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Cigarette Law†

DANIEL GIVELBER*

After forty years of wandering in the wilderness, tobacco litigation has taken a new turn and apparently discovered the promised land. The attorneys general of forty states have sued the major tobacco companies in an effort to recover for the costs which the various states have borne in caring for those injured by smoking tobacco. At this writing, these suits have produced a "global settlement"[1] which the President and Congress may approve, albeit on terms somewhat less advantageous than those to which the tobacco companies originally agreed.[2] Although the suits of the attorneys general proceed on many different grounds, the fundamental claim is similar: the tobacco companies have profited through the sale of an inherently dangerous product which has injured millions, and they, rather than the citizens of the various states, ought to pay for the medical care required by those they have injured.

Were it not that some complaints go to great lengths to invoke a variety of theories other than liability in torts for the act of manufacturing and distributing a lethal product,[3] one might assume that what the states are asking for is precisely

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1. Whether the tobacco companies abandoned their traditional "no negotiations" posture because they perceive the actual attorneys general's suits as a threat to their financial well-being or because they perceive the suits as providing an opportunity to negotiate a congressionally approved resolution of individual and class-action claims that will place a cap on liability going forward is an interesting question. *See* Anthony Flint, *Ante Raised for Tobacco Settlement*, BOSTON GLOBE, May 6, 1997, at A1. The states negotiated a national settlement on June 20, 1997. *See* Anthony Flint, *Deal Is Reached in Tobacco Talks*, BOSTON GLOBE, June 21, 1997, at A1. That settlement involved significant changes in the civil-justice system which provided the tobacco companies with a cap on potential liability to individuals injured by the consumption of tobacco. *See* RICHARD DAYNARD & JOHN RUMPLER, CHANGES TO THE CIVIL JUSTICE SYSTEM UNDER THE PROPOSED TOBACCO SETTLEMENT 4 (Tobacco Resource Ctr. Working Paper No. 4, 1997). However, the national tobacco settlement has been questioned by President Clinton and others. *See* John M. Broder, *Clinton Will Seek Tougher Proposal to Rein in Smoking*, N.Y. TIMES, Sept. 17, 1997, at A1; John M. Broder & Barry Meier, *Tobacco Accord, Once Almost Sure, Seems to Crumble*, N.Y. TIMES, Sept. 14, 1997, at A1.

2. *See* Jeffrey Taylor, *GOP Leaders Agree to Bipartisan Effort to Pass Tobacco Legislation by Early '98*, WALL ST. J., Oct. 2, 1997, at A4. As this Article goes to press, Congress has begun hearings on the proposed settlement. The tobacco companies remain committed to protection against future civil suits as the quid pro quo for their agreement to modify their marketing and advertising practices. *See* David E. Rosenbaum, *Tobacco Leaders Refuse to Budge on Pact*, N.Y. TIMES, Feb. 25, 1998, at A14.

3. Of the 40 complaints, only 11 explicitly invoke products liability as a basis for recovery: Texas, *see* Texas v. American Tobacco Co., No. 5-96 CV-91 (E.D. Tex. filed Mar. 28, 1996); Utah, *see* Utah v. R.J. Reynolds Tobacco Co., No. 96 CV 0829W (D. Utah filed

what the progenitors of strict products liability envisioned: enterprise liability[4]

Sept. 30, 1996); Florida, *see* State v. American Tobacco Co., No. 95-1466AO (15th Cir. Palm Beach County, Fla. filed Feb. 21, 1995); Hawaii, *see* State by Bronster v. Brown & Williamson Tobacco Corp., No. 97-0441-01 (1st Cir. Ct., Haw. filed Jan. 31, 1997); Louisiana, *see* Ieyoub *ex rel.* State v. American Tobacco Co., No. 96-1209 (14th Dist. Ct., Calcasieu Parish, La. filed Mar. 13, 1996); Maryland, *see* State v. Philip Morris Inc., No. 96122017/CL211487 (Baltimore City Cir. Ct., Md. filed May 1, 1996); Missouri, *see* State *ex rel.* Nixon v. American Tobacco Co., No. 972-1465 (City of St. Louis Cir. Ct., Mo. filed May 10, 1997); New York, *see* State *ex rel.* People v. Philip Morris Inc., No. 400361-97 (N.Y. County Sup. Ct., N.Y. filed Jan. 27, 1997); Oklahoma, *see* State *ex rel.* Edmondson v. R.J. Reynolds Tobacco Co., No. CJ96-1499 (Cleveland County Dist. Ct., Okla. filed Aug. 22, 1996); Pennsylvania, *see* Commonwealth by Fisher v. Philip Morris, Inc., No. 97 April 24-43 (Phila. County Ct. of Common Pleas, Pa. filed Apr. 23, 1997); Wisconsin, *see* State v. Philip Morris Inc., No. 97CV000328 (Dane County Cir. Ct., Wis. filed Jan. 27, 1997). Seven of the complaints invoke risk/utility as the test for determining that cigarettes are defective: Florida, Hawaii, New York, Oklahoma, Texas, Utah, and Wisconsin. Of the suits involving products-liability claims, only the Maryland court has granted tobacco's motion to dismiss on the claims of negligence and breach of implied warranty because of subrogation, but has given the state leave to amend its complaint. *See Philip Morris Inc.*, No. 96122017/CL211487 (May 21, 1997) (order granting Maryland leave to amend its complaint). In Utah, a preemptive suit brought by tobacco for injunctive and declaratory relief has been denied. *See* Philip Morris Inc. v. Graham, No. 960904948 CV (3d Dist. Ct., Salt Lake County, Utah Feb. 13, 1997) (order denying preemptive suit). In Louisiana, the court has denied tobacco's motion to dismiss, finding that the attorney general has the capacity to sue, that transferring the suit to the state capitol is unnecessary, and that the industry's liability insurance carriers can be named as defendants. *See American Tobacco Co.*, No. 96-1209 (Mar. 13, 1996) (order denying tobacco's motion to dismiss). All of the complaints filed and orders issued in the actions named above may be found, alphabetically arranged by state name, at State Tobacco Info. Ctr., *STIC Libraries* (visited Mar. 1, 1998) <http://stic.neu.edu/Libraries.html>.

Some states avoid tort theories altogether (Iowa, Kansas, New Jersey, and West Virginia), while others invoke negligence theories but not products liability (Alaska, Arizona, Arkansas, California, Illinois, Indiana, Massachusetts, Michigan, Minnesota, Montana, Ohio, Oregon, Rhode Island, and Washington). Some of the negligence theories focus on specific behaviors—for example, marketing to children or undertaking to look out for the health of smokers—rather than on a claim that manufacturing and marketing cigarettes is unreasonable behavior. Three states, Mississippi, Florida, and Texas, have settled their suits. The tobacco industry agreed to pay $3.7 billion dollars to Mississippi. *See* Anthony Flint, *Tobacco Firms to Pay Miss. $3.7b*, BOSTON GLOBE, July 4, 1997, at A1. Florida settled its suit for a total of $11.3 billion, which includes a two-year pilot program to educate minors on the dangers of smoking. Further, the Florida settlement forces tobacco to eliminate billboard and transit advertising and support legislation regulating vending machines, establishing civil penalties for selling tobacco products to minors, and instituting harsher civil penalties for possession of tobacco products by minors. *See* Settlement Agreement, *American Tobacco Co.*, No. 95-1466 AH [sic] (Aug. 25, 1997), *available at* (visited Mar. 1, 1998) <http://stic.neu.edu/FL/flsettle .htm>; John M. Broder, *Tobacco Pact in Florida Fuels Debate on National Accord*, N.Y. TIMES, Aug. 28, 1997, at A22. Texas has settled for $15.3 billion. *See* Comprehensive Settlement Agreement and Release, *American Tobacco Co.* No. 5-96CV-91 (Jan. 22, 1998), *available at* (visited Mar. 20, 1998) <http://stic.neu.edu/Tx/Texas-settlement.htm>.

4. Enterprise liability is hardly self-defining. It refers to a result which the law ought to achieve rather than to the specific legal rules thought to produce that result. "[T]he theory . . . provides in its simplest form that business enterprises ought to be responsible for losses resulting from products they introduce into commerce." George L. Priest, *The Invention of*

for the manufacturers of an inherently dangerous product. Because it is the state which seeks redress for funds which it has expended, and because those expenditures can be tied with considerable epidemiological precision to tobacco-related illnesses, the states' suits pose the issue of whether or not a certain category of products—here tobacco—should be forced to internalize at least a portion of the significant social costs which that product inflicts upon society. Despite the easy assurance with which many commentators dismiss the possibility of such liability,[5] courts have not been as uniform as the critics would suggest,[6] and have never ruled in a context in which it is as clearly presented as in the attorneys general's suits.

Whatever the outcome of the attorneys general's suits—whether a "global settlement" endorsed by Congress or litigation and settlement of the various states' suits—it is worth considering what it is about our tort-liability system which has permitted tobacco companies to continue their operations unabated for the more than forty years that it has been known that cigarettes make people sick. Part of the answer, the subject of this essay, is that tort law has accommodated itself to cigarettes rather than tobacco companies accommodating to the law.

Just as courts confront the taxing questions posed by these ambitious lawsuits, the American Law Institute ("ALI" or "Institute") has struggled to "restate"[7] the

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Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law, 14 J. LEGAL STUD. 461, 463 (1985). Those who advocate it share the common belief that business enterprises ought to be responsible for the injuries inflicted by their activities, but agreement seems to end there. For Nolan and Ursin, both history and policy suggest that enterprise liability is a mechanism for achieving assured and adequate compensation for injuries. *See* VIRGINIA E. NOLAN & EDMUND URSIN, UNDERSTANDING ENTERPRISE LIABILITY (1995). For other advocates, enterprise liability makes sense because it assures optimum safety through the mechanism of market deterrence. *See* Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683 (1993). The benefits of this approach include creating appropriate incentives for manufacturers to make their products as safe as practicable, spreading the loss from one individual to all the consumers of the products, and ensuring that the market reflects the true price of the product (for example, including social costs). Some contemporary advocates of enterprise liability suggest that "[t]o achieve the goal of assured, adequate compensation, a common law enterprise liability should dispense with the defect requirement and limit recoverable damages." NOLAN & URSIN, *supra*, at 168. For Nolan and Ursin, the notion of defect (in their plan, for premises) should be replaced by a requirement that the injury arise out of or be associated with the activity in question. This appears to be precisely what the attorneys general are asking for in their suits—partial compensation for the injuries inextricably associated with the use of tobacco. *See* James R. Hackney, Jr., *The Intellectual Origins of American Strict Products Liability: A Case Study in American Pragmatic Instrumentalism*, 39 AM. J. LEGAL HIST. 443 (1995) (providing an illuminating account of the intellectual origins of the doctrine).

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

6. *See* Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 MO. L. REV. 1, 35-38 (1995).

7. Restating the law is a tricky business under the best of circumstances. Indeed, it is probably impossible, and the ALI, to its credit, makes no effort to achieve the impossible. Rather, what purports to be a restatement of the law actually represents informed thinking about what the law ought to be. So what should the Institute do when confronted with the task of suggesting what the law of products liability ought to be, given that we live in a time when

law of products liability. Cigarettes again present the drafters with a need to reconcile two equally persistent notions: that a product's true costs ought to be reflected in the market price, and that one ought not disrupt the relative economic tranquillity of those who make a product, the true costs of which overwhelm any putative benefits. The proposal by the reporters continues the tradition of resolving the tension between a product and a principle by embracing the product through an almost complete[8] rejection of the principle. Eschewing the supposed ambiguity inherent in the phrase "defective condition unreasonably dangerous," the newest revision distinguishes between manufacturing, design, and warning defects, and announces, with respect to design defects, that there can be no liability short of the plaintiff establishing the existence of a reasonable alternative design. The draft elsewhere asserts that whiskey and cigarettes must be judged by the "reasonable alternative design" test[9] making it clear that this version, like its predecessor, refuses to countenance the possibility that cigarettes in their intended state are defective.[10] The difference is that what was once viewed as a doctrinal aberration required to protect the cigarette industry and

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a major political party has made reform of products liability a feature of its political program? As has been suggested by Marshall Shapo, the wise course of action might well be to do nothing at all. *See* Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 685-86 (1995).

8. This rule is then undermined by an acknowledgment in the comments that there may be products of such little utility and such great danger that they may be found defective even in the absence of a reasonable alternative design. *See* Ellen Wertheimer, *The Smoke Gets in Their Eyes: Product Category Liability and Alternative Feasible Designs in the Third Restatement*, 61 TENN. L. REV. 1429, 1436-40 (1994).

9. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. c, at 21 (Tentative Draft No. 2, 1995).

> 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. . . . [P]roducts such as . . . tobacco . . . may be found to be defective only upon proof of the requisite conditions [of manufacturing, design, or warning defect].

Id. It has been argued that the new draft is more sympathetic to the possibility of tobacco company liability than its predecessor because the new draft lifts the blanket exemption for cigarettes and substitutes the possibility of liability if the plaintiff can establish an available alternative design. *See* Alex J. Grant, Note, *New Theories of Cigarette Liability: The Restatement (Third) of Torts and the Viability of a Design Defect Cause of Action*, 3 CORNELL J.L. & PUB. POL'Y 343, 368-69 (1994).

10. The current revision follows upon a five-year study of the efficacy of the tort system sponsored by the ALI. According to the Alliance for Justice:

> The study has not been adopted by the entire ALI, in part because of heated criticism that it favors corporate defendants. Further criticism arose because the study's funding, which came largely from corporations and corporate foundations. The Aetna Foundation alone provided $300,000, with the RJR-Nabisco Foundation adding $200,000; together, these contributions accounted for half of the project's budget.

ALLIANCE FOR JUSTICE, JUSTICE FOR SALE 53 (1993) (footnote omitted) (citing Kenneth Jost, *Rarefied Atmosphere Masks High Stakes, Deep Passions*, LEGAL TIMES, Apr. 27, 1992, at 14).

others producing dangerous products[11] has been transformed into a core doctrine of universal application. *T.J Hooper*[12] has been overruled with respect to products. The exception has become the rule. But, the exception now has its own exception. At its annual meeting, the ALI voted to exclude tobacco from the list of inherently dangerous products which cannot support a defective-design case.[13]

This is not the first time that the drafters of the Restatement have proposed doctrine designed to ensure that neither the logic nor the letter of strict liability applies to tobacco. Indeed, tobacco may well reverse what is thought to be the traditional relationship between liability doctrine and firm behavior. Rather than legal doctrine influencing the behavior of those who produce and distribute products, it can be argued that concern about particular products—especially tobacco—has significantly influenced the development of the substantive law. The successful effort to ensure that a lethal product *not* reflect its true social costs may have contributed substantially to the incoherence which is at the heart of products-liability doctrine.[14] While tobacco is hardly the only product capable of causing damage when used as directed (the 1964 Restaters pointed to prescription drugs and alcohol as well), it may well be the only product which cannot be used safely,[15] and has no apparent substantial utility[16] beyond satisfying the craving created by its use.

While we cannot know what would have happened had strict liability for unreasonably dangerous products carried the day, we do have considerable information about the consequences of treating tobacco under a regime of negligence. The history of how tobacco companies have responded to the command of a negligence regime raises considerable doubt about the easy conclusion that both negligence and strict liability will produce roughly the same level of safety. To the extent that we are concerned about safety, doctrine matters.

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11. *See* Marcia L. Stein, *Cigarette Products Liability Law in Transition*, 54 TENN. L. REV. 631, 642 (1987).

12. 60 F.2d 737, 740 (2d Cir. 1932).

13. *See* Bob Van Voris, *ALI Adopts New Products Liability View*, NAT'L L.J., June 2, 1997, at B1.

14. *See* Bogus, *supra* note 6, at 1.

15. There is no safe level of consumption of tobacco. *See* RICHARD KLUGER, ASHES TO ASHES 412 (1996).

16. While there may be something to the general proposition that utility is in the eye of the beholder so that the utility of tobacco is demonstrated by the choice of millions who consume it, it is not self-evident that one can infer a product has utility simply from the fact of its use. Since those who consume cigarettes do so at a price which bears little relationship to the social cost imposed by tobacco, market choice broadcasts a distorted picture of whether individual consumers are making an informed choice. At $25 a pack, how many would smoke? At $40? We cannot derive utility from consumer choice if the cost to the consumers vastly understates the actual costs associated with consumption of the product.

I. THE OFFICIAL HISTORY

Section 402A of the *Restatement (Second) of Torts* is the most frequently cited section in the torts *Restatement*. Whether as rationalization or inspiration, it has figured prominently in the law of products liability in virtually every state. It is widely credited with providing the impetus to treat injuries from dangerous products under the heading of tort rather than contract. It also introduced the possibility that the liability of those who distribute dangerous products should be strict, and to an uncertain extent that possibility has become a partial reality. It is enough of a reality, in any event, that the current proposal to place design defect exclusively on a negligence footing has evoked considerable and rather pointed criticism.

The frequently told history of the emergence of section 402A in its tobacco-friendly form is as follows. The ALI undertook to restate the law of torts in the late 1950s, and appointed Dean William Prosser to the role of reporter. At some point during the process of restating the law concerning products which injure, Prosser and his advisory group determined that the section they had been developing, imposing strict liability for unreasonably dangerous consumables, ought to apply to all products. Before this point, while the proposal still dealt with consumables, the proposal to impose liability upon the manufacturer of "unreasonably dangerous" consumables was changed to add the words "defective condition" as a qualifier on liability. In the face of an objection at the meeting of the full Institute, Dean Prosser explained that the change was designed to clarify that firms engaged in the tobacco, liquor, or pharmaceutical business should not face liability simply because the product they produce may be unreasonably dangerous to the consumer.

> Mr. Dickerson has stated an original point of view which I first brought into the Council of The American Law Institute in connection with this section. " . . . food in a condition unreasonably dangerous to the consumer" was my language. The Council then proceeded to raise the question of a number of products which, even though not defective, are in fact dangerous to the consumer—whiskey, for example [laughter]; cigarettes, which cause lung cancer; various types of drugs which can be administered with safety up to a point but may be dangerous if carried beyond that—and they raised the question whether "unreasonably dangerous" was sufficient to protect the defendant against possible liability in such cases.
>
> Therefore, they suggested that there something must be [sic] wrong with the product itself, and hence the word "defective" was put in; but the fact that the product itself is dangerous, or even unreasonably dangerous, to people who consume it is not enough. There has to be something wrong with the product.
>
> Now, I was rather indifferent to that. I thought "unreasonably dangerous," on the other hand, carried every meaning that was necessary, as Mr. Dickerson does; but I could see the point, so I accepted the change. "Defective" was put in to head off liability on the part of the seller of whiskey, on the part of the man who consumes it and gets delirium tremens,

> even though the jury might find that all whiskey is unreasonably dangerous to the consumer.[17]

Not content with simply requiring proof of defect as well as unreasonable danger, the drafters of the *Restatement* spelled out in a comment that the new section 402A did not cover cigarettes:

> The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.[18]

This "sweepingly cheerful assertion of the non-defective character of a wide range of intrinsic hazards, many of which are functionally quite distinguishable from others"[19] represented a dramatic departure from the simple but powerful idea that those who manufacture and distribute products ought to be responsible for the injuries that they cause.[20] Indeed, it represented a retreat from the considerably more modest idea that manufacturers and distributors ought to be liable for the injuries caused by "unreasonably dangerous" products. It was not the only retreat from the grand vision of enterprise liability,[21] but it *was* the only retreat from the more modest notion that those who distribute unreasonably dangerous products ought to bear the liability when the unreasonable danger eventuates.[22]

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17. *Continuation of Discussion of the Restatement of the Law, Second, Torts*, 38 A.L.I. PROC. 76, 87-88 (1961) (omission in original) (statement of Dean William Prosser).

18. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

19. Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1355 (1974).

20. The idea that optimal deterrence demands that enterprises bear the full costs of the injuries they inflict is embraced by law-and-economics scholars. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 192 (1987); STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 133-34 (1987).

21. The comments to 402A also exempted from the definition of "any product in a defective condition unreasonably dangerous" useful products with unavoidably unsafe side effects (e.g., pharmaceuticals and blood transfusions), *see* RESTATEMENT (SECOND) OF TORTS § 402A cmt. k, and made it clear that there is no requirement to warn against dangers of which the seller does not know nor should have known. *See id.* § 402A cmt. j.

22. Although the comments to the *Restatement* work are quite muddled on the point, pharmaceuticals, knives, butter, and whatever else might be considered to be potentially dangerous are not, for that reason, *unreasonably* dangerous products. Their productive or benign uses outweigh their dangers. There is a powerful argument that cigarettes are unreasonably dangerous because there is no safe way to use them and no apparent benefit to their use other than a momentary relief of stress, much of which is caused by the need to feed the cigarette-induced craving for nicotine. Enterprise liability need not be synonymous with strict liability. *See* Robert L. Rabin, *Some Thoughts on the Ideology of Enterprise Liability*, 55

The *Restatement* drafting and adoption process requires academics to persuade judges and practitioners of the wisdom and accuracy of the academics' effort to summarize or, more accurately, recast common-law principles. The drafting process which led up to the promulgation of section 402A required the academics who supported the notion that those who manufacture and distribute products ought to be strictly liable for the injuries caused by those products to confront the practical challenges posed by judges and lawyers who might be inclined to view the problem from the perspective of potential defendants.

While there was, and continues to be, a strong case for enterprise strict liability even with respect to useful products with known dangers and with respect to products with no known or knowable dangers,[23] these exceptions to the principle of strict liability at least resonate with notions of fairness to the manufacturer or distributor. If everything we know or can reasonably be expected to know about a product suggests that its utility outweighs the harm it may cause, and if as much notice as is feasible is provided, then it may appear that the costs inflicted by the product ought to be borne by the consumer. Negligence reasoning supports such a result, if not strict liability. But, even negligence reasoning does not support the blanket exemption for tobacco, a product which is arguably devoid of any substantial utility beyond the satisfaction of a craving created by its use. At a minimum, those writing and approving the *Restatement* lacked the information to make a definitive judgment that the utility of tobacco outweighs its risks.

The *Restatement* provided no explanation for the decision to exempt tobacco. It asserted that a product cannot be defective unless it presents a danger "beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[24] Roger Traynor noted that the express purpose of this language was "to exclude liability in certain cases," specifically tobacco.[25]

Whatever the virtues of emphasizing unpleasant surprise as the basis for defectiveness, the drafters had no basis for concluding that the dangers of "good tobacco" were contemplated by those who purchased cigarettes operating with

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MD. L. REV. 1190 (1996). Theoretically, one could ask whether the enterprise of manufacturing and distributing tobacco was unreasonable as evaluated by traditional negligence criteria. The comments did not leave room for such an approach.

23. For a contemporary argument for enterprise liability, see Croley & Hanson, *supra* note 4, at 683. Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 368 (1965), provides a critique of the *Restatement*'s solicitude towards those who place unavoidably or unknowably unsafe products into the market. Rabin, who argues that notions of fairness limit the reach of the enterprise-liability concept, points to tobacco as an example of a situation in which the plaintiff, rather than the defendant, represents the person who should avoid the injury involved in defendant's enterprise in the first instance. *See* Rabin, *supra* note 22, at 1207-08. Rabin does not explain why the companies themselves—who manufacture a product which they know will injure every consumer—cannot avoid the costs imposed by cigarette smoking by simply getting out of the business of manufacturing cigarettes.

24. Traynor, *supra* note 23, at 370.

25. *Id.*

the "ordinary knowledge common to the community."[26] Certainly the tobacco industry did not believe that ordinary consumers had such knowledge; it warmly embraced the opportunity to participate in drafting federal legislation mandating a warning on all packs of cigarettes.[27] As counsel for one of the cigarette companies later noted, the legislation "'got us assumption of the risk—the warning label would do that. This was the [industry's] major motivation in accepting the legislation.'"[28]

In terms of a gross misestimation of future technological and social developments, the ALI's assumption that the public knew what there was to know about the dangers of cigarettes ranks with the Supreme Court's decision, during the 1920s, that rail traffic takes precedence over highway travel so that drivers must always stop, look, and listen at grade crossings.[29] The *Restatement* had been drafted, revised, debated, and redrafted before publication of the 1964 report of the Surgeon General's Advisory Committee clearly linked cigarettes to cancer. It was written long before the Surgeon General identified a broad range of other risks such as heart disease. Undoubtedly, many of those involved in the process of determining that the public knew all that needed to be known of the health risks of tobacco were themselves smokers.[30] This profound miscalculation of the true extent of the damage done by cigarettes represents a possible explanation for the ALI's position.

Judge Goodrich, the then director of the ALI, attempted to explain why good tobacco should be exempt from liability in his concurring opinion in *Pritchard v. Liggett & Myers Tobacco Co.*[31] in terms that minimized, to say the least, the

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26. *See* Rogers v. R.J. Reynolds Tobacco Co., 557 N.E.2d 1045, 1052-54 (Ind. Ct. App. 1990) (finding summary judgment for defendants inappropriate even if comment i is law in Indiana, since there was no basis for determining consumer knowledge with regard to the addictive qualities of cigarettes prior to the Surgeon General's report in 1988).

27. *See* KLUGER, *supra* note 15, at 279-91.

28. *Id.* at 290 (alteration in original) (quoting Robert Wald, one of Lorillard's attorneys). Traynor had noted that the absence of warnings on cigarettes had weakened the *Restatement*'s position that tobacco ought to be per se exempt. *See* Traynor, *supra* note 23, at 371.

29. *See* Baltimore & Ohio R.R. v. Goodman, 275 U.S. 66 (1927).

30. Fleming James remarks that when his generation "first became conscious of the joys of smoking, at the time of the First World War," there was a generalized awareness of the "substantial health hazards by excessive use of cigarettes." Fleming James, *The Untoward Effects of Cigarettes and Drugs: Some Reflections on Enterprise Liability*, 54 CAL. L. REV. 1550, 1557 (1966).

31. 295 F.2d 292, 301 (3d Cir. 1961) (Goodrich, J., concurring).

> Further than that I am unwilling to go. Take a sale of potentially dangerous subject matter like whiskey. Everybody knows that the consumption of intoxicating beverages may cause several different types of physical harm. This goes clear back to the era of the Old Testament:
>
> "Woe unto them *that* rise up early in the morning, that they may follow strong drink . . . ."
>
> "Who hath woe? who hath sorrow? who hath contentions? who hath babbling? who hath wounds without cause? who hath redness of eyes?
>
> They that tarry long at the wine; . . . ."
>
> If a man buys whiskey and drinks too much of it and gets some liver trouble as a result I do not think the manufacturer is liable unless (1) the manufacturer tells

health risk from cigarettes. Agreeing that the complaint against Liggett & Myers should be upheld to the extent that the defendant had advertised the safety of its cigarettes, Goodrich noted that those who either make false claims about the safety of a product or assert knowledge which they do not possess are, for that reason, liable to the party who relies to her detriment. Turning to the example of liquor, he argued that someone injured through repeated ingestion of alcohol could successfully sue a manufacturer who either promised that alcohol would have no such effect or produced adulterated alcohol. The reason that someone injured through excess consumption of alcohol could not sue simply because the product was dangerous, he insisted, is that everyone has known since biblical times about the effect of strong wine. Without pausing for breath or noting the difference between alcohol and products which only recently had been identified as particularly harmful to a small subset of the population, he then argued that there should also be no liability for a butter producer who sells to someone who *should* be on a low-fat diet or someone who sells salted peanuts to someone who *should* be on a low-salt diet.

It seems extremely unlikely that Goodrich was asserting as a factual matter that the dangers of alcohol, peanuts, and butter were equally well known, and that the consumer's knowledge was sufficient to bar her from recovery for deleterious effects. Perhaps he referred to peanuts and butter to demonstrate the generic point that useful products which may cause harm to some are not for that reason liability generating. While liquor is far more dangerous than butter or salted peanuts when used to excess, "everyone" knows this and can take preventive measures. Since butter and peanuts pose a danger to a much smaller segment of the population, it is the consumer's obligation, or misfortune, to make certain that they can consume them safely. Cigarettes differ from peanuts and butter in the sense that they are unreasonably dangerous to every smoker, not just a small subset. Cigarettes differ from alcohol in both the ordinary consumer's level of knowledge concerning their respective dangers, particularly in light of the immediate observable effects from the excess consumption of alcohol and the lack of any immediate indication of the deleterious effects of cigarettes.[32]

> the customer the whiskey will not hurt him or (2) the whiskey is adulterated whiskey—made with methyl alcohol, for instance. The same surely is true of one who churns and sells butter to a customer who should be on a nonfat diet. The same is true, likewise, as to one who roasts and sells salted peanuts to a customer who should be on a no-salt diet. Surely if the butter and the peanuts are pure there is no liability if the cholesterol count rises dangerously.
>
> In this case there was no claim that Chesterfields are not made of commercially satisfactory tobacco.

Id. at 302 (Goodrich, J., concurring) (emphasis and omissions in original) (quoting *Isaiah* 5:11, and *Proverbs* 23:29-30, respectively); *see* RESTATEMENT (SECOND) OF TORTS § 402A, at 24 (Tentative Draft No. 6, 1961).

32. The lack of immediate negative effects from consuming a single cigarette or pack of cigarettes may help explain why smokers who discount the addictiveness of cigarettes may rationally believe that the benefits of continuing to smoke outweigh the benefits of stopping. *See* Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1167, 1197-201 (1998).

It is possible, of course, that Goodrich and the *Restatement* were simply embracing a contemporary view of caveat emptor. Any product not affirmatively banned from the market was reasonable just so long as no one was misled as to the nature of the product or the harm it might cause. Contrary to the negligence principle that customary practice was not necessarily reasonable practice,[33] whatever made it to market and found a willing buyer was reasonable per se, provided only that there be no misrepresentation whether through claims or silence. With respect to such goods, contract principles, rather than tort, controlled.

The *Restatement* view was not universally endorsed. Roger Traynor, whose concurring opinion in *Escola v. Coca Cola Bottling Co.*[34] eloquently presented the case for strict liability in torts for injurious products, noted, concerning the *Restatement* definition of defect:

> If a product is so dangerous as to inflict widespread harm, it is ironic to exempt the manufacturer from liability on the ground that any other sample of his product would produce like harm. If we scrutinize deviations from a norm of safety as a basis for imposing liability, should we not scrutinize all the more the product whose norm is danger?[35]

Unlike Goodrich, some supporters of the *Restatement* recognized the need to explain how the exemption for cigarettes and whiskey could be squared with the notion that a producer of a product ought to be responsible for the injuries which are typically and foreseeably associated with the use of the product. Fleming James, an ardent advocate of broad recovery by accident victims and a champion of enterprise liability,[36] attempted to reconcile the *Restatement* position with his

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33. *See* T.J. Hooper, 60 F.2d 737 (2d Cir. 1932).

> Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.

Id. at 740.

34. 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

35. Traynor, *supra* note 23, at 368. Judge Traynor was particularly troubled by the case of cigarettes:

> The cigarette cases illustrate the difficulties presented by the definition of defect in terms of deviation from common expectation. *One of the purposes of the test is to exclude liability for the harmful effects of smoking.* Yet, until recently, the harm caused by smoking was unknown to the consumer, so that the cigarette manufacturer would be liable under this test to those injured before the danger became widely known. Even now, assumption of the risk presents special difficulties in connection with cigarette smoking. Given the habit-forming nature of cigarettes, it is questionable how voluntarily many consumers are continuing to smoke. Moreover, there are no warnings on cigarette packages of a sort to bring home the gravity of the risk. Important though it may be to scrutinize one man's meat for signs of nonconforming poison, it may more often prove necessary to scrutinize his conforming poison for signs of warning as to its use and even reminders as to its patent risks.

Id. at 371 (emphasis added).

36. *See* Priest, *supra* note 4, at 470-71.

deeply held conviction that tort principles ought to govern with respect to dangerous products.[37] He acknowledged that an exemption for whiskey and cigarettes was inconsistent with the theory of enterprise liability which he endorsed, but noted that the law may deny recovery to smokers and drinkers for reasons other than doctrinal consistency. James explained that the issues may be "tinged with political considerations that may transcend the judicial function."[38] Pointing to the nation's experience under Prohibition, James argued that the repeal of the Eighteenth Amendment represented a political judgment that the benefits to be derived from drinking, including the freedom to choose to drink, when coupled with the evils attendant to prohibition of alcohol, outweighed the evils of alcohol.[39]

James recognized that the argument weakened as it moved from alcohol (which had been the subject of the most vigorous political debate and resolution) to cigarettes and beneficial, albeit dangerous, drugs. Drugs represented the easier case since these were extensively regulated and could only be manufactured and sold with approval. As to cigarettes, however, the argument reduced to the claim that since the state had the power to regulate the manufacture and sale of cigarettes but had not done so, this inaction represented a judgment that the product was not in fact *unreasonably* dangerous. Thus, while the *Restatement* placed responsibility for smokers' injuries on those who consumed the product despite knowing of its dangers, James attempted to rescue the exemption by insisting that the absence of a prohibition actually represented a legislative judgment that cigarettes were not unduly dangerous.[40]

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37. *See* James, *supra* note 30, at 1558.

38. *Id.* at 1552.

39. *See id.* "The political judgment would seem to foreclose a judicial holding that the recognized dangers of whiskey render it *unreasonably* dangerous." *Id.* at 1552-53 (emphasis in original). *See* Brown Forman Corp. v. Brune, 893 S.W.2d 640 (Tex. App. 1994, writ denied) (urging precisely this argument as a justification for freeing a liquor manufacturer from the duty to warn college students that rapid intake of alcohol can be fatal).

40. Indeed, he went on to suggest that one could not infer a "political judgment" from inaction with respect to cigarettes before voters and legislators knew how bad they were:

> A political judgment may be inferred from non-action only with respect to those dangers that are so widely known and understood that they may fairly be assumed to have been in the minds of the voters and their representatives. This reasoning, for example, could not rationally justify a ruling that cigarettes were not unreasonably dangerous *before their tendency to cause cancer became common knowledge.*

James, *supra* note 30, at 1553 (emphasis in original). Interestingly, in a subsequent discussion of whether a manufacturer should be relieved of liability if the product's danger is one of which it could not have been aware, James argues that the relevant question is whether the danger is of the general type which the product generates.

> It may be, for example, that the cigarette industry was justifiably ignorant as late as the mid-fifties of the tendency of its product to cause cancer. But the creation of substantial health hazards by excessive use of cigarettes was a matter of common knowledge when my generation first became conscious of the joys of smoking, at the time of the First World War.

Id. at 1557.

These unsatisfactory explanations for the exemption for tobacco emphasize the obvious point that, as Judge Traynor noted, a perceived need to "exclude liability for the harmful effects of smoking" rather than a search for doctrinal or policy coherence produced the odd doctrine which emerged from the *Restatement (Second)*. This is not surprising given the composition of the ALI (which now, as then, is hardly a bastion of consumer activists or even plaintiffs' lawyers)[41] and the frank impossibility of a lawyer setting aside the interests of important clients when engaged in the business of recommending what the law ought to be.[42] Indeed, why should lawyers be expected to sacrifice the interests of their clients or those of their clients' class at a time—the early 1960s—when many people were still in some form of denial concerning exactly how lethal and addictive cigarettes were?

The tension between the exemption for tobacco and the claim that products liability focused on the product, not the conduct of its producer, emerged as courts and scholars tried to give meaning to the *Restatement* doctrine. Consider, for example, the tests proposed by Deans Keeton and Wade[43] for determining when a product is defectively designed. Keeton says that a product ought to be regarded as involving an unreasonably dangerous design if, "even though ordinary care is exercised in providing warnings and instructions, . . . a reasonable person would conclude that the magnitude of the danger in fact of the design as it is proved to be at trial outweighs the utility of design."[44] This test is inconsistent with the exemption for cigarettes unless one determines that reasonableness has no moral connotation whatsoever. That is, reasonableness is either an empirical question—what do people do in this situation?—or a predictive question of how the classic economic rationalist would behave. This approach to reasonableness involves a rather different understanding of that concept than has prevailed in the law of torts for the last century. Juries evaluating reasonableness do make moral judgments. They decide how people

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41. *See* John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects—A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493, 517-18 (1996).

42. The ALI encourages its members to leave their clients "at the door" when voting on what the law ought to be, Roswell B. Perkins, *The President's Letter*, A.L.I. REP., Apr. 1992, at 1, 3, but this hardly solves the problem given the tendency of lawyers to adopt the positions they consistently advocate on behalf of clients as their own view. *See* Vargo, *supra* note 41, at 517-18.

43. Stein describes Wade's multipart test as not nearly as favorable to the tobacco industry as section 402A. *See* Stein, *supra* note 11, at 648. Wade indicates that he and Keeton disagree on the issue of whether it matters whether it was possible to know about dangers in a product as of the time that it was sold. *See* John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 761-64 (1983).

44. W. Page Keeton, *Products Liability—Design Hazards and the Meaning of Defect*, 10 CUMB. L. REV. 293, 313 (1979). Ten years earlier Keeton had noted that although he was not critical at the time that the *Restatement* was promulgated, by 1969 he had become dissatisfied with comment h and its blanket exemption for products which are not more dangerous than what is contemplated by the ordinary consumer. *See* Page Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 569 (1969).

ought to have behaved. They are invited to do so. That is how the system is supposed to work.

Cigarettes do not fare much better under the risk-utility test proposed by Dean Wade.[45] Wade's seven-part test[46] requires a balancing of factors in order to determine whether a product is unduly dangerous. The seven-part test is designed to provide an answer to what appears to be a negligence question: "assume that the defendant knew of the dangerous condition of the product and ask whether he was negligent in putting it on the market or in supplying it to someone else."[47] Cigarettes simply do not fare well under a risk-utility analysis which looks to the utility of the product to the user and to society as a whole, as well as the certainty that the product will cause injury, in analyzing whether the product is one which it would be unreasonable to sell. While the knowledge of consumers and the ability to make the product safer are factors to be considered, neither is controlling. It is little wonder, then, that under risk-utility a plaintiff can get to the jury on the question of whether cigarettes are unreasonably dangerous.[48]

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45. Wade proposed the test in two early articles. *See* John W. Wade, *On the Nature of Strict Tort Liability*, 44 MISS. L.J. 825, 837-38 (1973) [hereinafter Wade, *Nature of Strict Tort Liability*]; John W. Wade, *Strict Tort Liability for Manufacturers*, 19 SW. L.J. 5, 17 (1965). Each article noted the particular challenge posed by cigarettes. He noted that under the proposed test cigarettes "may well be found to be duly safe" on the grounds that "[g]eneral knowledge and common expectations may well be controlling." Wade, *Nature of Strict Tort Liability*, *supra*, at 842. As Wade's use of the conditional suggests, this result does not follow ineluctably from his proposed risk-utility test.

46. As described in *Camacho v. Honda Motor Co.*, 741 P.2d 1240 (Colo. 1987), the following factors should be weighed in determining whether a product is unreasonably dangerous:

> (1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
> (2) The safety aspects of the product—the likelihood that it will cause injury and the probable seriousness of the injury.
> (3) The availability of a substitute product which would meet the same need and not be as unsafe.
> (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
> (5) The user's ability to avoid danger by the exercise of care in the use of the product.
> (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
> (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Id. at 1247-48.

47. Wade, *Nature of Strict Tort Liability*, *supra* note 45, at 835.

48. *See* Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239, 1252-54 (N.J. 1990) (analyzing changes in New Jersey law that emphasize consumer expectation over the previous risk-utility approach).

II. THE EXEMPTION MAINTAINED

Courts soon fell in line with the *Restatement* approach to tobacco.[49] For many years, no court had held it permissible for a jury to determine that cigarettes are unreasonably dangerous and, for that reason, return a verdict against a cigarette manufacturer.[50] For many years, no plaintiff recovered damages in a cigarette

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49. Comment i has been quoted approvingly in a number of tobacco cases. *See, e.g.*, Kotler v. American Tobacco Co., 731 F. Supp. 50, 52-53 (D. Mass.) (stating that risk-utility is a "radical doctrine which imprudently arrogates to the judicial process some very significant societal determinations" and that Massachusetts law is consistent with comment i), *aff'd*, 926 F.2d 1217 (1st Cir. 1990), *vacated*, 505 U.S. 1215 (1992); Gianitsis v. American Brands, Inc., 685 F. Supp. 853, 856-57 (D.N.H. 1988); Miller v. Brown & Williamson Tobacco Co., 679 F. Supp. 485, 487-88 (E.D. Pa.), *aff'd*, 856 F.2d 184 (3d Cir. 1988); Rogers v. R.J. Reynolds Tobacco Co., 557 N.E.2d 1045, 1053 (Ind. Ct. App. 1990); Hite v. R.J. Reynolds Tobacco Co., 578 A.2d 417, 420-21 (Pa. Super. Ct. 1990).

50. In a very early case relying on the theory of breach of implied warranty, *Green v. American Tobacco Co.*, 154 So. 2d 169 (Fla. 1963), a Florida jury in a diversity action returned a verdict for the defendant. On appeal, the Fifth Circuit certified to the Florida Supreme Court the question of whether under Florida law the inability of the defendant to know of the dangers inherent in a product it sold defeated a claim for breach of implied warranty. Noting that it was not asked to comment upon what constitutes an implied warranty or whether the facts of the case met the Florida standard for an implied warranty of merchantability, the Florida Supreme Court answered that the defendant's inability to know of the dangerous quality of cigarettes did not defeat the claim. *See id.* at 170-71. Unfortunately, the *Green* case degenerated into a '60s version of *Jarndyce v. Jarndyce* as the parties went through two trials and four trips to various panels of the Fifth Circuit before that court, en banc, made a definitive end to the litigation by upholding the second jury's exceptional conclusion that although cigarettes cause cancer they are nonetheless reasonably fit for ordinary use. The Fifth Circuit split over whether this verdict was consistent with Florida law, the majority concluding that it was. *See* Green v. American Tobacco Co., 409 F.2d 1166 (5th Cir. 1969) (en banc) (reversing panel decision and reinstating jury verdict for defendant); Green v. American Tobacco Co., 391 F.2d 97 (5th Cir. 1968) (reversing second jury verdict for defendant with direction to enter judgment for plaintiff); Green v. American Tobacco Co., 325 F.2d 673 (5th Cir. 1963) (remanding for a second trial on question of whether cigarettes are reasonably fit for ordinary use); Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962) (affirming verdict for defendant subject to certification to Florida Supreme Court as to whether ignorance as to danger defeats an action for breach of implied warranty); *Green*, 154 So. 2d 169 (answering certified question). The en banc court adopted the dissenting opinion from the original panel, an opinion which quoted comment i as support for the argument that "good" tobacco was not defective. *See Green*, 391 F.2d at 110 (Simpson, C.J., dissenting).

In *Cipollone v. Liggett Group, Inc.*, 649 F. Supp. 664 (D.N.J. 1986), Judge Sarokin originally ruled that New Jersey recognized the risk-utility as applied to cigarettes, and that the jury could determine whether or not the risks of cigarettes outweighed their utility. *See id.* at 670-71. After the ruling, the New Jersey legislature passed a products-liability-reform statute eliminating the possibility of risk-utility analysis in products-liability cases. Judge Sarokin interpreted the statute to be a codification of existing law and consequently ruled that the plaintiff could not establish liability through risk-utility analysis. *See* Cipollone v. Liggett Group, Inc., No. 83-2864, 1987 WL 14666 (D.N.J. Oct. 27, 1987). Judge Sarokin's interpretation of the New Jersey statute was definitively rejected by the New Jersey Supreme Court in *Dewey*, 577 A.2d at 1251-52, which held that the statute changed New Jersey law, but

lawsuit, although this has recently changed as well.[51] This is not surprising in light of three facts about cigarette litigation: (a) plaintiffs have frequently made out a prima facie case against the defendant by relying upon more traditional theories;[52] (b) juries have tended to view these claims unsympathetically, given plaintiff's continuation of a habit which millions seem capable of breaking; and (c) cigarette companies litigate all cases vigorously and (until very recently) successfully, thus discouraging plaintiffs from bringing cases which rely on a controversial theory of liability.

The cigarette companies' approach to litigation highlights a fundamental truth about the current liability regime. Negligence requires more than that the defendant ignored alternative and safer design options. Negligence requires that the plaintiff *prove* that such options existed and that the defendant should have known that they existed. Tobacco is hardly the only product for which there appears to be a dramatic difference between what defendants may know and do, and what the plaintiff can prove they knew and did.[53] As was the case with asbestos where companies aware of the health effects of their product took the public position of ignorance and demanded (as was and is their right) that the plaintiffs prove the opposite,[54] tobacco companies have insisted that the plaintiffs establish as true that which the tobacco companies have gone to great lengths to keep secret.[55]

But it is not simply the nature of cigarette litigation which has kept courts for years from ruling that a product like cigarettes is defective even when made as intended. The view that there should be such a thing as product-category liability has been subjected to sustained academic criticism. The current reporters of the *Restatement* assert that such a view is not simply wrong, but impossible.[56] In this,

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could not be retroactively applied. Interestingly, the Mississippi Supreme Court recently upheld a jury finding that cigarettes were unreasonably dangerous (albeit under a consumer-expectations test) while affirming that same jury's finding that plaintiff's injuries were entirely plaintiff's fault. *See* Horton v. American Tobacco Co., 667 So. 2d 1289 (Miss. 1995).

51. *See* Carter v. Brown & Williamson, No. 95-00934 (Duval County Cir. Ct., Fla. Aug. 8, 1996) (awarding plaintiff $750,000); Nick Ravo, *Smoker's Suit Brings Award of $750,000 in Florida*, N.Y. TIMES, Aug. 10, 1996, § 1, at 8.

52. *See* Gary T. Schwartz, *Tobacco Liability in the Courts*, *in* SMOKING POLICY 131 (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

53. *See* JONATHAN HARR, A CIVIL ACTION (Vintage Books 1996) (1995).

54. *See* PAUL BRODEUR, OUTRAGEOUS MISCONDUCT 106 (1985).

55. In 1958, a Florida jury concluded that it was impossible, "by the reasonable application of human skill and foresight," for a manufacturer and distributor of cigarettes to "have known of the danger" they posed prior to February 1, 1956. *Green*, 154 So. 2d at 170. As of 1978, asbestos companies had won half of the cases litigated against them on the grounds that they could not have been aware of the dangers in asbestos prior to the mid-1960s. *See* BRODEUR, *supra* note 54, at 106. They prevailed in some of these cases at the very time that a deposition by an asbestos health officer, which demonstrated that the companies had been aware of the ill effects as far back as the 1930s, was sealed through a gag order settling other litigation. *See id.* at 92.

56. *See* Henderson & Twerski, *supra* note 5, at 1306-07.

they follow in the academic tradition of insisting that the courts which employ doctrines approaching strict liability are misguided.[57]

The current reporters distinguish between enterprise liability (a universal rule rendering commercial distributors responsible for all physical injuries caused by their product)[58] and product-category liability. Under the latter approach, once a court decides that a product category is appropriate for strict liability, then "distributors or manufacturers would be strictly liable for any harm caused by their products whether or not these products could be found defective under traditional products liability doctrine."[59] While the reporters present the classic straw man of courts, choosing products for this treatment on such criteria as whether the product is controversial, they acknowledge that courts might well identify product categories by weighing the social costs of the product against its benefits. Even under this test, however, the reporters insist that product-category liability presents such a range of problems with issues of contributory fault, useful product life, and causation that it cannot be competently applied by courts.[60] The deep problem with product-category liability, however, resides in the polycentric nature of the inquiry. Invoking Lon Fuller's example of a spider web in which each strand is connected to and dependent upon all other strands, they insist that determining whether a product's social costs outweigh its benefits involves a process in which a "decision with regard to any element affects the decisions with regard to all the others."[61] Adjudication cannot do this because "neither side can move from element to element in an orderly sequence."[62] Legislative and administrative proceedings can do this, and these are the forums for determining whether a product's costs outweigh its benefits.[63]

The academic criticism has been supported by legislative response as well, although that legislation hardly represents the rational progression from "element to element" invoked by the reporters. When a state court appears insufficiently *au courant* to understand that it must not employ risk-utility analysis and thus raise the specter of product-category liability, state legislatures provide the needed corrective.[64] Without putting too fine a point on it, those most at risk from

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57. The New Jersey Supreme Court's decision in *Feldman v. Lederle Laboratories*, 479 A.2d 374 (N.J. 1984), is an example. In *Feldman*, the court identified academic criticism as a major reason for its refusal to extend to all products its earlier holding in *Beshada v. Johns-Manville Products Corp.*, 447 A.2d 539 (N.J. 1982), that asbestos manufacturers are liable regardless of whether they knew of the lethal characteristics of their product. *See Feldman*, 479 A.2d at 387-88.

58. "A system of across-the-board liability without defect would recognize causes of action for physical injuries caused by all commercially distributed products, whether or not courts would consider such products defective under traditional products liability doctrines." Henderson & Twerski, *supra* note 5, at 1276-77.

59. *Id.* at 1297.

60. *See id.* at 1301.

61. *Id.* at 1305.

62. *Id.*

63. *See id.* at 1305-06.

64. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, at 12 (Tentative Draft No. 2, 1995). The reporters note that Louisiana, *see* Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110, 114 (La. 1986), Maryland, *see* Kelley v. R.G. Indus., Inc., 497 A.2d 1143 (Md.

a move towards either product-category liability or enterprise liability seem adroit at presenting their case to the people's representatives.[65] In New Jersey, for example, the legislature enacted a new products-liability statute while the *Cipollone*[66] case was pending, leading the federal district court judge to reverse an earlier ruling and now reject the plaintiff's claim that cigarettes were defective

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1985), and New Jersey, *see* O'Brien v. Muskin Corp., 463 A.2d 298, 306-07 (N.J. 1983), all appeared to impose liability based upon risk-utility analysis in the absence of proof that there was a reasonable alternative design available. "Each of these judicial attempts at imposing such liability have either been overturned or sharply curtailed by legislation." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 reporters' note, cmt. c, at 96 (citing LA. REV. STAT. ANN. § 9:2800.56(1) (West 1991) (overruling *Halphen*), MD. ANN. CODE art. 27, § 36-I (Supp. 1990) (overruling *Kelly*), and N.J. STAT. ANN. § 2A:58C-3(3) (West 1990) (limiting *O'Brien*)).

65. For a stunning example of this process, consult Paul Glastris, *Frank Fat's Napkin: How the Trial Lawyers (and the Doctors!) Sold Out to the Tobacco Companies*, WASH. MONTHLY, Dec. 1987, at 19 (describing how lobbyists for the trial lawyers, the medical association, the insurance industry, and the tobacco industry agreed to a civil-liability "reform" which guaranteed immunity to the tobacco industry). The resulting statute currently reads:

> § 1714.45. Products liability; consumer products known by consumers to be inherently unsafe.
>
> (a) In a product liability action, a manufacturer or seller shall not be liable if both of the following apply:
>
> (1) The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community.
>
> (2) The product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, and butter, as identified in comment i to Section 402A of the Restatement (Second) of Torts.
>
> (b) This section does not exempt the manufacture or sale of tobacco products by tobacco manufacturers and their successors in interest from product liability articles, but does exempt the sale or distribution of tobacco products by any other person, including, but not limited to, retailers or distributors.
>
> (c) For purposes of this section, the term "product liability action" means any action for injury or death caused by a product, except that the term does not include an action based on a manufacturing defect or breach of an express warranty.
>
> (d) This section is intended to be declarative of and does not alter or amend existing California law, including Cronin v. J.B.E. Olson Corp., (1972) 8 Cal.3d 121, and shall apply to all product liability actions pending on, or commenced after, January 1, 1988.

CAL. CIV. CODE § 1714.45(a)-(d) (West Supp. 1998). The statute was amended in 1997 to omit tobacco from the list of products known to be inherently unsafe. According to the preamble to the 1997 revision, the statute was being amended to meet the objection of the Attorney General of California who took the position that the state could bring suit against tobacco companies as long as the statute specified tobacco as a product known to be unsafe. *See* A.B. 1603, 97-98 Leg., Reg. Sess. § 1 (Cal. 1997). California filed suit against the tobacco companies in June of 1997. *See* State *ex rel.* Lungren v. Philip Morris Inc., No. 97AS03031 (Sacramento County Super. Ct., Cal. filed June 12, 1997), *available at* (visited Mar. 20, 1998) <http://www.stic.neu.edu/Ca/COMPLA~1.htm>.

66. Cipollone v. Liggett Group, Inc., 649 F. Supp. 664 (D.N.J. 1986).

under a risk-utility analysis.[67] Whatever the role of lobbyists in a representative democracy, however, it is difficult to understand why those who purport to restate the law should treat the legislative overrulings as confirmation of, rather than as a challenge to, the wisdom of the resulting doctrine.[68]

Some thirty years after the *Restatement*'s apparent embrace of strict products liability, the dominant rule in American law appears to be that manufacturers are only strictly liable when they make a product different and more dangerous from that intended. In other situations, courts appear to require the plaintiff to prove that the manufacturer had access to an alternative means of making or describing the product in order for there to be liability.

For condemnation of the product itself we have substituted complaints about what the producer tells the consumer about the product.[69] This can lead to decisions in which the supposed defect seems so remote from the injury suffered that permitting juries to find *as a fact* that an adequate warning would have avoided the harm appears to invite juries, on an ad hoc basis, to find the manufacturer liable for marketing an inherently dangerous product. To use alcohol as an example, we all know (or so Judge Goodrich supposed) that too much alcohol is bad for us. Do we know that drinking straight shots of tequila over a number of hours can lead to death? And would it really make a difference to the nineteen-year-old chugging tequila whether an express warning to this effect appeared on the bottle? Language on a tequila bottle warning a drunk adolescent to stop drinking before she kills herself seems unlikely to have much effect in the real world. A decision suggesting that the manufacturer may be held liable for the failure to print such a warning seems vulnerable to the charge that

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67. The New Jersey statute specifically rejected the application of the risk-utility test when the plaintiff failed to establish liability under the consumer-expectations test. *See* Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239, 1252-53 (N.J. 1990). Although theoretically concerned with overruling a doctrine employed in a case involving above-ground swimming pools, the statute makes it absolutely clear that precluding a finding of liability in tobacco cases is one of its major concerns. It provides that a manufacturer shall not be liable if:

> The characteristics of the product are known to the ordinary consumer or user, and the harm was caused by an unsafe aspect of the product that is an inherent characteristic of the product and that would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the class of persons for whom the product is intended . . . [except for machinery-causing workplace injuries].

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

The New Jersey Supreme Court, in *Dewey*, held that this statute represented a change in the law of New Jersey and could therefore not be applied to preclude an action against a tobacco company commenced before the passage of the statute. *See Dewey*, 577 A.2d at 1251-53.

68. *See* Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 681-83 (1992) (adverting to the difficulty of accounting for legislative action in a legal and analytic discussion of developments in tort law).

69. *See* Bogus, *supra* note 6, at 35-36 (noting the "rampant overuse" of claims of inadequate warnings thus obscuring the underlying issue of whether the product itself is unreasonably dangerous).

it is simply giving the jury license to hold the defendant liable for producing liquor in the first place.[70]

To a considerable extent, the prior waves of product-liability suits against cigarette manufacturers have followed this path.[71] Juries have been asked to conclude that the misleading or incomplete nature of communications about cigarettes has caused the plaintiff to suffer devastating injuries. Juries have been understandably reluctant to make these findings in the face of common understanding that cigarettes are "bad" for you. The individual cases may turn into morality plays about the virtue of the habitual smoker rather than an inquiry into the appropriateness of manufacturing and distributing cigarettes. The attractiveness of this line of attack has been further compromised by the post-1965 federally mandated warnings on cigarettes which the Supreme Court in *Cippolone* insisted preempted state tort suits based on the claim that the warnings actually given were inadequate.

III. THE COSTS OF THE NEGLIGENCE REGIME

Plaintiffs' lack of success in negligence suits against tobacco companies should not be concerning from a health perspective because, in theory, a negligence regime produces the optimum expenditure on safety regardless of who wins particular lawsuits.[72] The claim that negligence principles will produce economically efficient results rests on the assumption that those subject to the rules will behave in a rational manner to minimize total accident costs. The fictional individual subject to the commands of the negligence regime is assumed to act in good faith. If so, it may in fact make very little difference in terms of efficiency whether one applies strict-liability or negligence doctrine. Under either formulation, accidents worth (in economic terms) avoiding will be avoided and those which are not worth preventing will occur.

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70. In *Brune v. Brown Forman Corp.*, 758 S.W.2d 827 (Tex. App. 1988, writ denied), the Texas Court of Appeals held that the lack of warning created a triable issue of fact. Following a trial verdict for the plaintiff, the court held that the producer had no duty to warn of the possibility that excess consumption would lead to death, reversed the jury verdict, and dismissed the case, employing reasoning similar to that used by Fleming James to explain the *Restatement (Second)*'s exemption for tobacco. *See* Brown Forman Corp. v. Brune, 893 S.W.2d 640 (Tex. App. 1994, writ denied).

71. Cigarette litigation is commonly described as occurring in two waves. The first occurred in the 1950s and 1960s fresh on the heels of scientific acknowledgment that cigarettes sicken and kill. The second occurred in the 1970s and early 1980s. Both focused upon the communications to consumers about tobacco. The first wave focused on the misleading advertising which induced individuals to take up smoking, whereas the second, while invoking misleading advertising, looked as well to the failure to warn adequately about the dangers of smoking. *See* Robert L. Rabin, *Institutional and Historical Perspectives on Tobacco Tort Liability*, *in* SMOKING POLICY, *supra* note 52, at 110, 110-12, 118-20.

72. *See* Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 206-09 (1973).

Those who oppose enterprise liability insist that the appropriate level of safety can be reached through a negligence or contractual regime.[73] There is not a great deal of empirical support for this proposition or even for the broader proposition that tort rules encourage safer behavior.[74] As with much of academic discourse, the theoretical case is better developed. The theoretical case assumes a market in safety in which either rational consumers or reasonable manufacturers have an incentive to either purchase or create increasingly safe products. Negligence law would produce this result by forcing manufacturers to employ knowable technologies to reduce the risk inherent in their product. The failure to employ these technologies would render their conduct unreasonable and produce liability.

While the law would not by itself force these new techniques to emerge, that would nonetheless happen because manufacturers would strive to capture market share by creating an ever-safer cigarette. Negligence doctrine would penalize those who failed to avail themselves of the new technologies of safety generated by competition in the marketplace itself.

The same result might be achieved in a world in which consumers had sufficient information to choose among sellers of comparable products. Given that some cigarette consumers are concerned about safety, a rational market should produce products which provide varying levels of safety at varying prices. Just as some who buy automobiles choose a Volvo based upon the perception that it is a safer automobile, so, the theory goes, those consumers of cigarettes most concerned about safety would purchase the cigarettes which offered the highest level of safety commensurate with other desired attributes of the product. On this view of the world, informed consumer choice would push towards the creating and marketing of safer products.

In theory, tobacco companies confronted with claims that the product they produced is harmful when used as directed would undertake a number of activities. First, they would attempt to determine whether or not the claim had merit. Second, if they determined that the claim did have merit or, at a minimum, could not be dismissed as clearly lacking in merit, they would attempt to determine whether there was a way to ameliorate the actual or perceived harm from the product. This could involve a number of different steps. They could try to manufacture a less harmful product. They could try to learn whether there were less harmful ways of using the product they were manufacturing, with a view towards advising those who chose to use the product of the safest way of doing so. They could tell those who consumed the products of the risks they were taking and techniques (if any) which would lower those risks.

They would take these steps for a number of reasons. On a moral level, it seems fair to assume that all things being equal, neither tobacco executives nor any of the rest of us would like to make their customers ill unto death. From a liability perspective, failure to take any action in light of information about the

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73. In this context, "appropriate" means economically efficient in the sense that we avoid the accidents worth avoiding. *See* Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994).

74. *See id.* at 422-30.

dangers of tobacco might make the company liable in damages, and avoiding this liability would provide the incentive necessary to ameliorate the effect of tobacco. From a competitive perspective, firms might take these steps in order to gain advantage in the marketplace by meeting the consumer's desire for tobacco which could be consumed without injury.

In fact, the tobacco companies took some of these steps and apparently did so for both moral (at least initially) and liability concerns. What they did not do, of course, is act like rational actors in seeking a larger share of the market by producing a more desirable—for example, safer—product.

IV. HOW THE TOBACCO COMPANIES BEHAVED[75]

We appear to have paid a huge social price for the failure of courts to honor the theoretical perspective that produced the revolution in products liability. While it is impossible to state with certainty what would have happened had tobacco been subject to an enterprise-liability regime, we do know what happened because cigarettes were treated like pharmaceuticals or chain saws. The decision to subject cigarettes to a negligence regime in which custom controlled created a perverse set of incentives for those who manufacture cigarettes. Since each company was to be judged by the industry standard, from a liability perspective the best result for all in the industry is the one that pertains today—every manufacturer makes equally toxic cigarettes and all consumers, even twelve-year-olds, are treated as being aware of this.

Rather than the negligence regime creating incentives towards safety, it produced the opposite result. The tobacco companies never explicitly competed in terms of safety. Indeed, they assiduously avoided mentioning safety in their marketing and failed to conduct meaningful research into safer ways of making cigarettes. Astonishingly, they put lawyers rather than scientists or manufacturing executives in charge of the research that was conducted, and they withheld dissemination of the results of that research as privileged legal work product. Collusion, not competition, ensured that the companies neither discussed the relative safety of the various brands nor worked strenuously to bring to market a demonstrably safer product. No plaintiff has yet succeeded in demonstrating that the "safe" or even "safer" cigarette is within the technical capacity of the cigarette companies employing any knowable technology. Plaintiffs may always fail to make this demonstration since no one but the cigarette companies has the resources or expertise necessary to determine if

75. Our knowledge of the behavior of cigarette companies is necessarily incomplete. It is based largely upon internal documents revealed through discovery in the case of *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), as well as internal documents of the Brown & Williamson Tobacco Company. The latter are summarized in the book, STANTON A. GLANTZ ET AL., THE CIGARETTE PAPERS (1996). The account that follows also relies significantly upon KLUGER, *supra* note 15. Much of this material also appears in the various complaints filed by the attorneys general of the 40 states which are suing the tobacco companies primarily in order to recover for Medicaid expenditures for tobacco-related illnesses (as well as seeking equitable relief). *See supra* note 3.

cigarettes can be made safer, and negligence law provides no incentive to make that determination. Indeed, it cuts the other way.

The history of how tobacco companies responded to the information that their product might be lethal when used as intended is neither surprising nor uplifting. In summary, here is what happened.

By the early part of the 1950s, evidence began accumulating that linked cigarette smoking with adverse health outcomes.[76] These concerns led to a ten-percent reduction in the per capita consumption of cigarettes over a two-year period and the prominent emergence into the market of filtered cigarettes which accounted for ten percent of all sales.[77] It also led a group of tobacco companies (all but Liggett & Myers) to retain a public-relations firm, Hill & Knowlton, for the purpose of responding to the claims about the health effects of cigarettes. Hill & Knowlton recommended that the tobacco companies issue a statement of their intention to confront the health questions presented by cigarettes in a frank and straightforward manner,[78] and to create an apparently independent organization, the Tobacco Industry Research Committee, to conduct research into the health effects of cigarettes.[79] From that point forward, the tobacco companies were agreed as to at least two basic matters. First, cigarettes did not cause cancer (or at least no study really proved this to be the case). Second, since cigarettes did not cause cancer, there was no need—indeed it was counterproductive—to develop, market, or advertise cigarettes on the basis that they reduced the (allegedly nonexistent) risk of cancer from smoking. While a few companies occasionally deviated from these principles in either research or advertising,[80] from that point to this no company has produced and marketed what it claims to be a safer cigarette.

The tobacco companies' counterattack on the emerging health data proved successful in marketing terms during the 1950s. By the early 1960s, however, the companies were faced with the possibility of potentially ruinous liability in the form of product-liability suits. This led to a deference to lawyers as "tobacco executives grew dependent on lawyers in framing their every public move and in the sort of research they undertook privately."[81]

What the lawyers wrought was a policy designed to avoid liability in tort. The companies adopted a siege mentality and worked collectively through four

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76. The major studies were by Dr. Earnest Wynder (the painted-mouse experiments) and by Hammond and Horn (epidemiological studies).

77. *See* KLUGER, *supra* note 15, at 170.

78. *See id.* at 164.

79. *See* Complaint ¶¶ 51-64, State *ex rel.* Edmondson v. R.J. Reynolds Tobacco Co., No. CJ96-1499 (Cleveland County Dist. Ct., Okla. filed Aug. 22, 1996).

80. For example, Liggett & Myers both developed a palladium cigarette (designed to reduce the toxicity of cigarette smoke through more efficient combustion of tobacco) and created a model marketing campaign for it before deciding not to bring the product to market. *See* KLUGER, *supra* note 15, at 455-61.

81. *Id.* at 227-28. At Philip Morris, "'no move of a public nature was or could be made without the special approval of legal advisors, a control which was to become more restrictive' as a result of the liability suits beginning to plague the industry at that time." *Id.* at 228 (quoting from an unpublished corporate history of Philip Morris prepared by Jerome E. Brooks).

parallel groups: the industry's executive committee, consisting of the chief executives of the major tobacco companies; the "Secret Six," composed of the general counsel of each company; an ad hoc group of lawyers from outside counsel for the various tobacco companies, and; the publicists from each company, as well as Hill & Knowlton.[82] Given negligence principles, the cigarette companies faced liability if they knew about dangers inherent in the product but failed to communicate this knowledge to consumers. They also faced liability if they failed to act reasonably in their design and manufacture of cigarettes. They did not face liability if the cigarettes were as safe as they could be, and if consumers knew about the dangers that smoking presented.

During the 1960s, two legal developments shored up the cigarette companies' positions. The first, already adverted to, was the decision by the ALI to insist upon proof of a defect, in addition to proof that a product is unreasonably dangerous, as a precondition to liability. Congress provided the second safe harbor through its requirement that cigarettes carry specified warnings, preempting any inconsistent state standards. Although the tobacco companies publicly opposed the congressional requirement for warnings on cigarette packs, their lawyers recognized that the warnings provided "assumption of the risk" as a defense in every subsequent lawsuit,[83] as well as the possibility that the legislation might preempt all lawsuits based upon warnings.[84]

Cigarettes, then, were neither defective per se nor were they presenting dangers of which the consumers were unaware. Manufacturing and marketing them was

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82. *See id.* at 228-29.

83. *See id.* at 290. "'It [i.e., the federal warning requirement] got us assumption of the risk—the warning label would do that. This was the [industry's] major motivation in accepting the legislation.'" *Id.* (first alteration added; second alteration in original) (quoting Robert Wald, one of Lorillard's attorneys). The virtue of this approach was not lost on the alcohol industry. In 1988, following the Third Circuit's decision the prior year upholding a lack-of-warning theory in a suit alleging that moderate drinking caused fatal pancreatitis, *see* Hon v. Stroh Brewery Co., 835 F.2d 510 (3d Cir. 1987), it too became subject to federal warning requirements.

> On and after the expiration of the 12-month period following November 18, 1988, it shall be unlawful for any person to manufacture, import, or bottle for sale or distribution in the United States any alcoholic beverage unless the container of such beverage bears the following statement:
> "GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems."

27 U.S.C. § 215(a) (1994). These requirements led a Texas court to essentially reverse itself and reject a jury verdict for a teenager who had died after chugging tequila. *See* Brown Forman Corp. v. Brune, 893 S.W.2d 640, 644 (Tex. App. 1994, writ denied).

84. *See* KLUGER, *supra* note 15, at 290-91:

> And privately some in the tobacco legal corps foresaw the day when judges would grant motions to throw out liability suits against the industry under state tort common law because all plaintiffs had been adequately forewarned under the preemptive federal labeling statute. "You bet," remarked Philip Morris attorney Alexander Holtzhoff, who was on the scene when the 1965 law was crafted, "but we didn't do much crowing about it."

not unreasonable conduct. These legal developments effectively immunized cigarette manufacturers from liability under a negligence regime as long as there was neither a claim that manufacturers continued to have superior knowledge about the properties of cigarettes which they exploited in their marketing,[85] nor a claim that less lethal cigarettes could be produced and marketed. In fact, cigarette companies did have additional information about cigarettes—particularly relating to the addictive nature of nicotine—and they did work on developing cigarettes which promised to be less lethal than brands on the market.[86] The attorneys general's complaints assert, with considerable documentary support, that the companies acted in a manner designed to ensure that neither consumers nor regulators would be in a position to demonstrate that this was so.[87]

The lure of a safer cigarette created considerable tension within the tobacco-producing community. To many tobacco executives it was the logical path to follow, one which had both moral and commercial benefits. If a safer cigarette could actually be produced, it would make those in the business feel better about their work (while doing less damage to their consumers), and bring them the business of those concerned about the ill health which cigarette consumption appeared to promise. Some of these very executives—as well as many others—could see the other side of the equation as well. They could see that a safer cigarette might threaten established "unsafe" cigarettes and thus undermine the remainder of a particular company's product line. In addition, the existence of a safer cigarette would undermine the effective legal immunity flowing from the industry's insistence that it was not possible to make such a product. A safe cigarette, after all, represented precisely that reasonable alternative design which would trigger negligence liability.

A number of tobacco companies invested significantly in research and development leading to the creation of a safer cigarette. One of these companies, Liggett & Myers, went beyond the research stage. They actually developed a cigarette, gave it a name, and in fact believed it was commercially marketable.[88] But this cigarette never made it to market, just as the efforts of the other companies never resulted in the production, sale, and marketing of an avowedly

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85. Whether or not this conduct generates liability is unclear following *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). *Cipollone* was decided more than 20 years after the labeling requirements were introduced, and during this period the tobacco companies had no assurance that they would succeed with their claim that federal law preempted all state actions based on a failure to warn adequately.

86. *See* GLANTZ ET AL., *supra* note 75, at 108-70 (discussing the "search for a 'safe' cigarette"); KLUGER, *supra* note 15, at 455-61 (describing Liggett & Myers's experience with developing and then failing to bring to market a safer, palladium cigarette).

87. *See, e.g.*, Complaint ¶¶ 159-75, State *ex rel.* People v. Philip Morris Inc., No. 400361-97 (N.Y. County Sup. Ct., N.Y. filed Jan. 27, 1997) (alleging suppression of information about safer cigarettes); *id.* ¶¶ 176-89 (alleging suppression of information about addictive nature of nicotine); Complaint ¶¶ 113-36, State *ex rel.* Edmondson v. R.J. Reynolds Tobacco Co., No. CJ96-1499 (Cleveland County Dist. Ct., Okla. filed Aug. 22, 1996) (alleging knowledge of safer cigarettes); *id.* ¶¶ 137-50 (alleging knowledge of addictive nature of tobacco).

88. *See* Complaint ¶¶ 119-26, *R.J. Reynolds Tobacco Co.* (No. CJ96-1499) (alleging these claims).

safer cigarette. This outcome was multidetermined. There were concerns that the safer cigarette would undermine the market for normal, unsafe cigarettes. These concerns melded with fear of liability once it became clear that cigarette companies, if they wished to do so, could in fact make a healthier product.

The research and production of the safer cigarette, interestingly enough, turned out to be a legal, as well as scientific and manufacturing, enterprise. Lawyers figured prominently in discussions relating to conceptualizing, researching, and producing the cigarette, and legal concerns apparently played a significant causal role in the determination never to bring such a cigarette to market. Thus, Liggett & Myers undertook the development of a safer cigarette (identified as "XA") in 1968.[89] By 1975, as the project apparently neared success, all meetings concerning the project were attended by lawyers who collected all notes after the meetings. Whenever the project confronted difficulties, the legal department would "'pounce upon [it] in an attempt to kill the project.'"[90] Indeed, the president of Liggett & Myers reported that he had been told by an individual at Philip Morris that if Liggett & Myers tried to market such a product, "'they would clobber us.'"[91]

Philip Morris had earlier contemplated producing a safer cigarette. The enterprise was explained to the company's board of directors in 1964 in the following terms:

> "Two years ago, in anticipation of a health crisis to be precipitated by the Smoking and Health Report of the Surgeon General's Committee, we undertook to develop a physiologically superior cigarette. [We] put together a charcoal filter product with performance superior to anything in the market place. That product was known as Saratoga. Physiologically it was an outstanding cigarette. Unfortunately then after much discussion we decided not to tell the physiological story which might have appealed to a health conscious segment of the market. The product as test marketed didn't have good 'taste' and consequently was unacceptable to the public ignorant of its physiological superiority."[92]

R.J. Reynolds also attempted to develop safer cigarettes.[93] As with the Philip Morris and Liggett & Myers efforts, the cigarette was never introduced and aggressively marketed from a safety point of view.[94] An attorney for Shook, Hardy & Bacon, commenting upon the attempt by R.J. Reynolds to create a safer cigarette, noted that such a cigarette could have "'significant effects on the tobacco industry's joint defense efforts' and that '[t]he industry position has always been that there is no alternative design for a cigarette as we know them'

89. *See id.* ¶ 122 (alleging this claim).

90. *Id.* ¶ 129 (alteration added) (quoting alleged statement of Dr. James Mold, Assistant Research Director at Liggett & Myers).

91. *Id.* ¶ 126 (quoting alleged statement of Dr. Mold, relating a characterization by Liggett & Myers president of an alleged threat from Philip Morris).

92. *Id.* ¶ 117 (alteration in original) (quoting an alleged 1964 Philip Morris research-and-development presentation).

93. *See id.* ¶ 114 (alleging this claim).

94. *See id.* (alleging this claim).

. . . . 'Unfortunately, the Reynolds announcement . . . seriously undercuts this component of industry's defense.'"[95]

The pattern which emerged with the safer cigarettes also characterized the treatment of scientific research into identifying the carcinogenic agents in cigarettes and into nicotine and its addictive qualities. At the very time that the companies were insisting publicly and in lawsuits that cigarettes are neither addictive nor carcinogenic, their own research, shielded from public view, was establishing the opposite.

V. WOULD A DIFFERENT LEGAL REGIME LEAD TO DIFFERENT BEHAVIOR?

There is no way of knowing with certainty what the response of tobacco companies would have been had they confronted differently configured liability rules. But some things are clear:

1. Managers of the tobacco companies have been acutely aware of the liability rules governing tort claims for injuries from tobacco. They made decisions in light of consistent, expert advice as to the possible liability consequences of those decisions.

2. Lawyers have been intimately involved in decisions about and the conduct of research. They have been involved in the process of determining whether or not to disclose information or to bring arguably safer products to market.

3. At a minimum, liability consequences were a factor in all decisions relating to the response by cigarette companies to concerns about health. They were a factor in the decision as to whether or not to pursue research in and bring to market safer cigarettes.

4. The management of tobacco companies understood that there was a trade-off between the competitive advantages of developing and marketing a safer cigarette and the liability consequences of demonstrating that less lethal cigarettes could be produced and marketed.

To apply familiar tort causation principles, the liability regime under which cigarettes were distributed has been and continues to be a *substantial contributing factor* in determining the manner in which the cigarette industry responds to concerns about the lethal nature of its product. While counterfactual arguments must always be tentative, this appears to be a situation in which a rule of strict liability would have led to different and more health-responsive behavior by those who manufacture cigarettes.

VI. BEHAVIOR UNDER A STRICT-LIABILITY REGIME

The theoretical case for either enterprise or product-category liability is straightforward. Once a firm cannot evade responsibility for the costs which its product imposes upon those who consume it and bystanders, these costs will be internalized into the market price of the product. The certainty that the price of

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95. *Id.* ¶ 115 (alteration and second omission in original; first omission added) (quoting an alleged 1987 memorandum written by a Shook, Hardy & Bacon attorney).

the product will reflect most social costs generated by the product will lead firms to try to limit those costs as much as possible, thus providing the incentive to make the product as safe as possible. To the extent that the product remains inescapably harmful, however, the cost of that harm will be borne by those who produce the product. This cost will be reflected in the market price of the product. Consumers choosing the product will be required to pay its full costs. This will lead them to make more rational decisions as to whether to consume the product or seek an alternative.[96]

Economic arguments need to be tempered by the realities of our dispute-resolution system. Strict liability would have meant that firms were aware that they might be forced to internalize the costs associated with the harm done by their products. It carries with it the promise that the fact finder would find the defendant liable in every case. The argument that the risks of tobacco outweigh its benefits is overwhelming, and tobacco companies could not depend upon winning very many cases on the grounds that their conduct was not tortious. The relative certainty of establishing that the defendant behaved tortiously would encourage injured smokers to seek to bring suit as well as encourage plaintiffs' lawyers to agree to represent the smokers.

That the plaintiff's case would be strengthened does not mean that the defendants would have conceded. It may well have made as much sense to fight every case to its limits under a strict-liability as under a negligence regime. The tobacco companies could always defend on both causal and comparative-fault grounds. Their willingness to do so would make bringing tobacco suits a very expensive business indeed. Thus, even if plaintiffs could establish causation to the satisfaction of a fact finder, the plaintiff's comparative fault—his or her refusal to stop smoking—might reduce the typical recovery sufficiently to make it unattractive for a plaintiffs' lawyer to take the case in the first instance.[97] Unless the specter of strict liability led the companies to settle rather than litigate, it is possible that even a more "plaintiff friendly" liability rule would not have dissuaded the tobacco firms from continuing to litigate each case vigorously.

Causation would remain a problem under product-category liability as well. We can be confident that in a large population of smokers a certain fraction of their

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96. *See* Hanson & Logue, *supra* note 32, at 1175-77, 1260-62.

97. A vivid example of just this process occurred May 5, 1997, when a six-person Florida jury returned a verdict for R.J. Reynolds against a plaintiff apparently on the grounds that the plaintiff had smoked despite knowledge that it was harmful to her. *See* Glenn Collins, *Tobacco Industry Cleared in Florida Smoker's Death*, N.Y. TIMES, May 6, 1997, at A16.

The attorneys general's suits arguably undermine the tobacco companies' relatively successful effort to paint the plaintiff as a morally tainted individual now trying to blame others for what is essentially a self-inflicted injury. These suits come as close as any in the history of tort litigation to a genuine effort to force the responsible parties to internalize the costs which their activities currently impose on society at large. The moral canvas is no longer painted in shades of gray. The claim is no longer that the companies deceived the consumers who were then incapable of stopping. That may be true but the outcome of the suit does not rest upon it. Rather the question is whether producers and consumers of cigarettes should be permitted to pass on the costs of their activity to the general public or whether they should be required to absorb it.

illnesses will be attributable to smoking. When it comes to the individual smoker, however, the most that a responsible expert can say is that the illness in question is associated with the plaintiff's smoking. While the magic of the "more probable than not" standard of proof will likely transform the expert's view into a positive statement about causation, such statements are always vulnerable to attack by the defendant before the jury on the grounds that we are talking about "one doctor's opinion" and not scientific proof.[98]

These problems notwithstanding, under product-category liability the relative advantage would necessarily shift to the plaintiffs (given that the defendants' liability would have been a foregone conclusion). Even if the companies pursued their scorched-earth policy it could not possibly be as cost effective as the same litigation strategy pursued under a negligence scheme. Defense costs would necessarily rise as more cases were brought, more cases were won, and more damages awarded.

The increased litigation costs would either reduce the profitability of manufacturing and selling cigarettes or lead to an increase in the price of cigarettes. Either way, social costs would be internalized and decisions by both consumers and producers would reflect a more realistic appreciation of the actual costs of the activity. This result may be sufficient to reduce cigarette consumption significantly given that tobacco is addictive, that most smokers acquire the habit in their teenage years, and that the habit develops through habituated use. If cigarettes are too expensive for teenagers to afford, the theory would go, many fewer teenagers would become addicted in the first place. The same result could be seen to obtain with adult smokers who suddenly find the cost of cigarettes going from $2 per pack to $5 or $6 per pack, a sufficient difference, the theory suggests, to encourage people to control their addictive urge for tobacco.

But, would the liability rule change the companies' behavior in ways likely to enhance the health of those who smoke? There is no way of avoiding a speculative answer to this question because there is no way of knowing whether there is anything that could be done by the cigarette companies to make their product less lethal. It seems safe to assume that, faced with responsibility for all

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98. The suits by the attorneys general provide the opportunity for courts to visit this question in a new context. The attorneys general's suits promise even higher costs to the defendants since these suits challenge the tobacco companies' traditional legal and tactical advantages. Causation no longer works for the defendant. While the defendants can successfully point out that "it is just one doctor's opinion" that an individual plaintiff's disease was caused by cancer, they cannot successfully make the same point with respect to a population of 10,000 or 10,000,000. With respect to the individual plaintiff, there is no way of knowing with certainty what caused a particular condition; we cannot look at a cancerous cell and read from it the process which caused it to mutate from its earlier, healthy state. Moreover, it is always true that something other than smoking could have caused an individual injury. But in sufficiently large populations it is possible to control for all other relevant variables and to then contrast the health history of smokers with that of nonsmokers. For large populations we can establish causation in a far more rigorous manner than is possible for an individual. This, after all, is what the science of epidemiology does. *See generally* Bert Black & David E. Lilienfeld, *Epidemiologic Proof in Toxic Tort Litigation*, 52 FORDHAM L. REV. 732 (1984).

who are injured through consumption of their product, the companies would invest more resources in seeking ways to make cigarette smoke less lethal.

First, there would be no litigation premium for ignorance. The current version of negligence applicable to cigarettes rewards the conclusion that it is impossible to make a safer cigarette. This in turn provides companies with an incentive both to deny the knowledge that they do have and not to acquire new knowledge. As noted, lawyers have played an integral role in both approving the research that is undertaken and in determining what happens to the results of the research that is completed. Results are husbanded and shrouded in work-product privilege rather than being shared broadly in the scientific community. While it may be naive to assume that open, well-funded, and peer-reviewed research could make a serious inroad into the lethal qualities of cigarettes, it is certain that secret, private, and poorly funded research which is viewed through the lens of possible negligence liability will only confirm the tobacco companies (and their critics) in the belief that the search for a safer way to smoke is futile.

Second, the increased litigation costs associated with a strict-liability regime would probably lead to a greater expenditure of firm resources on research and development related to safety. Given the enormity of the damage inflicted by tobacco, it is extraordinary how little has been spent on trying to make the activity of smoking safer. This is perfectly explicable if we know that it is impossible to do anything to decrease the lethal nature of smoking and that the only strategy worth pursuing is that of persuading consumers not to consume. To the extent that some in the antismoking forces believe this is the case, the tobacco companies have been only too willing to agree, apparently trusting to the addictive nature of tobacco to keep smokers smoking regardless of what public-service advertisements tell them.

Faced with potentially unlimited liability and no continuing advantage in remaining ignorant, the tobacco companies would probably have taken more seriously the technological question of whether a safer cigarette could be produced and successfully marketed. While courts have expressed reluctance to demand that companies make technological advances in order to avoid an injunction,[99] the suits under discussion seek money damages, not injunctions, and it is the defendant's choice as to whether and how much to spend in order to reduce total liability costs over the long term.

99. *See* Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970).

VII. SHOULD COURTS RECOGNIZE PRODUCT-CATEGORY STRICT LIABILITY IN THE CONTEXT OF THE LAWSUITS FILED BY THE ATTORNEYS GENERAL?

A. Does Strict Product-Category Liability Pose Insuperable Implementation Problems?

The reporters for the current *Restatement* insist that implementation problems preclude a court from seriously entertaining the question of whether a product category can be defective because the social costs of an entire product line outweigh its benefits.[100] Thus there is no need to get to the question of whether such a rule would advance public welfare. But their claim of insuperable implementation difficulties does not withstand analysis when it is applied to claims that cigarettes are defective per se. The attorneys general's suits, even more than the typical consumer action, provide courts with an opportunity to get to the merits of such a claim.

The reporters identify product life, causation, and comparative fault as issues plaguing any effort to employ product-category liability. Since cigarettes are the ultimate consumable, they do not present the problems which inhere in applying strict liability to products which remain in service for long periods of time. Both causation and comparative fault are significant issues in suits brought by individuals who claim to be harmed through smoking, but these issues are no more vexing when the theory is product-category liability than when the plaintiff's theory is inadequate warning or failure to employ alternative technologies. Indeed it makes more sense and comports more with reality to evaluate plaintiff's contribution to her injury on the assumption that she knew smoking was harmful and was unable to stop than on the theory that her decisions about smoking were a product of inadequate or incomplete advice from the defendants.

The reporters suggest that even if these issues can be resolved through adjudication, that setting will not do for resolving whether the utility of cigarettes outweighs the harm that they cause.[101] They point to the futility of trying to make such a decision with respect to small handguns, identifying line-drawing problems and the unknown consequences of a court effectively banning a subset of handguns. After all, how is a court to know the consequences of banning "Saturday Night Specials"? Will it be to drive criminals to use more high-powered weapons while precluding those who use weapons in a solely defensive

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100. *See* Henderson & Twerski, *supra* note 5, at 1300-08.

101. Courts are apparently competent to make these decisions if the product is a marginal one—for example, exploding cigars or pellet-shooting toy guns. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 illus. 5, at 23-24 (Tentative Draft No. 2, 1995); *id.* § 2 cmt. d, at 22.

manner from access to a cheap and convenient form of protection? Or will it lead to a growth in the illicit importation and sale of the now-banned weapons?

These are weighty concerns and may, to some, prove decisive against any effort to apply risk-utility analysis to the category of Saturday Night Specials. These concerns have considerably less weight when the question is whether a court should apply risk-utility to cigarettes. The line-drawing problems disappear—if a cigarette is ever *not* a cigarette, that case has yet to be made. If there is any claim that the utility of cigarettes outweighs their harmful effects, that case also has yet to be made. While the argument that liability rules which significantly increase the expense of cigarettes may lead to an illegal market in the product appears to have some validity, the case that such a market would produce greater social costs than the current legal trade in cigarettes also has yet to be made.[102] While it is undoubtedly true that more liability may have adverse consequences for those whose living depends upon cigarettes, that is true of any liability rule, not just product-category liability.

Those making the case against product-category strict liability do not use cigarettes as an example and for the best of reasons. Cigarettes pose neither implementation nor evaluation problems; rather than frustrating risk-utility analysis, they cry out for it. Curiously, the revised *Restatement* accepts the possibility that some product lines can be found defective pursuant to risk-utility analysis if the product is truly marginal—for example, an exploding cigar or a toy gun which shoots harmful pellets.[103] Marginality is defined in terms of whether a rational adult, fully aware of the risks and benefits of the product, would purchase and use it. Assuming that this test eliminates the polycentric nature of the inquiry, it defies understanding why an adjudicator would not even be permitted to apply this test to cigarettes. That the test might not work well with products which have safe uses—for example, guns and alcohol—does not explain why it cannot be employed with a product which cannot be used safely.

Cigarette law has always been distinctive. Principles routinely applied to other products seem to have no application when it comes to cigarettes. Courts seem prepared to impose liability on producers of products which are far less dangerous and more obviously useful than cigarettes. If a consumer chooses to buy a Honda motorcycle without crash bars despite the availability in the market of other cycles with this safety feature, this exercise of consumer sovereignty does not as a matter of law preclude the consumer from recovering against Honda on the grounds that the motorcycle was defectively designed.[104] Nor is a consumer who chooses a convertible top when a steel top is available barred from claiming that the soft top represented a defective design.[105] Despite FDA

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102. *See* Mark Geistfeld, *Implementing Enterprise Liability: A Comment on Henderson and Twerski*, 67 N.Y.U. L. REV. 1157, 1171 (1992).

103. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 illus. 5, at 23-24; *id.* § 2 cmt. d, at 22.

104. *See* Camacho v. Honda Motor Co., 741 P.2d 1240, 1246 (Colo. 1987).

105. *See* Reed v. Chrysler Corp., 494 N.W.2d 224 (Iowa 1992); *see also* Ames v. Sears, Roebuck & Co., 514 A.2d 352 (Conn. App. Ct. 1986) (permitting jury to consider whether lawnmower was defectively designed because it lacked a "dead man" switch to disable the unattended mower when other mowers on the market featured such a switch).

approval, a jury can believe testimony that a drug's dangerous characteristics outweigh its benefits, and conclude that no reasonable manufacturer would market it.[106]

If products-liability law covers these situations, why should it not cover a product whose dangers so far outweigh its utility? A naïf might wonder why a jury is permitted to consider whether a manufacturer of pharmaceuticals ought not to have marketed an FDA-approved drug whose costs appear to outweigh its benefits but the same jury is not permitted to consider whether a manufacturer of cigarettes ought to have not marketed a product that the FDA could never approve. There is no more satisfactory an answer to this question than that advanced by Fleming James thirty years ago: "political considerations," not doctrinal or theoretical consistency, explain the tort law of cigarettes.[107]

B. Policy Concerns

We have now had more than forty years of experience with attempts to compensate for tobacco-related injuries through our tort system. To date, only two smokers have recovered for such injuries, and the dollar amount of their recovery probably does not pay for the costs of litigating the cases.[108] As more information emerges about what tobacco companies knew and when they knew it and what they did with that knowledge, it may well be that more individual plaintiffs will succeed in establishing liability either through fraud (claiming to be investigating what was not investigated) or negligence (failure to develop a safer cigarette) claims. But given causal and comparative-fault issues, it seems improbable that tort litigation as traditionally configured will ever cause a significant change in the industry's basic approach to the manufacture and marketing of its product.

The attorneys general's suits reconfigure traditional tort litigation in a direction that may have an impact on the behavior of the tobacco companies. Whether or not these suits succeed depends upon how courts understand what is being asked of them and whether it is consonant with the judicial function and the goals of tort law to respond affirmatively.

As a matter of doctrine, the attorneys general's suits propose the recognition that the tobacco companies' duty of reasonable care extends beyond smokers to those who are injured by the cigarette-related activities of smokers. Stated at this level of generality, the claim presents no unique difficulty for courts. Bystanders are perfectly appropriate plaintiffs in product-liability actions and there is nothing exceptional about those injured by secondhand smoke seeking redress for their injuries. The difficulty is thought to emerge because states are not suing

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106. *See* Tobin v. Astra Pharm. Prods., 993 F.2d 528 (6th Cir. 1993). *See generally* James A. Henderson, Jr., *Prescription Drug Design Liability Under the Proposed Restatement (Third) of Torts: A Reporter's Perspective*, 48 RUTGERS L. REV. 471 (1996).

107. *See generally* James, *supra* note 30, at 1552 (discussing political judgment as a factor).

108. The suits resulting in damages are *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541 (3d Cir. 1990) (reversing $400,000 jury verdict and remanding for new trial), and *Carter v. Brown & Williamson*, No. 95-00934 (Duval County Cir. Ct., Fla. Aug. 8, 1996) (awarding plaintiff $750,000). *See* Ravo, *supra* note 51, § 1, at 8.

for personal injuries but rather for the costs which they have borne as a result of dealing with the health problems of those injured through smoking.

On its face, the states' claims seem to be superior to that of individual plaintiffs' since the states' claims pose neither the technical nor justice concerns typically presented by personal-injury suits seeking compensation for pain and suffering or lost opportunity or the like.[109] On the causal level, epidemiological studies should provide a sound basis for estimating the cost of medical services provided for smoke-related injuries. Courts can be more confident that the defendant's act caused the injury in question than in any individual claim. From a justice perspective, the apparently complicated question of whether it is fair to compensate plaintiffs for injuries for which they may be the cheapest cost avoider disappears. Certainly, as between the tobacco companies and smokers, on the one hand, and all taxpayers on the other, justice requires that the costs of smoking be borne by those who engage in the activity.

The apparently serious doctrinal problem posed by the state suits arises if the suits are viewed as seeking recompense for economic loss rather than personal injury. Financial losses, courts occasionally insist, are not the business of the tort law of personal injuries.[110]

If the state suits are viewed as a claim for purely economic injury, the duty inquiry takes on a narrower focus: Is the plaintiff a member of an "identifiable class" whom the defendants knew or should have known would be likely to suffer economic injuries if the defendants failed to exercise care?[111] Short of the defendants claiming that they were unaware of the existence of the Medicaid program, the state as plaintiff certainly qualifies under this definition. There is nothing exceptional in this conclusion; the doctrine of subrogation has always meant that the insurer who pays for injuries inflicted by a third party then has a right of action against that party. But the traditional doctrinal formulation is that the insurer recovers not because the defendant breached a duty owed directly to the insurer but rather because it breached a duty owed to the insured. In practical terms, this means that the defendant can raise against the insurer any defenses which would be available against the insured.

This issue—whether to identify the states' tort claims as resting on a duty owed to those who will be foreseeably and directly injured by the defendants'

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109. At least one of the courts which confronted strict products liability in the early days saw traditional tort damages as constituting an argument against the adoption of enterprise liability.

> Although we believe that it is the function of the judiciary to modify the law of torts to fit the changing needs of society, we feel that the judicial extension of the theory of strict liability to all cases where it is convenient for those engaged in commerce to spread the risk would not be advisable. If enterprise liability is to be so extended, there is a strong argument for limiting the victim's measure of recovery to some scheme of compensation similar to that employed in workmen's compensation. The legislature alone has the power to set up such a compensation scheme. The court cannot put a limit upon the jury's verdict.

Wights v. Staff Jennings, Inc., 405 P.2d 624, 628-29 (Or. 1965).

110. *See* Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513 (1985).

111. People Express Airlines, Inc. v. Consolidated Rail Corp., 495 A.2d 107, 116 (N.J. 1985).

marketing of an inherently injurious product or whether to characterize them as simply a claim to subrogation—does not lend itself to a coherent doctrinal resolution. There is no logic inherent in the doctrine of duty which compels the conclusion that the tobacco companies do not owe a duty to those who must foreseeably and inevitably pay for the damage inflicted by tobacco.

To the extent that there is any principle lurking in the notion that defendants do not owe a tort duty to those who will be financially (but not physically) injured by the unreasonable behavior of the defendants, it is that courts are reluctant to impose a duty when there appears to be the potential for unlimited liability, far out of proportion to the wrong committed.[112] If this is the basis for judicial hesitation to recognize a duty, it poses no barrier in the tobacco suits. Indeed, it argues for recognition of such a duty since the attorneys general's suits provide the best hope that the tobacco defendants will be held even partially responsible for the very devastating harm which their unreasonable conduct has engendered.

Since the emergence of the modern doctrine of products liability, tobacco companies have demonstrated a unique ability to resist liability for conduct which creates unreasonable risks. They have also demonstrated a unique resistance to the impulse to make their product safer. Rather than the current liability regime leading to either safety or compensation, it has produced neither. The current attorneys general's suits provide an opportunity for courts to reconsider these sobering facts.

112. *See* Rabin, *supra* note 110, at 1534.