one of a Working Paper Series of the National Bureau of Economic Research, Inc. Professor Viscusi argues, with statistical back-up, that the costs to both smokers and nonsmokers is more than offset by the savings resulting from the early deaths of smokers—savings in expenses, for example, for nursing home care and medical treatment. *Id.* at 29-33. It is unlikely, however, that tobacco companies would want to argue from the premise that smoking in fact causes early death.

109. *See, e.g.*, Bruton v. R.J. Reynolds Tobacco Co., 884 F. Supp. 1515 (D. Kan. 1995), in which the plaintiff alleged that in a 43-year period he smoked Camels and Luckie Strikes. If that is the testimony, it perhaps would have to be accepted, at least for the purpose of determining whether the plaintiff can get to the jury. Issues of credibility are usually for the jury to resolve. But the author of this commentary smoked for a shorter period than that, and while he cannot recall all the brands he smoked, he is sure that the cigarettes of more than two manufacturers were involved. It is hard to believe that his smoking pattern it atypical.

110. FLA. STAT. 409.910(1) (Supp. 1994).

111. *See* KEETON ET AL., *supra* note 63, § 52.

112. *See* Complaint ¶¶ 188-98, *American Tobacco Co.* (Civ. No. 95-1466AO) (containing count eight—Conspiracy and Concert of Action); *id.* ¶¶ 199-204 (containing count nine—Aiding and Abetting Liability); *supra* part I.B.

not specifically rely on it, is what has come to be known as "alternative liability." It originated in a famous California case familiar to all first year Torts students—*Summers v. Tice*.[113] The plaintiff and the two defendants were hunting.[114] The defendants negligently shot in the direction of the plaintiff, and a single shotgun pellet lodged in the plaintiff's eye and another in his lip.[115] Both defendants fired shells using the same size shot, so it was impossible to tell which defendant fired the shot which injured the plaintiff.[116] The court shifted the burden of proof of cause to the defendants, asserting that it was fairer for the innocent plaintiff to recover than to permit both negligent defendants to escape liability, even though one defendant did not cause the harm to the plaintiff.[117] The State might argue that putting cigarettes on the market where the recipients could buy them is analogous to firing in the direction of the recipients. But some courts have rejected the application of alternative liability in cases involving a large number of potential causes.[118]

The second device that the Act makes available to the State to help it overcome the problems of proving which manufacturer caused harm to which recipients is "market share" liability. The Act provides that the State can "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."[119] Market share liability originated in *Sindell v. Abbott Laboratories*,[120] a case involving plaintiffs who alleged that their mothers took DES to prevent miscarriages, but which ended up causing harm to the plaintiffs.[121] DES was a generic drug, and it was taken by the mothers many years before harm showed up in the plaintiffs.[122] As a result, it was not possible, the complaint alleged, for the plaintiffs to prove which DES manufacturer actually manufactured the DES taken by each plaintiff's mother.[123] In ruling that the complaint should not be

113. 199 P.2d 1 (Cal. 1948).
114. *Id.* at 2.
115. *Id.*
116. *Id.*
117. *Id.* at 5.
118. *See, e.g.*, Sindell v. Abbott Lab., 607 P.2d 924, 931 (Cal.), *cert. denied*, 449 U.S. 912 (1980).
119. FLA. STAT. § 409.910(9)(b) (Supp. 1994).
120. 607 P.2d 924, 931 (Cal.), *cert. denied*, 449 U.S. 912 (1980).
121. *Id.* at 925-26.
122. *Id.* at 925.
123. *Id.* at 929.

dismissed for failure to make a sufficient allegation of cause, the court created market share liability, under which each defendant would be liable for a share of the plaintiffs' damages geared to the share of the DES market held by each defendant.[124]

It is not clear that market share liability would be applicable to a case involving harm alleged to have been caused by cigarettes. Market share liability necessarily assumes that the manufacturers all sell the same product, and thus share the same market. That was true of DES—it was a generic drug that had to be produced in accordance with a formula approved by the Food and Drug Administration.[125] While the Florida Supreme Court has adopted a variation of the *Sindell* market share theory with respect to DES,[126] it has rejected the theory in a case involving harm alleged to have been caused by asbestos because of the differences between asbestos products—there is no single asbestos product.[127]

The Act does recognize the problem by requiring that the products be "substantially interchangeable among brands,"[128] and there is an allegation in the Complaint that cigarettes are so interchangeable.[129] But it is not true that all cigarettes are identical in design. Some have more tar than others, or more nicotine; some are sold with filters, some without; some are longer than others. Any one of these design differences might have an impact on the harm that can be caused by smoking.[130] Thus, the applicability of market share liability as a way of avoiding the cause of the problem will have to await proof at the trial.

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124. *Id.* at 930-31.

125. *See id.* at 926.

126. *See* Conley v. Boyle Drug Co., 570 So. 2d 275, 286 (Fla. 1990).

127. Celotex Corp. v. Copeland, 471 So. 2d 533, 537-38 (Fla. 1985). The court observed:

> DES was produced by hundreds of companies *pursuant to one formula.* As a result, all DES had identical physical properties and chemical compositions and, consequently, all DES prescribed to pregnant women created the same risk of harm to the women's female offspring.
>
> Asbestos products, on the other hand, have widely divergent toxicities, with some asbestos products presenting a much greater risk of harm than others.

Id. (citations omitted).

128. FLA. STAT. § 409.910(9)(b) (Supp. 1994).

129. Complaint ¶ 6, *American Tobacco Co.* (Civ. No. 95-1466AO).

130. For a discussion of the health effects of the lowering of the tar content of cigarettes, see VICUSI, *supra* note 108, at 14-19.

VI. CONCLUSION

This is not a complete analysis of all the issues that will arise should the State's Medicaid reimbursement claim go forward. The purpose here is rather to suggest that if the legislature and the drafters of the Act think that they have done something dramatic to save Medicaid in Florida, they are mistaken. It is by no means clear that the Act will yield the State one cent from the tobacco companies. Even if the State surmounts the problems of recovering expenditures suggested in this commentary, the problems of constitutionality remain. And even if the State succeeds on the constitutional arguments, the final resolution of all these problems will, I am confident in predicting, take years. The tobacco companies will fight this case every step of the way, and if there is recovery some day, it will not be soon. And one more "and even"—and even if the State, years down the road, is successful, it will not get full reimbursement of its Medicaid expenditures. Costs and attorney's fees will no doubt absorb a significant portion of whatever it is that the defendants will have to pay.

Of course, when the dust has settled, and *if* the State does ultimately prevail, recovery of something from cigarette manufacturers from the State's perspective will be better than nothing. But it may not be better than another avenue by which the State can get cigarette manufacturers to reimburse the State for Medicaid expenditures. That other avenue is one that is already travelled by the State, and it's called a sales tax.

If the thought is that tobacco companies should pay more to the State than they now do, a sales tax, rather than something that looks like a tort suit, is the more efficient way to accomplish that goal. It has been estimated that about 1.3 billion packs of cigarettes are sold in Florida each year.[131] At that level of sales, an additional tax of $1 per pack would provide in one year close to the $1.4 billion that it has been reported the State is seeking in its action under the Act.[132] An additional tax has the advantages of being quick and efficient. Had the Legislature passed a tax increase in 1994, revenue would be flowing to the State today by which Medicaid expenses would be offset. And the State would not have to share the revenue with anyone—no lawyers would be needed, and the existing tax collection system could no doubt absorb the collection of the additional tax at no significant increase in expense.

Why not a tax increase, then? There might be a number of reasons

131. *See* Tim Nickens, *Florida Leads Way on Tobacco Battlefront—Chiles to Use Tough New Law*, MIAMI HERALD, May 27, 1994, at A1.

132. *See* Lloyd Dunkelberger, *Bill Aiding Tobacco Is Vetoed*, GAINESVILLE SUN, June 16, 1994, at B5.

why the State would prefer the Act to a tax, as cumbersome, expensive, and time consuming as the former will be. One is that taxes are just not popular. A tax on cigarettes makes it sound more like the consumers are paying the State, rather than the cigarette manufacturers. That is true, but consumers would end up paying, through higher prices, the costs to the tobacco companies generated through the Act, just as much as they would if an additional tax were added to the price of cigarettes.

It might be, however, that a tax would hit Florida residents harder than the tort-like damages under the Act. A tax would be paid only on cigarettes sold in Florida, while the reimbursement under the Act would be included in the general cost of the production and sale of cigarettes. Under the Act, the manufacturers would either increase the price of all cigarettes wherever sold, or allocate all the loss to Florida. If the former, the residents of other states would pick up part of the tab. I have no idea which course the tobacco companies would follow. I do assume that it would be possible for them to follow the latter, and charge more for cigarettes sold in Florida than elsewhere. But I do not know whether that game would be worth the candle to them.

Another reason why the State would prefer Medicaid reimbursement through the Act is the effect that the increase in the price would have on cigarette sales, and thus the total amount of tax revenue collected. A tax would increase the price of cigarettes and would likely lead to a decline in the sales of cigarettes in Florida for two reasons. First, persons at the margin would be moved not to smoke in the first place, or to quit smoking, or to smoke less. A combination of these behavior reactions to the price increase would result in fewer cigarettes sold in Florida, and for that reason less revenue from a tax increase.[133] On balance, the State would no doubt view a reduction in smoking as a good thing, but it would have an adverse impact on revenue.

The second way that a price increase could affect cigarette sales would be through the increased purchase of cigarettes out of State for use in Florida. Anyone who has driven Interstate 95 through North Carolina knows that cigarettes are a good bit cheaper there than they are in Florida, and one would be entitled to guess with some confidence that some of those cigarettes purchased in North Carolina are actually

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133. *See* VISCUSI, *supra* note 108, at 2:

> Not only is the demand for smoking quite elastic and similar to that of many other goods, but the long-run elasticity is even greater than in the short run. As a result, economists . . . have estimated that the long-run revenue effects of cigarette taxes will be less dramatic than the short-run gains.

Id.

smoked in Florida. Any dramatic increase in the price of cigarettes here would probably result in an increase in the amount of out-of-state purchases of less expensive cigarettes for use in Florida, and a concomitant decrease in the sale of cigarettes, and of tax revenue, in Florida.

Of course, even if the State recovers from the tobacco manufacturers by way of the Act, the price of cigarettes will go up, and fewer cigarettes will be sold in Florida. But the Medicaid reimbursement recovery would not depend, at least in the short run, on the number of cigarettes sold in Florida. For that reason, such recovery, if there ever is any, might be a more dependable and certain recovery than that resulting from a tax increase.

On balance, however, I think that the scales tip rather heavily in favor of a tax rather than the Act as a way of seeking payment from cigarette manufacturers for smoking-related Medicaid expenditures. The transaction costs needed to seek recovery by way of the Act will be enormous. These costs include not just the direct costs to the litigants of fighting the case out in court, but the indirect costs to the State resulting from the absorption of judicial resources necessary for the litigation. The Florida court system is now strained close to the breaking point, and a case of this magnitude will require resources which might better be allocated to other pressing needs. And it is by no means clear that the enormous effort will, in the end, produce anything of value to the State.

However, this commentary should not be viewed as an argument in favor of a tax. Cigarettes are already rather heavily taxed. In addition to the usual sales tax, cigarettes are taxed at the rate of $.339 per pack.[134] On the estimated sales of 1.3 billion packs sold annually in Florida, cigarettes generate a total tax revenue of $440,700,000 a year above the sales tax revenue. Thus, in responding to the Governor's assertion that the State's smoking-related medical expenditures is "a bill that tobacco companies ought to pay,"[135] the companies might reply that they have already paid it.[136] But whether it is "fair" for cigarette manufacturers, and ultimately smokers, to contribute more to the State coffers than this is something as to which I take no position. If it is not fair, then the Act should be abandoned for that reason. If the political process determines that it is fair, then an additional tax, rather than the cumbersome, time-

134. FLA. STAT. § 210.02 (1993).

135. *See* Dunkelberger, *supra* note 132, at B5.

136. According to Professor Viscusi, existing cigarette taxes are more than adequate to compensate for what he calls the "externality costs" of smoking. *See* VISCUSI, *supra* note 108, at 46-49.

consuming, inefficient tort-like litigation required by the Act, is the better way.